

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C', NEW DELHI**

Before Sh. Amit Shukla, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 3234/Del/2019 : Asstt. Year : 2012-13

J.S.P. Constructions, C/o Kapil Goel, Adv., F-26/124, Sector-7, Rohini, New Delhi-110085	Vs	Asstt. Commissioner of Income Tax, Circle-62(1), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AACFJ9831E		

Assessee by : Sh. Kapil Goel, Adv.

Revenue by : Sh. Ved Prakash Mishra, Sr. DR

Date of Hearing: 14.01.2021	Date of Pronouncement: 01.03.2021
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of the Id. CIT(A)-20, New Delhi dated 26.02.2019.

2. Following grounds have been raised by the assessee:

"The initiation of action u/s 148 is bad in law,

(i) being based on bald allegations;

2. That the Ld. CIT(A) erred in not appreciating that the proceedings initiated u/s 147/148 by Ld. A.O. are invalid and illegal as the vague reasons recorded do not reflect any independent application of mind on the part of the assessing officer, so as to form a reason to believe that income has escaped assessment. Further corroborate from the fact that,

Firstly, no basis is available, as to how figure of Rs. 1.10 Crore has been arrived in the reasons mentioned, whereas assessment framed on Rs.1,24,84,178/-.

Secondly, After reopening Ld. A.O. gathered the basic information of contracts awarded to the assessee during the tenure of Mr. Yadav Singh vide letter .dated 19/12/2016 issued u/s 133(6) of I.T. Act just few days before the finalisation of assessment,

Thirdly, Contents of statement of Ramendra Singh are nowhere described in the reasons mentioned.

Fourthly, No evidence worth name to link the assessee with Ramendra Singh/ Yadav Singh has been described in the reasons mentioned.

3. That the Ld. CIT (A) has erred in not appreciating that the proceedings initiated u/s 147/148 are invalid and illegal as the reasons recorded do not reflect any live nexus (cause and effect relationship between findings of search and seizure operation on Mr. Ramendra Singh and assessee herein) therefore, satisfaction of the Assessing Officer regarding escapement of income are based upon borrowed satisfaction of the Investigation Wing of the department.

4. That orders passed by Ld AO and Ld CIT-A are bad in law as reasons stated in assessment order was never accompanied with any back material available with A.O. at the time of reasons recording (even during assessment/ first appeal proceedings said material was never confronted to assessee), therefore, sans, confrontation of stated material accordingly, notice issued u/s 148 and all subsequent proceedings including orders of Id. A.O. and Ld. CIT(A) are void-ab-initio. [refer Page 12 of CIT(A) order]

5. That Id. A.O. erred in assuming jurisdiction u/s 148 of the Act, where provision of section 153C could

have been invoked which override the provision of section 148 of the Act. Accordingly, notice u/s 148 and all proceedings subsequent thereto are liable to be cancelled without valid issue of notice u/s 145(2) after due application of mind, and accordingly, order passed by Ld. A.O. and CIT(A) is void-ab-initio.

6. That Ld. A.O. erred in assuming jurisdiction u/s 143(2) of the Act without valid issue of notice u/s 143(2) after due application of mind, and accordingly, order passed by Ld. Assessing Officer. And CIT(A) is voi-ab-initio.

7. That Ld. A.O. has erred in passing order u/s 147/148, without formally supplying the reasons recorded as per Supreme court decision in the case of GKN Driveshats (India) Ltd. vs. ITO 259 ITR19 (SC), before completion of assessment proceedings, even mandatory approval u/s 151 referred is never supplied to the assessee, assessment order dated 31/12/2016 is passed after time barring date (refer dispatch record), therefore orders passed by A.O./ CIT(A) are void-ab-initio

8. That on the facts and in the circumstances of the case and in law, Id CIT(A) erred in sustaining the action of AO in making addition of Rs.83,09,389/- without appreciating that no opportunity is given to the assessee to be confronted with back material and no opportunity to cross examine the revenue's witness was given despite mandated in revenue office manual which is flouted by the Id. A.O. and CIT(A).

9. That without prejudice to above, addition of Rs.41,74,789/- as made by the assessing officer u/s 40A(3) and confirmed by CIT(A) is outside the purview of reasons recorded and no subsequent information has come to A.O. within the meaning of Explanation 3 of section 147, no notice u/s 148 is issued for that item, addition sustained is patently invalid. Further genuineness of payment never doubted as per circular 6P of 1968 issued by CBDT, therefore, addition sustained is bad merit also.

10. That without prejudice to above, estimated/ ad-hoc addition of Rs.1,24,84,178/- as made by assessing officer on account of alleged payment of commission @ 5% to Mr. Yadav Singh and confirmed by CIT(A) to the tune of Rs.82,09,389/-, is without any basis and appellant had not made any payment to Yadav Singh through Ramendra Singh as alleged."

3. The assessee is a civil contractor doing work for Government and Semi-Government agency namely GNIDA, NBCC, PWD etc. The case has been reopened u/s 147 of the Income Tax Act, 1961 vide issue of notice dated 03.09.2015 on the grounds that the assessee paid commission @ 5% on the contracts awarded by the authorities.

4. During the course of assessment proceedings, the Assessing Officer directed the assessee to produce books of accounts for verification. Further, notice u/s 133(6) of the Act was issued to CEO, NOIDA calling for information of contracts awarded by the NOIDA during the financial year 2011-12 for which the NOIDA replied that the assessee has been awarded contracts to the tune of Rs.24.96 crores. During the assessment proceedings, the AO asked the assessee to produce details of purchases, labour expenses, wages, freight expenses along with requisite bills, vouchers and muster roll. The AO issued show-cause notice why not the profits be estimated @ 8% of the total receipts owing to non-submission of bills. The assessee vide letter dated 28.12.2016 submitted that all financial and necessary documents have been submitted and explained every debit entry of withdrawal and payment from bank account. The AO not satisfied with the reply of the assessee and has disallowed an amount @ 5% of the contract work awarded by NOIDA.

5. The relevant part of the assessment order is reproduced as under for ready reference:

"Considering the totality of facts of this case as also considering the nature of construction business, also relying on N.P. rate declared by other assesseees in similar line of business and also considering the large turnover of Rs.1,60,53,89,443/- shown during the year, application of 8% on the total turnover in the case of the assessee appears to be excessive. Despite so, assessee failed to produce original bills/vouchers, muster roll etc. for verification and further seen that most of the transactions have been made in cash. Also various discrepancies have been noticed from the ledger furnished by the assessee, which are being discussed in subsequent para. Perusal of the ledger reveals that the assessee has made cash payments exceeding Rs.20,000/- to a single party and the assessee has willfully bifurcated the above payments below the threshold limit to outwink the revenue. And, the payments have been exclusively made in cash for which, assessee has failed to produce original bills/vouchers for verification. Under the prevailing circumstances as the assessee cannot substantiate the above discrepancy, it cannot be denied that the assessee had diverted the funds for paying commissions in the guise of various expenses shown in the books, majority of which has been incurred in cash. Moreover, in the absence of proper bills/vouchers/documentary evidences, the source of cash payments remained unconfirmed. Hence, it is not possible to vouch the source of commission paid by the assessee @ 5% of contract work awarded in the tenure of Sh. Yadav Singh. As already discussed above, total work contract is

Rs.24,96,83,556/- . Hence, 5% of Rs.24,96,83,556/- worked out to be Rs.1,24,84,178/- which is being disallowed and added to the income of the assessee."

6. The Id. CIT (A) confirmed the addition. While confirming, the Id. CIT (A) assumed that "the Assessing Officer has given a finding that 5% of the total turnover **must have been paid** by the appellant as commission by diverting funds in the guise of various expenses shown in the books majority of which has been incurred in cash. The AO has also given a finding that the appellant had paid Rs.41,74,789/- in contravention to provisions of Section 40A(3) of the Act. The addition made by the Assessing Officer of Rs.41,74,789/ is confirmed. However, since this amount is also embedded in the 5% commission made in cash i.e. amount of Rs.1,24,84,178/-, the said addition is to be reduced by Rs.41,74,789/-. The Assessing Officer is directed to make an addition of Rs 83,09,389/- on this account".

7. Thus, the question before us to adjudicate remains as to "whether the amount of Rs.83,09,389/- confirmed by the Id. CIT (A) out of the disallowance made by the Assessing Officer on account of expenses which is a source of alleged commission paid is correct or not" ?

8. Heard the arguments of both the parties and perused the material available on record.

9. From the assessment order, we find that,

- a. The assessee received contracts from NOIDA to the tune of Rs.24.96 crores.
- b. The total turnover of the assessee was Rs.160.53 crores

- c. The show-cause notice has been issued for determination of estimation of profits @8%
- d. The net profit disclosed by the assessee was 6.77%

10. At the outset, we find that while the show-cause has been issued for determination of profits @8%, the disallowance has been made @5% on the contracts of Rs.24.96 crores. In addition to the net profits disclosed, the Assessing Officer has disallowed 5% of the expenses on the total contract work awarded by NOIDA. The AO also held that the application of 8% on the turnover appears to be excessive. While doing so, the Assessing Officer has held that payments exceeding Rs.20,000/- were made to a single party and the assessee has willfully bifurcated the payments to keep it within the threshold limit. Beyond this, the Assessing Officer has not brought anything on record to disallow 5% of the expenses. He has not determined even the head under which the expenses have been inflated or bogus. Even, in the case of payments made in cash, absolutely no enquiries have been conducted. The Assessing Officer held that the assessee could not substantiate the discrepancies but did not mention anything as to what are all the discrepancies found. The mere allegations cannot be treated as evidences. The fundamental principle of justice requires the Assessing Officer to discover and collect evidence and confront the assessee before making any disallowance. In the instant case, there was no mention at all as to which of the expenses is bogus or inflated. In the instant case, we find no primary evidences or secondary evidences or even any probabilities brought out by the revenue to resort to disallowance of 5% expenses over and above 6.77% net profit disclosed by the

assessee. Any disallowance made by the revenue without bringing any evidence on record is liable to be set aside.

11. In the result, the appeal of the assessee is allowed.

12. Since, the assessee gets relief on merits of the case, we refrain to adjudicate on the technical grounds being academic in nature.

Order Pronounced in the Open Court on 01/03/2021.

Sd/-

(Amit Shukla)
Judicial Member

Dated: 01/03/2021

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR