

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH : KOLKATA

[Before Hon’ble Shri N.V. Vasudevan, JM & Shri M.Balaganesh, AM ]

I.T.A Nos. 1425- 1429/Kol/2015

Assessment Years : 2006-07, 2008-09 to 2011-12

ITO, Ward-10(1),Kolkata

-vs-

M/s Gourangalal Chatterjee Construction Pvt. Ltd.

[PAN: AABCG 9694 G]

(Appellant)

(Respondent)

For the Appellant : Shri Kalyan Nath, Addl. CIT

For the Respondent : Shri D.S. Damle, FCA

Date of Hearing : 19.08.2017

Date of Pronouncement : 21.09.2017

**ORDER**

**Per Bench:**

1. These appeals by the Revenue arise out of the orders of the Learned Commissioner of Income Tax (Appeals) -4, Kolkata [ in short the Id CITA] in Appeal No. 279/CIT(A)-4/Wd-10(1)/(13-14)/14-15 dated 28.09.2015 for assessment year 2006-07, Appeal no. 277/CIT(A)-4/Wd-10(1)/(13-14)/14-15 dated 28.09.2015 for assessment year 2008-09, Appeal No. 278/CIT(A)-4/Wd-10(1)/(13-14)/14-15 dated 28.09.2015 for assessment year 2009-10, Appeal No. 29/CIT(A)-4/Wd-10(1)/(13-14)/14-15 dated 28.09.2015 for assessment year 2010-11, Appeal No. 282/CIT(A)-4/Wd-10(1)/(13-14)/14-15 dated 28.09.2015 for assessment year 2011-12 respectively against the orders passed by the ITO, Ward-10(1), Kolkata [ in short the Id AO] under section 147/144/145(2) of the Income Tax Act, 1961 (in short “the Act”) dated 17.05.2013 for

the Assessment Years 2006-07, 2008-09 and 2009-10 respectively, and orders u/s 144/145(2) of the Act dated 07.03.2013 and 19.04.2013 for Assessment Years 2010-11 and 2011-12 respectively. As the issues involved in all these appeals are identical in nature for all the years, the same are taken up together and disposed off by this common order for the sake of convenience.

2. The only issue to be decided in all these appeals is as to whether the Id CITA was justified in directing the Id AO to adopt the net profit at 2.5% of turnover, in the facts and circumstances of the case. The facts of Asst Year 2006-07 are taken up for adjudication and the decision rendered thereon would apply with equal force for other assessment years also herein except with variance in figures.

3. The brief facts of this issue is that the assessee is a company engaged in civil construction contracts awarded by Government departments. The assessee filed its return of income for the Asst Year 2006-07 declaring taxable income of Rs 23,96,540/-. The accounts of the assessee were duly subjected to tax audit u/s 44AB of the Act. The details of returned income, turnover, net profit reported by the assessee are as under:-

	<b>ASSESSMENT YEARS</b>				
	<u>2006-07</u>	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>	<u>2011-12</u>
Turnover	51857700	167616037	146060004	137912395	102956387
Net Profit	2822049	3454999	2761506	2787263	1711449
NP %	5.441909	2.061258	1.8906654	2.0210388	1.6623048
Returned Income	2396540	3531218	2710956	2798850	2411449

During the course of assessment proceedings, the assessee rejected the books of accounts and resorted to estimate the net profit from contract business at 8% of total contract receipts and accordingly added the same. On first appeal, it was pleaded by the assessee that deduction towards bank interest, bank charges and depreciation should be allowed to be deducted from the estimated business profit of 8% . The Id CITA upheld the action of the Id AO in rejection of the books of accounts of the assessee and the book results. The Id CITA observed that for the Asst Year 2007-08, in assessee's own case, it was held that estimation of net profit at 2.5% gross contract receipts would meet the ends of justice and accordingly followed the same for these asst years also. Aggrieved, the revenue is in appeal before us on the following grounds:-

**I.T.A. No.1425/Kol/2015 for Assessment Year-2006-07**

1. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing to adopt the rate at 2.5% of the turnover though the assessee-company failed to give details of opening stock as well as closing stock before the auditors, assessing officer and the Ld. CIT(A).*
2. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing to adopt the rate at 2.5% of the turnover without giving cognizance of the fact that the assessee had earned more than 2.5% profit in other years without any extra ordinary income.*
3. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing to adopt the rate at 2.5%.*
4. *The appellant craves leave to add/delete/modify the grounds of appeal before or at the time of hearing.*

4. We have heard the rival submissions . We find that the only issue involved in all these appeals is as to whether the Id CITA was justified in estimating the net profit at 2.5% of gross contract receipts as business income of the assessee as against 8% added by the Id AO. We find that the Id CITA had estimated the net profit at 2.5% of gross

contract receipts by placing reliance on the decision of his predecessor in assessee's own case for the Asst Year 2007-08. Against this order, the revenue had preferred an appeal before this tribunal, which was disposed off in ITA No. 760/Kol/2012 dated 20.1.2016 wherein it was held as under:-

*"5. We have heard the rival submissions and perused the material available on record. We find that the contract receipt of assessee amounting to Rs. 9,17,46,745/- is more than Rs 40 lacs and hence the provisions of section 44AD of the Act cannot be made applicable to the instant case. Hence the estimation of profit @ 8% of contract receipts does not gain any support from the provisions of the Act and has to be construed only as a general estimation made by the Learned AO. We also find that the operating profit of the assessee before charging interest and depreciation is 8% of contract receipts. This aspect was mistakenly understood by the Learned AO that the assessee itself had admitted to adoption of 8% of receipts as its net profit and this made the Learned AO to reject the books of accounts of assessee and resort to presumptive taxation u/s 44AD of the Act. This acceptance was denied by the assessee before the Learned CIT(A).*

*5.1. We find that the assessee had taken secured loans of Rs. 326.89 lakhs on which bank interest of Rs. 35,08,977/- and bank charges of Rs. 6,57,561/- was incurred by the assessee. Similarly fixed assets to the tune of Rs. 80,27,539/- was used for civil construction business and depreciation thereon of RS. 12,87,911/- was claimed as allowance u/s 32 of the Act by the assessee. The Learned CIT(A) found that these figures of bank interest, bank charges and depreciation, if reduced from the estimated profit of 8% of net contract receipts, the resultant profit figure was 2.1%. We find that the assessee had explained before the Learned AO that the assessee was formed with an objective of taking over business of an existing partnership firm and in order ITA No.760/Kol/2012-A-AM M/s. Gourangalal Chatterjee Construction 3 Private Ltd to build credentials of the new company in Government records, the assessee accepted contracts at substantially lower rates. As a result, the profit margin during the year was low. This fact was not disproved by the Learned AO and no evidence was brought on record by the Learned AO to show that the tenders were won by the assessee at higher prices. We find that the Learned CIT(A) had sought to restrict the estimation of net profit @ 2.5% of contract receipts by making the following observations :-*

*"8. The assessee's plea that in estimating income; deduction for the interest and depreciation should be separately allowed is also reasonable. The issue regarding allowance of depreciation in best judgment assessment was considered by the CBDT in its Circular no 290 and it was directed as follows:-*

*"Even where best judgment 'is made, the above procedure should be adopted provided the required particulars have been furnished by the assessee. In cases where required particulars have not been furnished by the assessee and no claim for depreciation has been made in the return, the Income-tax Officer should estimate the income without allowing*

*depreciation allowance. In such cases, the estimate of net profit would be naturally higher than otherwise and the fact that the estimate has been made without considering depreciation allowance may be clearly brought out in the assessment order. In such cases, the written down value of depreciable assets would continue to be the same as at the end of the preceding year as no depreciation would actually be allowed in the assessment year".*

9. This CBDT circular was considered and applied in various judgments wherein the High Courts directed the assessing authorities to allow deduction for depreciation separately while estimating the income. Some of such decisions are *CIT v. Friends Corporation* [1989] 180 ITR 334 (Punj. & Har.), *Beco Engg. Co. Ltd. v. CIT* [1984] 148 ITR 478 (Punj. & Har.), *CIT v. Arun Textile* [1991] 192 ITR 700 (Guj.), *CIT v. Shri Someshwar Sahakari Sakhar Karkhana Ltd.* [1989] 177 ITR 443 (Bom.), *CIT v. Bishambar Dayal & Co.* [1994] 210 ITR 118 (All.), *Chopra Bros.*

*(India) (P.) Ltd. v. ITO* [1993] 202 ITR 40 (Chd. Trib.), *CIT v. Jain Construction Co.* [2000] 110 Taxman 156 (Raj.)

10. As regards allowability of interest and bank charges the same is covered by the order of the Third Member ITAT Chandigarh in-the case of ITA No.760/Kol/2012-A-AM M/s. Gourangalal Chatterjee Construction 4 Private Ltd Income-tax Officer v. *Nikka Ram Sanjeev Kumar* [1999] 69 ITD 195 (CHD.) (TM) where the Third Member held as follows:

*"When an estimate of an income is made, all the inputs i.e., the expenses including interest paid for capital borrowed for the purpose of the business are allowable deductions. In doing so, it is to be seen whether the assessee borrowed capital for the purpose of the business and was used for the same. If so, then the interest thereon has to be allowed as a deduction. If, however, the assessee has sufficient capital and in spite of that borrowed money which was not utilised for the purpose of the business it is for the Assessing Officer to disallow the claim as the borrowed money was not for the purpose of the business. In the present case, there is no dispute regarding the capital borrowed which was utilised for the purpose of the business. Admittedly, it is allowable deduction. "*

11. Considering the totality of the facts and circumstances of the case as are available before me I therefore hold that in estimating appellant's income; deduction for depreciation and interest was required to be allowed separately. This was not done by the AO. I find that even if net profit rate of 8% as adopted by the AO is applied in assessee's case then the gross operating profit works, out, to Rs. 73,39,740 being 8% of Rs.9,17,46,745. From this; if bank interest of Rs.3508977, bank charges of Rs.657561 and depreciation of Rs.12,87,911 is

*reduced then the net. income from business of civil contract execution works, out to Rs.18,85,290 which in % represents 2.1 % of contract receipt. This compares favorably against returned net profit of Rs.18,69,454 except for minor difference of Rs.16,000 approximately. The Ld. counsel relied on a comparative case of Amplified Engineers PAN AACCA6890M for AY 2005-2006 in ITA No.757/K/2011 where the ITAT Kolkata in similar circumstances estimated the income of a civil contractor at 2% of the turnover of that assessee. Therefore considering the facts and circumstances of the case and the comparative instance I am of the opinion that it will meet the ends of justice if the assessee's business income for the year under consideration is estimated at 2.50% of the turnover. of Rs.9,17,46,745. Accordingly I direct the AO to assess the business income at Rs.22,93,668/- in place of Rs.18,63,450/- as discussed by the assessee. The assessee accordingly gets relief of Rs.51,41,882/-. These grounds are partly allowed."*

5.2. The following decisions relied upon by the Learned AR support the case of the assessee:-

*[CIT vs Earth Tech Engineers](#) reported in (2014) 46 taxmann.com 287 (P&H HC) dated 13.3.2014, wherein the questions raised before their Lordships and decision rendered thereon are reproduced below:-*

*Questions:*

- 1) *Whether the Hon'ble ITAT was correct in law in confirming the order of the learned CIT(A) scaling down the net profit to 8% on the gross receipts as against 12% applied by the AO at the time of assessment?*
- 2) *Whether the Hon'ble ITAT was correct in law in confirming the order of the learned CIT(A) allowing the depreciation out of the net profit?*

*Held :*

*"7. The issue before this Court in [CIT v. Chopra Bros. India \(P\) Ltd](#) [2001] 252 ITR 412/119 Taxman 866 and [Girdhari Lal v. CIT](#) [2002] 256 ITR 318 [2001] 119 Taxman 863 was with regard to deduction to be made on account of depreciation from the gross receipts while applying net profit rate. It was held on the basis of a circular issued by the Board, which was binding on the revenue that the gross receipts to which net profit rate is to be applied shall be determined after giving allowance on account of depreciation."*

*[CIT vs Y.Ramachandra Reddy](#) reported in (2014) 50 taxmann.com 129 (AP HC) dated 30.7.2014, wherein the questions raised before their Lordships and decision rendered thereon are reproduced below:-*

*Questions:*

1. *Whether on the facts and in the circumstances of the case the Tribunal is correct in law in directing the Assessing Officer to allow depreciation and interest payments from the estimate of profit at 12%?*

2. *Whether on the facts and in the circumstances of the case the Tribunal is correct in law in directing the Assessing Officer to grant reliefs on those items which are not claimed by the assessee?*

3. *Whether on the facts and in the circumstances of the case the Tribunal is correct in granting depreciation though it was already granted by the Assessing Officer?*

*Held:*

13. *The learned counsel for the appellant is not able to point out any provision of law in the Act or Rules made thereunder, which restricts the allowance of the depreciation and interest. On the other hand, the facility created under the Act is so firm and strong that if for any reason it becomes impermissible or unnecessary for an assessee to seek the allowance of depreciation for a particular Assessment Year, he is entitled to carry it forward, for the subsequent years. In such an event, it assumes the character of unabsorbed depreciation. In this very case, the Assessing Officer permitted the allowance of unabsorbed depreciation to the respondent. However, he denied the benefit of the allowance of current depreciation and interest. No reference is made to any provision of law to make such distinction. His understanding of the matter is that [Section 44AD](#) of the Act, that provides for a comprehensive formula of determining net profit derived by a civil contract or at 8%, takes in its fold, allowance of depreciation, interest and other benefits. The fact, however, remains that such a provision was not in exercise in the Assessment Year 1994-95.*

14. *If an assessee is entitled to claim deduction of interest, be it under [Section 36\(1\)\(iii\)](#) of the Act or any other relevant provision and of depreciation under [Section 37](#) of the Act, in the ordinary course of assessment, there is no reason why the same facilities be not extended to him, merely because the profit is determined on the basis of estimation as was done in the instant case. We are of the view that depreciation and interest, which are otherwise deductible in the ordinary course of assessment, remain the same legal character, even where the profit of assessee is determined on percentage basis.*

15. *The conclusions arrived at by us, get support from the Circular dated 31.08.1965 issued by the Central Board of Direct Taxes. Though the Circular was with reference to the 1922 Act, it holds good for the analogous provisions under the 1961 Act.*

16. *The learned counsel for the appellant relied on a judgment of this Court in [Indwell Constructions v. CIT](#) [1998] 232 ITR 776. That was a case in which this Court took the view that once the books of account are disbelieved for a particular purpose, they cannot be relied upon in the context of interest. In the instant case, we are concerned with the depreciation. The occasion to deny the*

*ITA No.760/Kol/2012-A-AM M/s. Gourangalal Chatterjee Construction Private Ltd deduction of depreciation or interest would arise if only the material placed before the Assessing Authority in proof of purchase of machinery and other items and payment of interest is disbelieved. No finding of that nature was recorded by the Assessing Officer. "*

*5.3. In view of the aforesaid facts and circumstances and respectfully following the aforesaid judicial precedents , we hold that depreciation and interest is allowable as deduction from the estimated net profit of 8% by the Learned AO and the resultant profit figure was 2.1% of contract receipts and further hold that the Learned CIT(A) had rightly estimated the net profit @ 2.5% of contract receipts to meet the ends of justice. Hence we don't find any infirmity in the order of the Learned CIT(A). Accordingly, the grounds raised by the revenue are dismissed.*

*6. In the result, the appeal of the revenue is dismissed."*

4.1. We find pursuant to the following of this tribunal order for the Asst Year 2007-08 for all the asst years under appeal before us, the position of net profit would be as under :-

	<b>ASSESSMENT YEARS</b>				
	<u>2006-07</u>	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>	<u>2011-12</u>
Turnover	51857700	167616037	146060004	137912395	102956387
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NP %	5.441909	2.061258	1.8906654	2.0210388	1.6623048
Returned Income	2396540	3531218	2710956	2798850	2411449
Assessed Income	3457937	13985382	11674199	12241640	11091570
NP @ 2.5%	1296443	4190401	3651500	3447810	2573910

4.2. Hence we find from the above chart, in each of the years under appeal, the determination of net profit at 2.5% of gross contract receipts would always be higher than the returned income of the assessee for each of the years under appeal. Hence we

direct the Id AO to adopt net profit at 2.5% of gross contract receipts by following the order of this tribunal supra. Hence we do not find any infirmity in the order of the Id CITA in this regard. Accordingly, the grounds raised by the revenue are dismissed.

5. In the result, all the appeals of the revenue are dismissed.

**Order pronounced in the Court on 21.09.2017**

Sd/-  
[N.V.Vasudevan]  
Judicial Member

Sd/-  
[ M.Balaganesh ]  
Accountant Member

Dated : 21.09.2017

SB, Sr. PS

Copy of the order forwarded to:

1. ITO, Ward-10(1), Kolkata, P-7, Chowringhee Square, 3<sup>rd</sup> Floor, Kolkata-700069.
2. M/s Gourangalal Chatterjee Construction Pvt. Ltd., 164/A/9, Lake Gardens, Kolkata-700045.
- 3..C.I.T.(A)-4, Kolkata
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary  
Head of Office/D.D.O., ITAT, Kolkata Benches