IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'B', BENGALURU

BEFORE SHRI. A. K. GARODIA, ACCOUNTANT MEMBER

AND

SHRI. LALIET KUMAR, JUDICIAL MEMBER

I.T.A Nos.1965, 2925 & 1966/Bang/2017
(Assessment Years : 2007-08, 2009-10 & 2011-12)

Shri. George Joseph Fernandez,
Engineers & Contractors,
Pulliah Block, Station Road,
Raichur .. Appellant
PAN : AABPF9791J

v.

Deputy Commissioner of Income-tax,
Circle – 1, Raichur .. Respondent

Assessee by : Shri. Balasubramaniam, CA
Revenue by : Shri. K. R. Narayana, JCIT

Heard on : 21.03.2019
Pronounced on : 05.04.2019

O R D E R

PER LALIET KUMAR, JUDICIAL MEMBER :

These are three appeals filed by the assessee against the separate orders of the CIT (A), Gulbarga, dt.24.07.2017, for assessment years 2007-08, 2011-12 and dt.17.10.2017, for the assessment year 2009-10.

02. The grounds of appeal raised by the assessee for A. Y. 2007-08 are as under :

1. The impugned order is opposed to the facts and law in so far as it is pre-judicial to the interest of the appellant.

2. The Ld. CIT(A) erred in confirming the order of Ld. Assessing Officer, disallowing payment as per proviso of Section 40(a)(ia) and in doing so, the Ld. CIT failed to appreciate that the impugned amount was already disallowed in an earlier assessment year and the same ought to have been allowed in the year under assessment since the Appellant had deposited the tax required to be withheld on the same.

3. The Ld. CIT(A) erred in confirming the order of Ld. Assessing Officer wherein the AO has added sales tax refund of Rs. 5,94,747/- to the total income and by doing so the Ld. CIT(A) failed to appreciate that the refund was only adjusted against fresh tax liabilities that crystalized during the year which are eligible for deduction.

4. The CIT(A) is not justified in adding Rs.6,00,000 as interest due on advances made to SPR Holdings when the matter was pending in litigation before local court. The addition is not warranted as the Appellant has declared total interest on receipt basis during 2009-2010 assessment year.

5. The Ld. CIT(A) erred in disallowing the deduction made by the state government towards Contractors Benevolent Fund and in doing so failed to appreciate that these were incurred in the normal course of business and were collected from the Appellant for the welfare of the workers and not for his personal benefit.

6. The Ld. CIT(A) erred in confirming the order of Ld. Assessing Officer wherein the AO has added notional interest on advances made to the Appellant's wife and by doing so the Ld. AO failed to appreciate that these were made out of the Appellant's own funds and there was no nexus between the borrowings made by the Appellant and the advance given to wife.

7. The CIT(A) is not justified in disallowing an ad-hoc amount on account of Repairs and Maintenance.

The grounds of appeal raised by the assessee for A. Y. 2009-10 are as under :

1) That the impugned order is opposed to facts and law insofar as it is prejudicial to the interests of the Appellant.

2) That the Ld CIT(A) erred in validating the impugned Assessment order passed by Ld. AO which is bad in law and null and void ab-initio in as much as the original return of income filed by appellant was already processed by the AO and the assessment is concluded by acting upon a revised return that is invalid as per the Ld. Assessing officer's own arguments.

3) Without prejudice to what is claimed in Ground No.2 as above and as an alternative thereto;

a) The Ld. CIT(A) erred in confirming the order of Ld. Assessing Officer by not considering the deductions claimed during the assessment proceedings for which the appellant was legitimately entitled for on account of donations claimed u/s 35 AC.

b) The action of Ld. CIT(A) in adding the capital loss to the income is unwarranted and bad in law inasmuch as the appellant himself had considered the same as not eligible for set-off in the return filed by him and confirming the same has resulted in double taxation.

c) The Ld. CIT(A) erred in confirming the view of Ld. Assessing Officer, by assessing the fabrication charges received on the basis of the TDS certificate issued by the deductor when TDS certificate furnished by the deductor contains an error and the appellant had declared correct amount in his accounts.

d) The Ld. CIT(A) erred in confirming the order of Ld. Assessing Officer in disallowing the payments made towards "Contractors Benevolent Fund" inasmuch as the same is a genuine business expenditure and deductible u/s 37 of the Act.

e) .The Ld. CIT(A) erred in confirming the order of Ld. Assessing Officer by adding the notional interest on Bank deposits is unwarranted inasmuch as the appellant himself had included the interest actually credited by bank in his income.

The grounds of appeal raised by the assessee for A. Y. 2011-12 are as under :

1. The impugned order is opposed to the facts and law in so far as it is pre-judicial to the interest of the appellant.

2. The Ld. CIT(A) erred in confirming the order of the Ld. Assessing Officer and in doing so,

   a) The Ld. CIT failed to appreciate that the addition made by the Ld. AO on Ligoria Industrial Complex under head income from house property is erroneous since the same was leased out in a composite manner and the income thereon has to be taxed under the head income from business or profession with depreciation and other deduction.

   b) The Ld. CIT also failed to appreciate that addition made by the Ld. AO was on the entire rental income for the Bangalore property. This addition made on the total income was unwarranted and untenable since the appellant himself has disclosed income thereon of Rs. 2,16,000 instead of Rs.3,96,000 and consequently the addition should have been limited to Rs.1,80,000 with deduction of 30% towards repairs.

3. The Ld. CIT(A) erred in confirming the order of the Ld. Assessing Officer and in doing so,

   a) The Ld. CIT failed to appreciate that the Ld. AO misdirected himself in limiting the depreciation on the assets in respect of Ajay Meetu Industrial Fabrication proportionate to 2 months was arbitrary and contrary to the provisions of Sec 32 read with sec 43(6)(c) of the IT Act of 1961.

4. The Ld. CIT(A) erred in confirming the order of Ld. Assessing Officer wherein the AO has added notional interest on advances made to the Appellant's family members and by doing so the Ld. AO failed to appreciate that these were made out of the Appellant's own capital and there was no nexus between the borrowings made by the Appellant and the advances made to his family members.

5. The Ld. CIT(A) erred in confirming the order of Ld. Assessing Officer wherein the AO has added only Loss on the sale of Fixed Asset was incorrect and without application mind since he ought to have also considered the profit on sale of asset as reduction from the profit and recomputed the proper depreciation allowable under the Act.

6. The Ld. CIT(A) erred in disallowing the deduction made by the state government towards Contractors Benevolent Fund and in doing so failed to appreciate that these were incurred in the normal course of business and were collected from the Appellant for the welfare of the workers and not for his personal benefit.

7. The Ld. CIT(A) misdirected himself by confirming the order of Ld. AO wherein he has disallowed the amount paid to Mumbai boat show which was arbitrary inasmuch as the same was not a works contract requiring TDS within the meaning of sec 194C and consequently the conditions requiring the disallowance U/s 40(aJ(iaJ are not fulfilled.

8. The Ld. CIT (A) misdirected himself by confirming the order of Ld. AO wherein the Ld. AO has applied a rate of commission on sub- contractor's payment which in reality was expenditure in the hands of the Appellant.

I.T.A No.1965/Bang/2017 – A. Y. 2007-08 :

03. In ITA No.1965/Bang/2017 for A. Y. 2007-08, ground no.1 is general. Ground nos.2 and 3 are not pressed by the Ld AR for the assessee .

04. In regard to ground no.4, the Ld. AR has drawn our attention to para 6 of the CIT(A)'s order to the following effect :

> *6. Ground No.3. The appellant's contention that the Learned DCIT was not justified in adding Rs.6,00,000/- as interest due on advances made to M/s SPR Holdings when the matter was pending in litigation before local court. The addition was not warranted as the appellant had declared total interest on receipt basis for the AY 2009-10.*
>
> *I hold that the appellant's arguments cannot be denied. The AO followed the assessment order for the AY 2006-07 passed by his predecessor where the interest entitlement from M/s. SPR was treated as income of the assessee and brought to tax. I have gone through the submissions and its enclosures and scores of judicial pronouncements relied were also perused which the appellant had relied. The interest is taxable on accrual basis and the AO had rightly added the interest due on advances to SPR holdings. The reasons stated by the Assessing Officer are acceptable. However, if the assessee had offered same income on receipt basis for the Assessment year 200910 as claimed by him, the same may accordingly be examined for necessary action by the Assessing Officer in that particular year. In view of the above discussion, the relevant grounds of appeal on this issue in this appeal are dismissed.*

It was submitted that the assessee has followed the hybrid system of accounting i.e., receipt basis as well as accrual basis. It was submitted that for the purpose of interest to the assessee had shown the interest whenever it was received by the assessee and not in the year it was accrued to it. It was submitted that in law the assessee is permitted to follow the hybrid method and choices was given to follow any of the methods prescribed in law . The Ld. AR had also relied on section 145 of the IT Act which provides the accounting method that is required to be followed.

05. On the other hand the learned DR submitted that the order passed by the lower authorities is correct as, under section 145 the choice is given to the assessee either to follow cash or mercantile system of accounting which is regularly employed by the assesse. However no where it was mentioned that both can be applied.

06. We have heard the rival contentions perused the material on record. Section 145 (1) provides as under:

> *145 (1) Income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall be computed in accordance with the method of accounting regularly employed by the assessee*

From the reading of the above section it is clear that the law gives the discretion to the assessee to follow either cash or mercantile system of accounting. The use of the word “either” cash or mercantile clearly indicates that one of the two methods provided under the Act, either cash or mercantile can be followed. The language used in the statute is no incapable of having two meanings and is clear and unequivocally suggest that one of the two method provided under law can be followed by the assessee . When the choice is given by the legislature to follow one method and not both of them , if the choice is given by the statute two follow both the method as and when decided by the assessee , then the statute would have mentioned that either one of the methods or both the methods or mixed of the two as and decided

by the assessee , but statute had not provided so . In view of the above, we hold that the assessee is only entitled to follow only cash or mercantile system of accounting. In the present case the assessee has followed mercantile system. According to which, the income is to be accounted in the year in which it is accrued and not in the year it was received. Since the income pertaining to interest dues and advances made to SPR Holdings, was accrued in the present year. Therefore the same is chargeable in the current year only . Therefore the action of the lower authorities is correct. In the result this ground no 3 of the assessee is rejected.

07. Ground no.5 pertains to deduction towards CBF. In this regard the Ld. AR had drawn our attention to internal Para 3 of page 4, of the assessment order and para 7 of the CIT (A) order, where in both the authorities have dealt with the issue of CBF and have denied it to be treated as business expenditure. The Ld. AR had drawn our attention to page 25 of the paper book which is part of the notification issued by the government of Karnataka, in the Building and Other Construction Workers' Welfare Cess Act, 1966, provides as under:

> *d) All Government Departments, public sector undertakings and other governmental agencies/ bodies carrying out any building or other construction works which are covered under Section2(d) of the main Act shall, in case the work is carried out through Contractor deduct 1% of the amount of the cost approved as per the tender notification from the bill at the time of making payment to the contractors and such amount so*

deducted from the contractors' bill shall be remitted by way of account payee cheque in favour of the Karnataka State Building and Other Construction Workers' Welfare Board within 30 days of making such payment along with a forwarding letter addressed to the Secretary-cum-Chief Executive Officer, Karnataka State Building and Other Construction Workers' Welfare Board,3rd stage, Karmika Bhavan, Bannerghatta Road, Bangalore-29.

It was further submitted that pursuant to this notification the assessee had deducted CBF of Rs.76,595/-, which is part of the memorandum of the payment (page 31 of the paper book), where the same amount is shown as deducted. On the basis of the above, it was submitted that the same is required to be an allowable deduction and therefore the action of the lower authorities without any merit.

08. On the other hand, the Ld. DR had submitted that this expenditure is not required to be allowed as a business expenditure.

09. We have gone through the records and perused the material placed before us. The Building and Other Construction Workers' Welfare Cess Act, 1966, came into effect from 3rd November 1995 for the welfare of construction workers and the Government had been issuing notifications mandating all the construction agencies to deduct cess on the total payment made to the contractors. If we look into the manner in which the amount is to be deducted by the government agency, then it is clear that the

said amount is required to be deducted before making payment to the contractor from the total amount of payment, as per the tender notification. This clearly means that cess deducted and deposited is not an application of income, rather it is mandatorily charge required to be deposited with the authorities which is necessary for doing business.

As per section 37 of the Act, as the assessee is entitled to deduction of any expenditure not being in the nature of capital or personal expenditure which was laid or expended wholly and exclusively for the purpose of business or profession. In the present case the amount of cess collected by the government agency has nothing but an expenditure incurred for doing the business or profession and further it would be required to spent by the central pool for the welfare of the construction workers.

In view of above we feel that finding recorded by the lower authorities is without any basis and accordingly the assessee is entitled to deduction of expenditure which is 1% of the cost of the work done by the assessee. Cost of the work done by the assessee was Rs.19,60,649 and 1% of the same would be Rs.19,606/-. Hence this amount was deducted before making payment to the assessee by the authorities therefore the assessee is entitled to the deduction of expenditure laid by him for the purpose of making the payment pursuant to notification issued vide Building and

Other Construction Workers' Welfare Cess Act, 1966, by the government of Karnataka. Accordingly ground 5 is allowed.

10. In respect of ground no.6, the Ld. AR submitted that the assessee is having the capital fund of Rs.10,43,14,790/-. In the consolidated balance sheet as on 30.03.2007, the reserve was Rs.83,56,401/- and the loan funds was 3,54,60,178/-. On the basis of the above it was submitted that as the assessee was having the interest-free funds and from the said amount the assessee had given interest-free advances to Celina Fernandes (assessee's wife). It was submitted that the presumption is always in favour of the assessee. If the assesse is having interest-free funds available with him then the action of the lower authorities was not correct whereby they have added interest of Rs.2,73,584 which is the interest element at the rate of 12%.

11.On the other hand the Ld. DR relies upon the order passed by the lower authorities.

12. We have heard the rival contentions and perused the material on record. Undoubtedly the assessee is having the capital fund of Rs.10,43,14,970/- which is far more than the amount paid by the assessee to his wife as interest-free advances amounting to Rs.22,79,868. The Honourable Supreme Court in the matter of CIT (LTU) v. M/s. Reliance Industries Ltd in Civil Appeal No.10

of 2019, had answered the question number one as under :

> *1. Whether the High Court is correct in holding that interest amount being interest referable to funds given to subsidiaries is allowable as deduction under Section 36(1)(iii) of the Income Tax Act, 1961 (for short 'the Act') when the interest would not have been payable to banks, if funds were not provided to subsidiaries;*
>
> .....
>
> ***Insofar as the first question is concerned, the issue raises a pure question of fact. The High Court has noted the finding of the Tribunal that the interest free funds available to the assessee were sufficient to meet its investment. Hence, it could be presumed that the investments were made from the interest free funds available with the assessee. The Tribunal has also followed its own order for Assessment Year 2002-03.***
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> ***In view of the above findings, we find no reason to interfere with the judgment of the High Court in regard to the first question. Accordingly, the appeals are dismissed in regard to the first question.***

In view of the above if assessee is having his own capital fund which is more than the interest-free funds given as loan, then the presumption is that he had invested the amount from the interest free fund and has not utilised the borrowed funds. In the present case the assessee is having sufficient interest free fund hence conclusion of lower authorities is not correct. Therefore the action of the lower authorities is incorrect and ground of the assessee appeal is liable to be ALLOWED . Therefore the ground no.6 of the assessee is allowed.

I.T.A No.1966/Bang/2017 – A. Y. 2009-10 :

13.Ground 1 is general. Ground 2 (a) is not pressed.

14.In respect of ground no.2(b), the Ld. AR submitted that the assessee had declared rental income at Rs.2,16,000/- as income from house property out of Rs.3,96,000/- which was the correct amount of income from house property. It was submitted that the addition should be restricted to the difference in the amount i.e., Rs.1,80,000 with the statutory deduction of 30% under section 24 (a) of the Act. Our attention was drawn to the balance sheet at page 91 to 93.

15. The Ld. DR relies upon the order of the lower authorities.

16. We have heard the rival contentions and perused the material on record. The AO had noted that the assessee had only disclosed the amount of Rs.96,000/- as income from other sources and has concealed income of Rs.3 lakhs and after giving the statutory deduction of 1/3rd for repairs had added Rs.2 lakhs whereas the CIT(A) had confirmed the order passed by the AO.

17. Before us the assessee has shown that the assessee has disclosed the income of Rs.2,60,000 and not 96,000 as recorded by the AO. In fact the assessee has added back Rs.2,60,000 in the computation of income and thereafter the taxable liability was computed. In these facts we deem it appropriate to remand the

matter back to the file of the CIT(A) to verify the claim of the assessee and thereafter decide the matter. Accordingly this issue is remanded back to the file of the CIT(A) for verification and passing a suitable order after giving an opportunity of hearing to the assessee.

18. Ground no.3 is not pressed.

19. Ground no.4 is similar to ground 6 of ITA No.1965/Bang/2017, which is in regard to loan given to the assessee's wife, which has been adjudicated by us in para 12 (supra). Hence, this ground of the assessee is allowed.

20. Ground No.5 is not pressed.

21. Ground no.6 is similar to ground no.5 ITA No.1965/Bang/2017, relating to CBF, has been adjudicated in para 9 (supra). Following the same, we allow this ground of the assessee.

22. Ground no.7 is not pressed.

23. In respect of ground no.8, the Ld. AR has drawn our attention to paragraph 12 of the CIT appeals order. From the perusal of the order it was submitted the details were not submitted before the lower authorities to show that the payment made to M/s. Excel Industries, were an expenditure and therefore the action of the AO

was unwarranted. Now it is submitted that the details have been provided and they have not been examined by the lower authorities. Further it was submitted that the matter kindly be remanded back to the file of the CIT (A) to verify the details available on record as well as the details sought to be filed by the assessee.

24. The Ld. DR relies on the order of the lower authorities.

25. We have heard the rival contentions and perused the material on record. The basis of order passed by the CIT(A) is that the whole of the contract was not been given on sub- contract basis to M/s. Excel Industries but only a part of the contract was given. Now the assessee had submitted that the details are available and hence in the interest of justice we may remand this to verify whether whole of the contract was been given on sub- contract basis to M/s. Excel Industries or only part of the contract was given and on what amount AO can apply rate of commission.

26. In the result above appeal of the assessee is partly allowed.

I.T.A No.2925/Bang/2017 – A. Y. 2011-12 :

27. The ground no.1 is general. Ground no.2 is not pressed. Ground nos.3 (b) and (c) are also not pressed.

28. With regard to Ground no.3(a), the Ld. AR has drawn our attention to para five at page 41 of the CIT appeals order where in it is recorded as under :

> *5. Ground No.2.A:(Donations claimed u/s 35AC):*
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> *The AO stated that the original return of income was filed beyond the specified due date ie on 01/10/2009. As such it cannot be treated as return filed u/s 139(1) and it is to be treated as return filed u/s 139(4) of the Act. As per the provisions of section 139(5),*
>
> > *"if any person, having furnished a return under sub suction (1), or in pursuance of a notice under sub section (2) of section 142, discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier".*
>
> *From the above, it is evident that only the person who had filed the return u/s 139(1) is entitled to file the revised return. Hence, the original return filed on 01/10/2009 was treated as return filed u/s 139(4) and the assesseeis not entitled to file revised return u/s 139(5).This view was supported by the decision of the Apex Court in the case of Sri Kumar Jagadish Chandra Sinha Vs CIT (220 ITR 067). As seen from the records, the assessee claimed deduction u/s 35AC of the Act amounting to Rs,15,14,651/- in the revised returns which were treated as non-est. The AO also placed the reference of the Apex Court in the case of Goetze (India) Ltd Vs CIT [284 ITR323] 2006. In view of the above the AO is justified and I do not find any need to interfere with the order. The appellant's contention stands on a weak footing and is without basis and lacks merit. The relevant ground of appeal is hereby dismissed.*

The order of the CIT (A) clearly shows that though the assessee has

filed the revised return of income, however the same was not considered by the lower authorities by relying upon the judgment of the Hon'ble Supreme Court in the matter of Goetze (India) Ltd (supra).

29. The Ld. DR relied on the orders of the lower authorities.

30. We have heard the rival contentions and perused the material on record. IN our understanding of Goetze (India) Ltd (supra) shows that this embargo of exercise of power is only with the AO and not to the powers of CIT (A) or the Tribunal. Moreover the whole purpose of assessment proceedings is to tax the taxable income and for that purpose CIT(A) should examine the claim of the assessee or the rectified return of income filled by the Assessee before first appellate authority or the Tribunal. In the present case despite filing of the revised return of income the CIT (A) has not examined the same. Accordingly, we remand the issue of donation claimed u/s.35AC to the file of CIT(A) to be adjudicated by the CIT (A) a fresh in accordance with law, after considering the revised return of income. Needless to say that CIT (A) shall grant opportunity of hearing to the assessee. The assessee is also directed to cooperate in the early disposal of appeal. The CIT (A) shall give fair chance to the assessee to file all the documents which are necessary in support of its case. This Ground no.3(a)of the assessee is allowed for statistical purpose.

31. Ground no.3(d) is similar to ground no.5 ITA No.1965/Bang/2017, relating to CBF, has been adjudicated in para 9

(supra). Following the same, we allow this ground of the assessee.

32. In the result, appeals of the assessee are partly allowed for statistical purpose.

Order pronounced in the open court on 5th day of April, 2019.

Sd/-	Sd/-
(A. K. GARODIA) ACCOUNTANT MEMBER	(LALIET KUMAR) JUDICIAL MEMBER

Bengaluru
Dated : 05.04.2019
MCN*

Copy to:
1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.