

also find that for admission of said additional ground does not require any fresh investigation of facts. Hence, in the light of the judgment of the Hon'ble Supreme Court in the case of NTPC Ltd Vs. CIT reported in 229 ITR 383(SC), we admit the additional ground as raised by the assessee before us.

4. The assessee has raised the following regular grounds of appeal :-

I. The ld. CIT(A) XXXIII Kolkata is wholly wrong to act and decide the issue being difference in running accounts of regular supplier without confronting both the parties as to the correctness of the respective figures in accounts as per provision of Section 1432(3) of the Act;

II. The ld. CIT(A) is wrong to uphold the presumption that the figures in question constituted unexplained expenditure made and paid to the regular supplier of goods without identifying the same with evidences;

III. The ld. CIT(A) is not justified to confirm the addition of 225,627 which the supplier M/s. United Enterprise received relating to the earlier year and which the said party failed to inform the A.O accordingly;

IV. The ld. CIT(A) is not justified to confirm the addition of Rs.30,775/- what related to the outstanding balance of the earlier year but received this year and which the supplying party being M/s. VTR marketing did not mention according to the A.O;

V. The ld. CIT(A) is wrong in not applying the ratio obtainable from the Orissa High Court decision relied upon i.e. Aurobindo Sanitary Stores 276 ITR 549;

VI. The ld. CIT(A) is wrong to confirm the addition of Rs.87,000/- in regard to the investment in land made out of fully explained sources.

VII. The ld. CIT(A) is wholly wrong to disregard the evidences furnished in regard to the absence of banking facilities and the connected difficulties in maintaining a bank a/c beyond 10 km away from his business and for that the application of the relevant rule has been wrongly denied to the appellant;

VIII. The ld. CIT(A) is thus wholly unjustified to confirm the disallowance made U/s. 40A(3) in violation of the relevant rules and the circumstances justifying cash payments for the genuine purchases;

5. The ld.AO had made the additions in the sum of Rs.2,25,633/- and Rs.30,775/- towards unexplained expenditure in respect of payments made to 1) M/s. United Enterprise, and 2) M/s. VTR Marketing respectively

6. The brief facts of this issue are that the Id.AO obtained information u/s. 133(6) of the Act from the sundry creditors of the assessee namely 1) M/s. United Enterprise and 2) M/s. VTR Marketing and found that the assessee had made the payments of Rs.25,84, 820/- and Rs.9,94,080/- respectively. This was compared with the books of account of the assessee, wherein the assessee had shown the payment of Rs.23,59,187/- and Rs.9,63,325/- as payments made to 1) M/s. United Enterprise and 2) M/s. VTR Marketing respectively. As no details were filed by the assessee with regard to said discrepancy in payments, when pointed out by the Id.AO, he added the same as unexplained expenditure in the assessment proceedings.

7. The Id.AO had rejected the books of account of the assessee by furnishing elaborate reasons, which are reproduced herein below for the sake of convenience:-

“3. Rejection of Accounts u/s 145(3) :

3.1 In course of assessment proceedings the following discrepancies in accounts of the assessee were observed:-

i) It was observed that there was difference in ledger accounts received under section 133(6) from M/s. V.T.R. Marketing Ltd and M/s. United enterprises, (creditors of assessee) about the transaction with assessee and the Ledger accounts submitted by the assessee about transaction with the said parties.

ii) Further there was difference in opening balance as on 01.04.05 as per bank statement and the assessee's accounts. The assessee was unable to reconcile the said difference in the course of assessment proceedings.

iii) Fixed deposits with United Bank of India, Garkamalpur Branch, were not disclosed in Books of Accounts.

iv) There was difference in interest actually paid to the said bank and interest claimed to be paid in books of accounts.

v) The cash payments made to different per-ties for purchase were not recorded in books of accounts correctly.”

8. This addition was also upheld by the Id. CIT(A) on 1st appeal. Aggrieved, the assessee is in appeal before us.

9. The Id.AR argued that no addition ought to have been made by the Id.AO towards difference in balances of sundry creditors after rejecting the books of account u/s. 145(3) of the Act. In response to this, the Id.DR vehemently supported the orders of the lower authorities.

10. We have heard the rival submissions and perused the material available on record. It is not in dispute that the books of account having been rejected by the Id.AO by recording elaborate reasons as stated herein above, have not been contested by the assessee. We find that once the books of account are rejected by the Id.AO, the Id.AO ought not to have made any separate addition towards difference found in payments made to the sundry creditors by placing reliance on the same rejected books of account. In this regard, we place reliance on the co-ordinate bench decision of this tribunal in the case of Prafulla Kumar Ghosh Vs. ITO, W-2, Malda in ITA No. 686/Kol/2012 for the A.Y 2006-07 dated 18.9.2015 , wherein it has been held as under:-

“3.3 We hold that once the business income is determined on estimated basis, any further addition towards business income would only get telescoped with the net profit already determined on estimated basis.

The assessment of income under presumptive basis u/s 44AD is similar to the income determined on an estimated basis by the AO after rejecting the books of account of the assessee. Once the books are rejected the doors of the AO are closed for looking after other provisions of the Act which are relevant for determining the business income of the assessee, unless or otherwise specifically provided in the provisions of section 44AD of the Act itself such as allowance of interest and remuneration to partners in 'the case of a partnership firm. Reliance is placed in this regard on the decision of Hon'ble Andhra Pradesh High Court in the

case of Indwell Constructions vs CIT reported in 212 ITR 776 (AP), wherein Lordships had held as under :-

"The pattern of assessment under the Income-tax Act, 1961, is given by section 29 which states that the income from profits and gains of business shall be computed in accordance with the provisions contained in sections 30 to 43D of the Act. Section 40 provides for certain disallowances in certain cases notwithstanding that those amounts are allowed generally under other sections. The computation under section 29 is to be made under section 145 on the basis of the books regularly maintained by the assessee. If those books are not correct or complete, the Income-tax Officer may reject those books and estimate the income to the best of his judgment. When such an estimate is made, it is in substitution of the income that is to be computed under section 29. In other words all the deductions which are referred to under section 29 are deemed to have been taken into account while making such an estimate. This will also mean that the embargo placed in section 40 is also taken into account. "

11. We also find that the Id.AO has made separate addition u/s. 40A(3) of the Act amounting to Rs.5,18,163/-.

12. Brief facts of this issue are that the Id.AO observed that the assessee has made payment in excess of Rs. 20,000/- otherwise than by way of account payee cheque or account payee bank draft to the following parties;-

1) M/s United Enterprise	Rs.19,73,812/-
2) M/sVTR Marketing	Rs. 1,67,000/-
3) M/s. Contai F.L Trade	Rs. 4,10,000/-
4) M/s Jharkhand Liquor.(P) Ltd	<u>Rs. 40,000/-</u>
Total :	<u>Rs.25,90,812/-</u>

13. The Id.AO disallowed @ 20% of the aforesaid sum of Rs. 25,90,812/- u/s. 40A(3) of the Act and made the addition of Rs. 5,18,163/-, which was upheld by the Id.CIT(A) on 1st appeal. Aggrieved, the assessee is in appeal before us.

14. The Id.AR argued that these parties are located in a village, where no banking facilities were available and distance between the said village and place in which the assessee is conducting his business is beyond 10 kms. Accordingly, he said it would be highly risky from the aspect of security to carry cash and deposit the same in the bank account of the assessee maintained with U.B.I. To mitigate this risk, the employees of the suppliers often visited the premises of the assessee to collect the cash out of daily sales from time to time. He also pleaded before us that the assessee's case falls within the exception as provided in Rule 6DD(g) of the I.T Rules 1962. In response to this, the Id.Sr.DR vehemently supported the orders of the lower authorities.

15. We have heard the rival submissions and perused the material available on record. We find that the assessee is engaged in the business of retail trading of foreign liquor and in the normal course of business he had to make the payments to the above mentioned four (4) parties for the purpose of business. We also find that the assessee has also produced the translated version of the certificate issued by the Itamgara- 2 Gram Panchayat, Mahisadal, Dist: Purba Medinapore vide dated 22-08-2012, confirming the distance between the assessee's shop and the UBI is 10 kms. We find lot of force in the arguments of the Id.AR that the Id.AO having rejected the books of account ought not to have made separate addition u/s. 40A(3) of the Act. We find that this aspect has been duly considered by the co-ordinate bench of this tribunal in the case of ACIT, Circle, Haldia Vs. Shri Jit Singh in ITA No.1961/Kol/2007 for the A.Y 2004-05 vide order dated 27-11-2007, wherein it has been held as under:-

“5.2... .. The AO applied 8% net profit rate for computing the income of National Transport Service, National Engg Co and Govind Chemicals. The Hon'ble MP High Court in the case of Puroshottam Lai Tamrakar (supra) as well as Hon'ble Allahabad High Court in the case of Banwarilal Bansidhar (supra) have held that where the AO applied net profit in computing income, Section 40A(3) has no application and no disallowance can be made. The Allahabad High Court has also held that when the gross profit rate is applied that would take care of everything and there was no need for the AO to make scrutiny of the amount incurred on the purchases by the assessee.

Further the ld. ITAT, Kolkata has held in the case of M/s. Koh Sinn Tannery and M/s. Chien Hsing Tannery (supra) that no disallowance u/s.40A(3) can be made in a case where the books of accounts are rejected and the assessment is made ex-parte by estimating the profit. The ld. Tribunal has also relied upon the decisions of Allahabad High Court in the case of Banwarilal Bansidhar (supra) and A.P High Court in the case of Indwell Construction –vs- CIT (232 ITR 776) in this regard. The reason as given by the ld. ITAT in the case of M/s. Chien Hsing Tannery is reproduced below:

... .. In our opinion, while exercising one option i.e. estimating the ideal profit by the Assessing Officer and rejecting the books of accounts, the Assessing Officer, ipso factor renounces the other alternative of modifying the book results so accepted in the light of various provisions. With rejection of books of account and with the consequential determination of completely new profitability, the entire cost structure gets redefined and as such there remains no scope for the specific allowability or otherwise of the individual elements of cost, let alone the invoking of section 40A(3) thereto. With the rejection of books, the Assessing Officer has distanced himself from the option to test the merit of the individual expenses from all perspectives. Accordingly, the decision of the Assessing officer for invoking section 40A(3) and consequential addition of Rs.23,12,497/- cannot be sustained. Accordingly, the same is deleted.

5. In the instant case also the books of accounts were rejected and the AO had estimated the income by applying the net profit rate of 8%. Though the appellant has challenged the net profit rate as applied by the AO, the matter regarding rejection of books of accounts and completion of assessment ex-parte u/s. 144 of the Act has not been challenged by the appellant. Under the circumstances, respectfully following the decision of ld. ITAT as mentioned above, it is held that disallowance made u/s. 40A(3) of the Act was not proper under such circumstances. Hence, the addition of Rs.25,02,960/- made u/s. 40A(3) to the income of National Transport Service & National Engg. Co is deleted. As already mentioned earlier the addition of Rs.4,86,080/- u/s. 40A(3) of the Act in the case of Govind Chemicals was wrongly made, hence, the same is also deleted. “

16. We find that the ld.AO on one hand had rejected the books of account and on the other hand resorted to make various additions by relying on the same rejected books of account u/s. 145(3) of the Act. In these circumstances, the ld.AO ought to have resorted to estimate the business profit in a rational manner. To meet the ends of

justice, we deem it fit and appropriate , to direct the ld.AO to adopt 8% of the turnover of the assessee's business as taxable business profits . Accordingly, the additional ground as raised by the assessee before us is allowed and regular ground nos.1 to 5, 7 & 8 of the assessee's appeal are allowed for statistical purposes.

17. The last ground to be decided in this appeal of the assessee is as to whether an addition of Rs.87,000/- could be made in the facts and circumstances of the case.

18. Brief facts of this issue are that the assessee made investment in land and building for Rs.5,25,000/-. The ld.AO observed that the assessee has incurred a sum of Rs.31,500/- towards stamp duty and Rs.2,500/- towards other incidental expenditure for registration of the said property. These two payments were admittedly not recorded in the books of account of the assessee and the ld. AO brought the same to tax as unexplained investment.

19. Similarly, the ld.AO found that the assessee has made investment in re-investment deposits and recurring deposits with the bank for a sum of Rs.53,000/-, which was also brought to tax as unexplained investment by the ld.AO. On 1st appeal, the assessee argued that these payments were made out of withdrawals from the bank and investment in deposits were made out of cash credit facility availed from the bank, which were even retained as security by the bank for granting the loan. He further argued that after rejecting the books of account the ld.AO cannot make separate addition towards transactions that are not recorded in the rejected books of account. The ld. CIT(A) not being convinced with the arguments of the ld.AR upheld the order of the ld.AO on this issue. Aggrieved, the assessee is in appeal before us by raising ground no.6.

20. The Id.AR reiterated the same submissions as made before the lower authorities. In response to this, the Id.DR vehemently supported the orders of the lower authorities.

21. We have heard the rival submissions. We find that the issue in hand requires to be set aside to the file of the Id.AO for verification of the same as to whether the assessee has made necessary withdrawals for meeting the aforesaid payments and also to prove whether the investment in deposits were made out of cash credit facility as claimed by the assessee. Accordingly, this issue is set aside to the file of the Id.AO to decide the same afresh in accordance with law. The assessee is at liberty to produce/file necessary evidences/ documents in support of this contention. We would like to reject the assessee's alternative argument that once the books of account of the assessee are rejected, no addition on this issue could be made towards unexplained investment based on reliance placed on rejected books of account by the Id.AO. We find that Id.AO no doubt has rejected the books of account and the assessee has not disputed the same. We have already given direction to the Id.AO to resort the estimation of business profit of the assessee at 8% of the turnover while disposing of other grounds as raised by the assessee hereinabove. However, this does not bar the Id.AO from making any separate addition towards unexplained investments, which are not connected with the assessee's business, if found necessary and appropriate. Accordingly, this ground of assessee's appeal is allowed for statistical purposes.

22. In the result, the appeal of the assessee is allowed for statistical purpose as stated above.

THIS ORDER IS PRONOUNCED IN OPEN COURT ON 6-4 - 2016

Sd/-
(N.V.Vasudevan, Judicial Member)

Sd/-
(M. Balaganesh, Accountant Member)

Date 6-4 -2016

Copy of the order forwarded to:-

- 1.. The Appellant/assessee: Shri Suprakash Das Prop: Vill & P.O: Kapasaria
P.O Mahishadal Dist: Purba Medinipore PIN 721628.
- 2 The Respondent/department: Income Tax officer Ward I, Haldia, Purba Medinipore.
- 3 /The CIT, 4.The CIT(A)
5. DR, Kolkata Bench
6. Guard file.

True Copy,

By order,

Asstt Registrar

**PRADIP SPS