IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 7.8.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

T.C.A.No.766 of 2017

Commissioner of Income Tax
Chennai. Appellant

vs

M/s.SPL Infrastructure Pvt. Ltd.,
No.15, Kasthuri Rangan Street,
Alwarpet, Chennai-18. Respondent

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'C' Bench dated 14.1.2016 in in I.T.A.No.2488/Mds/2014.

For Appellant : Mr.J.Narayanasamy, Senior Standing Counsel

For Respondent : Mr.M.P.Senthilkumar

JUDGMENT

(Delivered by Dr.Vineet Kothari,J)

The Court was held by Video Conference, as per the Resolution of the Full Court dated 3 July 2020, by Judges at their respective residences and the counsel, staff of the Court appearing from their

respective residences. 2. The Revenue has preferred this Appeal under Section 260A of the Act, aggrieved by the order dated 14.1.2016 passed by the learned Tribunal for the Assessment Year 2010-11.

3. The Respondent/Assessee is a Contractor, who carried out the work of road laying in the Thermal Power Plant, Rathnagiri, to the tune of Rs.3300 lakhs. The learned Assessing Authority made an addition of Rs.4,41,08,210/- in the hands of the Assessee on the ground that 14 of the Sub Contractors to whom the sub contracts were assigned by the Respondent/Assessee/ Contractor were not produced before the Assessing Authority upon summons being issued to them and thereupon, disbelieving their existence and the sub contract work carried out by them, the entire payments made to them were disallowed by the Assessing Authority and they were added back to the income of the Assessee.

4. On appeal by the Assessee before the learned Commissioner of Income Tax (Appeals), the said addition was restricted to 10% of the total sum of Rs.4,41,08,210/- on the agreement of the Assessee and thus, relief to the extent of 90% was granted by the Commissioner of Income Tax (Appeals), which order was upheld by the learned Tribunal by the order impugned before us.

5. The following substantial questions of law are suggested in the Memorandum of Appeal filed by the revenue:-

"(i) Whether the Tribunal was correct in restricting the disallowance to 10% of expenditure of Rs.4,41,08,210/- incurred towards subcontractors even though the assessee had failed to prove the identity, credibility and genuineness of the sub contractors?

(ii) Whether the Tribunal was right in not appreciating the findings of the assessing officer that the contractors were nonexistent, inexperienced, incompetent and bogus and the assessee had claimed the said expenditure only to reduce the income and the tax incidence on the income.

(iii) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the liability of the assessee to pay back to the creditors had not ceased even after 3 years time limit provided under Limitation Act and thereby holding that no addition can be made on account of cessation liability u/s 41 (1)?"

6. The relevant findings of the learned Tribunal on the said issue,

including the extract of the order passed by the learned Commissioner of Income Tax (Appeals), are quoted below for ready reference:

> *"4. On appeal, the CIT(A) has restricted the disallowance to Rs.44,10,821/- as against the disallowance of Rs.4,41,08,210/- by observing as under:*
>
> > *" 6.1.2. I have considered the findings of the assessing officer and also submission made by the AR of the appellant in the course of appellate proceedings along with the cited case laws on this issue carefully. It is not disputed that all the 14 persons have furnished the confirmation and some of the parties in response to the summons issued to them have furnished the copies of the Income Tax returns and also copies of the bank accounts. Some of the parties have also confirmed that they do not have invoice copies and maintain only M. Book which was retained by the assessee i.e M/s.SPL Infrastructure Private limited. The copy of the M. Book placed before me give the details of work*

done for particular period, measurement up to date of work done with signature of the supervisor of the company. 11 parties have sent the details from far of places to the assessing officer through courier. One party namely M/s.Sakthi Kanna Constructions Private limited appeared before the assessing officer and the transactions with this party were accepted by the assessing officer. The letters issued by assessing officer were remain uncomplied with only two parties. It is also fact that the appellant carried out the sub contract work with EDAC Engineering limited for laying the road work at the remote places for the purpose of Thermal Power Plant, JSW Energy (Rathnagiri limited), Nandiwadi Maharashtra State. For laying out road work man power is necessarily required. There is no evidence available on the record that the appellant had not executed the road work at Thermal Power Plant, Rathnagiri. The most of

the labour contractors were either relatives of the appellant or known to the appellant. The entire disallowance made by the assessing officer in respective expense debited in the name 14 parties cannot be accepted without disproving the confirmations received, disproving the payments made to them beyond doubt, disproving the execution of the work order. However there is a possibility of the inflation of the expenses in respect of road work carried out by the appellant as a whole. In the earlier A.Ys, the department accepted the 5% of the turnover declared by the appellant after detection of the inflation of the expenses by carrying out survey action. In the year under consideration, there was increase in GP and Net profit ratio declared by the appellant as compared to the GP and Net profit ratio declared in the earlier years. However the net profit declared by the appellant at 3.83% is less than the 5% of the

Net profit accepted by the department in the earlier years. The 5% of the Net profit on the turnover of Rs. 3334.16 lacs comes to Rs.166.7 lacs. The appellant had declared Rs.127.53 lacs as Net profit. The difference comes to about Rs.39.178 lacs. In the course of the appellant proceedings, the AR of the appellant had come out to offer 10% of the disallowance of Rs.4,41,08,210.00 which comes to about Rs.44,10,821.00 on the basis of the decision of the Honorable ITAT, Chennai B BENCH reported in (2014) 159 TTJ (Chennai) 526 and also on the basis of the decision of the Honorable Gujarat High Court reported in [2013] 355 TR290 (Guj). In the case cited by the AR of the appellant decided by Chennai B BENCH, the similar road work was entrusted to two persons namely Sri.N.Erulappan and Sri S.Kesavan by EDAC Engineering limited and the assessing officer recorded the statement of the two persons

who admitted that they had not carried out any work of the nature mentioned. In spite of the denial of the work carried out by Sri N.Erulappan and Sri S.Kesavan, on examination of the facts, the Honorable tribunal came to conclusion that the entire disallowance made by the assessing officer cannot be sustained and restricted the disallowance to 25% of the total claim of Rs. 22.10 crores. The Honorable Gujarat High Court in the case of Bholanath Poli Fab Pvt. Ltd., reported in [2013] 355 ITR 290 held that tribunal having examined the evidence on the record came to the conclusion that assessee did purchase cloth and sell the finished fabrics, as a natural corollary, not the amount covered under such purchase but the profit element embedded would be subject to tax. In the instant case the parties have not denied the payments made to them and also have not denied the work carried out by them. The

existence of the parties and the payments are also not disproved. The only fact was that the parties have not appeared before assessing officer for the summons issued to them but have given confirmation to the assessing officer. Since all the parties are known to the appellant, the appellant would have taken to the adequate steps for producing before the assessing officer for examinations. The net profit ratio declared by the appellant in the year under consideration is also less as compared to the net profit computed by the assessing officer in the earlier years which was also accepted by the appellant. Looking to the facts of the case in totality and legal position on this issue, I am convinced that the offer of the 10% of the total disallowance of Rs.4,41,08,210.00 made by the appellant during the course of the appellate proceedings as additional income over and above retuned income is reasonable. The offer of the 10% of

the total disallowance would lead to net profit ratio more than 5% of the turnover which was any way accepted by assessing officer in the earlier years. Therefore, the assessing officer is directed to restrict the disallowance to Rs. 44,10,821.00 as against the disallowance of Rs.4,41,08,210.00. The grounds of appeal raised by the appellant on this issue are treated as disposed off accordingly." .

Against the above, the Revenue is in appeal before us.

5. . We have heard both the parties and perused the material on record. In this case, it is admitted fact that 14 persons have furnished confirmation and some of the parties in response to summons issued to them have furnished the copies of income-tax return and also copies of bank account. Some of the parties also confirmed that they do not have invoice copies and maintain only Method book which was returned by the assessee. The copy of M.Book gave details of work done for a particular period, measurement up to the date of

work with the signature of supervisor of the company. 11 parties have sent the details from far off places to the Assessing Officer through courier. However, there was no response from two parties. The assessee has taken the road laying work and also completed that work. Most of the payments are not supported by bills issued by the above parties. On the above reasons, the Assessing Officer disallowed Rs.4,41,08,210/-. However, the CIT(A) considering the nature of business of the assessee and also chances of inflated expenses, sustained the disallowance to 10% of above expenditure. As seen from the fact brought on record that the assessee's total turnover for the assessment year under consideration is at Rs.3334.16 lakhs against which the assessee declared gross profit of 14.21% and net profit at 3.83%. When we compare the turnover of gross profit and net profit of the present assessment year with other assessment years it is at higher side. This can be seen from the below mentioned

table:

Rs. in lakhs

Y.E.	*31.3.05*	*31.3.06*	*31.3.07*	*31.3.08*	*31.3.09*	*31.3.10*
Turn over	*3133.38*	*2760.71*	*3527.99*	*6680.59*	*11585.30*	*3334.16*
G.P.	*253.47*	*247.37*	*352.46*	*436.04*	*625.25*	*473.93*
Depn.	*52.96*	*57.65*	*87.09*	*104.58*	*96.44*	*159.49*
Interest	*68.94*	*80.95*	*166.81*	*197.47*	*190.04*	*186.91*
N.P.	*131.57*	*108.77*	*98.56*	*133.99*	*338.77*	*127.53*
GP as % of T.O.	*8.09*	*8.96*	*9.99*	*6.52*	*5.40*	*14.21*
N.P as % of T.O.	*4.20*	*3.94*	*2.79*	*2.01*	*2.92*	*3.83*

Further, it is also admitted fact that the payment to above parties was subject to TDS and paid by cheques and the assessee has maintained the M. book which is signed by the sub-contractors. The only discrepancy noticed by the Assessing Officer is that the payments are not supported by the bills raised by the parties and only self-made vouchers were maintained by the assessee. In our opinion, considering the nature of work carried on by the assessee, there is no question of not incurring of expenditure by the assessee to carry on the road work contracts and the work is mentioned in the M

book maintained by the assessee and counter signed by the sub contractors. However, there is chances of inflating the expenditure for which the CIT(A) has, already disallowed 10% of the expenditure claimed by the assessee to the extent of Rs.4,41,08,210/-. Hence, the contention of the ld. DR that the entire amount of Rs.4,41,08,210/- is to be disallowed cannot be appreciated as held by the Tribunal in the case of EDAC Engineering Ltd vs ACIT, 149 ITD 341, wherein held that if expenditure claimed was not supported by proper evidence and some deficiency persist in evidence, part expenditure is disallowed on estimated basis. Being so, by placing reliance on the above decision of the Tribunal, the CIT(A) is justified in disallowing only 10% of the sub-contract expenses not supported by proper bills. This ground of the Revenue is dismissed.

6. *The next ground is with regard to deletion of addition made u/s 41(1) of the Act as cessation of liability.*

7. The facts of this issue are that the Assessing Officer made an addition of Rs.18,16,728/- towards creditors as they are outstanding for more than three years and any claim beyond three years is not good in law as per Limitation Act. However, the CIT(A) observed that there is no cessation of liability as on the date of the accounts since the assessee has not written off these amounts in its books of account. According to the CIT(A), Explanation 1 sec. 41(1)(4) also to apply to the facts of this case. Accordingly, he deleted the addition against which the Revenue is in appeal before us.

8. We have heard both the parties and perused the material available on record. In the present case, the Assessing Officer has not issued any notice to the creditors to confirm from them whether they have given up their dues from the assessee. The assessee has also not written back these amounts in its books of account. Except for the fact that the amounts are outstanding, there was no material

evidence to show that there was remission or cessation of liability. It is the Assessing Officer who has presumed that the liability in respect of these creditors was ceased to exist. Before coming to the conclusion by the Assessing Officer that the creditors were no more existing, it is incumbent upon the Assessing Officer to make necessary enquiry to bring on record material that the creditors were ceased to exist. He could have made necessary enquiry to this effect. The assessee herein, is a limited company and as per the legal position the acknowledgement of the liability in favour of the creditors in its Balance Sheet extends the period of limitation for the purpose of sec.18 of the Limitation Act. It is the assessee's claim that the debts are subsisting and it continues to be liable to pay the creditors. Therefore, it is not open to the Assessing Officer to draw the conclusion that the creditors have remitted the liability or that the liability has otherwise ceased without evidence or material

when the assessee acknowledges a liability in the Balance Sheet and Explanation 1 is not applicable. Since the creditors are continued to be appearing in the Balance Sheet from year to year and the accounts of the creditors have not been written back, the conclusion of the Assessing Officer that it was ceased to exist is not proper. Accordingly, in our opinion, the CIT(A) is justified in deleting the addition made by the Assessing Officer u/s 41(1) of the Act. This view of our is fortified by the judgment of the Delhi High Court in the case of CIT vs Hotline Electronics Ltd, [2012] 80 CCH 156, and Punjab & Haryana High Court judgment in the case of CIT vs GP International Ltd, 325 ITR 25. Accordingly, the deletion made by the CIT(A) is confirmed.

9. In the result, the appeal of the Revenue is dismissed"

7. The learned Senior Standing Counsel Mr.J.Narayanasamy appearing for the Appellant/Revenue submitted that for want of production of the Sub Contractors before the Assessing Authority, and

one of them being 94 years old, the Assessing Authority was justified in believing that the payments made to those Sub contractors were not the actual expenditure incurred by the respondent/assessee Contractor and therefore, he was justified in disallowing the same and adding back the same as the income of the Assessee. He also submitted that though the learned Commissioner of Income Tax (Appeals) had found that 11 out of these 14 sub contractors had not appeared before the Assessing Authority but submitted their confirmation forms, the payments made to them tallied with TDS (Tax Deducted at Source) claimed by the Respondent/Assessee Company. However, since these persons were not produced before the Assessing Authority, no proper verification could be carried out by the Assessing Authority for such payments made to them, and merely on the basis of Measurement Books (M Book) maintained by the Respondent Contractor Company, the allowance could not be made.

8. Upon the court's question, however, the learned Senior Standing Counsel for the Appellant/Revenue was unable to satisfy as to how the work, in the absence of sub contractors, was really carried out by the Respondent/ Assessee Company and why the estimate of the Gross Profit/Net Profit by the Appellate Authority could not be made, and no satisfactory answer could be given by the learned

counsel for the Revenue.

9. The learned counsel for the Respondent/Assessee, however, submitted that the agreement to the extent of 10% disallowance was made by the Assessee to buy peace and such disallowance has definitely given a much better compared result of Net Profit over 5% and a Gross Profit over 10% in the present assessment year compared to the previous years, which were given in the form of table by the learned Tribunal in the impugned order extracted above. Therefore, he submitted that the fact finding Bodies at appellate levels have given proper, cogent and reasonable estimation of profits in the hands of the contractor Assessee and the said findings do not give rise to any question of law, much less a substantial question of law, requiring consideration by this Court.

10. On the other issue of disallowance under Section 41(1) of the Act to the extent of Rs.18,16,728/-, the relief has been given by both the Appellate Authorities also, giving their findings, as they found that the amount in question did not become bad merely on expiry of three years of limitation and there was no cessation of liability in the hands of the Assessee.

11. Having heard the learned counsel for the parties, we are of the clear opinion that the impugned order of the learned Tribunal does

not give rise to any question of law much less a substantial question of law.

12. A bare perusal of the compared results of the Gross Profit and Net Profit by the Assessee given in para 7 of the Tribunal's order clearly shows that the said Gross Profit at the rate of 14.21% and Net Profit at the rate of 3.83% declared by the Assessee, with the addition of 10% agreed by the Assessee before the learned Commissioner of Income Tax (Appeals), resulted in a much better result of profits declared by the Assessee in the present Assessment Year viz., A.Y.2010-11 as compared to the previous years. The Net Profit rate in the previous three years was less than 3%, whereas the Assessee himself declared the net profit at the rate of 3.83% before the aforesaid addition of 10% of Rs.4,41,08,210/-. Therefore, the estimation of profit by the Appellate Authorities even on the premise taken by the Assessing Authority that some of the sub contractors could not be produced before the Assessing Authority, does not result in any perversity in the findings of the learned Commissioner of Income Tax (Appeals) as well as the learned Tribunal.

13. It is well known that where the books of accounts maintained by the contractors are not accepted by the Department, the estimation of profit made on the basis of history of Gross Profit rate and Net Profit

rate of the Assessee in the previous years or comparable cases of contractors can be made. Once such profit rates are compared, the additions on account of non confirmation or non production of the sub contractors, etc. is totally irrelevant and cannot be made.

14. In the hierarchy of the fact finding bodies created under the Income Tax Act, obviously the findings of the Assessing Authority stand superseded for all purposes, by the findings of the higher appellate authorities. Unless glaring perversity in the findings of the appellate authorities are pointed out and established by the Revenue in the Appeals filed by them under Section 260A of the Act, there is nothing for the High Court or Constitutional Courts to do in such matters. The findings of fact arrived at by the Authorities below are binding on the High Court under Section 260A of the Act, unless the perversity as aforesaid is clearly visible, established and proved.

15. As aforesaid, as against the perversity in these findings, we see a better taxable income finally taxed in the hands of the Assessee, *albeit* with the agreement to disallowance to the extent of 10% of the payments made to the sub contractors, which the Assessee appears to have agreed under the compulsion of circumstances to avoid litigation and to buy peace.

16. In fact, the results declared by the Assessee of the net profit

rate at the rate of 3.83% was much better as compared to previous three years and only marginally less than the previous two years of 2005-06 and 2006-07, which were at the rate of 4.20% and 3.94%. In these circumstances, no disallowance was called for. Still, if the Assessee agreed to such addition to apparently buy peace with the Department, we fail to understand as to why the Revenue has filed these Appeals to drag cases further in the High Court incurring the loss of man hours and cost of litigation. Such unnecessary litigation on the part of the Revenue Authorities deserves to be strongly deprecated, but, the Revenue Authorities do not seem to be seeing the sense behind this and keep on filing Appeals under Section 260A of the Act, as a matter of routine.

17. Though the provisions of Section 260A of the Act are intended only to settle the substantial questions of law arising from the order of the Tribunal, such appeals, against the pure findings of facts, are also filed in an absolutely reckless manner. We strongly deprecate this practice of the Revenue Authorities, as there seems to be no application of mind by the higher Authorities in sanctioning filing of these appeals before the High Court. We would have imposed exemplary costs in the present case also to compensate the Respondent/Assessee, who had to incur such litigation expenditure at

all the levels of appellate forums, three in number, beyond the Assessing Authority, viz., before Commissioner of Income Tax (Appeals), before the Income Tax Appellate Tribunal and before the High Court. However, we are not imposing the said costs with a clear warning to the Revenue Authorities in this regard. They should, as responsible Authorities, try to give quietus to litigation instead of mindlessly increasing the same before the Constitutional Courts. Even to dismiss such frivolous appeals, the precious time of the court is taken. In the present case itself, during Covid times, when we are hearing urgent matters through Video Conferencing, such matters are brought before us to be heard at least for an hour and then to pass such a detailed order.

18. We expect and have a sanguine hope that the Revenue Authorities will see the absence of reasonableness in filing such Appeals in future. On the one hand, the Central Board of Direct Taxes keeps on issuing of litigation policies and as of now, the latest CBDT instructions talks of withdrawal of Appeals with Revenue stake of less than Rupees One Crore. On the other hand, by such arbitrary additions made by the Assessing Authority, merely because the Revenue's stake may be more than Rupees One Crore for the Revenue Department, the validity of substantial question of law arising in the matter ought to

have been examined by the responsible authorities of the Revenue Department, before filing such Appeals before this Court.

19. In these circumstances, while not imposing the cost on the Appellant/Revenue with the hope that they will not file such unnecessary Appeals in future, we dismiss this Appeal in favour of the Respondent/ Assessee, while holding that no question of law arises in the present Appeal at all. No costs.

20. Registry is directed to send a copy of this order to the Chairman, Central Board of Direct Taxes (CBDT), New Delhi, and to the Secretary, Ministry of Finance, Government of India, New Delhi and also to the President, Income Tax Appellate Tribunal, for information and needful.

(V.K.J.) (K.R.,J.)
7.8.2020

ssk/kpl
Index:Yes
Internet:Yes

To
1. Income Tax Appellate Tribunal, 'C' Bench, Madras.
2. Commissioner of Income Tax
   Chennai.
3. Asst. Commissioner of Income Tax,

Company Circle VI(3), Chennai.

4. M/s.SPL Infrastructure Pvt. Ltd.,
   No.15, Kasthuri Rangan Street,
   Alwarpet, Chennai-18.

5. The Chairman,
   Central Board of Direct Taxes (CBDT),
   9th Floor, Lok Nayak Bhawan,
   Khan Market
   New Delhi 110 003.

6. The Secretary,
   Ministry of Finance,
   Government of India,
   New Delhi.

7. The President
   Income Tax Appellate Tribunal
   3rd & 4th Floor, Pratishtha Bhawan
   Maharshi Karve Marg
   Mumbai 400 020.

Dr.VINEET KOTHARI, J.

and

KRISHNAN RAMASAMY, J.

ssk.

T.C.A.No.766 of 2017

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