

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No. 169/Srt/2020 (Assessment Year: 2013-14)
(Physical hearing)

I.T.O., Ward- 3(3)(4), Surat.	Vs.	M/s Satyam Enterprise, 182-Thakordwar Society, Nr. Spinning Mill, Varachha Road, Surat. PAN No. ABVFS 5076 L
Appellant/ assessee		Respondent/ revenue

Department represented by	Shri Ashok. B. Koli, (CIT-DR)
Assessee represented by	Shri Rasesh Shah, CA
Date of hearing	20/01/2023
Date of pronouncement	06/04/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the revenue is directed against the order of learned Commissioner of Income Tax (Appeals)-3, Surat (in short, the Id. CIT(A) dated 23/03/2020 for the Assessment year 2013-14. The revenue has raised following grounds of appeal:

- "1. Whether, on facts and circumstances of the case and in law the Ld. CIT (A) was justified in deleting the addition of Rs. 3,28,67,900/- made by the AO U/s. 40(a)(ia) of the I.T. Act, on account of assessee's failure to deduct TDS on Labour Contract Expenses, by observing that the amount of receipts was shown by the respective Sub Contractors in their ROI, without considering the fact that the assessee had not adhered to all the conditions of first proviso of Section 201 of the Income Tax Act,1961?"*
- 2. Whether, on facts and circumstances of the case and in law the Ld. CIT (A) was justified in deleting the addition in the case of Sub Contractor Shri **Jyantkumar Hirani**, on account of assessee's failure to deduct TDS*

on Labour Contract Expenses, by observing that the said person has not filed ROI because of below taxable income, without considering the fact that the assessee had not adhered to all the conditions of first proviso of Section 201 of the Income Tax Act,1961?

3. *Whether, on facts and circumstances of the case and in law the Ld. CIT (A) was justified in deleting the addition in the case of Sub Contractor **Shi Laljibhai Narola**, on account of assessee's failure to deduct TDS on Labour Contract Expenses, by observing that the said person has expired, without considering the fact that the assessee had not adhered to all the conditions of first proviso of Section 201 of the Income Tax Act,1961?*
4. *Whether, on the facts and in law the Ld. CIT(A) was justified in restricting the disallowance to **Rs. 1,56,193/- out of Rs. 3,12,385/-** made by the AO, being 20% of various expenses for want of supporting evidences, without considering the fact that the assessee has failed to furnish any documentary evidences to show that the said expenses have been incurred by him, during the assessment as well as appellate proceedings?*
5. *On the basis of the facts and circumstances of the case, the learned CIT (A) ought to have upheld the order of the Assessing Officer. It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the A.O. may be restored.*
6. *The appellant craves leave to add, alter, amend and/or withdraw any ground(s) of appeal either before or during the course of hearing of the appeal."*

2. Brief facts of the case are that the assessee is a firm, allegedly engaged in the business of construction. The assessee filed its return of income for A.Y. 2013-14 on 26/09/2013 declaring income of Rs. 9,04,750/-. The case of assessee was selected for scrutiny. The Assessing Officer noted that the assessee has shown gross income of Rs. 6.11 crores and gross profit of Rs. 40,30,603/- being 6.59% and net profit of Rs. 9,04,754 which is

- 1.48%. The Assessing Officer noted that in the preceding year, the gross turnover of assessee was Rs. 3.86 crores and declared profit of Rs. 28,20,288/- being 8% and net profit of Rs. 4,25,986/-. On further perusal, the Assessing Officer noted that the assessee has shown various expenses consisting of canteen expenses, conveyance expenses, telephone, vehicle and transportation expenses aggregating of Rs. 15,61,929/-. The Assessing Officer noted that the assessee has not furnished supporting bills and vouchers to substantiate such expenses. In absence of complete supporting evidence, the Assessing Officer disallowed 20% of the expenses and worked out addition of Rs. 3,12,385/-.
3. On further perusal, the Assessing Officer noted that the assessee has shown contract expenses of Rs. 3.28 crores. No details of such expenses were furnished. The Assessing Officer issued show cause notice and directed the assessee to produce details of sub-contractors and details of TDS made. The Assessing Officer recorded that the assessee furnished the details of five sub-contractors and further submitted that they have filed return of income and has shown the contract income in their return of income. No details of return of income or TAN or PAN number of such contractors was furnish. The Assessing Officer issued final show cause notice as to why the contract receipts of Rs. 3.28 crores should not be

disallowed. The Assessing Officer on perusal of audit report also noted that auditor has made remarks that the assessee has not deducted TDS on labour contract expenses. Thus, the Assessing Officer on the basis of report of auditor and in absence of complete details of contract payments, made disallowance under Section 40(a)(ia) of the Income Tax Act, 1961 (in short, the Act) of Rs. 3,28,67,900/- while passing the assessment order on 28/03/2016.

4. Aggrieved by the additions in the assessment order, the assessee filed appeal before the Id. CIT(A). Before the Id. CIT(A), the assessee filed its detailed written submissions vide submission dated 08/09/2018. The submission of assessee are recorded in para 4 of order of Id. CIT(A). On the disallowance under Section 40(a)(ia) of the Act, the assessee submitted that the Assessing Officer disallowed the entire amount of Rs. 3.28 crores under Section 40(a)(ia) for non-deduction of tax at source. The assessee further submitted that they gave explanation and furnished complete details and explained legal position that if the deductee filed their return of income for corresponding assessment year, and included such contract receipt and paid taxes thereon, the deductor, who is assessee, shall not be treated as assessee in default as per first Proviso to Section 201 of the Act. The assessee also relied upon decision of Hon'ble Apex Court in case of Hindustan Coca Cola Beverages Private Limited Vs.

CIT (2007) 293 ITR 226 (SC) and Mahindra & Mahindra Ltd. Vs DCIT (2009) 30 SOT 374 (Mum) which was subsequently followed by the various High Courts. The assessee submitted that they paid contract amount to 11 parties aggregating of Rs. 3.28 crores and TDS @ 1% under Section 194C ought to have deducted by assessee, however, the same was not deducted. After going through the list of 11 parties, the assessee furnished the details of all parties who have paid the tax on such receipt, however, the Assessing Officer not considered and passed the assessment order hurriedly without considering that all the parties have filed their return of income and declared the income received from assessee in their return and paid tax on it. The assessee again furnished the details of 11 parties and annexing ITR acknowledgement copy, computation of income and copy of account and balance sheet of the parties. The assessee also submitted that the Assessing Officer not considered such evidence, which cannot be considered as additional evidence under Rule 46A of the Income Tax Rules, 1962 (in short, the Rules), however, even the document submitted by assessee are considered as additional evidence, the same may be admitted for granting relief.

5. On disallowance of various expenses @ 20%, the assessee submitted that the Assessing Officer made ad hoc disallowance without any basis and finding defects. The addition on ad hoc basis may be deleted.
6. The Id. CIT(A) forwarded the submission of assessee to the Assessing Officer for calling his remand report. The remand report was furnished by the Assessing Officer alongwith his letter dated 03/10/2018. In the remand report, the Assessing Officer reported that out of 11 contractors, the assessee furnished ITR of nine contractors only. For two sub-contractors namely Jayantkumar Hirani and Lalji Bhai Narola, no return of income was filed. Further in case of Mahendrabhai Radadiya, who has shown gross receipt of Rs. 2,37,370/- instead of Rs. 29,17,300/- as claimed by assessee.
7. In response to remand report, the assessee filed its rejoinder. In the rejoinder, the assessee further reiterated that in case of Hindustan Coca Cola Beverages Private Limited Vs CIT (supra), it has been held that the liability to deduct the tax at source is a vicarious liability which means if the tax on which amount paid or payable not deducted by the assessee, but the recipient of such payment has declared such income and paid the tax thereon, there will be no loss to the revenue and therefore, the deductor will not be treated as the assessee in default. Further the assessee also relied upon the decision of Hon'ble Delhi High Court in CIT

Vs Ansal Landmark Private Limited (2015) 279 CTR 384 and decision of Ahmedabad Tribunal in DCIT Vs Esaote India (NS) Ltd. 2018 (*) TMI 1183 ITAT, wherein it was held that if the recipient has included payment made by assessee in their receipt and paid tax thereon, the deductor is not liable and the amended provisions are retrospective effect. For two sub-contractors, who have not filed their return of income, the assessee explained that their income was less than the taxable limit. Further one of such party namely Lalji Bhai Narola expired on 09/08/2013, so no return could not be filed. Regarding discrepancy in the receipt shown by Mahendrabhai Radadiya, the assessee claimed that the payments made through account payee cheques, hence, the payment to sub-contractors cannot be doubted.

8. The Id. CIT(A) on considering the assessment order, submission of assessee, remand report of Assessing Officer and rejoinder thereon by the assessee, held that the Assessing Officer out of 11 sub-contractor accepted that payments to 8 sub-contractors, therefore, the addition to the extent of Rs. 2.34 crores were deleted. So far as dispute relating to remaining two namely Jayantkumar Hirani and Lalji Bhai Narola, return was not filed because of income was below the taxable income and death of Lalji Bahi Narola. Therefore, the Id. CIT(A) directed to delete the addition in respect of those two sub-contractors. Regarding discrepancy in

case of Mahendrabhai Radadiya, the Id. CIT(A) took his view that the payment was made through cheque and was debited in the account of recipient, therefore, there is no dispute about the payment and directed to delete the entire addition.

9. On *ad hoc* disallowance of expenses, the Id. CIT(A) without discussing the nature of expenses and evidences if any furnished by assessee, simply restricted to 10% of such disallowances thereby granting 50% relief on such addition. Aggrieved by the order of Id. CIT(A), the revenue has filed the present appeal before this Tribunal.
10. We have heard the submissions of learned Commissioner of Income Tax- Departmental Representative (Id.CIT-DR) for the revenue and the learned Authorised Representative (Id. AR) of the assessee and have gone through the orders of the lower authorities carefully. Grounds No. 1 to 3 of the appeal relate to deleting the addition of Rs. 3.28 crores made under Section 40(a)(ia) of the Act. The Id. CIT-DR for the revenue supported the order of Assessing Officer. The Id. CIT-DR submits that the Id. CIT(A) granted relief to the assessee merely by accepting the submission of assessee that the recipient has included the income in their return of income and has shown in their taxable income. As per provisions of Rule 31ACB, the certificate from Accountant under first proviso to sub-Section (1) of Section 201 is required to be furnished in Form 26A to

DGIT(System) or the person authorised by DGIT(System) in accordance with the procedure and standard specified under sub-Rule (2). In this case it cannot be ascertained whether Form 26A as furnished by Accountant was submitted to the authorised person or not. No such evidence is submitted by assessee, therefore, the assessee is not eligible for benefit of Proviso 1 to Section 201 of the Act. The Id. CIT-DR for the revenue submits that there were clear discrepancies in the computation of income of Mahendrabhai Radadiya who has shown contract receipts from diamond labour. The other two sub-contractors namely Jayantkumar Hirani and Lalji Bhai Narola have not filed their return of income, therefore, the stand taken by assessee before the Id. CIT(A) has so many inconsistencies and the same is liable to be set aside and to restore the order of Assessing Officer.

11. With regard to ground No. 4 which relates to restricting the disallowance of various expenses to 10% instead of 20%, the Id. CIT-DR submits that the Id. CIT(A) has not given any reason as to why he has restricted 10% only. The Id. CIT-DR for revenue submits that no evidence to substantiated the expenses were filed by the assessee and would submit to restore the order of Assessing Officer.
12. On the other hand, the Id. AR of the assessee on ground Nos. 1 to 3 of the appeal supported the order of Id. CIT(A). The Id. AR of the assessee

submit that the assessee before the Assessing Officer as well as before the Id. CIT(A) filed complete details of sub-contractors alongwith their PAN number and submitted that the assessee is eligible for the benefit of first Proviso to Section 201 of the Act and filed certificate of Accountant that the recipient of the sub-contract receipt has already including the income in their return of income and have paid tax thereon, thus no disallowance is warranted.

13. The Id. AR of the assessee submits that so far as payment to party No. 4 and 5 is concerned, who have not filed return of income, the Id. AR submits that their income was below the taxable limit, therefore, no return of income was filed, therefore, he has alternative submissions that the disallowance on their payments may be restricted to 30% of sub contract payment in view of amendment to first proviso to Section 40(a)(ia) by the Finance Act, 2014 which has been held as retrospective. To support such submission, the Id. AR of the assessee relied upon the decision of Rajkot Tribunal in Punabhai G. Pardava Vs ITO ITA No. 219/Rjt/2018 dated 08/06/2022. With regard to sub-contractor No. 6, the Id. AR of the assessee submits that so far as discrepancy in the income offered by sub-contractor No. 6, he has filed his copy of return of income and computation of total income showing that he has included Rs.

29,17,000/- in his computation of income. Against ground no.4 the Id AR for the assessee supported the order of Id CIT(A).

14. We have considered the rival submissions of both the parties and have perused the orders of the lower authorities carefully. We find that during the assessment, the Assessing Officer on verification of P&L account, noted that the assessee has debited contract expenses of Rs. 3.28 crores. On such sub-contract payments, no TDS was made by the assessee. The assessee was asked to substantiate the genuineness of such sub-contract payment. The Assessing Officer noted that in response to show cause notice, the assessee furnished details of only five sub-contractors and took plea that they have included such contract payment in their return of income while filing return. The Assessing Officer on the basis of adverse remark in audit report by the auditor that no TDS is made on such sub-contract payment, disallowed the entire expenses of Rs. 3.28 crores. The Id. CIT(A) granted relief to the assessee by taking a view that Assessing Officer in his remand report has accepted the fact about payments to 8 sub-contractors out of 11, who had included the contract receipt in their income and Certificate of Accountant alongwith Form-26A therefore, the addition to the extent of Rs. 2.34 crores were deleted. So far as dispute relating to remaining two namely Shri Jayantkumar Hirani and Lalji Bhai Narola, return was not filed because of income was below the taxable

income and death of Lalji Bhai Narola. Therefore, the Id. CIT(A) directed to delete the addition in respect of those two sub-contractors. Regarding discrepancy in case of Mahendrabhai Radadiya, the Id. CIT(A) took his view that the payment was made through cheque and was debited in the account of recipient, therefore, there is no dispute about the payment and directed to delete the entire addition.

15. We find that neither the Assessing Officer narrated the name and details of sub-contract in assessment order nor the Id. CIT(A) recorded in his order bifurcation of impugned expenses paid to various sub-contractors. The Id. CIT(A) called the remand report from the Assessing Officer during the pendency of first appeal. The Assessing Officer again in his remand report dated 03/10/2018 has not specified the name and bifurcation of different payments made to such sub-contractors. Thus, after hearing the submissions of both the parties, we directed the assessee to furnish the list of such persons alongwith their PAN number, details of sub-contract payment and the return of income if any shown by such sub-contractor. On our direction, the Id. AR of the assessee furnished the following details:

Sr. No.	Assessee	PAN	Amount of Contract (In Rs.)	Returned income
1.	Bhanubhai Rupareliya	ANAPB8672M	26,25,000	2,95,355

2.	Chirag Sheladiya	EEXPS4862D	40,10,000	2,04,140
3.	Hitesh Gondaliya	AJWPG5822D	26,25,000	3,24,692
4.	Jayantkumar Hirani	ACIPH1218H	29,89,000	Return of Income not filed
5.	Laljibhai Narola	AEEPN5752J	34,67,000	Dead Assessee
6.	Mahendrabhai Radadiya	ANUPP9118P	29,17,000	2,13,779
7.	Madhavjibhai Rupareliya	AFHPR2409C	23,17,000	2,39,692
8.	Natvarlal Miroliya	ALCPM5269Q	27,02,000	2,23,129
9.	Prafulbhai Ranpariya	AITPR3525Q	30,49,500	2,47,628
10.	Rajeshbhai Sheladiya	BFDP57743M	32,42,000	2,45,736
11.	Rajnikant Shakhiya	BYIPS4414H	29,24,400	7,72,626
			3,28,67,900	

16. As noted in earlier paragraphs that before the Id. CIT(A), the assessee contended that the recipients of contract payments have included the contract payment in their return of income and has paid the due tax. The Id. CIT(A) on such submission, obtained remand report from the Assessing Officer. The Assessing Officer except sub-contractor No. 4,5 and 6, accepted that recipients of contract payments, have included the contract payment in their return of income. Thus, we affirm the order of Id CIT(A) to that extent.
17. However, sub-contractor No. 4 & 5 have not filed their return of income, so there is no occasion to include such contract receipt in their income. Before us, the Id AR for the assessee made his alternative submissions that the disallowance on their payments may be restricted to 30% of sub contract payment in view of amendment to second Proviso to Section

40(a)(ia) by the Finance Act, 2014 which has been held as retrospective by various courts and Tribunal and relied upon the decision of Rajkot Tribunal in Punabhai G. Pardava Vs ITO (supra). On considering such plea of Id AR for the assessee, we direct the assessing officer to restrict the disallowance to the extent of 30% of payments made to sub-contractor no. 4 & 5, thereby, the order of Id CIT(A) is modified to that extent.

18. Further, as per the remand report of assessing officer, there is discrepancy in the computation of income of Mahendrabhai Radadiya, wherein he has shown gross receipt of Rs.,2,37,370/- that too from Diamond labour income and not from the contract of construction, whereas the assessee have claimed to have paid Rs. 29,17,000/-. Before us, the Id AR for the assessee has filed copy of return of income of Mahendrabhai Radadiya for AY 2013-14, with computation of income wherein he has shown construction labour income of Rs. 29,17,000/-, which is contrary to the remand report of assessing officer dated 03.10.2018, therefore, this part of disallowance is restored back to the file of assessing officer to examine the fact, if the assessee has included construction contract receipt in his computation of income or the assessee has filed this false and fabricated evidence before Tribunal. If the assessee has included construction contract receipt in his computation of income, then disallowance be restricted to 30% of such receipt, if not

included entire alleged contract payment of Rs. 29,17,000/- be disallowed and action may be initiated against the assessee as per law. In the result, this part of issue is allowed for statistical purpose.

19. In the result, ground No. 1 to 3 of appeal is partly allowed.
20. Ground No. 4 relates to restricting the various expenses to 10% in place of 20% disallowed by assessing officer. The assessing officer made disallowance of expenses @ 20% of various expenses (20% of Rs. 15,61,929/-) by taking that all the expenses are not fully supported with bills and vouchers. The Id CIT(A) reduced the disallowances to the extent of 10% of such expenses and granted further relief. Before us, the Id. DR for the revenue submitted that no evidence to substantiate the expenses were filed by the assessee. We find that the assessing officer made disallowance without specifying the specific defect. In our view the Id CIT(A) reasonable restricted the disallowance to the extent of 10%, which we affirm. In the result, this ground of appeal is dismissed.
21. In the result, the appeal of the revenue is partly allowed.

Order pronounced in the open court on 06th April, 2023 in open court.

Sd/-
(Dr. ARJUN LAL SAINI)
ACCOUNTANT MEMBER
Surat, Dated: 06/04/2023

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

**Ranjan*

Copy to:

1. Assessee –
2. Revenue -
3. CIT(A)
4. CIT
5. DR
6. Guard File

By order

Sr.Private Secretary, ITAT, Surat