

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

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

**I.T.A. No. 1437/KOL/ 2012
Assessment Year : 2009-2010**

Income Tax Officer,.....Appellant
Ward-3(2), Kolkata,
8/2, Esplanade East,
Dwarli House, Ground Floor,
Kolkata-700 069

-Vs.-

M/s. The Ganges Tube Company Limited,.....Respondent
Opposite of 13C Bus Stand,
Budge Budge Trunk Road,
Kolkata-700 141
[PAN : AAAC 9324 M]

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C.O. No. 73/KOL/2013
(arsing out of I.T.A. No. 1437/KOL/ 2012)
Assessment Year : 2009-2010

M/s. The Ganges Tube Company Limited,.....Cross Objector
Opposite of 13C Bus Stand,
Budge Budge Trunk Road,
Kolkata-700 141
[PAN : AAAC 9324 M]

-Vs.-

Income Tax Officer,.....Appellant
Ward-3(2), Kolkata,
8/2, Esplanade East,
Dwarli House, Ground Floor,
Kolkata-700 069

Appearances by:
Shri Sudipta Guha, JCIT, for the Department
Shri Arihant Jain, C.A., for the assessee

Date of concluding the hearing : April 11, 2016
Date of pronouncing the order : April 22, 2016

O R D E R

Per Shri P.M. Jagtap:-

This appeal is preferred by the Revenue against the order of Id. Commissioner of Income Tax (Appeals)-I, Kolkata dated 16.07.2012 for the assessment year 2009-10 and the same is being disposed of along with Cross Objection filed by the assessee being C.O. No. 73/KOL/2013.

2. The assessee in the present case is a Company, which is engaged in the business of erection, installation, fabrication of pipes, tubes and doing civil construction for this purpose under the rural electrification scheme implemented in the rural areas of the States of Jharkhand and Tamil Nadu. The return of income for the year under consideration was filed by it on 05.03.2010 declaring total income of Rs.22,64,060/-. On perusal of the relevant record, it was found by the Assessing Officer that the gross receipts declared by the assessee in the Profit & Loss Account are only Rs.7,07,84,883/- as against the aggregate of receipts as per the relevant TDS certificates of Rs.7,66,15,398/-. There was thus an apparent understatement of income by the assessee to the extent of Rs.58,30,515/- on the basis of which reason to believe about the escapement of income was entertained by the Assessing Officer. He accordingly issued a notice under section 148 after recording reasons. In reply, a letter was filed by the assessee requesting the Assessing Officer to treat the return originally filed by it on 05.03.2010 as the return filed in response to notice under section 148. During the course of assessment proceedings, opportunity was given by the Assessing Officer to the assessee to explain/ reconcile the difference of Rs.58,30,515/- in the gross receipts. The assessee, however, failed to offer any explanation and accordingly the amount of Rs.58,30,515/- was added by the Assessing Officer to the total income of the assessee. The Assessing Officer also found on the basis of relevant details of labour charges paid by the assessee to different

parties that there was a failure on the part of the assessee to deduct tax at source from the payment of labour charges aggregating to Rs.4,85,25,180/- as required by the provisions of section 194C. Since there was a failure on the part of the assessee to offer any satisfactory explanation in this regard, the Assessing Officer invoked the provisions of section 40(a)(ia) and made a disallowance on account of labour charges to the extent of Rs,4,85,25,180/-. During the course of assessment proceedings, letters were sent by the Assessing Officer to M/s. Transform Solutions and M/s. Rajput Construction Pvt. Limited to verify the claim of the assessee of having received advance amounts of Rs.10,00,000/- and Rs.14,00,000/- from the said parties. Since the said letters sent by registered post came back unserved from the Postal Authorities and the assessee also failed to give the correct address of the said parties and also failed to offer any satisfactory explanation as regards the advances received from the said parties, the amount of such advances aggregating to Rs.24,00,000/- was added by the Assessing Officer to the total income of the assessee under section 68. Accordingly in the assessment completed under section 143(3) read with section 147 vide an order dated 30.11.2011, the total income of the assessee was determined by the Assessing Officer at Rs.5,90,19,755/-.

3. Against the order passed by the Assessing Officer under section 143(3) read with section 147, an appeal was preferred by the assessee before the Id. CIT(Appeals). During the course of appellate proceedings before the Id. CIT(Appeals), written submissions were filed by the assessee along with numerous documents. The same being found relevant were forwarded by the Id. CIT(Appeals) to the Assessing Officer for the later's comments with a direction to the Assessing Officer to submit his remand report by 08.06.2012. The Assessing Officer vide letter dated 07.06.2012 sought one month's time to submit his remand report. There was, however, no remand report received by the Id. CIT(Appeals) even

within a period of one month. The Id. CIT(Appeals), therefore, proceeded to dispose of the appeal of the assessee and after taking into consideration the written submissions filed by the assessee as well as the material available on record including several documents filed by the assessee for the first time before him, the Id. CIT(Appeals) deleted the addition of Rs.4,38,76,695/- made by the Assessing Officer on account of labour charges under section 40(a)(ia) mainly for the following reasons given in paragraph no. 11 of his impugned order:-

"11. I have carefully considered the A/Rs submissions and examined the documents placed before me. The facts of the case are in narrow compass. During the relevant previous year the appellant was engaged in execution of civil construction contracts under the government's rural electrification schemes. From the details furnished it appeared that the contracts were executed by the assessee primarily in the interior areas of Jharkhand and Tamil Nadu. The contract execution primarily involved erection, fabrication and installation of towers/ poles for electricity connectivity in the rural areas. The nature of assessee's work was labour intensive and for which the assessee employed a large work force. During the relevant year the assessee carried out its contract execution in more than 650 villages located in the interior parts of the country. For manual jobs, the persons employed by the assessee were primarily uneducated and they were drawn from local areas where jobs were executed. The work at each site was supervised by a person in the assessee's employment who was semi literate and could communicate with assessee's head office at Kolkata. The site-in-charge trained "sardar" maintained basic accounting records at the work sites. Labour Sardars employed by the assessee supervised work at the contract sites and also maintained attendance registers and paper work necessary for accounting of expenses incurred at the sites. The wages were disbursed at periodic intervals by these sardars on behalf of the assessee. For administrative convenience it was not possible for the assessee's H.O. to make payments to individual labour and maintain accounting records of individual payments. Accordingly for the sake of administrative and accounting convenience wage payments were regularly disbursed through site-in-charge/sardars under whose supervision and control the labour functioned at work sites. Since the assessee did not maintain bank accounts at different locations the assessee's head office at Kolkata remitted funds to the site-in-charge/sardars and accounting of the payments made to workers was done in the name of respective site-in-charge/sardars on the documents furnished by the A/R it appeared that labour wages thro the

site-in-charge/sardars during the relevant year amounted to Rs.4,38.76,695/-. On examination of the copies of the attendance registers and wage payment sheets; it appeared that the persons who are alleged by the AO to be labour contractors; were employed by the appellant to supervise project execution at different sites. The site-in-charge/sardars were assessee's employees who supervised the work sites and maintained accounting records including attendance registers and wage payment sheets. From the copies of wage payment sheets it appeared that labour sardars were also listed as employees and wages were paid to them as well. I therefore find force in the submissions of the A/R that the payments to the sardars debited under the nomenclature of "labour charges" primarily consisted of wages disbursed to the labours employed by the assessee at work sites. The payments were not made to independent contractors but the payments were for disbursement of wages amongst the labours employed by the assessee for carrying on assessee's business of civil construction. In my considered opinion therefore the assessee had no liability to deduct tax u/s 194C of the Act from the payments made to labour sardars".

4. The addition of Rs.24,00,000/- made by the Assessing Officer under section 68 on account of unexplained advances received by the assessee from the two parties was also deleted by the Id. CIT(Appeals) for the following reasons given in paragraphs no. 19 & 20 of his impugned order:-

"19. I have carefully considered submissions of the assessee and the documents placed before me in support of amounts received from 2 parties. These documents were forwarded for AO's comments but no report from him has been received till date, I have therefore no other alternative but to presume that the A.O did not find any specific infirmity in these documents nor found any falsity, In the course of appeal the assessee filed confirmation of account issued by Transfront Solutions from whom the assessee had received Rs. 10,00,000/- on 29.12,2008. The said concern is having its office at 10, Shyamananda Road, Kolkata-700025 and assessed to tax under PAN AACFT 2420R. The amount received from the said concern was found credited in assessee's account with Axis Bank on 29.12.2008, From the copy of the bank statement it appeared that the amount received from Transfront Solutions was credited in the assessee's bank account on 29.12.2008 and the amount was cleared through cheque No.780364, I therefore find that the transaction with the said party was conducted through proper banking channel. The assessee having discharged the primary onus of proving identity and credit worthiness of the payer, sec 68 was not applicable

because the onus caste on the assessee in terms of that section was discharged.

20. As regards the addition of Rs.14,00,000/- received from Rajput Construction it appeared that the assessee received a contract under Rajiv Gandhi Gramin Vikas Yojana for rural electrification work through this concern. Copy of the work order placed by the said party on the assessee was filed. It further appeared that in respect of payments received from Rajput Construction tax was deducted at source and tax deduction appeared in Form 26AS. The sum of Rs.14,00,000/- added u/s 68 was also part of the addition of Rs.58,30,515/-, which was on account of unreconciled difference and it was subject of Ground Nos.2 & 3. The advance received from Rajput Construction was adjusted in the assessee's books against the invoices raised in F.Y. 2010-11 amounting to Rs.16.81.900/-. Having regard to the documentary evidences placed on record I therefore find that advance received from Rajput Construction could not be considered as unexplained cash credit for the purpose of Sec 68. The amount received during the year represented advance against project execution from which tax was also deducted u/s 194C by the payer. The amount received was ultimately offered as income by the assessee in F.Y. 2010-11 when the invoice was raised on completion of contract. The addition of Rs.24.00,000/- u/s 68 is therefore ordered to be deleted”.

5. As regards the remaining addition of Rs.58,30,515/- made by the Assessing Officer on account of alleged suppression of gross receipts, the same was sustained by the ld. CIT(Appeals) to the extent of Rs.42,07,742/- thereby giving relief of Rs.16,22,773/- to the assessee for the following reasons given in paragraphs no. 7 & 8 of his impugned order:-

“7. I have considered the submissions of the A/R. It is not in dispute that the differential between the gross receipts credited in assessee's Profit & Loss account and receipts certified in TDS certificates was Rs.58,30,515/- It is however the assessee's explanation that the said differential arose mainly on account of timing difference with regard to recognition of income in books and deduction of tax at an earlier point in time. The A/R claim that the assessee regularly follows mercantile system of accounting; and thereunder the revenue is recognized in the books only when the work performed is certified for payment by the principal. However the tax is deducted at source even when the advances are paid or released by the principals against future billings. It is on account of timing difference between revenue

recognition and tax deduction; the differences arose and the revenue credited in the assessee's books. Before me the assessee clarified that out of the total differential Rs.16,22,773/- pertained to revenue which was recognized in the assessee's books of the subsequent financial years and the same was also offered to tax in the respective years. The said sum principally included advance of Rs.15,17,143/- received from Rajput Constructions (since named as Rajput Ventures Pvt Ltd). At the time of payment of advance; tax was deducted at source by the said principal. The assessee executed and completed the job in subsequent year and gross billing of Rs.16,81,900/- was considered as appellant's income of A.Y. 2011-12. Similarly the assessee received advances of Rs.36,300/- and Rs.69,330/- from Larsen & Turbo Limited and IVRCL Ltd and the tax was deducted from advance amount though the invoices were raised on the parties in the immediate subsequent year.

8. *After considering the submission of the A/R I find merit in the assessee's explanations in so far as Rs.16,22,773/- is concerned. This difference certainly arose on account of timing difference and therefore I hold that the AO was not justified in making the disallowance simply because there was reconciliation difference between the income credited in the books and income certified in TDS certificates. No material was brought on record by the AO which in any manner established that the right to receive income as certified in the TDS certificate had legally accrued to the assessee during the relevant previous year. The addition to the extent of Rs. 16,22,773/- is therefore found to be unjustified. However with regard to the balance amount of Rs.42,07,742/- the A/R was not able to give any cogent or satisfactory explanation nor the appellant was able to clarify in which earlier or subsequent year such income was offered to tax. In absence of any satisfactory explanation supported by relevant material; I uphold the AO's addition to the extent of Rs.42,07,742/-. The assessee accordingly gets relief of Rs.16,22,773/-. Ground Nos, 2.3 & 4 are partly allowed”.*

6. The Id. CIT(Appeals) thus allowed a substantial relief to the assessee and aggrieved by the same, Revenue has preferred this appeal before the Tribunal, while the assessee has also filed its Cross Objection on the following respective grounds:-

Revenue's grounds of appeal:

“1. On the facts and in the circumstances of the case the Ld. CIT (A) was erred in deleting the addition made on account of 'under-statement of receipts' amounting to Rs.16,22,773/- in violation of rule 46A in accepting the fresh evidence without giving reasonable opportunity to A.O. for examination of the fresh evidence.

2. On the facts and in the circumstances of the case the Ld. CIT (A) was erred in deleting the disallowance made u/s 40(a)(ia) on account of 'labour charges' amounting to Rs.4,85,25,180/- in violation of rule 46A in accepting the fresh evidence without giving reasonable opportunity to A.O. for examination of the fresh evidence.

3. On the facts and in the circumstances of the case the Ld. CIT (A) was erred in deleting the addition made on account of cash credit u/s 68 amounting to Rs.24,00,000/- in violation of rule 46A in accepting the fresh evidence without giving reasonable opportunity to A.O. for examination of the fresh evidence.

Assessee's grounds of Cross Objection:

"1. That the Ld CIT(A) erred in sustaining addition of Rs.42,07,742/- representing alleged difference between the amount of contract receipt relevant to TDS as per Form No. 26AS and the amount as per P&L A/C on the alleged ground difference was not satisfactorily explained and/or accounted for in any of the earlier or subsequent years.

2. That without prejudices the addition sustained hurriedly on assumption without proper opportunity for reconciliation amongst numerous transactions of contract job covering several years scattered over across of sites in over 650 villages is unjustified, illegal, irrational, contrary to facts on records and is liable to be deleted".

7. We have heard the arguments of both the sides and also perused the relevant material available on record. At the outset, it is noted that there is a delay of 100 days on the part of the assessee-company in filing its Cross Objection. In this regard, an application is filed by the assessee seeking condonation of the said delay and keeping in view the reasons given therein, which are duly supported by an affidavit filed by the assessee affirming the relevant facts on oath, we are satisfied that there was a sufficient cause for the delay on the part of the assessee in filing its Cross Objection. The said delay is, therefore, condoned.

8. On merit, it is observed that the main grievance of the Revenue as projected in the grounds raised in its appeal is that the Id. CIT(Appeals) has allowed the relief to the assessee on all the three issues by relying on the numerous documents filed by the assessee for the first time before him as additional evidence without giving proper and sufficient opportunity to the Assessing Officer to verify the same, which is in violation of Rule 46A of the Income Tax Rules. At the time of hearing before us, the Id. D.R., has pointed out such additional evidence relied upon by the Id. CIT(Appeals) while giving relief to the assessee from the relevant portions of the impugned order of the Id. CIT(Appeals) and the Id. counsel for the assessee has not been able to dispute the same. He, however, has contended that opportunity was given by the Id. CIT(Appeals) to the Assessing Officer by forwarding all the documents filed by the assessee for the later's comments, but the Assessing Officer failed to avail the same. In this regard, it is observed that a period of one month was sought by the Assessing Officer to submit his remand report and since no such report was received from the Assessing Officer within a period of one month, the Id. CIT(Appeals) proceeded to dispose of the appeal of the assessee after taking into consideration the written submissions as well as numerous documents filed by the assessee without giving any further time or opportunity to the Assessing Officer. In our opinion, it, therefore, cannot be said that proper and sufficient opportunity was given by the Id. CIT(Appeals) to the Assessing Officer to verify the additional evidence filed by the assessee for the first time before him as envisaged in Rule 46A of the Income Tax Rules, 1963 and we find merit in the stand of the Revenue that there is a clear violation of the said Rule by the Id. CIT(Appeals). Even the grounds by the assessee in the Cross Objection further support this conclusion, wherein the assessee has alleged that the addition made by the Assessing Officer on account of suppression of receipts to the extent of Rs.42,07,742/- has been sustained by the Id. CIT(Appeals) hurriedly on assumption without giving

proper opportunity to the assessee to reconcile the difference in gross receipts. Having regard to all these facts and circumstances of the case, we consider it fair and proper and in the interest of justice to set aside the impugned order of the Id. CIT(Appeals) and remit the matter back to him to dispose of the appeal of the assessee involving three issues afresh on merit after giving both the sides proper and sufficient opportunity of being heard.

9. In the result, the appeal of the Revenue as well as the Cross objection of the assessee both are treated as allowed for statistical purposes.

Order pronounced in the open Court on April 22, 2016.

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

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

Kolkata, the 22nd day of April, 2016

- Copies to :
- (1) **Income Tax Officer,
Ward-3(2), Kolkata,
8/2, Esplanade East,
Dwarli House, Ground Floor,
Kolkata-700 069**
 - (2) **M/s. The Ganges Tube Company Limited,
Opposite of 13C Bus Stand,
Budge Budge Trunk Road,
Kolkata-700 141**
 - (3) *Commissioner of Income-tax (Appeals)-I, 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*