

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'SMC-II' NEW DELHI**

**BEFORE SMT DIVA SINGH, JUDICIAL MEMBER**

**I.T.A .No.-4636/Del/2015  
(ASSESSMENT YEAR-2009-10)**

Manish Nayyar, 16/46, Subhash Nagar, Delhi-110027. PAN-AAKPN4073C <b>(APPELLANT)</b>	Vs	ACIT, Circle-45(1), Civic Centre, New Delhi <b>(RESPONDENT)</b>
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**I.T.A .No.-4638/Del/2015  
(ASSESSMENT YEAR-2009-10)**

Surinder Nayyar, 16/46, Subhash Nagar, Delhi-110027. PAN-AAJPP5723G <b>(APPELLANT)</b>	Vs	ACIT, Circle-45(1), Civic Centre, New Delhi <b>(RESPONDENT)</b>
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<b>Assessee by</b>	<b>Sh.K.Sampath, Adv. &amp; Sh. Sh.V.Raja Kumar, Adv.</b>
<b>Revenue by</b>	<b>Ms. Anima Barnwal, Sr.DR</b>

<b>Date of Hearing</b>	<b>02.08.2016</b>
<b>Date of Pronouncement</b>	<b>30.09.2016</b>

**ORDER**

Both these appeals are being decided by a common order as identical issues are agitated by the two different assessee's in the present appeals. ITA No.4636/Del/2015 has been filed by the assessee assailing the correctness of the order dated 15.05.2015 of CIT(A)-15 pertaining to 2009-10 AY; ITA No.4638/Del/2015 has also been filed by the assessee pertaining to same assessment year assailing the correctness of an identical order passed by the very same authority on the very same date. The grounds raised by these two different assessee's are identical. For ready-reference, the grounds from ITA No.4636/Del/2015 are reproduced hereunder:-

1. *On the facts and in the circumstances of the case and in law the Ld.CIT(A) erred in confirming the validity of the proceedings u/s 147/148 of the Income Tax Act, 1961 which due to inherent deficiency, defects and fallacy ought to have been quashed.*
2. *Without prejudice to the foregoing the Ld.CIT(A) erred in confirming a 9% rate of return which being arbitrary and without any basis ought to be quashed and the rate as returned by the Appellant ought to be directed to be adopted and applied."*

2. The Ld.AR inviting attention to the material available on record submitted that in both the years, the Assessing Officer solely to enhance the profit rate re-opened the cases after issuance of notice. The exercise of power challenged in appeal it was submitted was dismissed by the CIT(A) holding that the issues whether the reasons were communicated to the assessee or not is an academic. It was submitted that on these above facts alone the assessee is confident that relief was allowable, however he would also like to bring certain other facts on record namely that the assessee is a registered Government contractor under Class IV B&R with MCD/CPWD and as per CPWD/contractee's requirement; he has to employ one diploma engineer for supervision of work allotted to him. Because of this, the direct expenses of the assessee are increased. In the circumstances, 6% profit rate it was submitted was justified. It was also submitted that the Assessing Officer in AY 2007-08 has accepted net profit @7% in assessee's own case.

3. It was his submission that whereas the AO has applied the rate of 12%, the CIT(A) had reduced it to 9% holding that partly the assessee is right and the AO is right. However, it was his submission admittedly the facts and circumstances of the assessee remains the same over the years and as per the past history of the assessee on the issue where admittedly books of accounts have not been maintained and the assessee continues to be a contractor of the same class in the year under consideration also the rate of 7% accepted by the tax authorities should be accepted. Accordingly it was his submission that

even if the assessee for peace of mind does not want to contest the re-opening, the facts remains that profit rate of 7% has been accepted by the Revenue. Inviting attention to the impugned order dated 15.05.2015 it was his submission that Paper Book page 19 to 22 would show that the AO in 2013-14 AY by his order u/s 143 dated 05.02.2016 has accepted the tax rate of 7% of net profit gross profit. Accordingly, it was his prayer that for verifying that fact the matter may be restored directing appropriate relief on verification.

4. Ld.Sr.DR, Ms.Anima Baranwal vehemently argued that it is the duty of assessee to file and maintain books of accounts accordingly the argument that the net profit rate accepted in the past must be applied does not make any sense.

5. Having heard the submissions and perused the material available on record. I find that though the assessee after challenging the jurisdiction proceedings to focus his prayer to the acceptance of tax rate accepted by the Revenue in assessee's own case, however I find that the ground assailing jurisdiction has not been given up or withdrawn. Since the challenge remains on record, it cannot be ignored. Considering the challenge and the grievance it is deemed appropriate to set aside the impugned order on the grounds that the conclusion arrived at by the CIT(A) cannot be upheld. The duty of communicating the reasons is an important step, it cannot be circumvented. The reasons for re-opening have to be communicated and if challenged that there is no communication it cannot be brushed aside as an academic issue. The issue is restored back to the CIT(A) with a direction to first decide the jurisdictional issue and then if need be proceed to the merits of the additions. It may not be out of place to make it clear that incase estimates are resorted to then the exercise is to be undertaken as per settled legal principles. The Courts

have been categorical in holding that if estimate had to be restored then the assessee's own past history can generally be the best guide and in case of inapplicability of the same then comparison with identically situated persons, during the same time, within the area is the best judge. Needless to say the evidence collected and applied has to be confronted to the assessee. Accordingly, in view of these obvious deficiencies and shortcoming in the orders under challenge the issues are restored to the file of the CIT(A) with a direction to pass a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard.

6. In the result, the appeals of the assessee are allowed for statistical purposes.

**The order is pronounced in the open court on 30<sup>th</sup> of September, 2016.**

**Sd/-**

**(DIVA SINGH)  
JUDICIAL MEMBER**

*\*Amit Kumar\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI