



2-ITXA-199-2016

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.199 OF 2016

The Commissioner of Income Tax-1 .. Appellant.
v/s.
B.G.Shirke Construction Technology Pvt. Ltd. .. Respondent.

Mr. Tejveer Singh, for the Appellant.
Mr. Ruturaj H. Gurjar i/b. Mr. Mihir Naniwadekar, for the Respondent.

**CORAM: M.S.SANKLECHA &
SANDEEP K. SHINDE,JJ.**
DATE : 8th August, 2018.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 30.9.2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 30.9.2014 is in respect of Assessment Year 2009-10.

2 Mr. Tejveer Singh the learned counsel appearing for the Revenue urges only the following question of law for our consideration:

“(a) Whether the Tribunal was justified in law in holding that the discrepancy between book value and physical value cannot be taxed u/s 69C of the Income Tax Act, but it can be taxed u/s 69 to 69B only ?”

3 The Respondent-Assessee is a company engaged in the business of civil construction. On 18.12.2008 there was search and seizure

operation conducted in the Respondent's premises. During the course of search, valuation report of the site engineers of the projects regarding work in progress (WIP) as on 30.11.2008 were found. It was noticed the figures indicated in the valuation report of the site engineers were higher than the work-in-progress recorded in the books of the Respondent as on 30.11.2008. As per the provisional Profit and Loss Account, this difference was Rs.9.30 Crores. Thus, the Respondent had agreed on 16.2.2008 to addition of Rs.10 Crores being made. However, at the end of subject Assessment Year in its return of income the Respondent had not offered the additional income of Rs.10 Crores. Nevertheless, the Assessing Officer proceeded to add Rs.10 Crores being the additional income on account of excess work in progress, which was financed out of unexplained source of income. Thus, attracting Section 69C of the Act. Resultantly, the Assessing Officer by order dated 31.12.2010 passed under Section 143(3) of the Act made an addition of Rs.10 Crores under Section 69C of the Act.

4 Being aggrieved, the Respondent preferred an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 26.3.2012, the CIT (A) deleted the addition of Rs.10 Crores this by inter-alia holding on facts that the Assessing Officer did not controvert statement of the Appellant that he had correctly taken value of work-in-progress. Further, it held the Assessing Officer had not brought on record any evidence to show that the appellant had not recorded sales, purchase, other expenses properly in its books of accounts. Under the circumstances, the CIT(A) inter-alia record in its order as under:

“The primary requirement for application of section 69C is that assessee should incur expenses out of unexplained source of income. The section cannot apply if the source of income for making expenses is explained. This section refers to the source of expenditure and not to the expenditure itself. No

evidence of any unexplained expenditure has been brought on record either by search party or by the AO. None of the seized material or document indicates that the appellant has incurred any unexplained expenditure out of books. Section 69C is a deeming provision. Therefore, it has to be interpreted strictly. Onus was on the AO to prove that the appellant had incurred expenses out of books of accounts. The AO has not brought on record any material to show that the appellant incurred expenses out of books of accounts. The only material on the basis of which he made addition u/s.69C was the valuation report certified by the site engineers. These valuation reports indicated existence of WIP of the value shown in the reports on that particular date, i.e., 30.11.2008. Therefore, the appellant was in the possession of the WIP of value which has been certified by the site engineers. As this value was more than the value recorded in the books of accounts, the appellant was in the possession of the excess WIP as on 30.11.2008. As discussed earlier, this excess WIP has already been added to the income of the appellant in view of incorporation of correct value of WIP as on 31.3.2009 and incorporation of correct figures of sales, purchases and other expenses in the period from 1.12.2008 to 31.3.2009. Under the circumstances, addition of the same amount again u/s.69C of the Act is not justified.
(emphasis supplied)

The CIT(A) further recorded the fact that the Respondent had explained reasons for difference in the work-in-progress as found on 30.11.2008 at the time of search on 18.12.2008 i.e. provisional estimate of the work-in-progress and not a result of taking physical inventory by the respondent-assessee or the search party. In the above circumstances, the Appeal of the Respondent was allowed.

5 On further Appeal, the Tribunal by the impugned order inter-alia records the fact that the Assessing Officer had not disputed the valuation of closing Work in Progress as on 31.3.2009. This figure has been arrived on actual verification. There is also no disallowance of any expenditure or suppression of income detected by the Revenue. In the

aforesaid facts, the Tribunal held that in the absence of any material being brought on record to show that the valuation done as on 31.3.2009 is incorrect, no occasion to apply Section 69C of the Act can arise. The Tribunal further holds that Section 69C of the Act would not be applicable to the facts of the present case as there is no evidence of any unaccounted expenditure. The difference was only on account of estimation of the value of Work in Progress by the site engineers in November, 2008 and actually arriving at the value on physical verification which is reflected in the return of income as on 31.3.2009. In the above circumstances, no occasion to apply Section 69C of the Act would arise.

6 Mr. Tejveer Singh the learned counsel appearing for the Appellant-Revenue states that the Respondent-Assessee has itself offered Rs.10 Crores as additional income consequent to the search on 18.12.2008. This by letter dated 16.2.2009 on account of work-in-progress. It is submitted that the source of the above expenditure on account of work-in-progress has not been explained. Therefore, Section 69C of the Act would be applicable.

7 We find that both the CIT (A) as well as the Tribunal have rendered a finding that Work in Progress as indicated in its return of income for the year ending 31.3.2009 correctly reflects the closing Work in Progress determined on physical verification. On facts both the CIT(A) as well as the Tribunal have rendered a finding that the value of Work in Progress as done by its site engineers in November, 2008 was only on provisional basis. No verification was ever done by the search party. The return filed on 31.3.2009 showing its closing Work in Progress has been accepted by the Assessing Officer. In the aforesaid facts, unless it is first established by the Revenue that there is unexplained expenditure, no

occasion to apply Section 69C of the Act can arise. The Revenue has not challenged the concurrent findings of the CIT(A) as well as of the Tribunal that the Work in Progress as disclosed during the time of search was on provisional basis and it was taken into consideration while determining the Work in Progress as on 31.3.2009. The proposed question that the Tribunal held that there is a difference in the book value and the physical value of the Work in Progress is factually not correct. We did point out this to the counsel for the Revenue but he insisted to pressing this question. However, during the course of his submission, he was not able to substantiate the above presumption in the question as framed.

8 In the above view, in the facts of this case, question as proposed is academic, unless the Revenue first challenges finding of fact arrived at by the Tribunal. The finding of fact is that, there is no excess work in progress than that declared by the Respondent-Assessee as on 31.3.2009 and the valuation done of the work-in-progress as on 31.11.2008 was only on provisional basis.

9 Moreover, even if assume that the closing stock i.e. work-in-progress is in excess of that recorded/disclosed by the Respondent, the same has to be added to the income only under Section 69A of the Act as held by this Court in **Dialust v. DCIT 261 ITR 456**. In fact, the impugned order of the Tribunal places reliance upon the above decision of this Court. No submission was made on the part of the Revenue as to why the above decision is not applicable to the present facts.

10 In view of the above, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

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11 Appeal dismissed.

(SANDEEP K. SHINDE,J.)

(M.S.SANKLECHA,J.)