

Date:23-04-2021

From

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To

Assessing Officer,
National –e Assessment Centre,
Delhi.

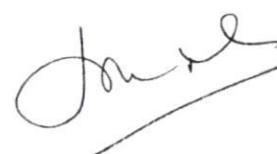
Respected sir/Madam,

Sub: IT Scrutiny Assessment Proceedings – Own case – PANAAGFV2068P
Asst. Year2018-19 -Reply to Show cause Notice (SCN) dated
21.042021- Reg.

Ref: Show cause Notice dated 21.04.2021 (DIN ITBA/AST/F/143(3)(SCN)/20
21-22/1032590936(1)

In connection with the income tax assessment proceedings for Assessment Year 2018-19, the above referred SCN is issued to show cause as to why assessment should not be completed as per Draft Assessment Order. The following reply is submitted for your kind consideration.

1. In the Draft Assessment Order, it is proposed to make an addition of Rs 3,20,18,364/-. The addition proposed is only due to difference in the methodology of computation of cost to be recognized. We have recognized the cost by reference to the stage of completion of the construction at the reporting date as against your proposal to recognize the cost on basis of the percentage of area sold (which is worked out at 79.275%). The cost recognized by us is Rs 40,33,49,495/- as against cost to be recognized as per your workings at Rs.37,13,31,132/- .Consequently due to lower recognition of cost in your workings the gross profit have gone up by Rs.3,20,18,364/-(40,33,49,495/- minus Rs.37,13,31,132/-) and this difference is proposed to be added to the Income returned of Rs 71,49,954/-.
2. For the purposes of computing cost to be recognized in the Draft Assessment Order Guidance Note of 2006 modified in 2012 of ICAI for Accounting for Real Estate Developers has been followed. Further, the workings are done as per the illustrations in the said Guidance Note.
3. CBDT has notified 10 Income Computation & Disclosure Standards (ICDS) in exercise of powers conferred to it under section 145(2) of The Income Tax Act, 1961 vide Notification No. 87/2016, dated 29th September, 2016. The Standards are applicable from a.y 2017-18 i.e Financial Year 2016-2017 and subsequent assessment years.



4. ICDS under Income Tax Act, 1961 were issued with the aim of bringing uniformity in accounting policies governing computation of income in accordance with tax related provisions, and also reducing the irregularities amongst them.
5. Certain Clarifications on Income Computation and Disclosure Standards (ICDS) notified under section 145(2) of the Income-tax Act, 1961 were given by CBDT by way of FAQ's. The CBDT has clarified in the FAQ issued on 23rd March, 2017 vide Circular No 10/2017 (Reply to Question No.12) that this ICDS is not applicable to real estate developers. For sake of quick reference, the same is reproduced below:

Question 12: Since there is no specific scope exclusion for real estate developers and Build -Operate- Transfer (BOT) projects from ICDS IV on Revenue Recognition, please clarify whether ICDS-III and ICDS-IV should be applied by real estate developers and BOT operators. Also, whether ICDS is applicable for leases.

Answer: At present there is no specific ICDS notified for real estate developers, BOT projects and leases. Therefore, relevant provisions of the Act and ICDS shall apply to these transactions as may be applicable.

6. Thus, under Income Tax Act, 1961 as on date there is no notified ICDS that is applicable to computation of business income of real estate developers.
7. It is pertinent to note the clarification given by CBDT in Question no 5 of the FAQ's which is reproduced below:

Question 5: ICDS is framed on the basis of accounting standards notified by Ministry of Corporate Affairs (MCA) vide Notification No. GSR 739(E) dated 7 December 2006 under section 211(3C) of erstwhile Companies Act 1956. However, MCA has notified in February 2015 a new set of standards called 'Indian Accounting Standards' (Ind-AS). How will ICDS apply to companies which adopted Ind-AS?

Answer: ICDS shall apply for computation of taxable income under the head "Profit and gains of business or profession" or "Income from other sources" under the Income Tax Act. This is irrespective of the accounting standards adopted by companies i.e. either Accounting Standards or Ind-AS.

8. The above clarification by CBDT implies that the ICDS will prevail in computation of taxable income under the head "Profit and gains of business or profession" or "Income from other sources" under the Income Tax Act over the accounting standards notified by Ministry of Corporate Affairs (MCA). The Companies are required to maintain books of account and prepare financial statements as per requirements of Companies Act 2013 but as far as computation of taxable income under the head "Profit and gains of business or profession" is concerned the Company will have to necessarily follow ICDS. Thus, ICDS notified under Income Tax Act shall be applicable irrespective of the accounting standards adopted by companies i.e., either Accounting Standards or Ind-AS.



9. The plain reading of the CBDT's clarification suggests that for the purposes of computing taxable income under the head "Profit and gains of business or profession" ICDS are superior than the accounting standards notified by the MCA for Companies under the Companies Act 2013. There might be similarity between the accounting standards notified by MCA and ICDS notified under the Income Tax Act, 1961 but nevertheless in case of any conflict/differences under the notified standards, the ICDS notified under the Income Tax Act, 1961 for the purposes of computing taxable income under the head "Profit and gains of business or profession" shall prevail and shall be followed.
10. Institute of Chartered Accountants of India (ICAI) which is an autonomous body set up under the Act of Parliament also from time-to-time issues Accounting Standards with respect to accounting treatment for various financial transactions that are to be followed by an enterprise. The members of ICAI who perform the financial audit function of such enterprises are required to report whether the financial statements are drawn up by the enterprises in accordance with the accounting standards or not. This reporting requirement is mandatory under the Companies Act 2013 for the statutory auditors. For accurate preparation of the financial statements the Companies do mandatorily follow the accounting standards and also for not inviting any adverse remarks in the Audit Report.
11. ICAI also issues Guidance Note on various accounting issues and the same are recommendatory in nature. They are not mandatory in nature. Thus, there is a basic difference in the accounting standards that are issued by ICAI and by MCA under the Companies Act, 2013 and the Guidance Note issued by the ICAI. The accounting standards issued either by ICAI or MCA shall be followed and any deviation shall have to be reported by the auditors of the Company. The Guidance Notes of ICAI are recommendatory in nature.
12. The present situation and the fact is that MCA has notified accounting standards under Companies Act, 2013, ICAI which is set up under an Act of Parliament has also issued Accounting Standards and CBDT has notified ICDS under Income Tax Act, 1961. Though there might be similarity in the standards notified but what is important to note is that each regulatory body wants to have and their own independent set of standards.
13. It is submitted that under the Income Tax Act, 1961 the ICDS notified by CBDT under section 145(2) are relevant for computation of taxable income under the head "Profit and gains of business or profession" or "Income from other sources".
14. In the absence of any notified ICDS specifically for real estate developers and also keeping in view the clarification given by the CBDT in FAQ's, the ICDS III applicable to Construction Contracts is not strictly and mandatorily required to be followed. The ICAI Guidance Note as submitted above is only recommendatory in nature and therefore not mandatory to be followed under the Income Tax Act, 1961. At the most it has a persuasive value.



15. The issue involved is only with respect to computation methodology that is adopted to determine the cost to be recognized against the revenue to be recognized under PCOM. There is no issue with respect to the revenue that is recognized on the basis of %age of work completed as on 31.03.2018.
16. In the absence of any specific ICDS notified for computing business income of the real estate developers the importance of the method of computation of recognition of revenue and cost followed consistently is of paramount importance. We have submitted in our reply on the same issue that the method has been consistently followed over past years. Further, the scrutiny assessments u/s 143(3) have been completed for Asst. Year 2015-16, Asst. Year 2016-17 and Asst. Year 2017-18. During all scrutiny assessment proceeding for all the said years the workings and computation of revenue and cost recognition have been called for and after examination is accepted.
17. To our above reply as to consistency in the method followed by us over past years and that the assessments after due verification has been accepted and Orders are passed u/s 143(3) of Income Tax Act, 1961, it is stated that Res judicata is not applicable to Income Tax Act, 1961 and therefore, the assessee's plea that no such adverse inference was drawn in earlier assessment year does not hold good.
18. We rebut your stand that Res judicata is not applicable to Income Tax Act and in support the following is submitted:
- a) The doctrine of res judicata rests on the principle that one should not be vexed twice for the same cause and that there should be finality of litigation.
 - b) But the above rule is subject to limitations.
 - c) The first limitation is that there should be finality and certainty in all litigations including those arising out of income-tax proceedings and an earlier decision on the same question cannot be changed in the absence of following circumstances:
 - (i) The previous decision is not arrived at after due enquiry,
 - (ii) The previous decision is arbitrary; or
 - d) The other limitation is that the effect of revising a decision in a subsequent year should not lead injustice and the court must always be anxious to avoid injustice to the assessee.
 - e) The above principle is held by Orissa High Court in the case of C.I.T Vs Belpahar Refractories Ltd, 128 I.T.R p.610. It has made the following observations on this aspect
"The rule of res judicata does not apply to assessment proceedings but there are two exceptions to the rule, namely, an earlier decision on the same question cannot be reopened unless that decision is arbitrary or perverse or arrived at without due enquiry. The second limitation is that the



effect of revising the earlier decision should not lead to injustice and the court may prevent an assessing authority from doing something which would be unjust and inequitable”.

- f) In the case of *Tejmal Bhojraj Vs C.I.T.*, 22 I.T.R; p.208(Nag) it is held that I.T.O cannot arbitrarily depart from the finding reached after the enquiry by his predecessor in office, simply on the ground that the succeeding officer does not agree with the preceding officer's findings.
- g) In the case of *C.I.T. Vs P.Krishna Warriar*, 208 I.T.R; p. 823(Ker) it was held in this case that the principle of *res judicata* would apply to proceedings under the Act regarding questions relating to assessment which do not vary with the income every year but depend on the nature of the property or question on which the rights of parties to be taxed, are based.
- h) From the aforesaid decisions of the Supreme Court and various High Courts, it becomes quite clear that though in general the principle of *res judicata* is not applicable to IT proceedings, **yet this principle will apply even to IT proceedings if the questions relating to assessment do not vary with the income every year but relate to matters such as (i) status of the assessee, (ii) method of accounting regularly followed by the assessee, (iii) charitable nature of a trust, (iv) partition of H.U.F and (v) gross profit in a business, etc.**

In addition, this principle also applies to cases where the effect of revising a decision in subsequent year leads to injustice, loss of an important advantage or loss of some benefit, on the part of the assessee.

- i) In the case of *DCIT-1(2)-2 vs M/s. Ozoneland Agro Pvt. Ltd.*, ITAT, Mumbai. T.A./4854/Mum/2016 in Para 5.3 of its Order stated as under: Copy of judgement enclosed **Annexure 1**.

5.3. We also find that in the earlier assessment year, the AO had, while completing scrutiny assessment, accepted the valuation of same shares at Rs.25,500/-. But, during the year under appeal why did he not follow the earlier year's order is not known. As per the basic principles of taxation, the AO's are not governed by the principles of *res judicata* and every assessment is a fresh assessment. But, it is also equally accepted that the AO's should not deviate from the earlier years' decisions without assigning any concrete and justifiable reasons. Tax determination cannot be left to whims and fancies of a person. It is a serious task and has to be accomplished in a disciplined manner. If an assessee has been allowed a certain concession in earlier year/(s), without giving any plausible reason it cannot be withdrawn in subsequent years.



As early as year 1952, in the case of *Tejmal Bhojraj* (22 ITR 208) the Hon'ble Nagpur High Court has reiterated the principles of non-applicability of res-judicata and consistency in income tax proceedings as under:

The principle of estoppel by record or res judicata, applicable to decisions of civil Courts, has no application to income-tax proceedings so as to prevent a decision in a prior year from being reopened in the assessment proceedings in a subsequent year because of the nature of enquiry and because the Income-tax Officer is not a Court. A previous finding or decision of such an authority may be reopened and departed from in subsequent years in the following circumstances, namely: (a) the previous decision is not arrived at after due enquiry; (b) the previous decision is arbitrary; or (c) if fresh facts come to light which on investigation would entitle the officer to come to a conclusion different from the one previously reached. In the absence of fresh circumstances, the Income-tax Officer cannot arbitrarily depart from the finding reached after due enquiry by his predecessor in office simply on the ground that the succeeding officer does not agree with the preceding officer's findings.

- j) in the case of *Godrej & Boyce Manufacturing Co. Ltd.* (394 ITR 449), the Hon'ble Apex Court has held as under:

"While it is true that the principle of res judicata would not apply to assessment proceedings under the Act, **there is need for consistency and certainty** and existence of strong and compelling reasons for a departure from a settled position has to be spelt out.

- k) In *International Tractors Ltd.* (397 ITR 696), the Hon'ble Delhi High Court has held that deductions allowed in the earlier assessment years should not be withdrawn unless the circumstances have changed.
- l) The Hon'ble Allahabad High Court, in the case of *Zazsons export Ltd.* (397 ITR 400), has held as under:

"In order to maintain consistency, a view, which had been accepted in an earlier order ought not to be disturbed unless there was any material to justify the Department to take a different view of the matter. In respect of the earlier assessment year, 2005-06, the Department had accepted the decision of the Appellate Tribunal that the trade amount due to the trade creditors in the books of account of the assessee could not be added to the income of the assessee. There was nothing on record to show that any appeal had been filed by the Department against that order, which had become conclusive.



- m) In the case of Galileo Nederland BV, (367 ITR 319), the Hon'ble Delhi High Court has held as under:

Decision on an issue or question taken in earlier years though not binding should be followed and not ignored unless there are good and sufficient reasons to take a different view. Said principle is based upon rules of certainty and that a decision taken after due application of mind should be followed consistently as this leads to certainty, unless there are valid and good reasons for deviating and not accepting earlier decision."

- n) The Hon'ble Bombay High Court in the matter of Aroni Commercials Ltd. (362 ITR 403) has dealt the issue of consistency as follows:

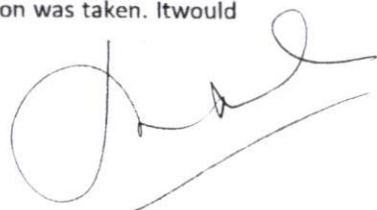
Though the principle of res judicata is not applicable to tax matters as each year is separate and distinct, nevertheless where facts are identical from year to year, there has to be uniformity and in treatment.

- o) Similarly, in the case of Gopal Purohit (336 ITR 287), the jurisdictional High Court has held that there should be uniformity in treatment and when facts and circumstances for different years were identical particularly in the case of the same assessee.
- p) Reliance is also placed on the judgement of Hon'ble High Court of Bombay in the case of Principal Commissioner of Income Tax-8 vs M/s. Quest Investment Advisors Pvt. Ltd and also the judgments of Apex Court referred therein. Copy of judgement enclosed **Annexure-2**.
- q) In the case of Municipal Corporation of City of Thane V. Messrs Vidyut Metalics Limited and another 2007 INDLAW SC 900 the Supreme Court observed –

We are in agreement with the following observations of Ranganath Misra, C.J., in Radhasoami Satsang V. Commissioner of Income Tax, 1991 Indlaw SC 948-

"We are aware of the fact strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year." (emphasis supplied)

In the present case, in earlier litigation, the court considered the evidence of Mr. Debe, Quality Control Manager who was described as 'expert' on the point and accepting his evidence, the court held that the goods imported by the company was ferrous in nature and not non-ferrous and the company was right in paying octroi under Item No. 71. It is thus a 'fundamental factor' and the nature of goods imported by the company was directly and substantially in issue, on the basis of which the decision was taken. It would



indeed be very difficult to hold that such decision would not continue to operate in subsequent years unless it is shown that there are changed circumstances or the goods imported by the company in subsequent years was different than the one which was imported earlier and in respect of which decision had been arrived at by the court.

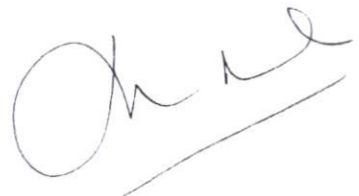
From the above judgment it is clear that the principle of res judicata is not only inapplicable in income tax proceedings but also in other tax proceedings also.

- r) In the case of CIT vs. Nagri Mills (1958) 33 ITR 681 (Bom.) (followed by Delhi High court in case of CIT vs. Vishnu Industrial Gases Pvt. Ltd.) the following is held

Where the department had not disputed that the expenditure was deductible in principle but was only disputing the year in which the deduction could be allowed. The Court held that, castigating the department, that as the tax rates were the same in both years, the department should not fritter away its energies in raising questions as to the year of deductibility / taxability.

The issue involved in our case is also similar to the extent that the actual revenue/cost and the actual profit for the project will finally get determined at the end of the project. Under the PCOM method there is only an issue of timing difference with respect to the profit during the construction period for first year, second year and onwards and till the completion of the project. The overall profits will get ultimately declared and offered to tax.

- 19) The method of cost recognition is in line with the basic concept of PCOM that the revenue and cost associated with the project should be recognized as revenue and expenses respectively by reference to the stage of completion of the construction at the reporting date.
- 20) Our method of PCOM also ensures that the profit in respect of the revenue that got recognized is correctly declared. It satisfies the principle of revenue and cost matching. On a revenue of Rs. 47,17,04,642/- the corresponding estimated gross profit of the project @ 14.49% should be Rs. 6,83,55,147/-. It may be noted that in the above workings the gross profit is coming to Rs. 6,83,55,147/- (i.e., revenue of Rs 47,17,04,642/- minus corresponding cost of Rs 40,33,49,495/-).
- 21) The above method has been consistently followed over past years.
- 22) It is important to note that the actual revenue/cost and the actual profit for the project will finally get determined at the end of the project. Under the PCOM method there is only an issue of timing difference with respect to the profit during the construction period for first year, second year and onwards and till the completion of the project. The overall profits will get ultimately declared and offered to tax.



23) Hence it is requested not to disturb the PCOM workings which has been consistently followed over the years and is not flawed.

24) Without prejudice to the above submissions, it is submitted that in the event it is held that the PCOM workings adopted by us needs to be disturbed and resultant profits are to be added in this year, we request that for such additional income, the set-off/adjustment is done against the income already declared in the subsequent Asst. Years so that there is no double taxation on the said amount and also do not cause injustice to us.

25) In your workings the closing WIP is arrived at Rs. 9,70,77,324/- (total cost incurred upto 31.03.2018 of Rs 46,84,08,456/- minus cost to be recognized of Rs. 37,13,31,132/-). The closing WIP as per financials is Rs 6,50,58,781/- which is carried forward. In the case the PCOM workings as proposed by you in the Draft assessment Order is taken, the benefit and set off of increased closing WIP which under an accounting principle shall be the opening WIP to arrive at the GP for subsequent years.

Keeping in view the above submissions and various judicial pronouncements as in supra, it is pleaded not to disturb the workings and reduce the cost to be recognized to 37,13,31,132/- as against Rs 40,33,49,495/- which results in huge and high pitched addition of Rs.3,20,18,364/- merely due to a different view with regard to the methodology of computation of the cost to be recognized.

Yours faithfully,

For VISTA HOMES,



(PARTNER)