आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 389/JP/2012
निर्धारण वर्ष/Assessment Year :2008-2009

M/s Mohd. Const. Co., 5-B-18 Vigyan Nagar, Kota.	बनाम Vs.	The ACIT, Circle- 1, Kota
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AACFM0470E		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 172/JP/2012
निर्धारण वर्ष/Assessment Year :2008-2009

The ACIT Circle-1 Kota	बनाम Vs.	M/s Mohd. Construction Co., 5-B-18, Vigyan Nagar, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AACFM0470E		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Mahendra Gargieya (Adv.)
राजस्व की ओर से/ Revenue by : Shri Rajendra Singh

सुनवाई की तारीख/ Date of Hearing : 30/03/2017
उदघोषणा की तारीख/Date of Pronouncement: 25/04/2017

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are cross appeals filed by the assessee and the Revenue against the order of Ld. CIT (A), Kota dated 29.12.2011 for A.Y. 2008-09. The effective grounds of the appeals are as under:-

389/JP/12 (Ground of Assessee's appeal):-

"1. That under the facts and circumstances of the case the learned Assessing Officer has erred in invoking the provision of section 145(3) of the I.T. Act and in rejecting the books of Accounts of the appellant and the Hon'ble CIT (Appeals) has further erred in confirming the invocation of the provisions of 145(3) and the rejection of the books of accounts of the appellant.

2. That under the facts and circumstances of the case, the learned Assessing Officer was erred in considering the Sales-tax refund separately from the operating profit and further erred in adding the same over & above estimated income of the appellant. The Hon'ble CIT (Appeals) has further erred in confirming that the sales tax refund was taxable u/s 41 of the Income Tax Act and has no bearing on the computation of income and has to be considered separately.

3. That under the facts and circumstances of the case, the learned Assessing Officer has erred in estimating the Net Profit rate @ 11% on contract receipts (subject to depreciation only) and further erred in separately considering the sales tax refund of Rs. 42,26,138/-. The Hon'ble CIT (Appeals) has further erred in restricting the net profit rate @ 8% only (Subject to depreciation and interest & remuneration paid to partners) by separately considered interest income of Rs. 52,09,524/- and sales tax refund of Rs. 42,26,138/-."

3172/JP/12 (Ground of Revenue's appeal):-

> *"(i) Reducing the net profit rate from 11% to 8% without any valid basis;*
>
> *(ii) Reducing the net profit rate to 8% despite the fact that the ld. CIT(A) has justified the action of the AO for applying the provisions of section 145(3) of the I.T. Act, 1961."*

2. Firstly regarding ground No. 1 taken by the assessee in its appeal, it is noted that the ground was not pressed before the Ld. CIT(A) and the same was thus dismissed. Hence, the subject ground is dismissed in limine.

3. Regarding ground No. 2, briefly the facts of the case are that the assessee was in receipt of Rs. 24,26,138/- on account of sales tax refund. During the year under consideration, the AO brought the same to tax u/s 41(1) of the Act which was confirmed by the Ld. CIT (A).

3.1 During the course of hearing, the Ld. AR has submitted that the sales tax refund was credited to the sales tax a/c. The collection of the sales tax was made by the awarder i.e. the Irrigation Department and was deposited on our behalf with the sales tax authorities. The same was debited in the sales tax a/c. It is only the net amount which was taken to the P&L a/c of Rs. 13,87,241/-. The entire gross receipts' including Sales Tax has been considered in the P& L a/c. Thus, it is not a correct fact that the sales tax or its refund is not considered at all.

3.2 It was further submitted that section 41(1) is not applicable in the instant case. A bare reading of the provision suggests that to invoke

sec. 41(1), the assessee must have been allowed any deduction in particular/specific year. However, the AO has not even whispered anything on this aspect much less establishing the existence of such conditions. Therefore, invoking of sec. 41(1) is completely out of picture. Kindly refer to the decision in the case of CIT vs. Bhawan Va Path Nirman (Bohra) & Co. 258 ITR 440 (Raj).

3.3 It was further submitted that both the AO and CIT (A) have summarily discussed the facts by simply referring to section 41(1), and made the impugned addition. There is no finding at all recorded in the impugned order as to in which particular year, the subjected amount was allowed as a deduction so as to invoke section 41(1) of the Act. Thus, as held in various cases in absence of such categorical finding no addition could be made. The situations of applying adhoc NP rate after rejection of accounts were also available in these cases. Therefore the impugned addition may kindly be deleted.

4. We have heard the rival contentions and pursued the material available on record. Firstly, regarding the decision of Hon'ble Rajasthan High Court in case of Bhawan Va path Nirman (supra), it is noted that it was rendered in the context of facts where the assessee has not offered the sales tax refund to tax though the same was credited in its profit & loss account and the Assessing Officer brought the same to tax by invoking provisions of section 41 of the Act. In the instant case, the assessee has not only credited the sales tax refund in its profit and loss account but at the same time, has duly offered the same to tax in its computation of income and the return of income filed for the subject assessment year. Hence, the said decision does not support the case of

the assessee. Here, the question that arises for consideration what is exact nature of the sales tax refund and how the same should be treated for tax purposes and under which head of income. The sales tax is payable on the sales affected by the assessee and the same is considered as deemed business receipts and the same is eligible as a business deduction in the year of payment in terms of section 43B of the Act. Where the sales tax which was paid earlier is refunded to the assessee in a subsequent financial year, it will therefore form part of the business receipts which is assessable under the head "profit and loss account of business and profession". In the instant case, where the books of account have been rejected and the N.P. rate has been estimated by the Assessing Officer, the said receipts on accounts of sales tax refund have to be taken into consideration while determining the total business receipts/turnover and the estimation of N.P rate has to be determined accordingly. We are therefore of the view that the AO was not correct in treating sales tax refund separately while determining the N.P rate. In the result the ground no. 2 taken by the assesses is allowed.

5. Now coming to ground No. 3 of the assessee's appeal and the two grounds of appeal taken by the Revenue, there are two issues that arises for consideration. The first issue is regarding interest of Rs. 52,09,524/- whether the same has to be treated as "income from other sources" and as "business income" and secondly, the issue regarding trading addition of Rs. 5,54,133/- made by the Assessing Officer by estimating N.P. rate.

5.1 Regarding the first issue, the ld. CIT (A) has noted that the assessee as shown interest receipt of Rs. 52,09524/- is as under:-

(a) Interest on Income Tax refund	Rs. 60,491/-
(b) Interest on sales tax refund	Rs. 7,69,785/-
(c) FDR interest	Rs. 43,79,248/-
Total	Rs 52,09,248/-

When asked why the interest should not be taxed as income from other sources, the assessee stated that these FDRs were pledged with the Banks to obtain bank guarantee which were necessarily required to be furnished to the various awarders/ government departments. As per their requirement, the appellant was bound to furnish performance security/guarantee. In absence, the assessee could not have begged contracts therefore, the interest income should be treated as income from business. The ld. CIT (A) however rejected the assessee's contention and treated interest receipt of 52,09,524/- as income from other sources". Hence this ground.

5.2. The ld. Counsel for the assessee has submitted that the Government Department who awarded the various subjected contracts, as a matter of standard practice requirement the contractor to furnish them the bank guarantee as security. The contractor-assessee, in turn had to pledge FDRS of the requisites amount with the concerned issuing bank for obtaining such guarantee in favour of the Government Department. In absence of the placements of such guarantee etc., the assessee could not have proceeded further to execute the contracts awarded by the Government Department. This way, it was an operation

and compelling necessity on the part of the assessee contractor to get the FDRs prepared and pledged with the concerned banks. Such requirement goes to the very root. In other words, without pledging FDRs, the contractor could not have proceeded to execute the contracts awarded in his favour. Thus, pledging of FDRs/ NSC is a condition precedent to have such business and to run the same. Needless to say that in absence of the FDRs, the assessee would not have got the contract business and no such contract receipts would have been there which are being taxed and which are under dispute. The facts submitted to the AO and the ld CIT(A) are neither denied nor rebutted.

5.3 It was further submitted that the assessee was not having surplus funds from which, investment towards FDR were made in as much as the appellant took loan and credit facilities from the bank and from those funds only, it had obtained FDR's. The ld. CIT (A) never denied that the appellant did not invest/use any surplus fund, which otherwise, the appellant was not having nor the ld. CIT (A) established nor even alleged so. The entire capital of Rs. 3.65 Cr. was completely utilized in the acquisition of fixed assets of Rs. 5.97 Cr. As per Audited Balance Sheet. (PB 17). The FDR's so pledged came out of the secured and unsecured loans of Rs. 7.3 Cr. and Rs. 1.02 Cr. respectively.

5.4. Further, the assessee has relied on decision of M/s Maya Construction in ITA No. 510/JU/2013 dated 18.07.2014 and in ITA No. 442/JU/2014 dated 23.12.2015. Further, the assessee has relied on Hon'ble Delhi High Court in case of CIT Vs. Jaypee DSC Ventures Ltd (2011) 53 DTR 305 (Del) and CIT vs. K & Co. 88 DTR 166 (Del).

5.5 It was further submitted even in the past, the Department has been assessing such income as business income and there is no justification for the departure which has been made this year.

5.6 We have heard the rival contentions and pursued the material available on record. Firstly, regarding interest on income tax refund and interest on sales tax refund, the same has rightly been treated by the Ld. CIT (A) as income from other sources and we donot see any infirmity in the same. Regarding interest on FDR, it is noted that the FDRs were placed with the Banks to obtain bank guarantee which was necessarily required to be furnished to the various government department and in absence of such bank guarantee, the assessee could not have proceeded with the execution of contracts with the government department. Further, there is no finding that the surplus funds have been invested by the assessee in the FDRs. Any interest on such FDR, therefore, must be treated as inextricably linked with the business of the assessee and therefore to be treated as business income and not as income from other sources. It is noted that similar view has been taken by Co-ordinate Bench in case of M/s Maya Construction (supra). The contention the ld. AR is therefore accepted and the order of ld CIT(A) to this extent stand modified.

5.7 Now coming to the remaining tradition addition of Rs. 5,54,133, it is noted that after taking into consideration the sales tax refund, interest on FDR as business income, the N.P. rate declared by the assessee is better than the N.P. rate declared in the earlier years.

Further, unlike A.Y. 2006-07 wherein specific instances have been highlighted by the Ld. CIT (A) in estimating the N.P. rate, no such instances which form the basis of reasonable estimation is seen in the year under consideration. Taken into consideration, all the facts and circumstances of the case, the trading addition of Rs. 5,54,133/- made by the Assessing Officer is hereby deleted.

5.8 In the result, the ground no. 3 taken by the assessee and the grounds in the Department's appeal are partly allowed.

In the result, the appeal of the assessee and Department are partly allowed.

Order pronounced in the open court on 25/04/2017

Sd/-	Sd/-
(कुल भारत)	(विक्रम सिंह यादव)
(Kul Bharat)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 25/04/2017.
*Santosh.
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- M/s Mohd. Construction Co. 18 Vigyan Nagar, Kota
2. प्रत्यर्थी/ The Respondent- ACIT ,Cirle-1, Kota.
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File {ITA No. 389&172/JP/2012}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar