

आयकर अपीलिय अधीकरण, न्यायपीठ –“A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
 [Before Shri A. T. Varkey, Hon’ble Judicial Member and Dr. M. L. Meena, Hon’ble Accountant Member]

I.T.A. No. 1030/Kol/2019
Assessment Year: 2015-16

Sahidur Rahman [PAN: ACYPR 0547 F]	Vs.	DCIT, Circle – 3(1), Malda
Appellant		Respondent

Date of Hearing (Virtual)	26.07.2021
Date of Pronouncement	28.07.2021
For the Appellant	Shri Sumit Ghosh, AR
For the Respondent	Smt. Ranu Biswas, Addl. CIT

ORDER

Per Dr. M. L. Meena, AM:

This is an appeal preferred by the assessee against the order of the Ld. CIT(A), Jalpaiguri dated 22.01.2019 For AY 2015-16.

2. The assessee has raised a legal issue regarding non issue of notice u/s 143(2) of the Income Tax Act, 1961(hereinafter referred to as the ‘Act’) by the DCIT, Circle – 3(1), Malda who passed the assessment order u/s 143(3) of the Act on 20.12.2017 which omission according to Ld. A.R. is an incurable defect and goes to the root of the assessment order. According to the Ld. AR, from a perusal of the assessment order, page 1 itself it is clear that notice u/s 143(2) was issued on 19.09.2016 by the ITO, Ward – 3(2), Malda and thereafter the case of the assessee was transferred to DCIT by ITO, Ward – 3(2) on 04.04.2017 and there is also no mention of DCIT having issued any notice u/s 143(2) of the Act. According to the Ld. AR, the last date for issue of notice u/s 143(2) by the Assessing Officer was on 30.09.2016. Therefore, according to the Ld. AR it can be therefore safely inferred that the DCIT has not issued notice u/s 143(2) within the time prescribed by the statute,

consequently the DCIT Circle – 3(1), Malda had no jurisdiction to frame the assessment u/s 143(3) of the Act and for that legal proposition relied upon the decision of the Hon'ble Supreme Court in the case of ACIT vs M/s. Hotel Blue Moon 321 ITR 362 (SC). However this legal issue is not being adjudicated by us since the Ld. AR had an alternative contention in respect of the merits of the addition made by the AO.

2.1. On merits, the assessee assails the decision of the AO to have made the addition of Rs. 42,30,786/- as undisclosed income.

2.2. Facts as noted by the AO is that when he perused the records he noted inter-alia the 26AS statement pertaining to A.Y. 2015-16, from which he discerned that the assessee has received Rs. 5,93,71,756/- whereas in his return of income (hereinafter ROI) as well as the Audit Report (hereinafter the initial/first Audit Report), the total receipt was shown to the tune of Rs. 5,51,40,970/- and thus there was difference of Rs. 42,30,786/-. Therefore, the AO asked the assessee to explain the difference (mismatch) between the 26AS and the initial Audit Report submitted by the assessee. Pursuant to the notice of the AO, the assessee submitted that the return for the assessment year was mistakenly made and the total receipt was to the tune of Rs. 5,93,71,756/- and the assessee filed Revised Audit Report before the AO. The AO after perusing the Revised Audit Report noted that even though the assessee has accepted that the gross-payment received him was as reflected in 26AS i.e. Rs. 5,93,71,756/- however the assessee has increased the labour charges from Rs. 4,99,26,870/- to Rs. 5,42,07,324/-. Further according to the AO, the assessee could not furnish any evidence/document relating to increase from labour expenditure. Therefore, the AO was of the opinion that the entire receipt of Rs. 42,30,786/- was undisclosed income of the assessee which the assessee failed to disclose in his return of income and made the addition of Rs. 42,30,786/-.

2.3 Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who was pleased to dismiss the same by holding as under:

"I have perused the grounds of appeal, statement of facts and the assessment order. On perusal of the assessment order, it is seen that as per revised audit report, the appellant has increased labour charge from Rs.4,99,26,870/- to Rs.5,42,07,324/-. At the time of assessment proceedings, the appellant could not furnish the evidence of the documents relating to such enhanced labour expenditure. Basically, in the appellant case, the difference of Rs. 42,30,786/- was established on perusal of Form 26AS statement with regard to gross receipts as against turnover admitted in the return of income. As it is based on the findings of the A.O., it is crystal clear that such receipts were suppressed as founded by the A.O. During appellate proceedings also the appellant could not come out for any cogent reason/credible evidence with regard to non-reconciliation of receipts as per 26AS statement as against admitted in return of income. Accordingly, the addition of Rs.42,30,786/- is hereby confirmed and the ground of appeal is dismissed.

3. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee has preferred this appeal before us.

4. We have heard both the parties and perused the material available on record. The assessee is engaged in the business of supply of labour for civil works. Facts pertaining to the dispute is that the AO taking note of the mismatch in 26AS and the initial Audit Report filed by the assessee detected a difference of Rs. 42,30,786/-. Therefore, the AO asked for explanation of the assessee and pursuant to same, the assessee admitted that there was mistake while filing the return of income and accepted that the gross payment he received was to the tune of Rs. 5,93,71,757/- (as shown in 26AS) and not Rs. 5,51,40,970/- as shown in First Audit Report. However, according to assessee, the assessee had mistakenly shown labour expenses at Rs. 4,99,26,870/- whereas the labour charges incurred by the assessee was to the tune of Rs. 5,42,07,324/- (increase of Rs. 42,80,454/-). These facts are discerned from a perusal of page 23 of PB where the P & L A/c of First and Revised Accounts are shown. And according to Ld. A.R. of the assessee, the payments made to labours were all made through bank account and the details of payment disbursed to labourers are available from page 46 to 64 of PB. However, we note that the AO did not accept the claim of assessee because assessee could not furnish proof of increased labour expenditure to the tune of Rs. 42,80,454/- and so made the addition, which was confirmed by Ld. CIT(A). During the hearing the Ld. AR contended that since there was a mistake in the return of income and initial Audit Report; that was rectified by filing Revised Audit

Report as discussed above. Regarding the addition of the mismatch between 26AS and the Audit report, we note that presently there is no mismatch, since assessee has accepted the gross receipt as that as shown in 26AS i.e. Rs. 5,93,71,757/-. And it is elementary that based on 26AS statement alone no additions can be made because if a mistake/error happens at the payee's side while remittance is made then the statement made under 26AS won't be giving the correct picture of payment received by the assessee from the payee which when contested by the assessee needs verification. Therefore mismatch can at best be a starting point for necessary enquiry and verification but it cannot, on standalone basis justify the addition. According to the Ld. AR of the assessee, the assessee had mistakenly shown gross receipt while filing return of income and accepted that the assessee received Rs. 5,93,71,757/- and the other mistake was in respect of not showing labour expenditure to the tune of Rs. 42,80,454/- which was rectified after filing the Revised Audit Report and thus the labour charges got increased from Rs. 4,99,26,870/- to Rs. 5,42,07,324/- and thus the mistake/over-sight between the 26AS and the revised Audit Report stand reconciled. The assessee has filed before us the details of payment to labourers which is placed at page 46 to 64 of PB and claims that all payments are through bank account, which facts need verification by the AO. So we set aside the impugned order of Ld. CIT(A) and direct the AO to verify the fact of increase in labour expenses and the assessee is bound to substantiate before the AO that the labour expenditure was not Rs. 4,99,26,870/- but it was Rs. 5,42,07,324/- (difference of Rs. 42,80,454/-). If the assessee succeeds, then there is no necessity of any addition and if the assessee fails to reconcile / bring material to substantiate the increased labour expenses to the tune of Rs. 42,80,454/-, the AO may pass fresh assessment order in accordance with law. The assessee is at liberty to file written submissions and to substantiate his claim by filing material / documents in respect of incurring of labour charges to the tune of increase of Rs. 42,80,454/-.

5. However, before we part in respect of the legal issue raised by the assessee we note that the assessee had taken the objection before the DCIT i.e. at the first instance itself before the AO that the DCIT has not issued notice u/s 143(2) of the Act and thus has challenged the jurisdiction of the DCIT to frame the assessment u/s 143(3) of the Act. This legal issue is not adjudicated since we have taken this route and the legal issue is kept open which can be

taken up at any stage. With the aforesaid discussion, we remand the issue of addition of Rs. 42,30,786/- back to the file of the AO for fresh adjudication as discussed (supra).

6. In the result, the appeal of the assessee is treated as allowed for statistical purpose.

Order is pronounced in the open court on 28th July, 2021.

Sd/-

(A. T. Varkey)
Judicial Member

Sd/-

(Dr. M. L. Meena)
Accountant Member

Dated: 28th July, 2021

Biswajit, Sr. P.S

Copy of the order forwarded to:

1. Appellant- Sahidur Rahman, Bhulitola, Bazarpara, Kaliachak, Malda – 732 206.
2. Respondent – DCIT, Circle – 3(1), Malda.
3. The CIT(A)- Jalpaiguri.
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Senior Private Secretary/DDO
ITAT, Kolkata Benches, Kolkata
