

आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI

श्री सी .नागेंद्रप्रसाद, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI C.N. PRASAD, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपीलसं./I.T.A. No.6063/Mum/2016
(निर्धारणवर्ष / Assessment Year:2011-12)

Assistant Commissioner of Income Tax- Circle 6(1)(2) Room No.563, 5 th Floor, Aaykar Bhavan, M.K. Road Mumbai-400 020	बनाम/ Vs.	Asahi Infrastructure & Projects Limited 502, Isphani Building, 120/122 Modi Street, Fort Mumbai-400 001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.AAACA-8777-F		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

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आयकरअपीलसं./I.T.A. No.6134/Mum/2016
(निर्धारणवर्ष / Assessment Year: 2011-12)

Asahi Infrastructure & Projects Limited 502, Isphani Building, 120/122 Modi Street, Fort Mumbai-400 001	बनाम/ Vs.	Deputy Commissioner of Income Tax -6(1) Mumbai
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.AAACA-8777-F		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

Revenue by	:	Rajesh Kumar Yadav, Ld.DR
Assessee by	:	Anil Thakrar, Ld. AR

सुनवाई की तारीख/ Date of Hearing	:	10/07/2018
घोषणाकीतारीख / Date of Pronouncement	:	10/07/2018



ITA Nos.6063 & 6134/Mum/2016
Asahi Infrastructure & Projects Ltd.
Assessment Year-2011-12

आदेश / ORDER

Per Bench

1. These are cross appeals for Assessment Year [AY] 2011-12 which contest the order of the Ld. Commissioner of Income-Tax (Appeals)-12 [CIT(A)], Mumbai, *Appeal No.CIT(A)-12/DCIT-6(1)(2)/141/13-14* dated 29/07/2016. The registry has noted that the revenue's appeal has been filed with a delay of 3 days, which has not been agitated by Ld. Authorized Counsel for Assessee [AR], *Shri Anil Thakrar* before us. Keeping in view the same, we proceed to dispose-off the cross-appeals on merits.

2. The effective grounds raised by the revenue reads as under:-

1. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) while upholding action of the A.O. in rejecting the books of account u/s 145(2) of the I.T. Act, is not justified in deleting addition made on account of rejection of books of account of trading activity."*
2. *"On the facts and in the circumstances of the case and in law. The Ld. CIT(A) is not justified in reducing the percentage of estimation of net profit from 8% to 7% on account of construction receipt."*

Whereas the effective grounds raised by the assessee read as under:-

1. Whether on the facts and in the circumstances of the case in law:
 - >The Learned Commissioner of Income Tax (Appeals) was justified in upholding:
 - * The Assessing Officer's stand of rejecting the books of accounts and making an addition on estimation basis @7% on account of construction receipts.

The assessment for impugned AY was framed by *Ld. Deputy Commissioner of Income Tax-Circle 6(1), Mumbai [AO] u/s 143(3) of the Income Tax Act, 1961* on 19/03/2014 wherein the income of the assessee has been assessed at Rs.525.37 Lacs after certain additions as against returned income of Rs.300.69 Lacs *e-filed* by the assessee on 30/09/2011



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which was later revised to same figures on 29/09/2012. The subject matter of cross appeals before us is estimation of income against *trading activities* as well as *construction activities* carried out by the assessee in the impugned AY.

3.1 Briefly stated the assessee being *resident corporate assessee* engaged in *construction work and trading of iron & steel* reflected combined *net profit* of Rs.3.30 crores against *construction turnover* of Rs.57.47 Crores & *trading turnover* of Rs.90.07 Crores. As evident from *para 3.2* of the quantum assessment order, the *Gross Profit rate* of trading activity & construction activity has been reflected as 0.68% & 8.28% respectively. The same *para* record a finding that the assessee failed to submit the requisite details as called for vide letter dated 19/12/2013 with respect to construction activities viz. *details of work done, material / labor utilized, work-in-progress etc.*

3.2 To verify the genuineness of the purchases reflected by the assessee, notices u/s 133(6) were issued to ten parties, the details of which have been extracted at *para 3.3 of the quantum assessment order*. However, most of the notices either returned back undelivered or no reply was received against the same. Only three parties responded to the notices which led the Ld. AO to doubt the genuineness of the purchases reflected by the assessee. A closer look into the confirmation filed by the parties revealed that the assessee was selling as well as purchasing material from the same parties without making any actual payment which led the Ld. AO



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to form a belief that the assessee was engaged in circular trading with these parties.

3.3 The assessee, vide submission dated 18/03/2014, defended the financial results and sought time to compile quantitative details of material consumed in construction activities. It was further submitted that the assessee was a *public listed company* and regular assessee for several years and the accounts were subjected to statutory / tax audit and therefore, there was no justification to reject the books of accounts. However, not convinced, Ld. AO, while rejecting the books u/s 145(2), estimated *net profit rate* of 1% in *trading activities* and 8% in *construction activities* which resulted into an addition of Rs.2.19 crores in the hands of the assessee.

3.4 Besides above, the assessee was saddled with addition of Rs.2.73 Lacs on account of certain *alleged bogus purchases* and another addition of Rs.2.73 Lacs on account of mismatch in *Annual Information Return [AIR] data*.

4. Aggrieved, the assessee contested the same with partial success before Ld. CIT(A) vide impugned order dated 29/07/2016 wherein the Ld. CIT(A), upon factual matrix, did not concur with the stand of Ld. AO in rejecting the books of accounts. Finally, the estimated addition on account of *trading results* were deleted whereas the *net profit rate* on account of *construction activity* was reduced to 7% in the following manner:-

6.3 *I have carefully perused the assessment order and the submission made by the appellant's AR vide letter dated 31.05.2016, 01.07.2016 and 29.07.2016. It is*



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seen that appellant is engaged in two types of activity, first such activity is trading of iron & steel, MS Plate, MS Angle, G.P. Sheet etc and second activity is of construction of EWS Flats under the SRA Scheme of State Government. With respect to the trading activity of the appellant, the appellant has furnished all the relevant details which were verified by the AO, only on the basis of confirmation filed by the appellant and confirmation received from some parties in response to the notice issued u/s 133(6), came to the conclusion that the appellant was engaged in circular trading as at appearing from the confirmation letters that the appellant had purchased and sold the goods in some cases. The AO has not brought out on records evidence to establish that the appellant is engaged in circular trading. The ledger copy only indicates the purchase and sale amount, it does not reflect the item sold, rates etc., hence on the basis of ledger confirmation, it cannot be said that the appellant is engaged in circular trading. At the most, it can be a good starting point of investigation. The addition cannot be based on suspicion. In the trading activity, the AO has not found a single mistake in the books of account. The AO has not recorded his satisfaction about the correctness or completeness of the accounts of appellant or neither stated that the appellant has not followed the accounting standard as notified was being regularly followed by the appellant. In some cases, notices issued were received unserved is a correct fact but it was explained by the appellant to the AO that the address are last known address of the suppliers and the appellant was in the process of identifying their addresses. The AO thereafter has not made any investigation nor any defect were noticed by him in the books of account. Under these circumstance, I do not find merit in rejecting the books of account of trading activity of the appellant only on the basis of suspicion. For rejecting the books of account it is incumbent on the AO's part to record that the books account in either not correct or not complete. In the instance case, the AO has not found any defect in the books of account or has not recorded reason to establish that from the books true profit cannot be deduced from the books of accounts. Therefore, rejection of books of account of trading activity is not called for and accordingly addition made on account of rejection of books of account of trading activity is directed to the deleted.

With respect to the construction activity of the appellant, the AO specifically called for certain details vide show cause notice dated 11.03.2014 which was reproduced in para 3.5 of the assessment order. In that notice the AO has specifically noted that quantitative details in respect of construction business are not furnished. The AO further noted that in the show cause notice that non-furnishing of quantitative & other details in respect of construction business coupled with the facts that noticed u/s 133(6) were returned unserved lead to the conclusion that books of account were not maintained in a proper manner. In response to the show cause, the appellant vide letter dated 18.03.2014 expressed its inability to submit quantitative details of material consumed in



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respect of construction business before the AO. The AO considered the appellant's submission but it was not accepted on the following grounds

- 1 The appellant is not able to furnish item-wise details of work done and item-wise & work wise utilization of material & labour input.
- 2 The appellant has not produced day to day stock register showing purchase, sale and consumption of material.
- 3 Labour register was furnished but work wise utilization of labour has not been furnished
- 4 Notices issued u/s 133(6) have come back unserved and in two cases no reply was received.

Under these circumstance, the AO rejected the books of account and estimated the net profit at the rate of 8% of construction activity.

6.4 The appellant during appellate proceedings stated that the appellant is public limited company listed at the Bombay Stock Exchange since last 25 years. Regular books of account are maintained and are duly audited under the provision of the Companies Act, 1956 and Income Tax Act, 1961, and annual result are published in newspaper and also circulated to shareholders as per statutory provision. The appellant further stated that it is not possible to maintain a stock register to record item-wise movement of material that is used in construction process. Items like cement, steel sand/ granules etc are procured as per requirement at the site and consumption is entirely debited to the work in progress A/c. This system is generally followed in the construction industries. The appellant stated that except for the absence of stock register, there is no finding by the AO to the effect that the accounts were not correct and complete or the assessing officer was of the opinion that the income could not be deduced from the duly audited accounts maintained by appellant and hence the books of account could not be rejected. The appellant also relied on certain case laws.

6.5 I have carefully perused the assessment order and the submission of the appellant. It is seen that the AO, nowhere in the assessment order, pointed out any defects from the books of accounts produced before him. The rejection of audited books of account were on account of non-submission of item wise work done & work wise utilization of material & labour input. Non maintenance of day to day stock register, and in some case notices issued u/s 133(6) were returned unserved. The AO has not pointed out any specific defects or discrepancy at all in the books of account maintained by the appellant. The appellant argued that except stock register all the books of accounts were maintained. There was no finding of the AO that the true profit cannot be deduced from the books of account maintained by the appellant or that the accounts were not correct or complete. It is also seen that the AO has not given any basis for the estimation of 8% of net profit. The Jurisdictional Hon'ble ITAT in the appellant's case for A.Y. 2007-08, noted that the provision of section 44AD/44AF of the Act apply only to presumptive assessment, where the turnover is Rs 40 lacs or less and not the



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case, where turnover is more than that. It is true that the appellant has not maintained stock register and also expressed its inability to maintain the same. Keeping of stock register is of great importance without which books of account cannot be held as complete. The consumption of material only can be verified from the stock register- In the instance case the appellant has not maintained the stock register and is also not able to furnish the new address of parties whose notices u/s 133(6) were unserved which itself leads to no verification of the purchase and its consumption for the construction activity of the appellant. Hence, the rejection of books of account with respect to the construction activity by AO is found to be correct. Now the question arises as to how the estimation was made. Neither the AO nor the appellant has given any basis of estimation. Hence, to meet net profit from the construction activity. Hence. AO is directed to deleted the addition in excess of 7% of the construction receipt. Therefore, the ground of appeal no. 1 is partly allowed.

Aggrieved, the assessee as well as revenue is in further appeal before us.

5. The Ld. Departmental representative, *Shri Rajesh Kumar Yadav*, contested the stand of Ld. CIT(A) in granting relief to the assessee whereas the Ld. Authorized Representative [AR] for assessee, *Shri Anil Thakrar*, placed reliance on the order of this Tribunal in assessee's own case for AY 2007-08, *ITA No. 5760/Mum/2012* dated 20/07/2016, a copy of which has been placed on record.

6.1 We have carefully heard the rival contentions and perused relevant material on record. The undisputed fact remain that the assessee has failed to submit the quantitative details of the trading operations as well as details of construction activities carried out by him during the impugned AY. The Ld. AR is merely harping on the point that the assessee was a *listed public company* and therefore, the books could not be rejected by Ld. AO and the profits could not be estimated by lower authorities. We are not convinced with the same since the complete onus to substantiate the financial results



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was on assessee which he has failed to discharge. Rather this argument put more onus on assessee to support the transactions carried out by him with documentary evidences and plausible explanation. Further, in terms of Section 44AA, the assessee was required to keep and maintain books of accounts and other documents as may enable the Ld. AO to compute the total income in accordance with the provisions of the act. Therefore, Ld. CIT(A), in our opinion, erred in shifting the onus upon Ld. AO to provide relief to the assessee since even the primary onus of substantiating the transactions remained un-discharged by the assessee.

6.2 Proceeding further, it is evident from quantum assessment order that most of the notices issued u/s 133(6) to confirm the purchases transactions elicited no satisfactory response and few confirmations, as received, demonstrated that the assessee was engaged in circular trading. No plausible explanation, in this regard, is available on record. No quantitative details could be filed by the assessee with respect to trading done by him and further no details with respect to *construction activities* as called for by Ld. AO were furnished by the assessee. In such a situation, Ld. AO was left with no option but to reject the books and estimate the income of the assessee on some reasonable basis. The same is evident from the fact that Ld. first appellate authority has also confirmed the stand of Ld. AO in estimating the income from *construction activities*.

6.3 So far as the Tribunal's order for AY 2007-08 is concerned, we find that the same could not help the assessee in any manner since the matter



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is factual one and secondly, in that year, Ld. AO, by mistake, estimated the additions by invoking the provisions of Section 44AD/44AF, which is not the case here. Further, the status of assessment / appellate proceedings for intervening AYs i.e. 2008-09 to 2010-11 has not been placed before us to appreciate the position therein.

6.4 Keeping in view the fact that the assessee is *corporate assessee* and subjected to statutory audits and therefore, the books could not be rejected in a light manner, the matter stands remitted back to the file of Ld. AO for re-adjudication with a direction to the assessee to substantiate the transactions carried out by him by way of trading as well as by way of construction activities failing which Ld. AO shall be at liberty to adjudicate the issue on the basis of material / explanation available on record. The order of Ld. first appellate authority, to that extent, stands reversed.

7. Resultantly, both the appeals stand allowed for statistical purposes.

Order pronounced in the open court on 10th July, 2018

Sd/-
(C.N.Prasad)
न्यायिक सदस्य / **Judicial Member**

Sd/-
(Manoj Kumar Aggarwal)
लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 10.07.2018

Sr.PS:-Thirumalesh



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आदेश की प्रतिलिपि अग्रेषित /Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त (अपील)/ The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधिमुंबई ,आयकरअपीलीयअधिकरण ,/ DR, ITAT, Mumbai
6. गार्डफाईल /Guard File

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**उपसहायकपंजीकार/ (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण ,मुंबई / ITAT, Mumbai**