

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member and
Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. No. 635/KOL/ 2014
Assessment Year: 2009-2010**

***Deputy Commissioner of Income Tax,.....Appellant
Circle-32, Kolkata,
10B, Middleton Row, 2nd floor,
Kolkata-700 071***

-Vs.-

***M/s. SPML CISC (JV),.....Respondent
22, Camac Street,
Kolkata-700 016
[PAN: AACAS 4605 G]***

Appearances by:

*Shri Rajat Kumar Kureel, JCIT, Sr. D.R., for the Department
Shri Sajjan Kumar Tulsian, Advocate, for the assessee*

Date of concluding the hearing : January 02, 2017
Date of pronouncing the order : February 03, 2017

O R D E R

Per Shri P.M. Jagtap, A.M.:

This appeal is preferred by the Revenue against the order of Id. Commissioner of Income Tax (Appeals)-XIX, Kolkata dated 15.01.2014 on the following grounds:-

(1)On the facts and circumstances of the case, Id. CIT(A) erred in reversing assessing officer's decision to reject books of accounts and estimate the profit at a certain percentage of the gross receipts.

(2)On the facts and circumstances of the case, Id. CIT(A) erred in observing that no sufficient and specific findings were brought on record which could have warranted rejection of books of accounts.

(3)On the facts and circumstances of the case, Id. CIT(A) erred in observing that non-furnishing of details of sundry creditors in a proper way was not sufficient reasons to reject books of accounts.

2. The assessee in the present case is a joint venture between M/s. SPML and M/s. CISC Limited for carrying out some works contract jointly. The return of income for the year under consideration was filed by it on 08.02.2010 declaring a loss of Rs.1,36,71,480/-. During the course of assessment proceedings, the assessee could not produce the complete details of sundry creditors as required by the Assessing Officer, inasmuch as the addresses of some of the creditors were not furnished by the assessee and the details of only 106 creditors could be furnished by the assessee out of total 155 creditors appearing in the list. On the basis of this failure on the part of the assessee, the Assessing Officer was not satisfied about the correctness and completeness of the accounts of the assessee and rejecting the same by invoking the provisions of section 145(3), he proceeded to determine the income of the assessee on estimated basis. In this regard, he estimated the income of the assessee from the business of execution of works contract by applying a G.P. rate of 5.15% and determined the loss of the assessee at Rs.1,01,02,822/- in the assessment completed under section 143(3)/144 of the Act vide order dated 30.12.2011.

3. Against the order passed by the Assessing Officer under section 143(3)/144, an appeal was preferred by the assessee before the Id. CIT(Appeals) challenging the action of the Assessing Officer in rejecting the books of account and estimating the income of the business of execution of works contract by applying a higher Gross Profit rate of 5.15%. In support of its case on this issue, the assessee made the following submission in writing before the Id. CIT(Appeals):-

"2.1. With regard to the above it is submitted that assessment proceedings began vide notice issued u/s 142(1) in August, 2011. However, details of creditors were not requisitioned in the said notice. Later, in course of hearing in November the assessee was asked to produce the details of creditors.

2.2. The assessee produced the complete break-up of the creditors (party-wise) together with their addresses in the last week of November. It was only with respect to the creditors of Rs.43,95,311/- that the addresses could not be provided because

the project (pertaining to such creditors) got terminated and all the books of account (including the creditor details) had to be transferred to different locations. To worsen the situation the concerned accountant also quit the organization.

2.3. Under the given circumstances, the assessee could not produce the addresses of the balance creditors. On the other hand, the AO under the pressure of concluding assessment within December, concluded the assessment to the best of his judgment, without affording any further opportunity to the assessee.

3.1. From the facts stated above it is clear that the assessee was prevented, by sufficient cause, from producing the said details. Further, even the AO, being under the pressure of concluding the assessment, did not provide further opportunity to the assessee so as to enable him to produce the balance details.

3.2. In the light of the above stated facts, it is prayed that the details of creditors (enclosed as Annexure-II) be admitted at this stage under Rule 46A of the Income Tax Rules, 1962, relevant extracts of which has been produced below:

"46A. (1) The appellant shall not be entitled to produce before the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, except in the following circumstances, namely:-

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer; or

(C) where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal."

3.2. From the above it is clear that the CIT(A) may admit additional evidence under Rule 46A of Income Tax Rules, 1962 in case the assessee was not provided sufficient opportunity by the AO and in case the assessee was prevented by sufficient cause from producing the evidence as called upon by the AO.

3.3. Thus applying the said rule to the facts of the case it is clear that details of balance creditors produced at this stage should be admitted under Rule 46A.

4.1. Further, it is pointed out that the action of the AO in rejecting books of account u/s 145(3) and computing the income of the assessee by applying the average GP ratio of the industry is completely unjustified.

4.2. *With regard to the above it is pointed out that accounts of the assessee as audited and in the absence of any adverse remark in the auditor's report, there lies a presumption that books of account maintained by the assessee is correct. The same cannot be rejected u/s 145(3) in the absence of any finding recorded by the AO that the books of account were incorrect rendering it impossible to deduce profits therefrom. In other words, the AO has the onus of proving that books of account maintained by the assessee are incorrect and incomplete”.*

The assessee also relied on the following judicial pronouncements in support of its aforesaid submissions:-

- (i) ITO-vs.- Girish M. Mehta [296 ITR (AT) 125 (Rajkot)];
- (ii) Eagle Synthetics Pvt. Limited -vs.- ITO [8 ITR (Trib.) 211(Ahmedabad)];
- (iii) Madnani Construction Corporation P. Limited -vs.- CIT [296 ITR 45 (Guwahati)].

4. After taking into consideration the submission made by the assessee as well as the case laws cited in support, the Id. CIT(Appeals) found merit in the stand of the assessee and deleted the addition made by the Assessing Officer to the total income of the assessee by estimating the gross profit of the business of execution of works contract at higher rate of 5.15% for the following reasons given in paragraph no. 10 and 10.1 of his impugned order:-

“10. The assessment order and the submission of the appellant have been duly considered in the deciding the issue at hand. The list of sundry creditors submitted at the appellate stage has been duly considered and admitted since it is apparent that the appellant was prevented by sufficient cause from producing the evidence as called upon by the AO. I find that the AO has not pointed any specific deficiency in the accounts of the appellant warranting the application of section 145 of the Act and more so since it is pointed out that accounts of the appellant are audited and in the absence of any adverse remark in the auditor's report, there lies a presumption that books of account maintained by the appellant is correct. The same cannot be rejected u/s 145(3) in the absence of any finding recorded by the AO that the books of account were incorrect rendering it impossible to deduce profits therefrom. In other words, the AO has the onus of proving that books of account maintained by the assessee are incorrect and incomplete. The appellant's contention is squarely backed by the case of Madnani Construction Corporation P. Ltd. v. Commissioner of Income-tax [296 ITR 45] wherein the Hon'ble

Court held that "the Assessing Officer did not record any finding that the books of account maintained by the assessee were incorrect rendering it impossible to deduce the profit and despite that he went on to complete the assessment invoking the principles of best judgment. The assessment order did not indicate that the Assessing Officer had noticed any inconsistency or infirmity in the audit report. On the other hand, the Assessing Officer accepted the report relating to the preceding year.

10.1. Failure of the appellant to give details of the sundry creditors may be a ground for raising suspicion, but suspicion alone was not enough for invoking the powers of best judgment without the support of materials. The AO relied upon a part of a transaction for the preceding year while rejecting the other. This is not permissible in law. Without pointing out any error in the profit and loss account and the audited report, the powers of best judgment cannot be invoked by any means. In view of the matter as discussed, I find that the action of the AO is devoid of any merit and hence the addition made on this count is not sustainable and therefore deleted".

Aggrieved by the order of the Id. CIT(Appeals), the Revenue has preferred this appeal before the Tribunal.

5. The Id. D.R. submitted that specific defects were pointed out by the Assessing Officer in the books of account and other record maintained by the assessee and the same were sufficient to reject the book results declared by the assessee by invoking the provisions of section 145(3). He contended that although the said defects were claimed to be removed by the assessee before the Id. CIT(Appeals), the details filed by the assessee in this regard were not confronted by the Id. CIT(Appeals) to the Assessing Officer in order to give him an opportunity to verify the same. He contended that the issue involved in this case therefore should go back to the Assessing Officer for giving him such an opportunity.

6. The Id. counsel for the assessee, on the other hand, submitted that the reasons for the assessee's failure to furnish the complete details of creditors as required by the Assessing Officer during the course of assessment proceedings were duly explained by the assessee before the Id. CIT(Appeals) and after taking into consideration the same, the

complete details of sundry creditors filed by the assessee were taken on record by the Id. CIT(Appeals) by exercising the powers conferred upon him under Rule 46A of the Income Tax Rules. He contended that the Revenue has not raised any ground in its appeal alleging violation of Rule 46A by the Id. CIT(Appeals) and, therefore, the arguments raised by the Id. D.R. seeking opportunity to the Assessing Officer to verify the relevant details of the creditors cannot be entertained. He contended that even otherwise the so-called defect pointed out by the Assessing Officer as regards the failure of the assessee to furnish the complete details of the creditors was not a material defect to justify the rejection of books of account and the same having been removed by the assessee by filing the relevant details before the Id. CIT(Appeals), the action of the Assessing Officer in rejecting the books of account cannot be said to be tenable in the eyes of law.

7. We have considered the rival submissions and also perused the relevant material available on record. It is observed that the books of account of the assessee were rejected by the Assessing Officer merely on the basis of the failure of the assessee to furnish the complete details of the creditors as required by him and there was no other defect pointed out by the Assessing Officer in the books of account maintained by the assessee to justify the rejection of books of account. As held by the Hon'ble Guwahati High Court in the case of Madnani Construction Corporation Pvt. Limited (supra) cited on behalf of the assessee, the failure of the assessee to give details of the sundry creditors may be a ground for raising suspicion, but suspicion alone is not enough for invoking the powers of best judgment. Moreover, the relevant details as sought by the Assessing Officer in respect of sundry creditors were completely furnished by the assessee before the Id. CIT(Appeals) and after having satisfied with the reasons explained by the assessee for not furnishing the same before the Assessing Officer during the course of assessment proceedings, the Id. CIT(Appeals) admitted the same on record and allowed relief to the assessee by relying on the same.

Although the Id. D.R. has raised an argument that there is a violation of Rule 46A by the Id. CIT(Appeals), inasmuch as, no opportunity was given by him to the Assessing Officer to verify the said details, it is observed that there is no ground specifically raised by the Revenue in its appeal alleging violation of Rule 46A by the Id. CIT(Appeals). Even otherwise the defect as pointed out by the Assessing Officer regarding the failure of the assessee to furnish the complete details of sundry creditors not being material or sufficient enough to justify the rejection of books of account maintained by the assessee as held by the Hon'ble Guwahati High Court in the case of Madnani Construction Corporation P. Limited (supra), we are of the view that the Id. CIT(Appeals) is fully justified in deleting the addition made by the Assessing Officer by estimating the income of the assessee from the business of execution of works contract by applying higher G.P. rate of 5.15%. Accordingly, we uphold the impugned order of the Id. CIT(Appeals) giving relief to the assessee on this issue and dismiss this appeal filed by the Revenue.

8. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on February 03, 2017.

Sd/-
(S.S. Viswanethra Ravi)
Judicial Member

Sd/-
(P.M. Jagtap)
Accountant Member

Kolkata, the 3rd day of February, 2017

- Copies to :*
- (1) **Deputy Commissioner of Income Tax,
Circle-32, Kolkata,
10B, Middleton Row, 2nd floor,
Kolkata-700 071**
 - (2) **M/s. SPML CISC (JV),
22, Camac Street,
Kolkata-700 016**
 - (3) **Commissioner of Income Tax(Appeals)-XIX, Kolkata;**
 - (4) **Commissioner of Income Tax ,Kolkata**
 - (5) **The Departmental Representative**
 - (6) **Guard File**

By order
Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata