

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
RAJKOT BENCH, RAJKOT**

[CONDUCTED THROUGH E-COURT AT AHMEDABAD]

**BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER AND  
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

**आयकर अपील सं./ ITA No. 367/Rjt/2014**

**Assessment Year : 2009-10**

The ACIT, Circle-1, Junagadh	Vs	M/s. Parishram Builders, Kunal Complex, Teachers Colony, Junagadh Road, Veraval-362 266 PAN : AACFP 5403 G
<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/ (Respondent)</b>

**आयकर अपील सं./ ITA No. 687/Rjt/2014 & CO No.11/Rjt/2015**

**Assessment Year : 2010-2011**

The ACIT, Circle-1, Junagadh	Vs	M/s. Parishram Builders, Kunal Complex, Teachers Colony, Junagadh Road, Veraval-362 266 PAN : AACFP 5403 G
<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/ (Respondent) &amp; Cross-Objector</b>

Revenue by :	Usha N Shrote, Sr DR
Assessee by :	M J Ranpura, AR

सुनवाई की तारीख/Date of Hearing : 14/02/2018

घोषणा की तारीख /Date of Pronouncement: 22/02/2016

**आदेश/ORDER**

**PER S.S. GODARA, JUDICIAL MEMBER :-**

These two revenue's appeals for assessment years 2009-10 and 2010-11 and assessee's cross-objection in latter case arise against CIT(A)-IV, Rajkot's order dated 26.03.2014 and 11.09.2014 in case Nos. CIT(A)-IV/0161/11-12 and CIT(A)-IV/0056/13-14; respectively, in proceedings under section 143(3) of the Income-tax Act, 1961 (in short the "Act").

2. A perusal of revenue's pleadings in both these appeals indicates that identical issues are sought to be raised for our apt adjudication. Learned departmental representative pinpoints the fact that first common issue in these two appeals is that of rejection of books by the Assessing Officer under section 145(3) of the Act has reversed in lower appellate proceedings. He then submits that the CIT(A) has partly restricted the Assessing Officer's action estimating 8% net profits on assessee's self executed contract work receipts amounting to Rs.2,01,94,365/-, 5% net profit on sublet contract work amounting to Rs.50,14,247/- and 5% net profit on black metal sales coming to Rs.99,572/- in former assessment year and similar net profits in latter case on corresponding gross receipts of Rs.13,10,03,194/-, Rs.5,76,87,048/- and Rs.55,99,130/- in latter appeal; respectively, to a lump-sum amount of Rs.5,00,000/- each in the two assessment years in question. We thus treat former appeal ITA No.367/Rjt/2014 as the lead case. The assessee's cross-objection in latter assessment year 2010-11 on the other hand seeks to challenge the CIT(A)'s action restricting the above addition of Rs.5,00,000/- only in lower appellate proceedings.

3. We now advert to the relevant basic facts. There is no dispute that this assessee is a firm engaged in civil construction business. It filed its return in former assessment year 2009-10 on 30.09.2009 declaring total income at Rs.98,55,046/-. The Assessing Officer thereafter framed a regular assessment on 23.06.2011 assessing the above income at Rs.2,50,48,440/- after rejecting the assessee's book results under section 145(3) of the Act thereby estimating its net profits at Rs.2,53,08,184/- comprising of the above three additions of self executed contract work, sublet contract work and black metal sales (supra). He was inter alia of the opinion that the assessee's books did not maintain quantitative details, its stock register of the material purchased/consumed was not properly maintained, the work-in-progress

was valued on estimation basis, it had sublet its construction work without maintaining corresponding support account, there was no agreement of subletting with such sub-contractors, it had entered into substantial transactions with specified persons under section 40A(2)(b) of the Act, the relevant expenses had been supported only by internal vouchers instead of independent verification and it had not properly compiled its vehicle's log-book; respectively. All this resulted in rejection of assessee's books of accounts. The Assessing Officer then quoted section 44AD of the Act for guidance purposes to conclude that assessee's self executed construction work, sublet purchase and black metal sales ought to be subjected to 8% and 5% (in latter two instances); respectively, resulting in three impugned additions.

4. The CIT(A) reverses Assessing Officer's finding qua rejection of books. He then restricts the above three additions on merits to cumulating sum of Rs.5,00,000/- only as under:-

*"5. I have perused the written submission of the AR as also the assessment order. It is seen from the assessment order (para 3.) that, the books were rejected as the appellant had not maintained quantitative details, WIP was on estimate basis, substantial work was done through sub contracts, there is no sub contracts agreements, there were substantial transactions with persons related in terms of section 40A(2)(b) and log book for vehicle is not maintained. However, none of the above reasons for rejections were specific in nature, in as much as, the AO failed to hold which transactions were covered u/s. 40A(2)(b) and to how much extent they were over valued or under valued, how non-maintenance of log book for use of vehicles would translate into rejection of book results, how estimation of WIP made by the appellant was under valued, how by not entering into sub-contract agreements, the appellant's book did not present a true and fair picture, etc. In the absence of any specific instance, it would be difficult to infer that the appellant's books does not present a true and a fair picture. Therefore, rejecting the book results, without bringing forth any specific instance of false presentation through the books, would be harsh and unjust. Therefore, as there are no specific instance for rejecting the book results, the AO is not justified in invoking the provisions of section 145(3). Hence, the first ground of appeal is allowed.*

6. The next three grounds of appeals are with regard to estimation of appellant's profits. As discussed supra, the AO proceeded to estimate the income of the appellant by invoking the provisions of section 145(3). In fact, it is seen from the assessment order that, the AO has again not brought forth any reason to estimate the gross turnover of the appellant at 8%, except by taking analogy of section 44AD, though however, the AO himself accepts that the appellant's case is not covered by section 44AD. He further held that, even small and marginal contractors earn 3% and therefore the appellant with greater capital outlay and bigger contract receipts should minimum have income of 8%. However, again the AO failed to bring any specific instance on record. No comparative cases were cited or compared. Merely because section 44AD prescribes mandatory 8% GP on gross receipts, does not translate into such income in the hands of the appellant, particularly when no specific instance has been quoted. Therefore, in the absence of any details to support the finding of the AO, the estimation appears to be on the higher side.

6.1 Further, by estimating profit at 5% on sub-let works and estimating the income from sale of black metal, the AO has not brought forth any specific instance. The provisions of Income tax Act are ruled by facts and not by surmises. Unless there is specific instance that the appellant had earned income which was not brought forth for tax, it cannot be notionally held that the appellant may have earned income, in order to tax the same. Hence, in the absence of any details, the finding of the AO is held to be mere surmise and on presumptive basis. It is an established rule that, surmises however strong it may appear, can never take the place of facts. Therefore, the estimation made by the AO is ruled to be on the higher side and the same are rejected.

6.2 However, as held supra, though the reasons for rejection of books are held to be unjustified and the estimation is held to be on the higher side, but in order to avoid any pilferage of revenue, and in the interest of fair play and justice, I uphold addition to the tune of Rs.5 lacs. Thus, the appellant gets relief of the balance amount.

6.3. In light of the above, the additions made by the AO are directed to be deleted."

5. Learned departmental representative vehemently submits during the course of hearing that the Assessing Officer had rightly rejected assessee's books in order to arrive at 8% net profit estimated figures in question. She vehemently supports the Assessing Officer's action to pray for reviving both

rejections of books as well as all three additions on merits. Learned authorized representative on the other hand supports the lower appellate findings extracted in the preceding paragraphs. We notice in this backdrop of facts that the Assessing Officer had rejected assessee's books on a variety of reasons as narrated in the preceding paragraphs. We have perused the Assessing Officer's finding in assessment order qua this effect. There is not even a single specific instance quoted in assessee's books indicating the above stated irregularities. We afforded ample opportunities to learned departmental representative to refer to any findings on record which could indicate that the same suffered from all the said specific shortcomings. There is no such material referred before us in support of assessment findings. It thus turns out to be a case wherein learned Assessing Officer proceeded to reject assessee's books of accounts without even dealing with all the specified parameters disclosed therein. We further find in page no.7 of the CIT(A)'s order that the assessee's net profit rate is @ 2.82% as against 1.43% and 2.0% in assessment year 2007-08 and 2008-09; respectively. We wish to quote Hon'ble jurisdictional High Court's judgment in CIT Vs. Vikram Plastic & Ors, 239 ITR 161, that section 145 is not to be invoked for rejecting an assessee's books in absence of any material brought on record to establish that relevant purchases or expenses were inflated or sales suppressed or that the tax payer concerned had not followed the regular method of accounting. It has further come on record that the CIT(A) has still upheld the impugned addition on merits to a lump-sum figure of Rs.5,00,000/- despite upholding assessee's books of accounts. We therefore see no reason to interfere with the learned CIT(A)'s above extracted findings granting part relief to the assessee. The revenue's twin substantive grievances on rejection of books as well as merits along with its main appeal ITA No.367/Rjt/2014 fail accordingly.

6. Same order to follow in ITA No.687/Rjt/2014 as it has already come on record that revenue's grievance therein is identical to that in former appeal.

7. These two revenue's appeals are accordingly dismissed.

8. Learned counsel representing assessee informs us that the assessee no more wishes to press cross-objection No.11/Rjt/2015 keeping in mind our adjudication of appeals on merits as well as in view of the smallness of the amount involved therein. Assessee's cross-objection No.11/Rjt/2015 is thus dismissed as not pressed.

9. In the result, revenue's appeals ITA Nos. 367 & 687/Rjt/2014 and assessee's cross-objection CO No.11/Rjt/2015 are dismissed.

Order pronounced in the Court on 22<sup>nd</sup> February, 2018 at Ahmedabad.

Sd/-

Sd/-

**(PRADIP KUMAR KEDIA)**  
**ACCOUNTANT MEMBER**

**(S.S. GODARA)**  
**JUDICIAL MEMBER**

Ahmedabad, Dated 22/02/2018

*BB*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण/ DR, ITAT, Rajkot
6. गार्ड फाईल / Guard file.

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आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./ Asstt.Registrar)  
आयकर अपीलीय अधिकरण/ ITAT, Rajkot