

IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR

BEFORE SHRI N.K.SAINI, VICE PRESIDENT AND
SHRI A. T. VARKEY, JUDICIAL MEMBER

ITA No.25/Jodh/2019
(ASSESSMENT YEAR-2014-15)

Varaha Infra Limited Plot No. 6, Jalan Vilas Scheme, Jodhpur, Rajasthan-342001. (PAN:AACCV7972K)	Vs	Deputy Commissioner of Income Tax, Central Circle- 1, Jodhpur
(Appellant)		(Respondent)
& ITA No.122/Jodh/2019 (ASSESSMENT YEAR-2014-15)		
Deputy Commissioner of Income Tax, Central Circle-1, Jodhpur	Vs	Varaha Infra Limited
(Appellant)		(Respondent)

Assessee By	Shri Amit Kothari, CA
Revenue By	Sh. K. C. Badhok, CIT DR
Date of hearing	09.05.2019
Date of Pronouncement	10.05.2019

O R D E R

PER A. T. Varkey, J.M.

These are cross appeals preferred by the assessee and the revenue respectively against the order of the Ld. CIT(A)-2, Udaipur dated 26.12.2018 for AY 2014-15.

2. Ground no. 1 of assessee has not been pressed and the Ld. AR has affixed his signature with endorsement that he is not pressing this ground no. 1 which we not is a legal issue, since the same is not pressed it stands dismissed.

3. Ground no 2 of the assessee's appeal and ground no. 1 of the revenue's appeal are for the same issue wherein the Ld. CIT(A) has given partial relief to the assessee. Hence, the assessee as well as the revenue both is aggrieved against the order of the Ld. CIT(A) and is in appeal before us.

4. The ground no. 2 of appeal of the assessee is as under:

"2. The Ld. CIT(A) has erred in sustaining the addition of Rs.34,46,84,368/- in relation to purchase made from Sundha Road Developers Private Limited and from Khush Infratech Private Limited, The addition so confirmed is bad in law and had on facts. The appellant submitted few copies of bills on a sample basis, and not allowing the other purchases was unjustified, particularly when the said purchases made are duly confirmed by the respective parties."

The ground no. 1 of the revenue's appeal is as under:

"1. Whether on the facts and in the circumstances of the case the CIT(A) was right in deleting the addition made by the AO on account of bogus purchases shown from M/s. Sundha Road Developers Pvt. Ltd. and M/s.

Khush Infratech Pvt. Ltd. of Rs.6,66,210/- and Rs.3,73,690/- respectively.”

5. Brief facts of the case are that the original return of income was submitted by the assessee on 24.11.2014. Later a search proceedings u/s. 132 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) was carried out against the assessee on 21.01.2015. Pursuant to which notice u/s. 153A of the Act was issued on 29.01.2016 and the assessee filed fresh return of income once again on 22.02.2016. The AO noted that the assessee company was incorporated on 11.04.2008 and is engaged in the business of civil construction, sub-contractor and road contractor and the assessee has declared total income of Rs.22,89,70,040/-. The AO noted that the assessee has made huge payments to M/s. Sundha Road Developers Ltd. (hereinafter referred to as “SRDL”) to the tune of Rs.18,18,34,000/- and M/s. Khush Infratech Private Limited (hereinafter referred to as the “KIPL”) to the tune of Rs.18,10,85,268/- and M/s. Hari Laxmi Infra Project Pvt. Ltd. (hereinafter referred to as the “HLIPPL”) to the tune of Rs.4,42,00,000/- during the relevant assessment year. It is noted that no adverse view has been taken against the purchases made from M/s. HLIPPL which the AO referred to TPO u/s.92CA of the Act to compute arms length price in relation to the specified domestic transaction aggregating to Rs.6,12,90,000/-; whereas the TPO vide order dated 28.08.2007 was of the opinion that no adverse inference need to be drawn in respect of the arms length price of the domestic transaction conducted by M/s. HLIPPL and the AO has not made any adverse view against the said company. Coming to the adverse view taken by the AO against M/s. SRDL and M/s. KIPL, we note that the AO in order to examine the genuineness of the expenditure claimed by the assessee, issued notice u/s. 133(6) of the

Act to these companies with the direction to provide the following details:

- i) Copy of ITR, computation of income along with all annexure for AY 2014-15.
- ii) Confirmed copy of accounts w.r.t. M/s. Varaha Infra Ltd. for the period relevant to AY 2014-15.
- iii) Complete details of nature of transaction with M/s. Varaha Infra Limited along with supporting evidence.
- iv) Copy of any agreement executed with M/s. Varaha Infra Ltd., if any, relevant for AY 2014-15.
- v) They were required to produce original bills, vouchers etc. along with their books of accounts for verification of transaction made with M/s. Varaha Infra Ltd. during AY 2014-15.

6. According to the AO, M/s. KIPL submitted ledger account of assessee, acknowledgment of its Income tax Return with computation and further the confirmed that it had supplied material to the assessee company. The AO acknowledges that similar replies were submitted by M/s. SRDL also. The AO notes that the replies were exactly similar and identical and without furnishing the complete details as required vide his summon u/s. 131 of the Act. According to the AO, despite several reminders both the companies reply was exactly the same and requested for grant of time to submit the details and documents. According to AO, thereafter he issued notice to the assessee as to why purchases made by it from the said parties should not be treated as bogus. Taking note that no specific reply was received from the assessee for not producing the directors of the other two companies ie, M/s. SRVL and M/s. KIPL according to AO the genuineness of the huge expenses paid by assessee to the said companies remained unverified and after referring to few judgments was pleased to hold that the assessee failed to establish the genuineness of the expenses claimed to have been incurred for alleged

supply of materials by M/s. SRDL to the tune of Rs.18,18,34,000/- and M/s. KIPL to the tune of Rs.18,10,85,268/- totaling Rs.36,29,19,268/- was disallowed as bogus expenses and added to the income of the assessee. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who gave partial relief to the assessee by deleting the addition made by the AO on account of bogus purchases shown from M/s. SRDL to the tune of Rs.6,66,210/- and in respect of M/s. KIPL to the tune of Rs.3,73,690/-. At this juncture, we note that an amount of Rs.1,71,95,000/- credited on account of cheque received by the assessee from M/s. SRVL since was borne out from the records, the Ld. CIT(A) has deleted the same on which the revenue is not in appeal. Aggrieved, by the action of Ld CIT(A), both parties are in appeal before us, raising the grounds supra.

7. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee company was incorporated on 11.04.2008 and is engaged in the business of civil construction, sub-contractor and road contractor and claimed to have purchased materials for its construction/road contracts from M/s. SRDL M/s. KIPL and M/s. HLIPPL, which the assessee had claimed as its expenditure. The AO in order to ascertain the veracity of the claim of expenditure had issued notice to the parties involved directly u/s. 133(6) of the Act for necessary verification of the purchases made from these parties. From the perusal of the assessment order it is revealed that in response to the notice u/s. 133(6) issued all the parties have duly replied and had confirmed the purchases made by the assessee. Since in this appeal only the purchases in respect of M/s. SRDL and M/s. KIPL are in dispute and since there is no dispute in respect of transaction with M/s. HLIPPL the facts involved in respect of M/s. HLIPPL is not narrated. The AO has acknowledged that both the [M/s. SRDL and M/s. KIPL]

companies have replied as well as submitted copies of the respective income tax returns and audited balance sheet for the year under consideration. We note that the assessee is a contractor engaged in the business of civil, sub-contractor and road contractor etc. The assessee has huge turnover in this year which is to the tune of Rs.606.49 cr. which has been accepted by the AO and the assessee has shown GP of Rs 119.31 cr. [GPpercentage is 19.67%] when compared with the previous two assessment years the GP percentage is the highest. We note that the books of the assessee are statutorily audited and accounts maintained by the companies are required to be audited under the Companies Act, 1956. We note that the auditors have certified the correctness of the financials filed by the assessee. The AO has to accept the tax audit report unless it turns out to be patently a false certificate. We note that the AO has not brought on record any defects/faults in the audited financials filed by the assessee and the AO have not rejected the books maintained by the assessee in the regular course of business. Moreover, we note that the AO in order to verify the veracity of the purchases made by the assessee from its two companies M/s. SRDL and M/s. KIPL has asked for various details which have been replied to by both the companies along with the following details:

- i) In respect of M/s. SRVL following documents were filed:
- ii) Income Tax Return filed at page 68 of the paper book,
- iii) Account statement of the said party from the books of account of the assessee available at pages 38 & 39 of the paper book,
- iv) The account confirmation and the account statement from the books of M/s. SRVL confirming the transaction with the assessee available at paper book pages 40 to 46,
- v) Copy of computation of total income and audited Balance Sheet of M/s. SRVL submitted directly to the AO in response to

notice u/s. 133(6) available at paper book pages 124 to 131 and 132 to 134.

vi) Copies of specimen bills of purchase made available at paper book pages 47 to 84,

vii) Payments made by account payee cheques for purchasing the material for the road construction.

In respect of M/s. KIPL the following documents were filed:

i) The account statement of the said party from the books of account of the assessee available at paper book pages 5 to 86,

ii) The account confirmation and the account statement from the books of M/s. KIPL confirming the transaction with the assessee available at pages 87 to 90 of the paper book,

iii) Copy of computation of total income and audited Balance Sheet of M/s. KIPL which was directly submitted to the AO in response to the notice u/s. 133(6) available at paper book pages 135 to 143 and 144 to 147.

iv) Copies of specimen bills of purchase made by the assessee, Payments made by account payee cheques and purchases are for construction material used for the road construction,

v) Income Tax Return available at page 180 to 182 of the paper book.

8. We note that by filing the aforesaid documents the identity of the seller of goods/purchases cannot be doubted for the simple reason that they are income tax assessee and the payments were made by account payee cheques to them, which has not been disputed. The assessee's turnover from its business of construction of roads has been accepted by AO, whereas the materials used for the very same construction/road on

which the assessee received the payments on completion of projects or as per contract have not been accepted by the AO when the facts remained that both M/s. SRDL as well as M/s. KIPL had confirmed/replied pursuant to the 133(6) notice of AO and have filed their Income Tax Returns along with confirmation regarding sale of materials to assessee. We note that the Ld. CIT(A) has given relief to the assessee only for the bills which have been produced before him. It was brought to our notice that the bills produced were only specimen bills of both these parties, so when the Ld. CIT(A) has given partial relief it means that the Ld. CIT(A) agreed to the existence of M/s. SRDL as well as M/s. KIPL and has accepted the assessee's contention that materials were purchased for the bills produced by the assessee. As we stated earlier that without purchasing the construction materials, the assessee could not have constructed the roads e.c. and since the assessee's turnover has been accepted in toto and when the parties M/s. SRDL as well as M/s. KIPL has given the confirmation along with the fact that payments were through banking channel and other documents as aforesaid, question of disallowance of the expenses claimed by the assessee does not arise. It goes without saying that entire contract receipt can never be the income and only the net income after deducting corresponding expenses can be taxed. The disallowances have been made only on suspicion; and suspicion howsoever strong cannot take the place of the proof. The Ld. CIT(A) by giving partial relief to the assessee has recognized the genuinity of purchases on the bills submitted, which goes against the theory of bogus purchases as held by the AO and cannot be sustained and, therefore, we are inclined to allow this ground of appeal of the assessee and confirm the action of the Ld. CIT(A) to the partial relief granted by him and direct the AO to allow claim of expenditure of the assessee incurred for purchases from M/s.

SRDL and M/s. KIPL. Thus, the assessee succeeds and the revenue fails in this ground.

9. The next ground of appeal of the revenue wherein the Ld. CIT(A) ordered deletion of addition of Rs.35,42,12,560/- which was added by the AO for payment made to M/s SREI Infrastructure Finance Ltd. (in short M/s SREI). The AO during assessment proceedings noted that the assessee has claimed advisory service expenses which was paid to M/s. SREI of Rs.35,42,12,560/-. In order to verify its veracity of the claim, the AO issued notice u/s. 133(6) of the Act dated 13.10.2017 which AO agrees that M/s. SREI replied vide letter dated 22.12.2016 which according to AO was not complete, so he again issued notice and asked M/s. SREI to furnish copy of the Income tax Return, complete details of projects for which it has provided/rendered advisory services to the assessee, the advisory fee received in respect of relevant assessment year, party wise complete details of such advisory services provided by it during the assessment year etc. According to AO, reply was received from M/s. SREI on 15.11.2017. However, according to AO again there were no complete details. Again the AO asked M/s. SREI to provide more details which according to AO, no response was there. Therefore, he examined the veracity of the transaction with the materials filed with him. The AO acknowledges that the assessee has submitted copies of ledger account, bills and agreement with M/s. SREI and after reproducing the agreement from page nos. 17 to 25 of the assessment order, the AO found certain mismatch in the receipt claimed by M/s. SREI and furnished by the assessee. Thus, the AO was of the opinion that in the light of the inconsistencies and contradictions with respect to the worth of EPC/BOT projects for which advisory services have been provided by M/s. SREI ;and since the assessee failed to adduce proper details of the project advisory services expenditure of Rs.35,42,12,560/-

the AO treated the same as bogus expenses. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who was pleased to delete the same. Aggrieved, the revenue is before us.

10. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the AO during the course of assessment proceedings taking note that the assessee had made payment of Rs.35,42,12,562/- to M/s. SREI, asked for various details from them which was acknowledged by the AO to have been received by him. The only fault which the AO has raised is that complete details were not furnished by M/s. SREI, however we note that AO has not spelled out as to which all details were not furnished before him which is relevant to adjudicate this issue. It was brought to our notice by the Ld. AR that the turnover of M/s. SREI was more than Rs.3260 cr. and took us to page 76 of the paper book where the Balance Sheet of M/s. SREI is found placed and page 77 which is P&L Account from which income from operations of M/s. SREI is found to be Rs.3260 cr. and the amount disbursed by the assessee to M/s. SREI is only Rs.35 cr. It was brought to our notice that M/s. SREI is a reputed company and acted as advisory and consultant and its clientele includes various Government agencies like Ministry of Rural Development, Govt. of India, Asian Development Bank, Ministry of Commerce & Industries, Department of Commerce (SEZ), Bangalore Metro Railway Corporation, Delhi Metro Development Corporation, Greater Vishakapatnam Municipal Corporation etc. It was brought to our notice that M/s. SREI was instrumental in getting various Government contracts to assessee company and helped in filing the tender, making detailed evaluation of the cost and requirements etc. It was also brought to our notice that M/s. SREI provides complete technical support while completing the projects awarded to it. In order to counter the allegation of AO that it was a bogus transaction, our

attention was drawn to account statement of M/s. SREI placed at page 22 of the paper book, copy of invoice raised by M/s. SREI towards advisory services which are found placed at pages 23 and 24, copy of TDS certificate issued to M/s. SREI for payment of TDS on the payments made is found placed at pages 25 to 26, copy of the agreement executed with M/s. SREI is found placed at pages 27 to 31 of the paper book. M/s. SREI's audited balance sheet for the year ending 31.03.2014 and 31.03.2015 are found placed at pages 32 to 37, copies of report issued by M/s. SREI to the AO are also enclosed. We note that M/s. SREI is regularly filing its returns with the Registrar of Companies and the payments have been made by the assessee to M/s. SREI by account payee cheques or through RTGS. Taking note of all these facts and taking note of the fact that the inconsistency/mismatch highlighted by the AO has been also rightly addressed by the Ld. CIT(A) in the form of a chart placed at page 26 of his order and the Ld AR, painstakingly took us through the Paper-book and explained to us and reconciled the figures before us. We note that the Ld. CIT(A) has given relief to the assessee by observing as under:

"6.3. I have considered the order of the AO and the submissions of the assessee

6.3.1 I find that M/s. SREI have confirmed that they have assisted the assessee in all technical and financial matters for applying for the contracts and for execution of the contracts awarded. Further, the payment of advisory services fee of Rs.36,06,31,780/- (Fees Rs.32,09,61,000/- plus service tax of Rs.3,96,70,780/-) is duly supported by bills raised by SREI infrastructure Finance Limited. The payment has been made by account payee cheques or through RTGS. TDS certificate in Form 16A issued to SREI by the assessee company, reflects payment of fees of Rs.32,09,61,100/- (Rs.36,06,31,780/- less service tax Rs.3,96,70,780/- and deduction of TDS of Rs.64,19,220/- thereon. Further M/s. SREI, by their reply dt. 15.11.2017, have furnished before the AO complete details of contracts of Rs.3288.14 crores, which include contracts of Rs.991.34 crores, where the assessee has been awarded the contracts (placed as Annexure B to this order); thus the observation of the AO that M/s. SREI furnished details of contracts of only Rs.1045.11 crore, is factually incorrect. The fees of Rs.32,09,61,000/- (Rs.36,06,31,780/- less service tax

Rs.3,96,70,780/-) is correlated with the details of value of total contracts and value of successful contracts as under:

M/s Varaha Infra Limited
 ITA No. 10250/2014-15
 A.Y. 2014-15

S. No.	Particulars	Amnt (Rs.)
1	Total Contract Amount	32,88,14,000/-
2	Successfully bid	9,91,34,000/-
3	Fees at 0.75% of total contracts bid (0.75% of Rs.32,88,14,000/-)	24,66,10,500/-
4	Additional Fees at 0.75% of contracts where possesee was selected as the bidder (0.75% of Rs. 9,91,34,000/-)	7,43,50,500/-
5	Total fees excluding Service Tax	32,09,61,000/-

6.3.2 The A.O has noted that there was a difference in the terms of fees in the agreement as submitted by the assessee and copy as obtained from SREI vis 133(6), the assessee has explained that when these services were being negotiated, there was exchange of various proposals and they were negotiating for the best terms SREI wanted higher charges towards services, and the assessee company was trying to get the best of the rates. Ultimately it was agreed that on successful contracts being awarded, 0.75% additional services charges would be required and therefore the assessee agreed upon such charges, and accordingly the fees was being paid to them. It is submitted that on direct enquiry made from SREI they had also confirmed these facts before the Id. AO and had forwarded the details of bills, payments, and details of work for which such advisory services were being paid.

Considering the fact that the bills finally raised by M/s SREI for fees of Rs.36,06,31,780/- (fees: Rs. 32,09,61,000/- plus service tax of Rs. 3,96,70,780/-) include fee of 0.75% of total contracts plus the additional fee of 0.75% of the value of successful contracts, (Para 6.3.1 above refers), consistent with the terms of fees as mentioned in the agreements directly submitted by SREI to the A.O, and the fact that as per Form 16A the assessee has deducted TDS on fees of Rs. 32,09,61,000/-, I find that the A.O was not justified in holding the fees paid to SREI as bogus based on the fact that there was a difference in terms in the agreement submitted by SREI and the assessee.

6.3.3 The A.O has also observed that while the assessee has credited fees of Rs. 35,42,12,560/- to SREI in its books, M/s SREI have debited an amount of

Rs.36,06,31,780/- to the assessee. In this regard the assessee has explained that the difference of Rs.64,19,220/- is on account of TDS. I find that the AO has failed to appreciate the debit of Rs.64,19,220/- on account of TDS, in the ledger account of the assessee submitted by SREI (placed as Annexure C to this order). Further, this contention of the assessee is brone out from Form 16A, as per which TDS of Rs.64,19,220/- has been deducted from fees paid to SREI. Therefore the discrepancy pointed out by the AO is found to be fully explained.

6.3.4. In view of the discussion in para 6.3.1 to 6.3.3 above, the disallowance of Rs.35,42,12,560/- made by the AO is hereby deleted. This ground of appeal is thus allowed."

11. Since we fully agree with the view expressed by the Ld. CIT(A) and no infirmity could be detected by us in the impugned order after hearing the Ld. DR, and for the reasons stated by us at para 10 supra, we

are inclined to confirm the order of the Ld. CIT(A) and dismiss the ground of appeal of revenue.

12. In the result, appeal of assessee is allowed and that of the revenue is dismissed.

Order pronounced in the open court on 10th May, 2019

Sd/-
(N.K. SAINI)
Vice President

Sd/-
(A. T. Varkey)
Judicial Member

Dated : 10.05.2019

“J.D. Sr. PS.”

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

अपीलार्थी/ The Appellant

प्रत्यर्थी/ The Respondent

आयकरआयुक्त/ CIT

आयकरआयुक्त (अपील)/ The CIT(A)

विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, DR, ITAT, Jodhpur

गार्डफाईल/ Guard File

आदेशानुसार/ By order

सहायकपंजीकार/ Assistant Registrar