आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ ।

IN THE INCOME TAX APPELLATE TRIBUNAL,
"C" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.2813/Ahd/2016

निर्धारण वर्ष/ Asstt. Year: 2013-2014

Dwarkesh Infrastructure P.Ltd. S/1, Neelkanth Apartments B/h. Vishramnagar Memnagar, Ahmedabad. PAN : AACCD 0020 C	Vs.	DCIT, Panjrapole Ahmedabad.

(Applicant)		(Responent)

Assessee by :	Shri T.P.Hemani, AR
Revenue by :	Shri Lalit P.Jain, Sr.DR

सुनवाई की तारीख/**Date of Hearing : 27/09/2018**
घोषणा की तारीख /**Date of Pronouncement: 23 /10/2018**

आदेश/O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER:

Assessee is in appeal before the Tribunal against order of ld.CIT(A)-1, Ahmedabad dated 30.8.2016 passed for the Asstt.Year 2013-14.

2. In the first ground of appeal, the assessee has pleaded that the ld.CIT(A) has erred in confirming disallowance of Rs.1,04,98,580/- which has been disallowed by the AO out of labour expenditure.

3. Brief facts of the case are that the assessee at the relevant time was engaged in the business of road-construction. It has filed its return of income on 28.9.2013 electronically declaring total income at Rs.72,09,250/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) was issued and served upon the assessee. On scrutiny of the

accounts it revealed to the AO that the assessee has shown total receipt of Rs.24,74,51,027/- on which net profit of Rs.71,670,948/- has been declared. It is pertinent to observe that the assessee is used to get contracts from AUDA and AMC etc. It was noticed by the AO that the assessee has debited an amount of Rs.6,77,69,053/- towards labour charges which included the amount of Rs.26,57,765/- and Rs.70,90,815/- payable to B.A.Pavagadh and M.H. Shah Labour contractors respectively. In order to examine genuineness of the expenditure, the ld.AO issued notice under section 131 of the Act and recorded statement of the labour contractors. He confronted the assessee with the outcome of these statements. Q*ua* query of the AO, it was contained that somehow business is being carried out in the name of wife by her husband. Hence with regard to the details of business, its nature, dealing with others, must be in the knowledge of the husband who were actually conducting business. The assessee has submitted complete details of such labour expenditure. It has submitted ledger account, labour bills & contracts, bank statements etc. showing payment through bank channel, acknowledgement of income tax returns of the recipients who have offered this labour charges as their income. The assessee has submitted TDS details. Somehow, the ld.AO was not satisfied with the explanation of the assessee, simply for the reasons that the lady-contractor could not explain the nature of work done by them or any outstanding amounts, if any towards the assessee. The AO took these circumstances as if the assessee has created *demi*-contractors and inflated the expenditure. He disallowed labour expenditure of Rs.26,57,765/- and Rs.70,90,815/- payable to B.A.Pavagadh and M.H. Shah labour contractors respectively. Appeal to the ld.CIT(A) did not bring any relief to the assessee.

4. The ld.counsel for the assessee while impugning orders of the ld.Revenue authorities contended that the assessee has established direct link between the work obtained from government instrumentalities i.e. AUDA and

AMC, and how these works have been got performed by it with the help of labour contractors. Complete ledger details exhibiting the nature of contract obtained from these agencies, and assignment to the labour contractor has been filed. The ld.counsel for the assessee took us through page nos.42 to 47 of the paper book, where the details of bills, nature of work, rates and how these works have been carried out are being placed on record. He thereafter made reference to the bank statement vide which the payments have been made. He pointed out that payments to labour contractor is being made through banking channels. It is being received by the assessee from the contractees i.e. AUDA and AMC, a complete re-conciliation is available with the assessee. He thereafter made reference to the ledger account containing all these details, TDS details. He further contended that these parties are assessed to tax, and their respective income are not disturbed or altered by the department. They have included these receipts in their income tax return. He pointed out that GP in this year is 9.66% which is better than the last year i.e. 8.09% . This 8.09% was accepted by the department in scrutiny assessment under section 143(3). If the disallowance is included then GP will be increase to 13.90%. The net profit will come around 6.03% which is not possible to achieve in this line of business. The net profit in earlier year was 0.99% and 0.74% which has been accepted by the department in scrutiny assessments. On the strength of this comparative analysis he pointed out that the reasons assigned by the ld.Revenue authorities are only peripheral and not based on sound evidence. The ld.counsel for the assessee prayed that disallowance be deleted.

5. On the other hand, the ld.DR relied upon the orders of the Revenue authorities. He pointed out that both labour contractors appeared before the AO and in their statements they failed to disclose nature of work performed on behalf of the assessee.

6. We have duly considered rival submissions and gone through the record carefully. It is pertinent to observe that in order to claim expenditure under section 37(1) of the Act, the assessee is required to fulfill certain conditions viz. (a) there must be an expenditure, (b) such expenditure must not be of nature described in sections 30 to 36, (c) expenditure must not be in the nature of capital expenditure or personal expenditure of the assessee, and (d) expenditure must be laid out or expended wholly and exclusively for the purpose of business or profession. Expression "wholly" employed in section 37 relates to quantification of the expenditure, while expression "exclusively" refers to the motive, objects and purpose of the expenditure. If we make an analysis of the record, then it would reveal that the assessee has demonstrated the incurrence of the above expenditure for the purpose of business. It has submitted contract details from AUDA or AMC how these contracts completed by it with help of labour contractor. It has submitted that labour bills and contract indicating the working assigned by it to different labour contractors. It has submitted bank statement showing payment through banking channel to labour contractors. It has produced income tax return of the contractor showing income of these receipts received from the assessee. It has produced TDS details. It has produced comparative analysis of the GP as well as NP of earlier years vis-à-vis this year. It has also demonstrated how profit will abnormally rise if these disallowances are being included in the income of the assessee. Thus, complete circumstantial evidence produced by the assessee would indicate that it has incurred these expenditure for completing the work. The only circumstances with the AO is that proprietorship concern of the labour contractors were in the names of ladies and actual work were being looked after by their husbands, hence, they are not having knowledge of their business. To our mind these circumstances, ought not to be looked into in isolation for disbelieving the claim of the

assessee. Receipts have already suffered tax in the hands of the recipients. Work has been done. There are no doubt with regard to the contracts obtained from AUDA or AMC and completion of work. Thus, actual expenditure must have been incurred on such work. Can the claim of the assessee be belied simply for the reasons that some of the labour contractors were not having complete knowledge of the contract which is being looked after by their husband ? To our mind, the ld.Revenue authorities have failed to appreciate actual circumstances of the dispute. Considering the above details, we allow this ground of appeal and delete the impugned disallowance.

7. In the next ground, grievance of the assessee is that the ld.CIT(A) has erred in confirming the disallowance of depreciation amounting to Rs.5,35,000/-.

8. The assessee has claimed deprecation on plant & machinery. According to the AO, the assessee has made claim from additional depreciation which is not permissible to the assessee. On appeal, the ld.CIT(A) has upheld the disallowance by observing as under:

> *"4.3 I have carefully considered the assessment order and submission filed by appellant. The Assessing Officer has observed that appellant has claimed additional depreciation on additions made to Plant & machinery used for the purpose of construction of road. The appellant claimed additional depreciation on plant & mahcinery used for the purpose of construction of road. The assessee is not entiled for additional depreciation on plant & mahcinery which is covered u/s. 32(1)(iia) of the Act. Moreover, the additional depreciation is allowable on the new machinery used for the purpose of manufacturing. Section 2(29BA) of the I.T. Act, 1961 defines manufacture, the facts remain that the assessee has used the machinery for the purpose of construction work and the construction work cannot be said to be a manufactuirng activity within the meaning of section 2(29BA) of the Act. As such, the claim of the assessee for additional depreciation of Rs. 5,35,0007- on pland & mahcinery is disallowed as the assessee is not carrying on any manufacturing activity.*

On the other hand, appellant has argued that DCIT erred in disallowing the claim holding that Assessee is not carrying on manufacturing Activity within the meaning of section 32(1) (iia) r. w. s 2(29 BA) of the Act.

4.4. On careful consideration of entire facts, it is observed that provisions of section 32(1)(iia) granting additional depreciation reads as under:

> *"32(1)(iia)..... in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an Assessee engaged in the business of manufacture or production of any article or thing or in the business of generation or generation and distribution of power], a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):*
>
> *Provided that no deduction shall be allowed in respect of—*
>
> *(A) any machinery or plant which, before its installation by the Assessee, was used either within or outside India by any other person; or*
> *(B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or*
> *(C) any office appliances or road transport vehicles; or*
> *(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year,"*
>
> *The provisions granting additional depreciation clearly state that assessee is entitled to additional depreciation if two conditions being (i) plant & machinery is acquired and installed after 31st March 2005 and (ii) is engaged in manufacturing & production of any article or thing. In the present case, the appellant does not fulfill both the conditions to claim the additional depreciation. Considering the facts discussed herein above it are held that appellant is not entitled to additional depreciation. The disallowance of additional depreciation on*

machinery for the purpose of construction work is confirmed as these are not used for the purposes as discussed above and does not fulfill the criteria enumerated for allowance of additional depreciation. This ground of appeal is dismissed.

9. The ld.counsel for the assessee contended that the ld.Revenue authorities failed to appreciate the controversy. In fact, it has not been claiming additional depreciation, rather higher rate of depreciation on the vehicle used for construction business. According to the assessee, originally a claim for depreciation at the rate of 15% was made where vehicles used in construction business are eligible for depreciation at the rate of 40%. Thus, the dispute between the assessee and the Revenue is, whether depreciation is to be granted at the rate of 15% or 40%. The ld.Revenue authorities have disallowed the claim by holding that the assessee has been claiming additional depreciation which is available to an assessee engaged in the manufacturing activity. In support of his contentions, the ld.counsel for the assessee relied upon the order of ITAT in the case of DCIT Vs. Rakesh Jain,49 SOT 57 (Chand) wherein deprecation on tippers, vibrators etc. was allowed at the rate of 40%. The ld.DR contended that there is no discussion in the impugned order in this angle of controversy. He relied upon the order of the ld.CIT(A).

10. We have duly considered rival contention and gone through the record carefully. We find that the ld.Revenue authorities have appreciated the controversy with a different angle than the one agitated by the assessee. The case of the assessee is, whether depreciation on the vehicles and instruments used for construction business will be allowed at 40% or 15%, whereas the Revenue authorities have considered this issue, whether the assessee is entitled for additional depreciation or not. Considering the above facts, we deem it appropriate to set aside this issue to the file of the AO for examination. The ld.AO shall consider the claim of the assessee, whether it is entitled for higher rate of deprecation or not. The ld.AO shall look into the

order of the ITAT in the case of Rakesh Jain (supra) . This ground of appeal is allowed for statistical purpose.

11. In the result, appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the Court on 23rd October, 2018 at Ahmedabad.

Sd/-	**Sd/-**
(AMARJIT SINGH)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**