

THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA no.4863/Mum./2013
(Assessment Year :2009-10)

ITO 6(1)(4)
Aayakar Bhavan,
Mumbai 400 020

..... Appellant

v/s

Asahi Infrastructure Projects Ltd.
Vinayak Sankul, 2nd Floor, Tapadia Nagar
Akola 444 005
PAN AADCA8777F

..... Respondent

Assessee by : Shri. Rajesh Kumar Yadav
Revenue by : Shri. Anil Thakrar

Date of Hearing -28.02.2017

Date of Order - 16.03.2017

ORDER

PER: SHAMIM YAHYA

This appeal by the revenue is directed against order of CIT-A dated 15.03.2013 and pertains to assessment year 2009-10.

2. The grounds of appeal read as under:

i) On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in deleting the additions of Rs. 91,00,915/- based on fresh evidence, without giving opportunity the

A.O. to refute the same in contravention of Rule 46A of the I.T. Act 1961.

ii) On facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting disallowance of Rs. 91,00,915/- stating the AO was not justified in invoking the provisions of sec. 44AD/44AF of the I.T. Act without appreciating the fact that provisions of sec. 44AD/44AF were never invoked by AO and AO had merely estimated profits in absence of complete details being furnished by the assessee by rejecting the books of accounts.

iii) The appellant prays that the order of CIT-A on the above grounds be set aside and that of the AO be restored.

iv) The appellant craves leave to amend or later any ground or add a new ground which may be necessary.

3. In this case the A.O. noted that assessee has not supplied proper details as called for. He noted that assessee has failed to furnish account confirmation of sundry debtors and creditors. The A.O. also noted that earlier assessment order was also passed u/s. 144 of the Act. The A.O. issued letters u/s. 133(6), to 12 parties. But response was received only from 4 parties. In these confirmations A.O. noted a lot of discrepancies. The A.O. proceeded to reject the books accounts. The A.O. concluded as under:

"In view of the above findings it transpires as under:

- i) The assessee has not furnished the details with supporting documents as called for on the basis of the final accounts submitted.*
- ii) No compliance on the appointed date and time.*
- iii) No books of accounts with supporting bills, and vouchers produced for verification.*
- iv) There is a huge difference in the sale/purchase and closing balance of the at least with the four parties as stated above. The assessee could not reconcile such differences.*
- V) As many as 8 parties have not complied with the requirement of notice u/s 133(6). The assessee has not furnished any confirmation from all these parties.*
- vi) Though the assessee has produced confirmation from Nitco Ltd and Solid Stone Co. Ltd the nature of transactions appears to be non-genuine.*
- vi) The conduct of parties from whom compliances have received appears to be the accommodation entry provides and in all probability the assessee has obtained and/or provided the accommodation entries to/from such parties.*

In view of the above discussion the book result shown by the assessee cannot be accepted on the face value and the only relevance of the books is the turnover shown. It may be relevant mention here that in the immediately preceding year also the assessee's book result were rejected on the basis of similar finding and the net profit of the assessee was estimated at 2% of the turnover. Considering

the facts of the case for the A.Y. under consideration the net profit of the assessee is estimated at 2% of the turnover which comes to Rs. 91,00,915- (i.e. 2% of Rs.45,50,45,762/-). Accordingly, Rs. 91,00,915/- is treated as business income. penalty proceedings u/s. 271 (1) (c) of the I.T. Act 1961 is initiated for concealment of income and furnishing inaccurate particulars of income. Penalty proceedings u/s. 271 (1)(b) of the I.T. Act, 1961 is hereby initiated for non-compliance to Notice u/s. 142(1) & 143 (2) of the I.T. Act, 1961.

The assessee during the course of assessment proceedings has not produced the books of accounts for verification; hence it is apparent that the assessee is not maintaining any books of accounts as required u/s. 44AA of the I.T. Act, 1961. Therefore, penalty proceedings u/s. 271A of the I.T Act, 1961 is hereby initiated for failure to maintain books of accounts u/s. 44AA of the I.T. Act, 1961.

4. Up on assessee's appeal Ld. CIT-A noted that by merely finding differences in 4 of the confirmations the A.O. has rejected the book results and that he has applied the provisions of section 44AD and 44 AF. After considering the assessee submissions and reproducing the provisions of section 44 AD and 44 AF, Ld. CIT-A concluded as under;

I have considered the above submissions of the appellant as well as the facts of the case. I agree with the appellant that sections 44AD/ 44AF cannot be invoked in the case of the appellant because the appellant's total turnover is much higher at Rs.45,50,45,762/- and the appellant being a limited company, its accounts have been audited as per the provisions of

Companies Act, 1956, as well as under the provisions of section 44AB of the Income Tax Act, 1961. Even in the cases where the total turnover does not exceed Ps. 40 lakhs, the provisions of these sections provide an option to a person to claim lower profits and gains than the profits and gains specified in the main sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB. The main reason, on account of which the AO rejected the books of account of the appellant and applied the provisions of sections 44AD/ 44AF was that the AO had found some discrepancies and mismatch between the sales/purchases reported by the appellant and the confirmations received in response to notices issued u/s 133(6). However, it is also true that the appellant was not granted sufficient opportunity in this regard. Or else, it can be said that the opportunity granted by the AO could not be availed by the appellant due to certain bona fide reasons (this is evident from the appellate proceedings in the case at the appellant in the preceding year i.e. AY 2007-08.

In this regard, as extracted above, the appellant states that "We request Your Honour to please note that no opportunity was accorded to Your Appellant to reconcile the alleged differences. In-fact, Your Appellant was never informed that notices u/s 133(6) were issued to various parties. We hereby, very humbly, wish to draw Your Honour's kind attention to the fact that, as called for by the Ld. A.O., the names and addresses of the parties were submitted before him vide submission Dt. 29/11/2011. We

hereby also fail to understand the last minute doubt expressed by the learned Assessing Officer when the proceedings were in progress since 18/08/2010 u/s 143(2). Had the learned Assessing Officer communicated to the Your Appellant and called for the names and addresses of parties, Your Appellant would have been in a position to ensure the submissions from the parties and also reconcile the alleged differences".

In the cases cited by the appellant i e. Tin Box Company, Dhanalakshmi Pictures and Kanhaiya Lal (HUF) (all supra), Hon'ble Courts have held that it is the duty of the AO to provide sufficient and adequate opportunity of hearing to the assessee. Furthermore, as highlighted by the appellant, the AO's contention that 'transactions with parties who have provided confirmations appear to be non- genuine', is based on presumptions and not substantiated by facts and findings.

In view of above facts and circumstances, therefore, it is evident that the AO was not justified in invoking the provisions of sections 44AD/ 44AF and making an addition of Rs.91,00,915/- thereof, without providing sufficient opportunity of hearing to the appellant. Even on merits, the addition is not justified. Hence, the addition of Rs. 91,00,915/- is deleted.

5. Against above order revenue is in appeal before us. We have heard both the counsel and perused the records.

6. We find that A.O. has mentioned several factors including non-compliances by the assessee. He has issued letters to 12 parties. Out of that only four have responded, wherein a lot of discrepancies have been noted. No where in the assessment order the A.O. has mentioned the

provisions of section 44AD or section 44AF. In these circumstances in our considered opinion Ld. CIT-A's order reflects a lack of applications of mind on the issue involved. He has proceeded to mention that A.O. had invoked provisions of section 44AD and section 44AF which is a totally wrong fact. The Ld. CIT-A has observed that assessee has not been granted opportunity to rebut the confirmations received from the parties. This also Ld. CIT-A has found to be a reason to set aside the order's of the A.O. We find that the powers of the Ld. CIT-A are coterminous with that of the A.O. further, more as held by the Hon'ble Apex Court in the case of Kapoorchand Shrimal, 131 ITR 451, it is the duty of the appellate authority to correct the errors in the order's of the authorities below and remit the matter to them if needed with necessary directions. Hence Ld. CIT-A's action in this regard is not correct.

7. In the background of aforesaid discussion we find that Ld. CIT-A has not actually understood the issue and there is wrong appreciation of A.O's order.

8. In this regard we note that Ld. Counsel of the assessee has submitted that ITAT in assessment year 2007-08 in assessee's own case has upheld the Ld. CIT-A order.

9. In this regard we note that the facts of the year under consideration are different. We have noted that Ld. CIT-A has found fault in the order of the A.O. by noting that he has invoked provisions of section 44AD and 44AF, which is totally factually incorrect. Moreover, we have also found that Ld. CIT-A has been lacking in exercising his coterminous power which he

should have exercised as per the ratio emanating from Hon'ble Apex Court decision cited above. In these circumstances in our considered opinion the issues raised in this appeal need to be remitted to the file for the Ld. CIT-A. Ld. CIT-A is directed to consider the issue afresh after properly appreciating the facts and pass a speaking order after giving the assessee adequate opportunity of being heard.

In the result this appeal by the revenue is stands allowed for statistical purposes.

Order pronounced in the Open Court on 16.03.2017

Sd/-

**RAVISH SOOD
JUDICIAL MEMBER**

Sd/-

**SHAMIM YAHIYA
ACCOUNTANT MEMBER**

MUMBAI, DATED: 16.03.2017

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

*Nishant Verma
Sr. Private Secretary*

By Order

(Dy./Asstt.Registrar)
ITAT, Mumbai

		Date	Initial	
1.	Draft dictated on	09.03.2017	}	Sr.PS
2.	Draft placed before author	09.0.2017		Sr.PS
3.	Draft proposed & placed before the second member	--		JM/AM
4.	Draft discussed/approved by Second Member	--		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	06.03.0217	}	Sr.PS
6.	Date of pronouncement	16.03.2017		Sr.PS
7.	File sent to the Bench Clerk	.03.2017		Sr.PS
8.	Date on which file goes to the Head Clerk			
9.	Date of dispatch of Order			