

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, BANGALORE**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

ITA No.883/Bang/2014
(Assessment year: 2008-09)

Asst. Commissioner of Income-tax,
Circle 8(1),
Bangalore. ... Appellant

Vs.

Shri H.Noor Ahmed,
M/s. Noor Enterprises,
Ganigarapet,
A.T.Pet, Hosakote,
Bangalore-562114. ... Respondent
PAN: ABGPH 9731E

Appellant by : Dr. P.K.Srihari, Addl.CIT.
Respondent by : Shri H.R.Suresh, CA.

Date of hearing : 16/03/2016
Date of pronouncement : 12/04/2016

ORDER

Per VIJAY PAL RAO, JM :

This appeal by the revenue is directed against the order dated 17/2/2014 of the CIT(A) for the assessment year 2008-09.

2. The revenue has raised the following grounds:

1. "The Order of the Ld.CIT (A) is opposed to facts of the case.

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2. On the facts and circumstances and in law, the Ld.CIT(A) erred in deleting the addition of Rs.31,80,844/- made out of the excavation charges debited by the assessee.
3. On the facts and circumstances and in law, the Ld.CIT(A) erred in deleting the addition of Rs.7,50,202/- made u/s 68 for want of adequate proof and substantiation at the time of assessment proceedings.
4. On the facts and circumstances and in law, the Ld.CIT(A) erred in deleting the addition of Rs. 1,03,26,985/- made on account of non deduction of TDS out of the transportation charges well before the end of the financial year and corresponding disallowance u/s 40(i)(a).
5. On the facts and circumstances and in law, the Ld.CIT(A) erred in deleting the addition of Rs.50 lakhs being cash credit u/s 68 without verifying the facts pertaining to earlier years made out of the excavation charges debited by the assessee.
6. The appellant craves for permission to add, modify or delete the grounds of appeal at the time of hearing the case. ”

3. Ground No.1 is general in nature and does not require any specific adjudication.

Ground No.2 regarding disallowance of excavation charges:

4. The AO found that transport receipts of the assessee was inclusive of excavation charges of Rs.36,70,787/-. The AO proceeded to work out the expenses attributable to excavation activity and arrived at the amount of Rs.31,80,884/- being not

allowable by deduction considering the opening work-in-progress at Rs.15,25,150/- and no closing work-in-progress. Accordingly, the AO made addition of the said amount of Rs.31,80,884/-.

4.1 On appeal before the CIT(A), the assessee submitted that while computing the disallowance by AO, the entire diesel expenses of Rs.27,00,090/- has been wrongly considered to be attributable to excavation activity. Assessee pointed out that the said expenses of diesel purchase of Rs.27,00,090/- should be apportioned between hire activity and excavation activity. The assessee filed separate profit and loss account in respect of these two activities with proportionate bifurcation of expenses in the ratio of 30:70 between excavation activity and hire charges. The CIT(A), after considering these details filed by the assessee, has deleted the addition made by the AO on this account.

4.2 Before us, learned Departmental Representative has submitted that the CIT(A) has considered the apportionment expenses between excavation activity and transport activity as per separate profit and loss account which was not filed before the AO.

4.3 On the other hand, learned AR of the assessee has submitted that the entire record was produced before the AO and no new evidence or material was produced before the CIT(A).

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4.4 We have considered the rival submissions as well as relevant material on record. The AO noted that the transport receipts are inclusive of excavation charges of Rs.36,70,787/-. Further, the opening excavation work-in-progress was shown at Rs.15,25,150/- and no closing work-in-progress was shown by the assessee. Accordingly, the AO worked out the addition as under:

Opening Work in progress	Rs. 15,25,150/-
Excavation Labour Charges	Rs. 24,74,922/-
Diesel expenses towards exaction of	<u>Rs. 27,00,090/-</u>
	Rs. 67,00,162/-
Less: Excavation charges accounted	<u>Rs. 36,70,787/-</u>
Difference	Rs. 30,29,375/-
Add: Margin of Profit	<u>Rs. 1,51,469/-</u>
Addition under Excavation	<u>Rs. 31,80,844/-</u>

4.5 Before the CIT(A), assessee explained that diesel expenses are attributable to excavation activity as well as transportation in the ratio of 30:70 and therefore, the AO committed an error by considering the entire diesel expenses towards excavation activity while working out the addition in question. The CIT(A) deleted the addition in para.4 as under:

"4. The AO found that the transport receipt of the assessee was inclusive of excavation charges of Rs. 36,70,787. He calculated/reworked the expenses attributable to the excavation activity and arrived that his addition of Rs. 31,80,844 after considering the opening WIP of Rs. 15,25,150, excavation labour charges of Rs.24,74,922 and diesel expenses of Rs. 27,00,090. The appellant has protested this recalculation on the ground that the entire diesel purchase of Rs.27,00,090 could not be attributed only to the excavation activity and should be apportioned between the hiring activities and excavation. The

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appellant also filed separate Profit & Loss account in respect of these two activities with proportionate bifurcation of expenses, 30% of which was attributed to excavation activity and 70% to hire charges. A gross profit of Rs. 42,30,003 was shown attributable to hire charges and Rs. 5,19,280 to excavation charges. Considered thus, the AO's conclusions are clearly unwarranted especially since he has given no reason for considering the entire diesel expenditure as attributable to excavation activity only and the appellant's grounds succeed. "

Thus it is clear that only 30% of the diesel expenses of Rs.27,00,090/- are attributable to the excavation activity and to that extent, the assessee would get relief. However, the CIT(A) has deleted the entire addition without considering the fact that addition of about Rs.8 lakhs would be sustained, even if a proportionate 30% of diesel expenses is attributable towards excavation activity. Accordingly, we modify the order of the CIT(A) qua this issue and direct the AO to re-work the addition by allocating the diesel expenses between excavation activity and transportation activity in the ratio of 30:70. Accordingly, this ground of the revenue is partly allowed.

5. Ground No.3 regarding addition of Rs.7,50,202/- u/s 68 in respect of cash credit from M/s SVS & DVS (HUF) Goa. The AO held that satisfactory explanation of the transaction was not provided and hence, he treated the amount as unexplained cash credit u/s 68.

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5.1 The assessee challenged the action of the AO before the CIT(A) and submitted that the said amount represented receivables from M/s Svs & Dvs (HUF), Goa against hire charges which has been duly shown on accrual basis in the earlier year and offered to tax. The CIT(A) accepted the explanation of the assessee and deleted the addition made by the AO.

5.2 We have heard the learned Departmental Representative as well as the learned AR of the assessee and perused the relevant material on record. The AO made addition for want of satisfactory explanation in respect of this amount of Rs.7,50,202/- received by assessee from M/s Svs & Dvs (HUF), Goa. The CIT(A) has deleted the addition by giving the reasons in para.5.1 as under:

"5.1 Before me it was contended that the said amount represented receivable from M/s SVS and DVS, Salgaocar house, Vasco da Gama against hire charges which had been duly shown on accrual basis in an earlier year and offered to tax. It was also shown as receivable in the balance sheet as on 01.04.2007 and this amount had been received and recorded in the books on 01.03.2008. I have examined this explanation of the appellant which is found to be factually correct. The addition is, therefore, directed to be deleted. "

It is clear that the CIT(A) examined and verified the books of account and found that this amount was offered to tax on accrual basis in the earlier year. Even the said amount was shown as receivable from M/s Svs & Dvs (HUF), Goa in the balance sheet as on 1/4/2008 cannot be taxed because it was already offered to

tax on accrual basis in the earlier year. Accordingly, we do not find any error or illegality in the impugned order of the CIT(A) qua this issue.

Ground No.4 regarding disallowance made u/s 40(a)(ia):

6. During the course of assessment proceedings, AO noted that the assessee incurred transport charges of Rs.1,03,26,985/-. On query from the AO regarding compliance of TDS, the assessee stated before the AO that it paid Rs.1,21,148/- on 29/5/2008 which is a belated one. The AO held that sec.194C casts an obligation on the assessee to deduct tax at source on contract payment and remit to the Central Government account within stipulated time. Since the assessee has deposited the amount belatedly, the AO made disallowance u/s 40(a)(ia) in respect of entire transport charges of Rs.1,03,26,985/-.

6.1 On appeal, the CIT(A) allowed the claim by recording the fact that the assessee paid TDS along with interest within the due date of filing of return of income u/s 139(1).

6.2 We have heard the learned Departmental Representative as well as the learned AR of the assessee and considered the relevant material on record. The AO has made disallowance u/s 40(a)(ia) because the assessee made payment of TDS belatedly on 29/5/2008. On appeal, the CIT(A) has allowed the claim of

the assessee by considering the fact and the issue in para.8.1 as under:

8.1 Before me in appeal it was contended that the appellant had paid the deducted TDS, along with interest, within the due date for filing of return u/s 139(1). Reference was made to the amendment effected by the Finance Act 2010 which allowed for deduction even when the TDS had been deposited before the due date specified u/s 139(1). It was contended that this amendment has been held to be operative with retrospective effect from 01.04.2005 by the Hon'ble Calcutta High Court in the case of CIT vs Virgin Creations (2011) (11 TMI 348 (HC). A similar position of accepting the retrospective operation of these provisions was held by the Hon'ble ITAT Bangalore in the case of ACIT vs Sri M. K Gurumurthy (ITA no.717/Bang/2011). I have gone through the judicial decisions cited and respectfully agree with the stand of the Hon'ble High Court and the ITAT. Since the appellant had deposited the TDS amount with interest before the due date of filing of return, and in view of the judicial decisions, as above the AO is directed to allow the claim of expenditure of Rs.1,03,26,985.

Thus it is clear that TDS which was deducted by the assessee from the transport payment was deposited before the due date as per section 139(1). The CIT(A) has also placed reliance on the judgment of the Hon'ble Calcutta High Court in the case of *CIT vs. Virgin Creations* (11 TMI 348) as well as the decision of the co-ordinate bench of this Tribunal in the case of *ACIT vs. M.K.Gurumurthy* (ITA No.717/Bang/2011). The revenue has not disputed the fact that TDS deducted by the assessee on transportation charges was paid along with interest within due date on filing of return of income u/s 139(1). Accordingly, we do

not find any error or illegality in the impugned order of the CIT(A) qua this issue.

Ground No.5 regarding addition of Rs.50 lakhs u/s 68 of the IT Act:

7. The AO noted that the assessee has sundry creditors of Rs.60,06,599/- from V.M.Salgaokar Sales International. The AO further noted that this amount is appearing as opening balance and neither assessee received above amount from the creditor nor creditor advanced the amounts to the assessee. Since the assessee could not produce any evidence by way of confirmation letter from the creditor, therefore, the AO proceeded to make addition of said amount u/s 68 of the Act. On appeal, the CIT(A) deleted the addition by nothing the fact that the assessee produced confirmation from the party.

8. We have heard learned DR as well as learned AR of the assessee and considered relevant material on record. The CIT(A) has dealt with this issue in para.9.1 as under:

"9.1 Before me in appeal it was contended that out of the outstanding balance of Rs. 60,06,599 the assessee had furnished a confirmation for Rs. 50 lac and only the balance was subject to reconciliation, but the AO did not take into account this confirmation available. From the copy of the ledger account of this party/creditor in the appellant's books for FY 2007-08 it is seen that the impugned amount was only an opening balance as on 01.04.2007 against which no payment was made by the assessee during the year. The opening balance in question, therefore, is clearly the result of the transactions of earlier periods. The confirmation to the extent of Rs. 50 lac in respect of this credit entry in the books was also available before the AO. Since the

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details of the earlier year's transaction which resulted in this credit balance were not made available before me, I am constrained to treat the matter only in terms of the impugned amount representing a credit entry in the books. Since 50 lac out of the same had been confirmed by the creditor the AO's not taking cognition of the same, and giving no reason for the rejection thereof, is not in order. To the extent of Rs. 50 lac, therefore, the credit entry is considered to be evidenced. The addition u/s 68 is to be made only in respect of Rs. 10,06,598, being the balance for which confirmation was not available. This ground, therefore, partly succeeds."

It is clear from the finding of the CIT(A) that the alleged confirmation was neither examined nor verified by the AO nor by the CIT(A). Once a document was available on record and it was not examined by the AO, it was incumbent upon the CIT(A) to get the said document verified from the AO by issuing remand order or examine by himself in the appellate proceedings. In the absence of examination and verification of the alleged certificate, we are not able to concur with the view of the CIT(A) on this issue. Accordingly, we set aside this issue to the record of the AO for proper verification of the confirmation from the creditor and then decide the same as per law.

9. In the result, the appeal of the revenue is partly allowed.

Order pronounced in the open court on this 12th day of April, 2016

sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER
Place : Bangalore
D a t e d : 12/04/2016
srinivasulu,sps

sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-II Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore