

आयकर अपीलिय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE HON'BLE KUL BHARAT, JUDICIAL MEMBER
AND HON'BLE MANISH BORAD, ACCOUNTANT MEMBER

ITA No.261/Ind/2017
Assessment Year 2013-14

M/s. Ferro Concrete Construction(India) Pvt.Ltd, Bidasaria Mills Compound, Plot No.5-A, Bhagirathpura Industrial Estate, Indore	Vs.	DCIT, 1(1), Indore
(Appellant)		(Respondent)
PAN No.AAACF2726K		

Revenue by	Smt. Ashima Gupta, CIT
Assessee by	Shri C.P. Rawka, Adv
Date of Hearing	09.05.2019
Date of Pronouncement	16.05.2019

ORDER

PER MANISH BORAD, AM.

This appeal is filed at the instance of the assessee pertaining to Assessment Year 2013-14 and is directed against the order of Ld. Commissioner of Income Tax(Appeals)-II (in short 'CIT(A)'), Indore dated 31.01.2017 which is arising out of the order u/s 143(3) of the Income Tax Act 1961(In short the 'Act') dated 18.03.2016 framed by DCIT-1(1), Indore.

2. The assessee has raised following grounds of appeal;

1. That the Ld. CIT(A) erred and confirmed the action of assessing officer in rejecting the books of accounts without pointing out any material defect in the correctness and completeness of books of accounts. The addition made by the A.O and confirmed by the CIT(A) is totally wrong and illegal on the facts of the case.

2. That the Ld. CIT(A) erred and confirmed the addition of Rs.33,37,479/- for low profit without appreciating full facts and reasoning.

3. That the Ld. CIT(A) erred and confirmed the addition of 1% net profit rate, since the N.P rate applied by the Assessing Officer and same after giving 1% relief which is confirmed by CIT(A) is unjustified being excessive.

4. That the Ld. CIT(A) erred and confirmed the addition of Rs.1,51,642/- on account of disallowance of testing charges u/s 40(a)(ia) without appreciating full facts.

5. That the appellant craves to leave, add alter or amend any of the ground at or before hearing.”

3. Brief facts of the case as culled out from the cords are that the assessee is a private limited company engaged in construction work. E-return of income for Assessment Year 2013-14 was filed on 29.09.2013 declaring income of Rs.2,43,37,640/-. Case picked up for scrutiny followed by serving notices u/s 143(2) and 143(1) of

the Act. Various details as called for were filed. Further on the basis of following observations Ld. A.O rejected the book results u/s 145(3) of the Act and made addition of 2% of gross receipts over and above the net profit shown by the assessee thereby making addition of Rs.66,74,958/-:-

i)The assessee company has not maintained separate books of accounts for contract receipts of Mumbai and for other business receipts.

ii)The assessee company has shown work in progress of estimation basis no quantitative details for work in progress maintained.

iii)It has been noticed that assessee company has carried out its working activities on different sites of Indore like Kushalpura, Mahakal Bridge, Mhow, Rajendra Nagar, Teen Imli, Pagra Dam, Laxmi Bai Nagar and etc. Further, it has been noticed that expenses claimed in the P&L account for the relevant period, in respect of all sites have not been maintained properly. On called, complete details for some site

wise expenses have not been produced. It is also found that some payments made in cash and some vouchers of payments are self made and even unsigned. In this context, genuineness of the expenses claimed by the assessee company cannot be properly verified. In is therefore, on the basis of vague and dubious nature of vouchers of expenses, expenses as claimed by the assessee company cannot be allowed in full.

iv) On verification of labour expenses, it has been noticed that Assessee Company has made payments of labour expenses in cash and no labour payment registers were produced.

v) Further, on verification of ledgers of sub-contractors and construction-work payments filed by the AR of the assessee company on 05.01.2016. It has been noticed that the assessee company has made various payments in cash. When the AR of assessee was asked to verify the same with supporting documents. In response to this the AR of assessee produced some bill/vouchers of payments. But cash payment details not found on record.

vi) Most of the payments made in cash even paid more than 20,000/- some of them are payments made to Manish Khodiyar (Khodiyar Const.) of Rs. 16,85,325/- and Gangaram of Rs. 15,73,308/- and others in cash in full. In absence of bank payments cross verification of the said payments are not possible. The AR explained during verification of Books that these payments are PR W (piece rate worker payments) and also claimed to paid various workers through above persons.

vii) Further the assessee company has also paid club membership fees Rs.28,740/- and the same was not found related with business.

viii) During the course of assessment proceedings it has been noticed from P&L account the assessee has shown purchase of stock in trade of Rs.157391315/- . Further verification it is found that the said amount is the purchase of construction material i.e. Bitumen, Bricks, Cement, Diesel, Steel, Sand etc. Further, on verification of bills/vouchers of material purchased it has 'been found that various payments made in cash and in some cases bills of various payments not found in record.

4. Ld. A.O also made disallowance u/s 14A of the Act at Rs.2,43,581/- and u/s 40(1)(ia) at Rs.1,51,642/-.

5. Aggrieved assessee preferred appeal before Ld. CIT(A) and partly succeeded.

6. Now the assessee is in appeal raising following three issues;

(i) Against rejection of books u/s 145(3) of the Act and estimating profits

(ii) Confirming the addition of 1% as additional net profit as against 2% net profit rate adopted by the Ld. A.O.

(iii) Disallowance u/s 40(a)(ia) of the Act.

7. Ld. Counsel for the assessee vehemently argued supporting following written submissions;

The learned Assessing Officer applied the provisions of section 145(3) and rejected the books of accounts. Resultantly net profit increased by 2% as against declared profit of 4.93% after depreciation. Thereby, a total addition of Rs. 66,74,958/- made by Assessing Officer.

The nature of business of assessee requires certain items to be purchased readymade and some items required to be fabricated or manufactured. Therefore, it is submitted that the construction expenses

and material consumed expenses are required to be aggregated to arrive at the actual expenses at sites. If we look into this aspect, your honor will appreciate that the receipt and expenses are compatible and reasonable.

Secondly, it is submitted that project of a contract may take 3-4 years for completion against which running bills, received from contractee are credited in the profit & loss account, on the basis of term and condition laid down in the work contract. As against which, the expenses are incurred during the currency of project. During the period, cost of material as well as labour cost escalates. Thus in fact, the revenue gained by contractor in real term is total receipt from a project less total expenditure.

In view of the forgoing paras it is submitted that the neither AO not Ld. CIT(A) has not pointed out any specific defect in the correctness and completeness in the Books of Accounts and invoked section 145(3). He has referred to some self drawn vouchers which are not denied but that is not a defect considering the line of business and location of site at far off places. It was specifically pointed out during the Assessment Proceeding that it is neither practicable nor possible to obtain *Pakka bills* in respect of purchase of snacks, milk, mending of punctures, minor repairs of vehicle and machinery by the local mechanics etc. However, it is clear beyond doubt that these expenses are genuine and quantitatively correct. This procedure is subjected to strict vigilance by the company's directors as above expenses are met from petty cash maintained at the site where supervisor is the person entrusted with the task of incurring the expenditure to the bare minimum. There is no likelihood of exaggeration of the said expenses because it will leave sufficient apertures for leakage of Company's funds.

The next issue is enhancement in net profit by Rs. 66,74,958/- which is

a gigantic and unscientific figure. There is no basis to arrive at the said figure. It is submitted that even if the books of accounts are rejected and book results are disturbed, the Assessing Officer is duty bound to adopt a reasonable and scientific manner while making the addition in book results. Arbitrary and imaginary figures cannot be placed in the Assessment order.

Reliance is placed on the following pronouncements:

1. CIT Vs Rajendra Prasad Jain, High Court of Punjab & Haryana 374 ITR 0545
2. Karnataka State Forest Industries Corporation Vs. CIT, High Court of Karnataka, 201 ITR 674
3. CIT Vs Ranicherra Tea Co Ltd High Court of Calcutta, 207 ITR 979
4. DCIT Vs Vishwanath Prasad Gupta, ITAT Jabalpur, 137 TTJ 385
Pankaj Diamond Vs ACIT, ITAT Ahmedabad, 32 DTR 462

However, Ld. AO as well as Ld. CIT(A) ignoring the above factual position and without pointing out any such major defect in the books of account other than as explained above, rejected the books of accounts *uls* 145(3) and applied net profit rate which is unjustified though. Ld. CIT(A) sustained the net profit rate of 1 only on the basis of previous years' appellate order without ignoring the increase or decrease in turnover of assessee company each year. The said addition was without taking care of this fact of changing turnover each year.

Please find the enclosed chart where the net profit rate has been worked out for last three years at each stage i.e. before assessment, after

assessment and after CIT(A)'s order.

Therefore, in view of the above the addition made by the Ld. Assessing Officer and partly sustained by CIT(A) deserves to be deleted.

8. Per contra Ld. Departmental Representative vehemently argued and supporting the orders of lower authorities.

9. We have heard rival contentions and perused the records placed before us and carefully gone through the judgments referred and relied by the Ld. Counsel for the assessee.

10. As regards the issue relating to rejection of book results and estimation of net profit by adding 1% of gross turnover as additional net profit over and above the net profit disclosed by the assessee. We observe that similar set of facts and issues came up for adjudication in the case of assessee before the Hon'ble Indore Tribunal for Assessment Year 2011-12 in ITA No.509/Ind/2016. Both the parties failed to controvert that the facts and issues of the assessee under appeal for Assessment Year 2013-14 are similar to the facts and issues adjudicated by the Tribunal in assessee's own case for Assessment Year 2011-12 .

11. From perusal of the decision of the Hon'ble Tribunal, we observe that the action of the Ld. A.O of rejecting the book results was uphold by the Tribunal and as regards estimation of net profit, Tribunal uphold the view taken by Ld. CIT(A) of making addition of 1% net profit as against 2% applied by the Ld. A.O by observing as follows;

“4. Now the department is in appeal against reducing the net profit by 1% as against 2% applied by the Assessing Officer and the assessee is in appeal against 1% retention

5. During the course of hearing the learned counsel for the assessee submitted that the issue in controversy is covered by the decision of the Tribunal in the assessee's own case for the assessment year 2008-09 wherein the Tribunal has accepted the net profit @ 5.39% The learned counsel for the assessee submitted that in the assessment years 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11

6. the net profit ratio comes to 4.88%, 4.42%, 5.42%, , 5.39%, 5.28% and 5.75% and the Tribunal has applied 4% net profit rate for the assessment year 2005-06, therefore, it may be accepted and the learned CIT(A) is not justified in giving relief of only 1%. On the other hand, the learned DR supported the order of the Assessing Officer.

7. We have considered the submissions of both the sides. We find that the net profit for the A.Y. 09-10 and A.Y. 10-11 has been shown by the assessee at 5.28% and 5.75% respectively. Therefore, if 2%

increase is 'considered, the net profit for the relevant assessment year with go up to 7.14% which is much higher than the average net profit in the above mentioned assessment years. We are, therefore. of the opinion that the estimation of profits by the A.O. has not been found based on some cogent and relevant increasing the profit by 1% which will take the net profit for the relevant year at 6.14% which will still be much higher than 5.50%, the 'average of two preceding assessment years. In view of the above discussion and the facts and circumstances of the case, we hold that the learned CIT(A) was justified in directing the Assessing Officer to re-compute the profits by increasing the same @ 1% as against 2% applied by)he Assessing' Officer. We, therefore, confirm the order of the learned CIT(A) .

8. *In view of the above discussion, we find no flaw in the order of the learned CIT(A) and confirm the same.*

9. *In the result, the appeal of the revenue and the assessee stand dismissed”.*

12. We further find that the above decision of the Tribunal has been confirmed by Hon'ble jurisdictional High Court in ITA No.84/2017 order dated 04.01.2018 observing as follows;

“On due consideration of the arguments of the learned counsel for the parties, so also the law laid down by the Supreme Court in the case of State of Orissa v. Maharaja Shri B.P. Singh Deo reported in 1971(3) SCC 52 and a Division Bench of this Court in the case of Karan Singh v. Commissioner of Wealth Tax reported in MANU/MP/0112/1980 (1981) 127 ITR 25(MP), we are of the view that the order passed by the learned

Appellate Tribunal is based on “best judgment assessment”. The power to levy assessment on the basis of best judgment is not an arbitrary power; it is an assessment on the basis of best judgment. Therefore, the Tribunal was in error in confirming the decision of the Commissioner of Income Tax (Appeal).

6.No case to interfere with impugned order dated 15.12.2016 (Annexure’C’) passed by the learned Appellate Tribunal, as prayed for, is made out; nor any substantial question of law is arising in this appeal.

7.Accordingly, Income Tax Appeal No.84/2017 has no merit and is hereby dismissed”.

13. We therefore respectfully following the judgment of Hon'ble jurisdictional High Court and in the given facts and circumstances of the case are of the considered view that the assessee's books of accounts were rightly rejected by Ld. A.O observing discrepancies as mentioned herein above in preceding paras and Ld. CIT(A)has rightly sustained the addition of 1% net profit rate thereby confirming the addition of Rs.33,37,479/-. We accordingly dismiss assessee's Ground No. 1,2,& 3.

14. Now we take Ground No.4 for the disallowance made u/s 40(a)(ia) of the Act at Rs.1,51,642/-. This disallowance was made for non deduction of tax at source at testing charges paid by the

assessee. We find that the Co-ordinate Bench in the case of ITO vs Akash Developers ITA No.859/Kol/2012 order dated 20.11.15 dealing with the issue of disallowance u/s 40(a)(ia) of the Act in the case of book results being rejected u/s 145(3) of the Act, held as follows;

“5. We have heard Ld. Sr. DR and gone through the facts and circumstances of the case. We find that there are errors/inconsistencies in the maintenance of books of accounts because in several case for the relevant AY booking of sales does not tally with the year of registration. Even the method of recognition of sale adopted by the assessee is inconsistent, defective and not in accordance with any recognized system of accounting. Even before the AO or before the CIT(A), the assessee could not explain the basis of booking of various construction expenses in respect of flats kept in stock in trade. In view of these differences, we find the CIT(A) has rightly rejected the books of account by applying the provisions of section 145(3) of the Act and we find no infirmity in the order of CIT(A) in applying profit rate of 8%.

6. In reply to other additions, it is clear that once net profit rate is applied, the expenses or other disallowances, since relating to business, cannot be made separately because the profit element of expenses or disallowances have already been considered while applying profit rate. Accordingly, we confirm the order of CIT(A). Appeal of revenue is dismissed”.

15. In view of the above decision of the Tribunal there remains no dispute that once after rejecting the book results, net profit is estimated by applying net profit rate, no disallowance could be

made separately for other expenses, as the profit element already stands considered during the application of net profit rate. We accordingly delete the disallowance made u/s 40(a)(ia) of the Act at Rs.1,51,642/- and allow Ground No.4.

16. Ground No.5 is general in nature which needs no adjudication.

17. In the result appeal of the assessee is partly allowed.

The order pronounced in the open Court on 16.05.2019.

Sd/-

Sd/-

(KUL BHARAT) (MANISH BORAD)
JUDICIAL MEMBER ACCOUNTANT MEMBER

दिनांक /Dated : 16 May 2019

/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A)
concerned/ DR, ITAT, Indore/Guard file.

By order
Assistant Registrar, ITAT, Indore