



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK 'SMC' BENCH, CUTTACK**

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.458/CTK/2019

Assessment Year : 2014-15

Srabani Constructions Pvt Ltd., A-16, Plot No.1185, Nayapalli, Bhubaneswar.	Vs.	ACIT, Corporate Circle -1(2), Bhubaneswar,
PAN/GIR No.AAGCS 8902 A		
(Appellant)	..	(Respondent)

Assessee by : Shri Mohit Sheth, AR
Revenue by : Shri Subhendu Dutta, DR

Date of Hearing : 18/12/ 2020
Date of Pronouncement : 12 /3/2021

ORDER

This is an appeal filed by the assessee against the order of the CIT(A),1, Bhubaneswar dated 5.9. 2019 for the assessment year 2014-15.

2. The assessee has raised the following grounds of appeal:

'1. For that on the facts and in the circumstances of the case, the addition of Rs.41,84,879/- as made by way of disallowance u/s.40(a)(ia) of the Act is uncalled for and unjustified.

2. For that the AO is wholly unjustified to make an addition of Rs.1,68,54,180/- u./s.28 by treating 15% of total advances received from customers as income of the appellant."

3. Apropos Ground No.1 of appeal, Id counsel for the assessee submitted that the assessee, in the relevant assessment year was engaged in the real estate business and had paid a sum of Rs.41,84,879/- to

contractors on which TDS alongwith interest was deposited on 31.3.2015 with the Government. He submitted that in support of deposit, a challan was also furnished before the authorities below. He submitted that TDS amount was deposited much before the completion of assessment. He submitted that when the assessee has already deposited the TDS amount, the AO is not justified in making entire amount as addition and Id CIT(A) is not justified in confirming the same.

4. Replying to above, Id DR submitted that when the assessee had not deducted the TDS u/s.194C of the Act on the payments to the contractors of Rs.41,84,879/-, the AO had no option but to disallow the entire amount. Ld D.R. submitted that the receipt of payment was not furnished before the AO and Id CIT(A). He, therefore, supported the orders of lower authorities.

5. On consideration of the rival submissions, I observe that the assessee is in the business of real estate and made payments of Rs.41,84,879/- to the contractors, who were engaged for construction work. However, as stated by Id A.R. that the TDS amount was not deposited to the Government due to financial stringency and later on deposited before the completion of the assessment. Section 194C of the Income Tax Act provides that any individual making a fee to a residential individual, who carries out 'work' as a contract between the 'specified individual' and the 'resident contractor,' is obliged and required to deduct tax at source. In this case, the assessee could not deposit the TDS within the stipulated period as

specified in the Act and, therefore, the AO made disallowance by invoking the provisions of section 40(a)(ia) of the Act. Ld A.R. of the assessee submitted that the assessee has deposited Rs.73,437/- (i.e. TDS u/s.194C of Rs.62,230/- and interest of Rs.11,201/-) against payment of Rs.41,84,879/- on 31.3.2015, i.e. much before the completion of assessment, supported by challan placed in paper book at page 89. From the above, it is discernible that the assessee has already deposited the TDS alongwith interest before completion of assessment. We also note that a person is liable to pay interest under section 201(1A) for failure to deduct tax at source or delay in payment of tax deducted at source and interest under section 206C(7) is levied for failure to collect tax at source or delay in payment of tax collected at source. In this case, the assessee has already deposited the TDS alongwith interest to the Government exchequer, as is evident from the challan, placed before the Tribunal. In view of above, I am of the considered view that no loss is caused to the revenue. Hence, I allow this ground of appeal of the assessee.

6. Apropos Ground No.2 of appeal, facts as emanated from the assessment order that during the course of assessment proceedings, the Assessing officer noticed that the assessee was engaged in the business of real estate and filed the return of income on 30.9.2014 declaring total loss of Rs.1,87,16,175/-. From the financial statements, the AO noticed that the assessee has received advance of Rs.11,23,61,227/- from the

customers. The AO required the assessee to state the method adopted for the recognition of revenue and also to furnish complete details with working for the amount shown in the profit and loss account. The assessee submitted that the income from the real estate business was recognised on the basis of actual registration of properties during the year and no percentage completion method was adopted. It was stated that due to low market demand & scarcity of funds, the percentage completion of all on going project were lower than in an average. However, the AO noted that the assessee did not file any other documents in support of the financial statements as well as the necessary self-supporting documentary evidences in respect of the amounts shown as work-in-progress and as advances received from the customers. The AO also noted from Form 3CD dated 2.9.2014 that at column 13(a), the assessee has certified that it is following mercantile system of accounting but actually for the purpose of accounting, the assessee is following on its own system inasmuch as it has accounted income only after the property has been registered. It was in this backdrop that the Assessing Officer observed the books of accounts are not reliable and, therefore, rejected the same and considering the fact that the projects have been ongoing for at least five financial years on which the assessee has not offered any income for taxation, estimated the income @ 15% of advance from customers shown at Rs.11,23,61,227/-, which works out to Rs.1,68,54,180/- and

added the same to the income of the assessee. In first appeal, the action of the AO was confirmed.

7. At the time of hearing, Id counsel for the assessee submitted that the assessee has been following project completion method consistently. He submitted that the since the assessee is following project completion method, the AO has no power to discard this and adopt to estimate 15% on the customer's advance by applying percentage completion method. He submitted that during the assessment proceedings, the assessee has produced all the details as asked for by the AO. He submitted that the advance from customers is a liability. He further submitted that the opening balance as at 1.4.2013 is Rs.8,09,01,787.64 and closing balance as at 31.3.2014 is Rs.11,23,61,226.65 as is evident from the ledger account of the assessee duly furnished before the lower authorities. Therefore, no addition could be made with regard to credit balances brought forward from either assessment years. Ld A.R relied on the decision of Hon'ble Gujarat High Court in the case of CIT vs Shivalik Buildwell Pvt Ltd., (2013) 40 taxmann.com 219 (Guj), wherein, it was held that assessee being a developer of project, profits in its case would arise only on transfer of title of property and, therefore, receipt of any advance or booking amount could not be treated as trading receipt of year under consideration. He also relied on the decision of Chandigarh ITAT in the case of M/s. Kuldip Industrial Corpn vs ITO (1987) TAXATION 84(4) -96, wherein, it was held that no

addition could be made with regard to credit balances brought forward from earlier assessment years. He submitted that similar view has already been taken by Chandigarh Tribunal in the case of Kailash Rice Mills vs ITO (1983) 32 CTR (Trib) 18 (Chandigarh). He also referred to the decision of Chandigarh Bench in the case of ITO vs M/s. Shanti Constructions, in ITA No.289/Chd/2017 for A.Y. 2012-13 order dated 16.5.2019, wherein, the above two decisions have been followed. Lastly, he submitted that the adoption of 15% on advance from customers is highly excessive, which should be reduced to a reasonable basis on the transaction for the year under consideration only and not in the balance brought forward of earlier years.

8. Replying to above, Id DR supported the orders of lower authorities.

9. On careful consideration of the rival submissions and from a careful perusal of record, I find that undisputedly, being the assessee is a builder and promoter, has been following project completion method of accounting, in which the net profit can be offered at the time of completion of project. It is also undisputed fact that during the course of assessment proceedings the assessee did not produce the books of account and other documents as sought by the Assessing Officer. Therefore, the Assessing Officer has rejected the books of account of the assessee under [section 145\(3\)](#) of the Act and estimated the income on the advance received from customers. The rejection of books of account as well as the estimation of income @ 15% on

customer's advance was approved by the Id. CIT(A). Once the books of account are rejected and the assessee is not co-operating, the only option left with the Assessing Officer is to estimate reasonable income after taking into account the total receipts of that year. However, in this case, the authorities below have adopted the estimation on the total amount received from the customers. I find that in the case of Shivalik Buildwell Pvt Ltd.(supra), it has been held that assessee being a developer of project, profits in its case would arise only on transfer of title of property and, therefore, receipt of any advance or booking amount could not be treated as trading receipt of year under consideration. In the case of Kuldip Industrial Corpn (supra), it has been held that no addition could be made with regard to credit balances brought forward from earlier assessment years. In the present case also, the balances have been brought forward from earlier years and the AO has adopted 15% profit of the advance from customers as the revenue to be recognised on the amount brought forward of earlier years and also the amount received in the present year.

10. In the present case, the AO has made addition of Rs.1,68,54,180/ @ 15% by considering whole amount of advance from customers i.e. closing balance as on 31.3.14 of Rs.11,23,61,227/-, which also includes opening balance from customers brought forward from earlier year as opening balance as on 1.4.2013 of Rs.8,09,01,787.64. As I have noted above that as per the decision of Hon'ble Gujarat High Court in the case of Sjhivalik

Buildwell pvt Ltd (supra), the profit in its case would arise only on transfer of title of property, therefore, receipts of any advance or booking amount could not be treated as trading receipt of the year under consideration. We are also in agreement with the contention of Id counsel for the assessee on the strength of the order of ITAT Chandigarh in the case of Kuldip Industrial Corpn (supra), wherein, the Co-ordinate Bench has held that no addition could be made with regard to credit balance brought forward from earlier assessment years. In the present case also, the AO has not brought on record that the assessee has transferred the title of property during the relevant period, which accrued the business profit of the assessee. However, the AO while disputing the manner of accounting adopted by the assessee i.e. project completion method and tax the element of profit embedded in the amount received by the assessee during the relevant financial period from customers which was Rs.3,65,00,439.01 during the period. Therefore, the assessee gets part relief with regard to amount of advance from customers brought forward from financial year 2013-14 as opening balance as on 1.4.2013. The AO is directed to delete the addition @ 15% of opening balance of advance from customers of Rs.8,09,01,787.64. In view of foregoing discussion, I am of the considered opinion that the AO is entitled to make addition pertaining to the element of profit embedded in the amount of advance received from customers during the relevant financial period 2013-14 which was Rs.3,65,00,439 on which

the AO has made addition @ 15% of total amount of advance from customers, which has also been confirmed by the Id CIT(A). Ld counsel vehemently argued that the revenue recognised by the AO on the amount advanced from customers @ 15% is very high, excessive and unreasonable. Therefore, same may kindly be reduced to 5% of total amount received from customers during the year under consideration and not the whole amount which includes the brought forward advance from customers. He submitted that the assessee being a builder and developer, has to incur huge expenditure on development and construction of projects on the unit allotted to the respective customers against which advance has been received. Ld counsel pointed out that in this case, the assessee has filed return declaring huge loss, therefore, the assessee would get nothing if unreasonable and excessive profit is estimated but prayed that the profit element which is reasonable, just and proper may kindly be taxed in the hands of the assessee imparting justice to the assessee. He also submitted that the assessee was not allowed to explain his stand and submission on the percentage of profit determined by the AO and Id CIT(A). Therefore, the estimation may kindly be reduced to a reasonable 5% on total receipts during the relevant financial period.

11. Ld D.R. submitted that the assessee is a developer and builder and earning huge profit from its project and not offering any amount for taxation. Therefore, the AO was right in making addition with regard to

element of profit embedded in the amount of advance from customers. Therefore, the action of the AO may kindly be upheld. Ld D.R. in all fairness submitted that the percentage of profit taken by the AO is 15% and the assessee's request to take 5% of profit from advance from customers is also not reasonable to cover the possible of leakage of revenue. Therefore, the prayer of the assessee may kindly be dismissed and action of the AO may kindly be upheld. Ld D.R. submitted that if the contention of Id A.R. is found to be just and proper for determination of profit percentage, then he would prefer to leave this issue for the wisdom of the Bench to determine percentage of profit for taking care of all possible leakage of revenue.

12. On careful of rival submission, first of all I observe that the AO is right in taking action against the assessee, wherein, he proceeded to tax the element of profit embedded in the amount of advance from customers. As I have noted that the AO was not right in taking the entire amount of advance including opening balance brought forward from earlier financial period and amount received during the relevant financial period as advance from customers. In view of above noted factual matrix, I am inclined to hold that the advance from customers at the end of the relevant preceding financial period and the opening balance brought forward from the preceding financial year(F.Y. 2012-13) cannot be taken for estimating and taxing the profit element therein in the hands of the assessee in present

assessment year 2014-15. Although I have also concluded above that the profit element embedded in the amount during the financial period 2013-14 can be taxed by the AO in the hands of the assessee for assessment year 2014-15 but at the same time, I have no hesitation to hold the profit percentage of 15% of total advance amount from customers is very high, unreasonable and excessive and simultaneously I also observe that the prayer of the Id counsel for the assessee that the profit may be estimated @ 5% is also very unreasonable and thus not acceptable. Considering the entire facts and circumstances of the case and to take care of all possible leakage of revenue, I direct the AO to estimate 10% of amount of advance received from customers during the relevant financial year 2013-14 relevant to assessment year 2014-15 only. The AO is direct to recompute the profit as per the direction given above. Accordingly, Ground No.2 of appeal is partly allowed.

13. In the result, appeal of the assessee is partly allowed.

Order pronounced on 12/3/2021.

Sd/-
(Chandra Mohan Garg)
JUDICIAL MEMBER

Cuttack; Dated 12 /3/2021
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : Srabani Constructions Pvt Ltd.,
A-16, Plot No.1185, Nayapalli, Bhubaneswar.
2. The Respondent. ACIT, Corporate Circle -1(2),
Bhubaneswar,
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT- 1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack