

IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH 'G' NEW DELHI

BEFORE : SHRI I.C. SUDHIR, JUDICIAL MEMBER &
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA No. 2029/Del./2009 & 1651/Del./2012
Asstt. Year : 2003-04

Scantec (India) Pvt. Ltd.,
Dadri Road, P.O. Kuleshra,
Greater Noida, Noida.
(PAN: AAHCS 4330H)
(Appellant)

vs.

A.C.I.T., Circle,
Noida.

(Respondent)

Appellant by : Sh. Yogesh K. Jagia, Advocate
Respondent by : Sh. B. Ramanjaneyula, Sr. DR

Date of hearing : 23.08.2016
Date of pronouncement : 16.09.2016

ORDER

Per L.P. Sahu, Accountant Member:

Both these appeals by the assessee are directed against the orders dated 17.02.2009 & 20.01.2012 of ld. CIT(A), Ghaziabad for the assessment year 2003-04, challenging the sustenance of addition made in quantum appeal and confirmation of consequential penalty imposed by AO u/s. 271(1)(c) of the Income-tax Act (hereinafter referred to as "the Act"). The grounds raised in quantum appeal read as under :

"1. That in the facts and circumstances of the case and in law the order passed by Ld. Commissioner of Income Tax (A), hereinafter referred as

CIT(A) is in contravention to the provisions of law and hence is void ab initio.

2. That in the facts and circumstances of the case and in law the Ld. CIT(A) erred in upholding rejection of books of accounts under section 145(3) of the Income Tax Act, 1961, hereinafter referred as "Act".

3. That in the facts and circumstances of the case and in law the Ld. CIT(A) erred in estimating income of appellant @ 8% by applying section 44AD of the Act.

4. That in the facts and circumstances of the case and in law the Ld. CIT(A) erred in upholding that onus to produce the sub contractors before Ld Assessing Officer is on the Appellant.

5. That in the facts and circumstances of the case and in law the Ld. CIT(A) erred in observing that the appellant failed to furnish any cogent materials/evidence to controvert finding of the Assessing Officer."

2. The brief facts of the case are that the assessee company is engaged in the business of electro-mechanical and civil engineering contractor and carried out the erection of Extra High Voltage Overhead transmission lines, installation of underground EHV power cables, Microbe and telecom towers, repair and maintenance of EHV transmission and distribution equipments for electrification. The assessee filed its return of income on 01.12.2003, declaring total income of Rs.16,79,304/- which comprises the business income at Rs.9,43,295/- and income from other sources at Rs.7,36,009/-. During the assessment proceedings, the AO noticed that during the year, the assessee has executed the contracts awarded from various Govt. Departments. The

assessee declared gross receipts from such contracts at Rs.7,13,83,337/- and income at Rs.9,43,295/- giving net profit rate of 1.32%. The assessee was asked to justify the net profit of Rs.9,43,295/- against gross job receipts of Rs.7,13,83,337/-. In response, the assessee explained that the operating profit without considering bad debt, provision for doubtful debt and provision for tax including deferred tax, in the current year comes to 16% of the turnover as against 12% in the last year. There is 68.10% increase in the turnover and 60.95% in project expenses resulting GP of 29% as against 30% in the last year. It was also explained that depreciation and exceptional items have been increased in the current year as compared to the last year. On perusal of profit and loss account, the AO noticed that the assessee had claimed the wages expenses of Rs.1,16,41,903/- besides the sub-contractors cost of Rs.1,44,61,444/-. The material consumption has been shown at Rs.1,66,44,053/- as against Rs.64,71,601/- of the last year. The assessee was asked to justify the payments made to sub-contractors and wages. In response the assessee submitted the list of the sub-contractor/petty contractors and payments made to them along with their addresses. In order to verify, the payments to sub-contractors, notices u/s. 133(6) were issued to 11 parties through whom excavation work etc. was shown to have been made, were issued to test check the payments, the details of which are as under :

- 1) M/s Infogip Systems & Translines, R/7, B-18, Raj Nagar, Ghaziabad having transaction of Rs.26,78,387/- for concrete and excavation expenses.
- 2) M/s Tulcha Ram Sharma, Village Badaria, Tehsil. Sardar Sehra, Distt. Churu. Rajasthan having transaction of Rs.1 0,65,336/- for excavation and concrete/erection.
- 3) M/s H.P. Sharma and Associates, Ward No. 8, Sardar Sehr, Churu having transaction of Rs. 15,34,298/- for excavation and concrete.
- 4) Sri Suresh Babu Sharma, Vidhya Nagar, Bagarpur, Auraiya Rs.3,83,762/- for excavation and concrete.
- 5) M/s Dwevedi Trading Co., Sikandarpur, Rath. Hamirpur, U.P. - Rs.4.16,667/- for excavation and concrete.
- 6) Shri Shiv Charan, Kunali Bazar, Distt. Supaul, Bihar. Rs.4,27,856/- for excavation and concrete.
- 7) Shri S. Soman, SS Sadanam, Mulhalakullam, P.O. Kollam, Kerala. Rs.5,02,594/- Survey Work.
- 8) Sri K. Girisham Pillai, Kizakkepaiavilia, PO Nedunagolam, Distt Koilam, Kerala Rs.68,600/- excavation and concrete.
- 9) M/s Solar Engg. Pvt. Ltd, B-56, Sector-14, Noida - Rs. 3,88,700/- excavation and concrete.
- 10) M/s R.K. Constructions, Palloo, Rawaisar, distt : Hanuman Garh, Rajasthan Rs.4,37,903/- excavation and concrete.
- 11) Jai Maruti Constructions, Ram Nagar, Mangalpuri, Kankarkhera, Meerut. Rs.3,86,926/-excavation and concrete.

Out of the above parties, the notices sent to S. Soman, Solar Engg., and Jai Maruti were returned back with the remarks "Not traceable". Only M/s H.P. Sharma & Associates confirmed the transaction vide his letter dated 25.9.2005. Since the notice sent to above parties were returned back and no response was received from the remaining parties for whom the payments

had been claimed, the AO issued a letter dated 15.12.2005 to the assessee for justifying the same and to produce evidence to prove the impugned expenditure.

3. Thereafter confirmations were received from four parties M/s INFOZIP Systems and Translines, Ghaziabad for accepting the payment of Rs.28,64,382/- (Rs. 18,89,932/- through cheque/DD and the balance in cash), Shri Shiv Charan Contractor of Dehradun for confirming payment of Rs.4,27,856/- (Rs.2,23,560/- by DD and Rs.1,77,000/- in cash and Rs.22,803/- balance), M/s Dwevedi Trading Co. for Rs.5,15,250/- [Rs.3,05,000/- by DD & Rs.2,10,250/- in cash] and Sri Tulcha Ram Rs.10,65,336/-. No other confirmations were received. To further verify the genuineness of the transaction, the summon u/s 131 was issued on 3.1.2006 to Sri K.P. Singh signatory of confirmation letter of M/s Infozip Systems and Translines, Ghaziabad, which was duly served through Inspector, but Sri K.P. Singh did not respond. Accordingly, show cause notice dated 24.1.2006 was issued to the assessee requiring him to justify the cash portion of the payments in the cases where confirmations were received and the total payments with respect to the five parties mentioned herein below :

- 1) Sri Suresh Babu Sharma, Vidhya Nagar, Bagarpur, Auraiya Rs.3,83,762/- for excavation and concrete.

- 2) Shri S. Soman, SS Sadanam, Muthalakullam, P.O. Kollam, Kerala. Rs.5,02,594/- Survey Work.
- 3) Sri K. Girisham Pillai, Kizakkepalavilla, PO Nedunagolam, Distt Kollam, Kerala Rs,68,600/- excavation and concrete.
- 4) M/s R.K. Constructions, Paltoo, Rawatsar, distt Hanuman Garh, Rajasthan Rs.4,37,903/- excavation and concrete.
- 5) Jai Maruti Constructions, Ram Nagar, Mangalpuri, Kankarkhera, Meerut. Rs.3,86,926/-excavation and concrete.

The assessee could not be able to furnish the confirmations from the above parties and therefore, keeping in view the huge payments made by the assessee which could not be verified, the ld. Assessing Officer rejected the books of account u/s. 145(3) of the Act and applying the net profit rate of 8% as applicable u/s. 44AD, on the gross contract receipts of Rs.7,13,83,337/-, assessed the net profit from contract business at Rs.57,10,666/- as against Rs.9,43,295/- declared by the assessee, thereby making an addition of Rs.47,67,371/- vide assessment order dated 03.03.2006. Consequent upon this addition, penalty proceedings were also initiated by the AO u/s. 271(1)(c) of the Act and a penalty of Rs.17,52,011/-. The assessee carried both the matters in appeal before the ld. CIT(A), who confirmed the action of the AO. Aggrieved, the assessee is in these appeals before the Tribunal. For the sake of convenience, we first take up quantum appeal.

4. During the course of hearing, the Id. Counsel for the assessee submitted that the rejection of accounts, made by the authorities below is not justified as the AO has failed to point out any specific defect in the maintenance of books, as per section 145(3) of the Act. Simply because some of the contractors did not respond to the notices of AO, the expenditure made cannot be disbelieved, particularly when complete books of accounts along with relevant vouchers were produced before the AO. It was further submitted that the Id. Authorities below have failed to consider the explanation of assessee that provisions of section 44AD are not applicable in the present case, because the appellant company is neither an eligible assessee nor doing eligible business as contemplated u/s. 44AD of the Act. It is an admitted fact that the turnover of the assessee company exceeds Rs.40 lacs and books of accounts maintained by assessee duly audited, were produced before the Id. Assessing Officer, which were examined on test check basis and no defects were been pointed out. Reliance is placed on the following decisions :

- (i). CIT vs. Rice India Exports Pvt. Ltd. (ITA No. 999/10 dated 03.08.10)(Delhi High Court.
- (ii). CIT vs. Fancy Internation, 168 Taxman 183 (Delhi H.C.)
- (iii). Anis Ahmad & Sons vs. CIT, 297 ITR 441 (SC)
- (iv). ITO vs. Raees Garments (ITA No. 997/Del./07(ITAT)
- (v). CIT vs. Winner Constructions Pvt. Ltd. (ITA No. 796/2011 dated 03.05.12)(Delhi High Court.

(vi). Continental Carbon India Ltd. vs. ITO, ITAT, Delhi dated 31.10.2011 (ITA No. 5269 to 5271/Del./2010)

He, therefore, urged for deletion of impugned addition.

5. The ld. DR, on the other hand, relied on the orders of the authorities below and submitted that since the impugned expenditure debited in P & L account were not found open for verification during the investigation made by AO, the authorities below were justified to reject the books of account and to apply the net profit rate of 8% on the gross receipts, as the entries in the books of account of assessee were found not deducing the correct profit. It was submitted that since the recipients of the amounts did not confirm the payments allegedly made to them, the ld. Authorities were justified to discard the nominal net profit shown by the assessee on huge contract receipts.

6. We have heard the rival submissions and have gone through the entire material available on record. The only question to be adjudicated in this appeal is with regard to the rejection of account books u/s. 145(3) of the Act and computing the net profit from contract business by applying net profit rate of 8% on the gross receipts as contemplated u/s. 44AD of the Act. Having gone through the relevant provisions of section 145(3) of the Act, we find that

sub-sec. (3) of Section 145 lays down that where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting namely cash or mercantile systems or accounting standards have not been regularly followed by the assessee, the Assessing Officer may make an assessment in the manner provided in Section 144 of the Act. In the instant case, it is not the case of Revenue that the method of accounting followed in this year is not consistent with the accounting standards or with the method followed regularly by the assessee. However, as to the correctness and completeness of accounts maintained by the assessee, the main objection of the Revenue has been that the expenditures debited by assessee in its profit and loss accounts towards payments to various sub-contractors, were not found open for verification. Such expenditures were found to have been made both through account payee cheques/DDs as well as in cash. The Assessing Officer had made deep investigations to verify the impugned expenditures by issuing summons u/s. 133(6) and 131 of the Act and also afforded several opportunities to the assessee, but no confirmations regarding the work done by five parties noted above certifying the receipt of payments from assessee, could be produced before the Assessing Officer. It is no doubt true that mere lack of response by the parties to whom payments are said to have been made by assessee, cannot

be taken to be a sole ground for rejection of books of accounts and making best judgment assessment u/s. 144 as held in various decisions relied by assessee, but once the assessee was required time and again, informing the result of investigation, to furnish the confirmations of the parties to justify the impugned expenditure, it was incumbent upon the assessee to discharge its onus, which he failed to do in the instant case. In absence of this, the expenditure shown by assessee were not found open for verification and thus, the entries made in the books of account do not go to deduce correct profit from contract business. The AO, therefore, could resort to make an assessment to the best of his judgment by invoking the provisions of section 144 of the Act. However, while making the best judgment assessment the AO has to take into account all relevant material. It is well settled that even in case of best judgment assessment estimate of profit or addition should be on a rational basis and it should not be based upon the whims and fancies of the AO. In the instant case, the authorities below have applied the net profit rate of 8% on gross receipts as per section 44AD of the Act, which section does not apply to the present case, as the assessee is not a civil contractor but is engaged in the business of electro-mechanical and civil engineering contractor and carried out the erection of Extra High Voltage Overhead transmission lines, installation of underground EHV power cables, Microbe and telecom

towers, repair and maintenance of EHV transmission and distribution equipments for electrification. It is also an admitted fact that the turnover of the present assessee exceeds the sum of Rs.40 lacs which bars the application of section 44AD or the profit rate prescribed therein. Therefore, the conclusion reached by AO to apply the profit rate as contemplated u/s. 44AD cannot be supported. A perusal of the impugned order of the Id. CIT(A) also reveals that the Id. CIT(A) has justified the profit rate of 8% after considering the results of assessment year 2006-07 in the instant case for A.Y. 2003-04, which is not appropriate. In the facts and circumstances of the present case, we find that the profit rate applied by the authorities below is not based on correct appreciation of facts or any rational. In order to justify the best judgment assessment, support could be derived from the previous history of the assessee and the comparable cases of the same line of business. The AO could also verify the genuineness of payments from the concerned banks where the expenditures were paid by assessee by way of account payee cheques or demand drafts, as are reflected in the ledger accounts of those five parties whose confirmations were not brought on record or notices u/s. 133(6) stood un-responded. In such state of affairs, and in the peculiar facts of the present case, we deem it expedient in the interest of justice to restore the matter to the file of AO for deciding the issue afresh in view of the

observations made in the body of this order. Accordingly, the appeal of the assessee deserves to be allowed for statistical purposes.

7. Since we have restored the matter of addition involved in the quantum appeal to the file of Assessing Officer, the appeal challenging the penalty is also restored to the AO for deciding the same afresh as per decision to be taken on the quantum of addition. Accordingly, the appeal relating to penalty is also allowed for statistical purposes.

8. In the result, both the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 16.09.2016.

Sd/-

(I.C. SUDHIR)
Judicial Member

Sd/-

(L.P. SAHU)
Accountant Member

Dated :16.09.2016

*aks/-

Copy of order forwarded to:

(1) *The appellant*

(3) *Commissioner*

(5) *Departmental Representative*

(2) *The respondent*

(4) *CIT(A)*

(6) *Guard File*

By order

*Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi*