

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E': NEW DELHI**

**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
and
SHRIS.RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.3752/DEL/2017
(Assessment Year: 2013-14)**

DCIT, Circle 1,
Muzaffarnagar.

vs.

M/s. Mittal Construction Unit,
Near Town Hall,
Muzaffarnagar.
(PAN :AABFM3190L)

**CO No.91/Del/2023
(in ITA No.3752/DEL/2017)
(Assessment Year: 2013-14)**

M/s. Mittal Construction Unit,
Near Town Hall,
Muzaffarnagar.
(PAN :AABFM3190L)

vs.

DCIT, Circle 1,
Muzaffarnagar.

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Ankit Gupta, Advocate
REVENUE BY : Shri Dheeraj Kumar Jain, Sr. DR

**Date of Hearing : 23.01.2025
Date of Order : 21.04.2025**

ORDER

PER S. RIFAUR RAHMAN, ACCOUNTANT MEMBER :

1. The Revenue has filed appeal against the order of the Learned Commissioner of Income Tax (Appeals), Muzaffarnagar[“Ld. CIT(A)”, for short]dated 23.03.2017 for the Assessment Year 2013-14. The

assessee also filed cross objections against the order of ld. CIT (A) dated 23.03.2017 for AY 2013-14.

2. First we take up Revenue's appeal being ITA No.3752/Del/2017 and the Revenue has taken the following three grounds :-

“1. The CIT (A) has erred in law by directing the AO to take gross profit @12.5% on the total contract receipts of Rs.99.88 crore as against on the total contractual receipts of Rs.104.77 crore as reflected in 26AS.

2. The CIT (A) has erred in law by directing the AO to delete all other additions i.e. on account of unexplained sundry creditors at Rs.2,29,71,599/-, on account of depreciation excessive claimed on mobile at Rs.57,506/-, on account depreciation at Rs.9432/-, on account of salary at Rs.3,24,000/-, on account of rent claimed at Rs.2,88,000/-, on account of software development expenses at Rs.13,219/-. Without appreciating facts mentioned in the assessment order.

3. The CIT (A) has erred in law by deleting the addition of Rs.94,39,000/- against the addition of Rs.1,02,50,000/- u/s 68 of the I.T. Act, 1961 made by the AO on account of unsecured loans as the identity, creditworthiness and genuineness in respect of the concerned parties were not proved.”

3. At the time of hearing, ld. DR of the Revenue brought to our notice brief facts of the case, return of income was filed on 30.09.2013 at Rs.4,32,36,520/- which was revised on the same day declaring income of Rs.4,33,37,240/-. The case was selected for scrutiny and assessment under section 143(3) of the Income-tax Act, 1961 (for short 'the Act')

was completed vide order dated 31.03.2016 at an income of Rs.9,66,38,594/-.

4. With regard to ground no.1, Ld DR of the Revenue submitted that the Assessing Officer rejected the books of account u/s 145(3) after detecting some discrepancies in the books and proceeded to make addition on GP rate of 12.5% on receipts as appearing in Form 26AS. Ld DR submitted that the ld. CIT(A) has ignored the findings of the AO that TDS return was not rectified. Even the letter was not written to the corresponding party. Ld DR submitted that the AO found that there were instances when assessee claimed certain debit notes to reconcile the difference in books of assessee and relevant parties, but the concerned parties denied such debit note, refer, page 32 of assessment order. AO observed that no evidence was submitted by the assessee that the same pertained to other financial year. The Ld CIT(A) ignored findings in case of sundry creditors.
5. On the other hand, ld. AR of the assessee submitted that the reasons for discrepancy in the payment are on account of following factors; -

“Mobilization advance- This advance is received before the start of work and on which TDS is deducted. On final payment or running payment, this advance is adjusted and thus there remains a difference in payments shown and reflected in the Form26AS. The position of payment was reconciled. The discrepancy found in the accounts or various parties were explained which have been discussed by the ld. CIT(A) on page 31 to 41. In view of these facts

and the facts that the discrepancy was explained Id. CIT(A) erred in confirming the G.P. rate @12,5% as applied by the A.O. by observing various defects but the submission of the appellant is that when the discrepancies stands explained and there is no hard and fast rules for application of G.P.rateof 12.5% while the past record of the appellant have the best comparable rate in the case andas such Id. CIT(A) has erred in confirming the G.P. rate as applied by the AO.

(ii) Running payment : These payments are received by the appellant after start of the work, when a part of construction is done and a request for running payment is made and the party for which work is done makes payment to certain percentage.

(iii) By booking the Bill : When bill is booked the payment is received it can be said is that of final payment. The appellant has shown the turnover onthe basis of bill booked.

By making payment of mobilization on advance the amount is to be deducted from the bill submitted. Sometime the party deduct TDS on mobilization advance and further on booking the bills and that too on the gross amount of bills without considering the fact of deduction of amount of deduction of 10% of mobilization advance and the fact that the TDS has already been made on mobilization advance.

While making running payment the employer deduct TDS on running payments without considering the fact that TDS has already been made on mobilization advance.

The employer deduct TDS on booking the bills and while making payment he again deduct TDS on making payment ignoring the fact that TDS has already been made on mobilization advance and running payments.

In these circumstances there remains certain discrepancy which were reconciled.”

6. Considered the rival submissions and material placed on record. We observed that the AO has merely observed certain discrepancies and proceeded to reject the books and estimated the income on the gross receipts as per the form 26AS. We observed that the assessee is in the business of construction business and received contract payments. In the previous assessment year, the assessee received Rs.83.72 crores reflecting GP of 10.46% and declared NP of 5.09%. Similarly, this year also, received similar payments. Merely because there is difference of recording of receipts in the books of assessee and in Form 26AS, he proceeded to reject the books and estimated the income without appreciating the facts and nature of the business of the assessee. He should have asked the assessee to file reconciliation. He should have given further opportunities to the assessee. We observed that the assessee has filed the additional evidences before Id CIT(A) and he had appreciated the facts on record properly however, Id. CIT(A) has observed that there are certain cash payments made by the assessee to the creditors and towards purchases in the AY 2014-15, which was unverified and proceeded to sustained the estimation of income made by the AO @ 12.5%. Both actions of the tax authorities are not proper and justified. The assessee has in the regular business of contract and all along he has declared the income at GP of 10.64% and net profit of about

5% in the past. Therefore, if there are any discrepancies in the information contained in the Form 26AS, it has to be dealt properly instead of rejecting the books. Further, if there are cash payments, it has to be dealt as per law and not estimate the income. This is not the first year of operation to adopt such pattern of estimation. In our view, the findings of Id. CIT(A) to the extent of estimate the income @ 12.5% of the gross receipt is not proper and it should be based on the past performance and reasonable basis. We observed that the assessee had declared the net profit @ 5.09% in the previous AY, therefore, it should be 5% and Id. CIT(A) has observed that the books are not complete, so he proceeded to add 2% for that purpose. If that be the case, the proper income estimation should have been at 7% of the gross receipts after reconciliation of books receipt and Form 26AS. Therefore, we are inclined to direct the AO to estimate the income of the assessee @ 7% of the reconciled gross receipt for the year under consideration. Accordingly, the ground no.1 raised by the department is dismissed and ground no 3 raised by the assessee in CO is partly allowed.

7. With regard to ground no.2, Id. DR of the Revenue submitted as under :-

“Other Disallowances;

(i) Depreciation on mobile phone claimed @ 60% as against 16% allowed by the AO [Addition Rs.57506 page 46-47 of AO]

- (ii) Disallowances out of salary (pg 47-48) expenses of Rs.324000/- [108000x3] - a) No evidence of rendering services by 3 relative persons b) no personal deposition c) No document/evidence in support of claim filed
- (iii) Disallowance of Rs.9432/- [pa. 48-49) - Bills to show as to when the asset put to use not filed as the same was shown to have been purchased on the last date
- (iv) Disallowance on Rent Rs.2,88,000/- (pg.49-52] - No rent agreement was filed and payment made in cash. No justification for use of premises for business purposes.
- (v) Disallowance of software expenses of Rs. 13219/- (pg.52,53]- These are website designing & development which are of enduring nature and rightly treated as capital expenses by the AO.
- (vi) Unexplained sundry creditors Rs.2,29,71,599/- [list at pg. 10-14 of AO order - in some case at pg. 14 even address are not given) The reasons for addition has been mentioned in assessment order [page 23-24) Notices issued u/s 133(6) and sent through postal authorities at the address given by the assessee were returned back unserved

Ld CIT(A) deleted all other disallowances [(i) to (vi) above] on the ground that where G.P. addition has been made no separate addition is required in respect of sundry creditors. While dealing with the issue of rejection of books u/s 145(3). Ld CIT(A) (page-60] held that Rs 1.51 crore cash payment was not verifiable. It is also noticed that while sending remand report the AO requested the CIT(A) for not accepting any additional evidence but no comments has been made on this issue by Ld CIT(A).

In case of CIT Vs. G.S.Tiwari [All. High Court) 357 ITR 651 -AO rejected books of account and estimation of profit was made. It was held that in appropriate case, AO can make addition in both u/s 68 as well as estimate u/s 44AD. It was held that where certain unexplained sundry creditors are found in the books of account, the AO is not prevented from treating the unexplained sundry creditors standing in the books as income from undisclosed sources.

In case of CIT Vs. L.N.Dalmia 207 ITR 89- it was held that department is entitled to pierce the veil to determine whether the transaction is sham/illusory or a device or a ruse. Authorities entitled to look into surrounding circumstances to find out reality.”

8. On the other hand, ld. AR of the assessee submitted that ld. CIT(A) following the decision of Hon'ble Allahabad High Court in the case of CIT vs. Banwarilal Basheshwar and ITAT in the case of S.B.Industries has deleted all the additions connected with trade holding that AO was not justified for making separate addition on account of disallowance of sundry creditor on estimate basis. Even there is no basis on record by the AO to make such estimation for disallowance of sundry creditors 20% and other expense.
9. Considered the rival submissions and material placed on record. We observed that the tax authorities have rejected the books of account and estimated the income of the assessee. As held by the Hon'ble Allahabad High Court, once the books are rejected and resorted to estimate the income, no further disallowance can be made. Therefore, we do not see any reason to disturb the findings of Ld CIT(A). In the result, ground no.2 raised by the revenue is dismissed.
10. With regard to ground no.3, ld. DR of the Revenue submitted as under :-

“Unsecured Loan:

AO made addition of Rs.1,02,50,000/- but Ld. CIT(A) allowed major relief of Rs.94,39,000/- and sustain the addition of Rs.8,11,000/- only in cases where cash was deposited just before issuing cheque(s) for loan amount.

AO mentioned (p-43) that as per tax audit report unsecured loans of Rs.1.025 crore was received during the year (as per list at page 44). Details by issuing notice(s) u/s 133(6) to concerned parties were called for by the AO (page 45), however, no details were filed. Hence, the all the three ingredients i.e. identity, creditworthiness and genuineness of lenders required to be proved u/s 68, remained unproved. Before the Ld.CIT(A) the assessee filed ITR, Balance Sheet and confirmation with PAN of these parties and on the basis of the same CIT(A) deleted the addition ignoring the fact that identity, creditworthiness and genuineness of lenders were not proved before the AO. The Ld.CIT(A) has accepted the assessee's version without any investigation or verification.

Here it is pertinent to mention that the assessee did not furnish any details asked by the AO de about the lenders despite notice u/s 142(1) issued on 06/10/2015 (Pg.45) upto the date of completion of assessment on 31.03.2016 but he submit the details before CIT(A) only and the same were not provided to the AO for verification. The Ld.CIT(A) should have asked the AO to verify the details produced at the appellate stage and never furnished before the AO during assessment proceedings. Further the AO has elaborated upon the conduct of the assessee and stated that the assessee is avoiding furnishing details in time deliberately to hamper further investigation in the matter. The Ld. CIT(A) is silent on non-compliance of notices issued by the AO u/s 133(6). Only self serving statement has been relied upon by him ignoring the investigations made from the third party The AO called for financial statement but Ld. CIT(A) relied on ITR, confirmation, Bank statement and the financial statement neither filed before the AO nor before the Ld CIT(A) during appellate proceedings In case of Vishnu Enterprises Ra 23 lakh, only balance sheet is filed (pg 67 of CIT(A) order).

Address of unsecured loan/creditors (pg. 05 00 of CIT(A) & PG 44 of AO's order) is same then why notice issued u/s 133(0) were not complied Human probabilities should be considered to break the corporate veil. [Sumati Dayal v.CIT 214 ITR 80].”

11. On the other hand, ld. AR heavily relied on the findings of Ld CIT(A).
12. Considered the rival submissions and material placed on record. We observed that the assessee had filed and submitted additional evidences before ld. CIT(A) and after considering the remand report of AO, the Ld CIT(A) considered the submissions in detail and discussed the relevant facts and gave relief to the assessee. Further, he has sustained the additions to the extent the assessee failed to furnish details. Therefore, the ld. CIT(A) had fairly concluded his findings considering the relevant facts on record and ld. DR has brought to our attention the facts on record at the stage of assessment, once the assessee filed the additional evidences and AO was given fair opportunity to rebut the additional evidences filed by the assessee, there is no point going back to the original assessment findings. Therefore, we are inclined not to disturb the detailed findings of ld. CIT(A). Therefore, we are inclined to dismiss the ground no.3 raised by the Revenue.
13. Assessee filed the cross objections in support of the appellate order. At the time of hearing, ld. AR of the assessee submitted that in case the Bench decided the issue in the appeal of the Revenue in favour of the

assessee on merit, assessee does not want to press the cross objections except the ground no 3 on jurisdictional issue. We have considered the submissions and decided on the issue with merit. We have not adjudicated the jurisdictional issue raised by the assessee on notice u/s 143(2) of the Act. Since majority of the issues are decided in favour of the assessee in the department appeal, we are inclined to dismiss the grounds raised by the assessee in the CO, except ground no.3, we have analyzed the issue on estimation of income, we are inclined to partly allow the ground no .3.

14. In the result, the appeal filed by the Revenue is dismissed and CO filed by the assessee is partly allowed as stated above.

Order pronounced in the open court on this 21st day of April, 2025.

Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Dated: 21.04.2025
TS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals).
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI