

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA No. 5760/MUM/2012
(Assessment Year: 2007-08)

The ACIT, Cir. 6(1),
Mumbai.

... Appellant

Vs.

M/s. Asahi Infrastructure & Project Ltd.
502, Isphani Building, 120/122,
Modi Street, Fort, Mumbai 400001
PAN: AAACA 8777F

.... Respondent

Appellant by : Shri A.Ramachandran
Respondent by : Shri Anil Thakrar

Date of hearing : 23/06/2016
Date of pronouncement : 20/07/2016

ORDER

PER MAHAVIR SINGH, J.M:

This appeal by Revenue is arising out of order of CIT(A) - Mumbai in Appeal No.CIT(A)-14/IT.402/Rg.6(1)/09-10 dated 29/06/2012. Assessment was framed by ITO, Ward 6(1)(2) for the assessment year 2007-08 vide his order dated 31/12/2009 under section 144 of the Income Tax Act, 1961 (hereinafter referred to as ' the Act').

2. The first issue, in this appeal of the Revenue is against the order of CIT(A) deleting the addition made by the AO by disallowing the expenses, which are not supported by evidences. For this, Revenue has raised ground

regarding not allowing sufficient opportunity by the CIT(A) to the AO and admitting additional evidences in contravention of Rule 46A of the Income Tax Rules, 1962 (in short 'the Rules). For this the Revenue has raised following two Grounds:-

1. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the additions of RS.1,56,67,294/- based on fresh evidence without appreciating the fact that the A.O. was not given sufficient opportunity; CIT(A) forwarded to the A.O. the submissions of assessee only without forwarding supporting evidences which were relied upon by the CIT(A) to rebut the same in the last week of December 2011, and passed the order in the month of March, 2012".*

2. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A)) erred in deleting the additions of Rs.1,56,67,294/- based on fresh evidence without giving opportunity to A.O. to refute the same, in contravention of Rule 46A of the LT. Act, 1961".*

3. Briefly stated, the facts are that the assessee is engaged in the business of reseller of iron and steel and also construction work. The AO, during the course of assessment proceedings noticed from the P&L account of the assessee that the assessee has credited an amount of Rs.16,52,93,228/- and Rs.3,81,28,000/- being sales and service, contract and labour job works respectively and also debited sum of Rs.17,82,72,672/- being cost of sales and a sum of Rs.2,05,43,030/- being cost of labour charges. The assessee furnished party wise details and AO made enquiries by issuing notices under section 133(6) of the Act with respect to labour charges paid to various parties. The AO noted that receipt of contract from the parties is as follows:-

1. Aegis Logistic Ltd.	Rs. 19,95,214/-
2. Sealord Containers Ltd.	Rs. 3,95,55,531/-
3. Engineering & Agencies Pvt. Ltd.	Rs. 13,02,784/-
4. Dodsai Pvt. Ltd.	<u>Rs. 1,09,41,765/-</u>
Total :	Rs. 5,37,95,294/-"

But the assessee has shown receipt from contract and labour job work at Rs.3,81,28,000/-, as against the actual receipt of Rs.5,37,95,294/-. According to AO, there is difference in receipt of labour charges i.e. short declaration of labour receipts, the AO treated the same as unexplained and added to the

returned income of the assessee. Aggrieved, assessee preferred an appeal before the CIT(A). Before CIT(A), assessee submitted a reconciliation statement and stated that the difference of Rs.1,56,67,294/- is taken due to misunderstanding of facts by the AO due to work contract tax of Rs.18,22,140/-, service tax element of Rs.17,19,693/-, sales to Dodsai Pvt. Ltd. amounting to Rs.1,09,41,765/- and also sales returned amounting to Rs.11,82,896/-. The assessee filed complete reconciliation, which is reproduced in the CIT(A)'s order and the same is again being reproduced as under:-

"Total receipts of Rs.5,37,95,294/- highlighted on page 5 of the assessment order:-

<u>Name</u>	<u>Amount</u>
1. Aegis Logistic Ltd.	Rs. 19,95,214/-
2. Sealord Containers Ltd.	Rs. 3,95,55,531/-
3. Engineering & Agencies Pvt. Ltd.	Rs. 13,02,784/-
4. Dodsai Pvt. Ltd.	<u>Rs. 1,09,41,765/-</u>
<i>Total :</i>	<i>Rs. 5,37,95,294/-"</i>

The above figures comprises of receipts on account of Contract Work, Works Contract Tax, Service tax, Sales and Sales Returns. The same is worked out as under:-

Receipts on Account of Contract and Labour job work (as also accepted by the Learned Income Tax Officer)Rs.3,81,28,000/-

<i>Add:- Works Contract Tax</i>	<i>Rs. 18,22,140/-</i>	
<i>Service Tax</i>	<i>Rs. 17,19,693/-</i>	
<i>Net Sales (Dodsai)</i>	<i>Rs.1,09,41,765/-</i>	<i>Rs. 1,56,67,294/-</i>

<i>Total</i>		<i>Rs. 5,37,94,494/-</i>
		=====

These reconciliations are referred back by CIT(A) to the AO for remand report vide letter dated 22/3/2011 and AO send remand report dated 14/11/2011, wherein it was stated that the assessee has been given opportunity but he has not furnished any details as required. The CIT(A) on the request of the assessee allowed one more opportunity and issued another letter dated 20/12/2011 and was asked to examine records/books of account of the assessee and send remand report by 6/1/2012. The AO did not send any remand report by the appointed date and hence, a reminder was sent on 6/1/2012, to comply with the same by 20/2/2012. No remand

report was received from the AO by CIT(A), a final reminder was issued on 27/2/2012 to examine the issue and send the requisite report by 5/3/2012. In this requisition, it was clearly mentioned by the CIT(A) that in case the AO fails to submit the remand report, ex-parte decision on merits will be passed on the submissions of the assessee. No remand report was sent by the AO despite these three opportunities given to him and CIT(A) based on the reconciliations submitted by the assessee and other details deleted the addition. Aggrieved against the action of the CIT(A), Revenue came in second appeal before the Tribunal.

4. Before us, Ld. Sr. Departmental Representative only requested for setting aside of the issue to the file of the CIT(A) or the AO for the reason that the CIT(A) admitted additional evidences in contravention of Rule 46A of the Rules and also not allowed any opportunity to the Assessing Officer. Apart from the issue of opportunity and violation of Rule 46A of the Rules, Revenue has not raised any other issue on merits.

5. On the other hand, Ld. Representative for the assessee stated that the complete reconciliation was submitted before the CIT(A) and which was forwarded to the AO for seeking remand report and AO has not replied despite the fact that complete details were available before him. According to him, the CIT(A) after going through the reconciliation statement and other evidences allowed the claim of the assessee.

6. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the assessee had filed a complete reconciliation and difference in labour receipts arose due to the fact that the AO has not gone into details of work contract, service tax and net sales and sales returns to Dodsai. We find that the payments towards services to

Dodsals amounting to Rs.42,88,111/- was subject to TDS and assessee had deducted the same. Further, the amount of Rs.66,53,654/-, the balance amount, was towards sale to Dodsals and thereby the total difference to Rs.1,09,41,765/- was explained. Above all, we have gone through the order of CIT(A) and seen that the AO was given reminder to send remand report and after examining the books of account of the assessee qua the reconciliation of other evidences, but the AO kept silent on three occasions i.e. covering almost six months i.e. upto 20/12/2011, till the date of passing of appellate order on 29/06/2012. Even now, before us, the Revenue's contention is only limited that for admitting additional evidences, the CIT(A) has contravened the provisions of Rule 46A of the Rules. We find that CIT(A) has given ample opportunities with specific directions to the AO, which were never complied by the AO due to reasons known to him only. It means that the Revenue was not at all interested in co-operating with the appellate proceedings. In terms of the above and in the given facts and circumstances of the case, we are of the view that the CIT(A) has deleted this addition based on sufficient evidences and particularly based on the reconciliation submitted by the assessee. The AO was allowed sufficient opportunity to examine the details but he chose not to. Hence, we confirm the order of the CIT(A) and this issue of Revenue's appeal is dismissed.

7. The next issue, in this appeal of Revenue is against order of CIT(A) deleting disallowance of Rs.40,81,308/- added by invoking provisions of section 44AD and 44AF of the Act. For this, Revenue has raised following Ground No.3.

3. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.40,81,308/- stating that A. O. was not justified in invoking the provisions of sec. 44AD & 44AF of the I.T. Act without appreciating the fact that provisions of sec. 44AD/44AF were never invoked by A.O. \ and A.O. had estimated the profits in absence on complete details being furnished by the assessee".

8. We have heard the rival contentions and gone through the facts of the case. We find that the AO has applied the provisions of section 44AD and 44AF of the Act in assessing assessee's income of Rs.40,81,308/- under totally misunderstanding of facts and law. We find that the assessee's total turnover is at Rs.20,40,65,412/- and being a Limited Company, it's accounts are audited as per provisions of the Companies Act, 1956 and under the provisions of section 44AB of the Act. Even otherwise the AO could have resorted to another provision in case the assessee fails to produce the books of accounts. The provisions of section 44AD/44AF of the Act apply only to presumptive assessment, where the turnover is Rs.40.00 lacs or less and not the cases, where turnover is more than that. Accordingly, we are of the view that the CIT(A) has rightly deleted the addition and we confirm the same.

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

Order pronounced in the open court on 20/07/2016.

Sd/-
(RAMIT KOCHAR)
ACCOUNTNAT MEMBER
Mumbai, Dated 20/07/2016

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Vm, Sr. PS
LKDeKa, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai

	Details	Date	Initials	Designation
1	Draft dictated on	24/6/2016		Sr.PS/PS
2	Draft Placed before author	11/07/2016		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk	20/07/2016		Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			