Officer (FAA) has raised following grounds of appeal:

Before S/Sh. Rajendra, Accountant Member & Dr. S.T.M. Pavalan, Judicial Member

आयकर अपील सं./ITA No. 6727/Mum/2012, निर्धारण वर्ष /Assessment Year-2009-10

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<th>DCIT 25(3), 308, C-11, Bandra-Kurla Complex, Bandra (East), Mumbai-400051</th>
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Pratiksha San. / C.O. No. 06/Mum 2014 / Nirdharan Varsh /Assessment Year 2009-10

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Date of Hearing: 06-08-2014

Date of Pronouncement: 20-08-2014

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

Challenging the order dated 16.08.2012 of the CIT(A)-35, Mumbai, Assessing Officer (FAA) has raised following grounds of appeal:

1. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to delete the addition of Rs.13,69,417/- on account of non-genuine purchases without appreciating the facts that the assessee was not able to substantiate his claims even after giving ample opportunity and also the fact that AO had given a specific finding of the fact that "M/s. N.S Enterprises" is treated as a 'Hawala Dealer' by the official website of the Sale Tax Department, Government of Maharashtra, www.mahavat.gov.in.""

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to delete the addition of Rs.1,53,22,875/- on account of suppression of sales without appreciating the fact that the assessee had credited the above amount in the next year, inspite of TDS deducted on the amount has been claimed in this year. So, it was incumbent upon the assessee to offer the same amount as income for this year as per provisions of section 198 of the I. T. Act."

3. "The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the AO be restored."

4. "The appellant craves leave to amend or alter any ground or add a new ground."

Asseesee has filed following grounds of the Cross Objections:

1. ADDITION OF Rs. 13,69,417/- IN RESPECT OF PURCHASES:
   a. The Ld. AO has erred in law and in facts in alleging that the respondent has made bogus purchases by completely ignoring various documentary evidences submitted in support of subject
transactions such as invoices, delivery challans, entries in bank statement for account payee cheques supported by bank manager’s certificate, etc.

b. The Ld. AO has erred in law and in facts in alleging that the defaults on the part of the suppliers under the provisions of the MVAT Act, would not be sufficient to hold respondent’s purchases as non-genuine.

c. The Ld. AO has erred in law and in facts in alleging that respondent’s purchases are non-genuine without bringing on record any independent and reliable evidences.

d. The Ld. AO has erred in law and in facts in alleging that respondent has received back cash from the suppliers purely on the basis of surmises and conjectures; without adding any evidence on record in support of the same.

e. The Ld. AO has also erred in alleging the respondent’s purchases are non-genuine purchases and disallowing the same as expenditure, which infact is as held by the Ld. CIT(A).

2. ADDITION OF Rs. 1,53,22,875/- ON ACCOUNT OF SUPPRESSION OF SALES: -

a. The Ld. AO has erred in law and in facts while adding as suppression of sales, an amount of Rs. 1,53,22,875/- received as advance (on which TDS was deducted). The Ld. AD has failed to appreciate that the amount received was in the nature of mobilization advance, as per terms of the contract for smooth running of work and was not a part of the Contract value. The advance received was a pure liability in nature (as evident form balance sheet) and recoverable proportionately against future running bills and accordingly, was correctly accounted for as liability in compliance with the Mandatory Accounting Standard - 9 - Revenue Recognition.

b. The Ld. AO erred in appreciating that there was no work-in-progress as on 31.03.2009 (as evident from the Balance Sheet) and the unadjusted amount of Rs. 1,41,70,000/- - received as mobilization advance represents liability as on 31.03.2009; and not income as contended by the Ld. AO.

c. The Ld. AO has erred in appreciating that the work corresponding to the advance received was completed in the subsequent year i.e. AY 2010-11 and the subject amount was duly included as part of sales.

d. The Ld. AO has also erred in claiming that the income corresponding to TDS is chargeable to tax as per the provisions of section 198 without appreciating that what is chargeable to income is only the TDS amount out of the advance received, which infact is as held by the Ld. CIT(A).

3. The respondent prays that the appeal of the Ld. DCIT - 25(3), Mumbai be dismissed on the above grounds.

4. The respondent craves leave to add, alter, substitute, amend or modify all or any of the grounds of cross objections.

During the course of hearing before us, Authorised Representative (AR) of the assessee stated that grounds of C.O. filed were infructuous. Therefore, cross objections filed by the assessee stands dismissed.

2. Assessee, an individual, engaged in the business of civil contractors, filed his return of income on 30.09.2009 declaring income of Rs. 34.02 lakhs. The AO completed the assessment on 17.12.2011 determining the income of the assessee at Rs. 2.37 crores.

2.1. First ground of appeal is about deleting an addition of Rs.13,69,417/- on account of non-genuine purchases. During the course of assessment proceedings, notices u/s.133(6) of the Act were sent to some of the sundry creditors on random basis. However, notice in the cases of M/s D K Enterprises (DKE) and N B Enterprises (NBE) were returned back by the postal authorities with the "Not Known" remarks. Therefore, he was asked give correct addresses or in the alternative to explain as to why the purchases of Rs. 5,05,259 from NBE and Rs. 8,64,158/- from DKE totaling to Rs.13,69,417 should not be treated as bogus purchase. He was also asked to submit sample bills of those parties. The assessee submitted a letter dated 05-12-2011 as under:
we tried to communicate them but there is no response at all from parties. Further our person visited at parties' places as per address on our record, but parties are not available on respective places. Please find enclosed herewith letters from our banker stating the payment details to respective parties in subsequent year ...."

The sample bills submitted contained TIN numbers of the vendors. The same were verified in the Maharashtra sales tax department official website www.mahavat.gov.in. The website had specifically put up the name of NBE with TIN number as 'Hawala Dealer' who issued bill without delivery of goods. As regards DKE, the website search did not yield any results for the TIN numbers shown in the bills. The AO concluded that the TIN number shown in DKE bill itself was bogus. After considering the submissions of the assessee, the AO held that same was not acceptable, that merely payment to parties through banking channel did not prove the genuineness of purchase or genuineness of expenses made by the assessee. He made an addition of Rs. 13.69 lakhs (Rs. 5.05 lakhs + Rs. 8.65 lakhs) to the total income of the assessee.

2.2. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him it was argued that the assessee had filed copies of bills of purchase from DKE and NBE, that both the suppliers were registered dealers and were carrying proper VAT and registration No.s, that ledger accounts of the parties in the assessee's books showed bills accounted for, that payment was made by cheques, that a certificate from the banker giving details of cheque payment to the said parties was also furnished. Copies of the consignment received from the Government approved transport contractors showing that material purchased was actually delivered at the site was furnished before the AO. It was also argued that some of the material purchased from the said parties were lying part of closing stock as on 31.03.2009 as per the statement submitted on record. After considering the assessment order and the submissions made by the assessee, FAA held that the transactions were supported by proper documentary evidences, that the payments made to the parties by the assessee were in confirmation with bank certificate, that the suppliers was shown as default under the Maharashtra VAT Act could not be sufficient evidences to hold that the purchases were non-genuine, that the AO had not brought any independent and reliable evidences against the assessee to prove the non-genuineness of the purchases, that there was no evidence regarding cash received back from the suppliers. Finally, he deleted the addition made by the AO.

2.3. Before us, the Departmental Representative argued that both the suppliers were not produced before the AO by the assessee, that one of them was declared hawala dealer by VAT department, that because of cheque payment made to the supplier transaction cannot be taken as genuine. He relied upon the order of the G Bench of Mumbai Tribunal delivered in the case of Western Extrusion Industries. (ITA/6579/Mum/2010-dated 13.11.2013). Authorised representative (AR) contended that payments made by the assessee were supported by the banker’s statement, that goods received by the assessee from the supplier was part of closing stock, that the transporter had admitted the transportation of goods to the site. He relied upon the case of Babula Borana (282 ITR251), Nikunj Eximp Enterprises (P) Ltd. (216 Taxman171) delivered by the Hon’ble Bombay High Court.

2.4. We have heard the rival submissions and perused the material before us. We find that AO had made the addition as one of the supplier was declared a hawala dealer by the VAT Department. We agree that it was a good starting point for making further investigation and take it to logical end. But, he left the job at initial point itself. Suspicion of highest degree cannot take place of evidence. He could have called for the details of the bank accounts of the suppliers to find out as whether there was any immediate cash withdrawal from their account. We find that no such exercise was done. Transportation of good to the site is one of the deciding factor to be considered for resolving the issue. The FAA has given a finding of fact that part of the goods received by the assessee was forming part of closing stock. As far as the case of Western Extrusion Industries.
(supra) is concerned, we find that in that matter cash was immediately withdrawn by the supplier and there was no evidence of movement of goods. But, in the case before us, there is nothing, in the order of the AO, about the cash trial. Secondly, proof of movement of goods is not in doubt. Therefore, considering the peculiar facts and circumstances of the case under appeal, we are of the opinion that the order of the FAA does not suffer from any legal infirmity and there are not sufficient evidence on file to endorse the view taken by the AO. So, confirming the order of the FAA, we decide ground no. 1 against the AO.

3. Next ground of appeal is about addition of Rs. 1,53,22,875/- on account of suppression of sales. The AO, during the assessment proceedings, found that the the assessee had received Rs. 3,85,22,149/- from M/s. Jain Irrigation System Ltd. (JISL), that TDS had been deducted to the tune of Rs. 8, 70,630/- in this regard. Looking into the turnover of Rs. 3,96,94,583/- as per Profit & Loss a/c., the assessee was asked to submit the turnover reconciliation with TDS of all the parties. From the reconciliation, he found that the assessee had shown the receipt of Rs. 2,12,29,584/- only from JISL, whereas the TDS of full amount of Rs. 8,70,630/-, deducted by that party, had been claimed by the assessee. The assessee was asked as to why Rs. 1,72,92,565/- should not be added to income. Explaining the difference, the assessee submitted that remaining amount was shown as advance. However, in the balance sheet instead of Rs. 1,72,92,565/- [385,22,149 (-) 2,12,29,584] only Rs. 1, 41,70,000/- was shown as advance from JISL. In response to the same the assessee submits as under through the letter dated 14-10-2011. The AO rejected the stand taken by the assessee on the ground that the assessee had treated the part amount as advance which was to be adjusted as and when the bill arose, that the assessee had take credit of whole TDS, that the contention of the assessee that amount was partly treated as advance which was adjusted in stages in next FY was not acceptable, that the work was already in progress, that remaining amount was to be shown as WIP on the credit side of P&L a/c and not as advance in Balance sheet, that the work contract received was only one work, that the work was not several pieces of work but one project, that the project had already started during FY.2008-09, that the entire receipts had to be treated as sales or as WIP, that the assessee had shown Rs. 1,41,70,000/- as advance which resulted in reduction of profit, that on the other part he claimed full TDS credit for amount received, that as per Section 198 of the Act all sums deducted would be income of an assessee for the purpose of computing his income. Finally, he added Rs. 1.53 Crores, received from JISL to the total income of the assessee.

3.1. Aggrieved by the order of the AO, the assessee filed an appeal before the FAA. After considering the contentions of the assessee and the assessment order, he held that the assessee had received work order on 27.12.2008, that he had started the work only thereafter, that he had already raised bills aggregating to Rs. 88.30 lakhs during the 3 months ended on 31.03.2009, that the said amount Rs. 17.6 lakhs, being 20% of the billed amount was adjusted out of the total advance of Rs. 1.59 crores, that accordingly, he had shown the balance advance of Rs. 1.41 crores as liability in the balance-sheet as on 31.03.2009, that from the statement reconciliation of billing and advances submitted by him showed that balance advance of Rs. 1,41,70,000/- was offered as part of sales on the following assessment year on completion of the contract, that there was no work-in-progress on 31.03.2009, that the unadjusted advance of Rs. 1.41 crores represented liability as on 31.03.2009 and not income as contended by the AO, that as per the accounting standard (AS)-9 the revenue from sales or service had to be recognized when the requirements as to the performance set out in paragraph no. 11/12 of AS-9 were satisfied, that in view of the mandatory accounting standard it was not reasonable and property for the assessee to recognized and advance as income, that the assessee had not rendered any services against the advance received, that services were rendered in subsequent AY., that the advance was recognized as contractual receive in the profit and loss account, that deduction of tax of income did not ipso facto declared amount referred in the TDS certificate is subject to tax on the whole figure that too in the same year.
mentioned in the certificate, that provisions relating to TDS were not the provisions for computation of income, that income of a tax payer was not required to be computed merely with reference to the TDS certificate, that assessment of an income was altogether and independent exercise. He referred to the order of Hans Road Carriers Pvt. Ltd. (45 SOT 149). Finally, he deleted the addition of Rs. 1.41 crores, made by the AO.

3.2. Before us, the DR stated that the assessee had taken credit for the TDS for the year under appeal, that provisions of section 199 require the assessee to declare the income for a particular year, if credit for tax paid is taken by it. He relied upon the order of the Hon’ble Kerala High Court delivered in the matter of Smt. Pushpa Vijoy (9taxmann.com. 175). AR argued that amount in question was an advance, that contract was given to the assessee and by end of December, that during the succeeding year income was offered for taxation, that only 20% was advance, that the assessee was in same bracket of income for both the years, that treatment given by the assessee was as per the provisions of AS-9.

3.3. We have heard the rival submissions and perused the material before us. Undisputed fact of the case are that the assessee had received work order in December 2008 for refloating, repair and installation of sea water intake and outfall pipeline for Chennai Desalination Limited at Ennore Port, Chennai, that he had raised bills of Rs. 88.3 Lakhs for the period ending on 31.03.2009, that 20% of the billed amount i.e. Rs. 17.66 Lakhs was adjusted out of the total advance received by him, that balance advance of Rs. 1.41 Crores (1.59 Crores – 17.66 Lakhs) was shown as liability in the balance sheet for the year under appeal, that in the reconciliation of billing and advance statement, the assessee had offered advance of Rs. 1.41 Crores as a part of sale for the AY-2010-11, that the contract was completed in the succeeding year.

Accounting Standard-9 (AS-9) envisages that the revenue from sale/service should be recognized as to the performance set out in paragraph no. 11 or 12 are satisfied. In our opinion, the advance received by the assessee during the year cannot be treated income and hence he had correctly shown the balance amount of Rs. 1.14 Crores for the AY-2010-11. It is a fact that deduction of tax for the payment is one of the deciding facts for recognize the revenue of a particular year. But TDS in itself does not mean that the whole amount mentioned in it should be taxed in a particular year. Deduction of tax and completion of assessment are two different things while finalizing the tax liability of the assessee and AO is required to take all the facts and circumstances of the case not only the TDS certificate. Considering the peculiar facts and circumstances, we are of the opinion that order of the FAA with regard to the TDS does not suffer from legal infirmity. We find that in Hansh Road Carriers Pvt. Ltd. (Supra) similar view has been taken, we also find that the FAA had directed the AO to include Rs. 3.21 Lakhs, being TDS on the advance of Rs. 1.41 Crores, to be included as a part of the turnover in terms of section 198. Considering the above facts, the order of the FAA is upheld. Ground no. 2 is deciding against the AO.

As a result, appeal filed by the AO stands dismissed.

Order pronounced in the open court on 20th August, 2014.

SK

Date: 20.08.2014.

(DD. ES. TIT. AM. PAVALAN /Dr. S.T.M. Pavalan) (RAJENDRA/ Rajendra)

JUDICIAL MEMBER ACCOUNTANT MEMBER

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2. Respondent /प्रत्यर्थी
3. The concerned CIT(A)/संबद्ध अपीलाय आयकर आयुक्त
4. The concerned CIT /संबद्ध आयकर आयुक्त
5. DR ‘D’ Bench, ITAT, Mumbai /विभागीय प्रतिनिधि श्री खंडपीठ,आ.अ.न्याया,मुंबई
6. Guard File/गार्ड फाइल

सत्यापित प्रति //True Copy//
आदेशानुसार BY ORDER,
उप/सहायक पंजीकार Dy./Asst. Registrar
आयकर अपीलाय अधिकरण, मुंबई /ITAT, Mumbai