IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC-A" BENCH : BANGALORE

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT

ITA No.221/Bang/2019
Assessment year : 2010-11

M/s. Roopa Electricals, Ashoka Road, Opp: Marikamba Temple, Shimoga – 577 202. **PAN : AAEFR 8977 P**	Vs.	The Income Tax Officer, Ward – 4, No.75, 100 Ft. Road, Gopala Gowda Extension, Shimoga – 577 204.
APPELLANT		**RESPONDENT**

Assessee by	:	Shri. B. S. K. Rao, Advocate
Revenue by	:	Shri. Ganesh R. Ghali, Advocate Standing Counsel to Department

Date of hearing	:	14.11.2019
Date of Pronouncement	:	22.11.2019

O R D E R

This is an appeal by the Assessee against the order dated 05.11.2018 of CIT(A), Davangere, relating to Assessment Year 2010-11. The issues and grounds raised by the assessee reads as follows:-

Section	*Issues*	*Grounds*
U/s 37	*Additions made without any discussions & satisfaction of AO Rs.1,70,230/-*	*Additions made without discussion & satisfaction of AO Rs. 1,70,230/- is not sustainable in the eye of law, facts, equities & circumstance of the case.*
U/s 44AD	*Difference in work receipts from Kuvempu University as reflected in 26AS & Form No.16A Rs 2,42,931/- wrongly added to the taxable income.*	*Extra work receipts of Rs 2,42,931/- from Kuvempu University as reflected in 26AS, in fact not received by the appellant. (See Physical work certificate issued under Income-Tax Act Form No.16A and Form No.VAT-156 enclosed). Further, AO does not have any material on record to show that extra work receipts of Rs.2,42,931/- received by the appellant. In the above circumstance, AO ought to have invoked provisions U/s 44AD & added only a sum of Rs. 19,434/- being 8% of Rs 2,42,931/- to the taxable income, to meet the end of justice.*
U/s 40(b)	*AO wrongly alleged that excess remuneration of Rs 7,29,196/- has been paid to partners U/s 40(b) of Income-Tax Act*	*Section 40(b) of Income-Tax Act has been amended to allow increased limit of remuneration to partners. As per Explanatory notes to provisions of Finance (No.2) Act, 2009 issued by CBDT Dt.03.06.2010 (Copy Enclosed) increased limit of remuneration to partners U/s 40(b) is allowable from Asst. Year 2010-11 onwards. Therefore, it is prayed to hold that remuneration paid to partners are within limits of allowability & hence disallowance of Rs 7,29,196/- made U/s 40(b) be deleted.*

2. At the time of hearing, the learned Counsel for the assessee did not press for adjudication, the first issue set out in the aforesaid chart with regard to disallowance of Rs.1,70,230/- and hence the said ground is dismissed as not pressed.

3. As far as the second ground with regard to addition of Rs.2,42,931/- being the difference in work receipts from Kuvempu University as reflected in Form 26AS and Form No.16A is concerned, the facts are that the Assessee which is a partnership firm and engaged in the business of executing electrical contracts did some contract work for Kuvempu University for which it had shown receipts of Rs.6,66,600/-. Kuvempu University in their return of TDS in Form 26AS had shown payments to Assessee at Rs.9,09,532/-. The Assessee claimed that it had executed contracts worth Rs.6,66,600/- only and the payments received from the aforesaid person is duly reflected in the bank statement. The addition was made by the AO purely on the basis of AIR Information, for which the Assessee could not explain why Kuvempu University have shown excess payments as having been made to Assessee. The Assessee requested the AO to confirm from Kuvempu University about the correctness of their Form 26AS. The revenue authorities however made the addition disregarding the plea of the Asseessee.

4. The learned counsel for Assessee reiterated plea put forth before revenue authorities and further submitted that at best an addition of 8% profit on the excess receipts should be made instead adding the entire difference. It was submitted that the AO has not found out any mistakes in the Books of Accounts and in the absence of the same no addition should be made. There is no evidence whatsoever that the Assessee had received the entire amount disclosed by the customers in 26AS. It was submitted that the person who made payments to the Assessee (i.e., customers) might have committed a mistake while furnishing the information to the Department. The assessee has no access whatsoever to verify the correctness of the information collected by the Department.

5. The learned DR relied on the order of the CIT(A).

6. I have heard the rival submissions. It is clear from the orders of the Revenue authorities that the impugned addition has been made purely on the basis of difference between income as reflected in Form 26AS and income as reported in books of accounts. As far as the Assessee is concerned, the receipts of rents as recorded in the books of accounts is in consonance with the agreement between the assessee and the lessee. No defect whatsoever has been pointed out by the Revenue authorities in the books of accounts of the assessee. ITAT, Mumbai Bench, in the case of TUV India Pvt. Ltd., Vs. DCIT (2019) 75 ITR (Trib.) held an addition to total income cannot be made due to discrepancy in receipts as shown in 26AS. The Tribunal firstly held that assessee has discharged its primary onus/burden and the assessee could not be asked to do impossible. Secondly the Tribunal held that there could be differences in the accounting policy followed by the taxpayer and its clients who have deducted Income-tax at source on behalf of the taxpayer as well wrong mention/punching of the permanent account number of the tax payers by the clients while filing the TDS returns with the Department. One of the reasons for differential could be that the clients have deducted TDS on the gross amount inclusive of service tax while the income is reflected by the taxpayers exclusive of service tax. Thirdly, the tribunal held that the assessee has no control over the data base of the Income-tax Department as is reflected in Form No. 26AS and at best the assessee could do is to offer bona fide explanations for these differential which the assessee did in this case during the appellate/remand proceedings. Fourthly, it held that the Income-tax Department has all the information and data base in its possession and control. The learned Commissioner of Income-tax (Appeals)/Assessing Officer ought to have conducted necessary enquiries to unravel the truth but asking the assessee to do impossible is not warranted. The tribunal finally concluded that no additions to the income are warranted in the hands of the assessee owing to differential in

income based on Form No. 26AS and the income as is reflected in the books of account maintained by the assessee.

7. I am of the view that the facts of the case of the Assessee are identical to the case decided by the Mumbai ITAT referred to above. I am therefore of the view in the facts and circumstances of the case, the impugned addition cannot be sustained and the same is directed to be deleted. The issue accordingly decided in favour of the Assessee and the addition made is deleted.

8. As far as the third issue of allowing remuneration to partners is concerned, the assessee had claimed as a deduction of a sum of Rs.21,75,000/- on book profits of Rs.34,83,260/- under section 40(b) of the Act. As per the provisions of section 40(b) of the Act, the remuneration that can be allowed as a deduction in respect of remuneration paid to partners under section 40(b) of the Act was Rs.50,000/- or 90% of the book profits whichever is more on the first Rs.1,00,000/- of book profit and 60% of the book profit, on the next Rs.1,00,000/- of book profit and 40% of the reminder. This is the remuneration that can be allowed to partner as per the provisions of section 40(b) of the Act as it prevailed upto Assessment Year 2009-10. The Finance No.2 Act, 2009 however increased this limit of remuneration that can be allowed as deduction paid to partners was increased to Rs.1,50,000/- or 90% of the book profits upto Rs.3,00,000/- of book profits whichever is more and on the balance book profit 60% can be allowed as a deduction. The remuneration claimed by the assessee as allowable under section 40(b) of the Act was as per the amended provisions of law as applicable to Assessment Year 2010-11. The AO and the CIT(A) had wrongly applied the provisions applicable upto Assessment Year 2009-10 and restricted deductions allowable on account of remuneration paid to partners under section 40(b) of the

Act. I therefore direct the AO to allow deduction under section 40(b) of the Act as claimed by the assessee.

9. In the result, the appeal by the Assessee is partly allowed.

Order pronounced in the open court on this 22nd day of November, 2019.

Sd/-
(N. V. VASUDEVAN)
Vice President

Bangalore.
Dated: 22nd November, 2019.
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Copy to:

1. Appellants
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.