

आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "बी" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE**

श्री डी. करुणाकरा राव , लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

**BEFORE SHRI D.KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM**

आयकर अपील सं. / ITA Nos.2038 and 2039/PUN/2014
निर्धारण वर्ष / Assessment Years : 2010-11 and 2011-12

ACIT, Circle-2,
Aurangabad

.... अपीलार्थी/Appellant

Vs.

M/s. Ambarwadikar & Company,
Gut No.103, Beed Bye-pass Road,
Deolali, Aurangabad
PAN : AAHFA6223A

.... प्रत्यर्थी / Respondent

C.O. Nos. 88 and 89/PUN/2017
(Arising out of ITA Nos. 2038 and 2039/PUN/2014
(A.Yrs. 2010-11 and 2011-12)

M/s. Ambarwadikar & Company,
Gut No.103, Beed Bye-pass Road,
Deolali, Aurangabad
PAN : AAHFA6223A

.... अपीलार्थी/Appellant

Vs.

ACIT, Circle-2,
Aurangabad

.... प्रत्यर्थी / Respondent

Assessee by : Shri M.K. Kulkarni
Respondent by : Smt. Nirupama Kotru, CIT-DR

सुनवाई की तारीख / Date of Hearing : 21.02.2018	घोषणा की तारीख / Date of Pronouncement: 23.02.2018
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आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

There are 4 appeals filed by the Revenue and the Assessee under consideration involving assessment years 2010-11 and 2011-12. Main appeals ITA Nos. 2038 and 2039/PUN/2014 are filed by the Revenue

against the common order of CIT(A), Aurangabad, dated 28-08-2014. Assessee filed the Cross objections vide C.O. Nos. 88 and 89/PUN/2017.

2. We shall first take up the appeals of the Revenue for the A.Yrs. 2010-11 & 2011-12 in the following paragraphs.

ITA Nos.2038 & 2039/PUN/2014
(By Revenue - A.Yrs. 2010-11)

3. Briefly stated relevant facts culled out from the appeal ITA No.2038/PUN/2014 are that assessee is a firm engaged in the business of Civil Contracts. There was survey action u/s.133A of the Act on the Ambarwadikar group of cases on 10-12-2012 to 12-12-2012. Survey action resulted in discovery of incriminating documents and books of account etc. AO impounded these papers and documents. Statement of Mr. Suryant Ambarwadikar was also recorded on oath u/s.131 of the Act. Further, considering the complexity of the accounts and voluminous papers/documents impounded by the Revenue, with the approval of CIT, Aurangabad, a Special Audit was ordered u/s.142(2A) of the Act. M/s. S.R. Rahalkar and Associates, Chartered Accountants were the Special Auditors. After taking into account the report of the Special Audit, the assessment was completed determining the total income of Rs.19,66,83,090/- against the returned income of Rs.1,05,34,323/-. AO made various additions invoking the provisions of sections, 32, 69C, 40A(3), 40(a)(ia), 37, 14A etc. The details of the additions as appearing on page 40 of the assessment order are extracted as under :

<i>“Disallowance as per Para No.6</i>	<i>Rs.5,84,736</i>
<i>Disallowance as per Para No.7</i>	<i>Rs.2,00,000</i>
<i>Disallowance/Addn. as per Para No.8</i>	<i>Rs.45,69,900</i>
<i>Disallowance as per Para No.9</i>	<i>Rs.16,74,572</i>
<i>Disallowance as per Para No.10</i>	<i>Rs.12,70,400</i>
<i>Disallowance as per Para No.11</i>	<i>Rs.2,75,750</i>
<i>Addition as per Para No.12</i>	<i>Rs.11,218</i>

<i>Disallowance as per Para No.13</i>	<i>Rs.10,35,634</i>	
<i>Disallowance as per Para No.14</i> <i>(5,76,742+3,02,400+1,20,000)</i>	<i>Rs.9,99,142</i>	
<i>Addition as per Para No.16</i>	<i>Rs.82,60,000</i>	
<i>Addition as per Para No.167</i>	<i>Rs.1,44,54,828</i>	
<i>Disallowance as per Para No.18</i>	<i>Rs.7,48,82,935</i>	
<i>Disallowance as per Para No.19</i>	<i>Rs.4,63,30,250</i>	
<i>Addition as per Para No.20</i>	<i>Rs.20,53,000</i>	
<i>Addition as per Para No.21.3</i>	<i>Rs.1,90,95,000</i>	
<i>Addition as per Para No.21.4</i>	<i>Rs.1,04,51,302</i>	<i>Rs.18,61,48,767</i>
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<i>Total income</i>		<i>Rs. 19,66,83,090</i>

4. Aggrieved with the said order of the AO with aforementioned itemised additions, the assessee filed an appeal before the CIT(A) raising various grounds on merits of the additions. In the impugned order, the CIT(A) examined each of these additions and found that, with the said additions, the GP rate of the assessee works out to a phenomenal GP rate of 164.14% of the contract receipts for the A.Y. 2010-11. Similarly, the GP rate for the subsequent assessment year 2011-12 works out to 60% of the contract receipts. Relevant discussion is given in Para Nos. 12 along with its sub-paragraphs of the order of CIT(A).

The discussion given in Para Nos. 12.1 to 12.6 constitutes operational paragraphs and the summary of the same includes that the contract receipts for the A.Y. 2010-11 works out to Rs.12.99 crores. Assessee declared in the return of income Rs.56,88,654/- only. AO made addition of Rs.18.61 crores (rounded off).

For the next A.Y. 2011-12, AO made additions amounting to Rs.56,57,055/- which resulted in recording of 60% net profit rate. CIT(A) held that the gross profit rates of 164.64% for the A.Y. 2010-11 and 60% for the A.Y. 2011-12 are unreasonably high.

Therefore, considering the unusual GP rates of 164.14% and 60% for A.Yrs. 2010-11 and 2011-12, in principle, the CIT(A) dismissed the manner of assessment by AO, which involves itemised additions, in both

the assessment years. Alternatively, the CIT(A) invoked the provisions of section 145 of the Act and proceeded to estimate the profits relying on various decisions of the Pune Bench, Hyderabad Bench and other Benches of the Tribunal. The details are mentioned in Para No. 12.3 to 12.6 of the order of CIT(A) and they are extracted as under :

“12.3 In view of the ratio laid down by various decisions, including the decisions of Hon’ble ITAT, Pune relied on by the appellant and particularly in view of the ratio laid down by the above mentioned decision in the case of N. Ramchandra Reddy, I hereby reject the book results of the appellant firm for A.Ys. 2010-11 and 2011-12 by invoking provisions of section 145(3) of the Act.

12.4 After rejecting the book results for A.Y. 2010-11, I estimate the profit of the business of the appellant @13% of the business receipts before remuneration to partners or actual income returned by the appellant. The business profit for A.Y. 2010-11 @13% on contract receipts of Rs.12,99,58,419/- works out to Rs.1,68,94,594/- and after reducing the remuneration to partners Rs.6,00,000/-, the same works out to Rs.1,62,94,594/- as against shown by the appellant at Rs.56,88,654/-. Therefore the addition made by the A.O. stands upheld to the extent of Rs.1,06,05,940/- and the remaining addition stands deleted. The A.O. is directed accordingly.

12.5 The contention of the appellant that the addition, if any, confirmed in A.Y. 2010-11 is to be reduced from the income for A.Y. 2011-12 is rejected as the same is not supported by any corroborative evidence and particularly in view of the fact that the income for A.Y. 2010-11 is being decided by rejecting book results and by estimating business profit @13%.

12.6 After rejecting the book results for A.Y. 2011-12, the business profit of the said year is to be estimated. The business profit for A.Y. 2011-12 @13% on the contract receipts of Rs.6,38,30,637/- works out to Rs.82,97,983/- and after reducing the remuneration to partners Rs.12,00,000/-, the same works out to Rs.70,97,983/- which is much less than the business income returned by the appellant at Rs.1,57,71,802/-. The income of the appellant firm cannot be reduced to the figure less than the income returned, particularly in view of the assets appearing in the balance sheet as at 31/03/2011, the source of which is out of income returned and the items of liability side of the balance sheet. Therefore, the total income returned by the appellant at Rs.2,47,58,468/-, including the business profit at Rs.1,57,71,802/- is to be considered subject to further addition of Rs.5,26,263/- on account of apparent mistake of claim of depreciation on building which has not been contested by the appellant in appeal. Therefore the A.O. is directed to assess the income of the appellant for A.Y. 2011-12 at Rs.2,52,84,731/-.”

5. From the above, the summary of the decision of CIT(A) includes :

(1) the estimation of profits @13% of the business receipts for the A.Y. 2010-11 is reasonable. Effectively, the addition to the extent of Rs.1,06,05,940/- was confirmed against the addition of

Rs.18,61,48,767/-, (2) the profits returned by the assessee for A.Y. 2011-12, which amounts to the GP rate of 24% constitutes reasonable and hence, the income returned by the assessee with business profits of Rs.1,57,71,802/- is fair and reasonable. As per the return, assessee returned the total income of Rs.2,47,58,468/-. With these profits, the gross profit rate is found to be around 24%. Therefore, the CIT(A) confirmed the same and deleted the entire itemised additions in both the assessment years.

6. Aggrieved with the deletions of the itemised additions made by the AO in both the assessment years, the Revenue is in appeal before us. Revenue holds that there is no bar in making addition u/s.69C of the Act over and above the estimated profits for A.Y. 2010-11. Further, Revenue desires confirming of the itemised additions. Further, aggrieved with the additions confirmed by the CIT(A) in both the assessment years, assessee filed the Cross Objections vide C.O. Nos. 88 and 89/PUN/2017.

7. We shall now take up the adjudication of the said issues raised by the Revenue in both the appeals for the A.Yrs. 2010-11 and 2011-12. We also find both the cross-objections filed by the assessee are linked to the issues raised by the Revenue. Otherwise, Revenue raised 19 grounds in the appeal memo and all these grounds relate to the merits of the additions. On finding certain deficiencies in the grounds, Revenue filed 'additional grounds' in two instalments on 22-02-2017 and 04-09-2017. The said additional grounds are extracted as under :

"1. On the facts and circumstances of the case and Law and without prejudice to Ground No.1 in the original Grounds of Appeal, the Ld. CIT(A), Aurangabad, erred in holding that no separate addition can be made u/s.69C of the Act once the profits are estimated. In this regard reliance is placed on the following decisions :

- a. CIT Vs. K.M.N. Naidu 221 ITR 451*
- b. Kale Khan Mohammad Hanif Vs. CIT 50 ITR 1*
- c. Devinder Singh Vs. ACIT 101 TTJ 505*

2. *On the facts and circumstances of the case and Law and without prejudice to Ground No.1 in the original Grounds of Appeal, the Ld.CIT(A), Aurangabad erred in estimating the profits for A.Y. 2010-11 at 13% by comparing other cases ignoring the fact that profit @24% was declared by the assessee itself for the A.Y.2011-12 which was better comparable.*

3. *On the facts and circumstances of the case and Law the Ld.CIT(A), Aurangabad erred in deleting the addition of Rs.36,00,340/- made on account of cement material payable as fictitious liability.”*

8. After hearing both the parties on the additional grounds and on finding that there is no requirement of any investigation into the facts for adjudication of the issues, we find the said grounds should be admitted for adjudication.

9. Additional Ground No.1 and 2 common to both the assessment years relate to legal bar if any for making separate additions u/s.69C of the Act over and above the profits estimated u/s.145(3) of the Act. Further, the correctness of estimation of profits @13% for A.Y. 2010-11 and deleting itemized additions amounting to Rs.18,61,48,267/- were also raised. Infact, additional Ground No.3 relates to one of the itemized additions and the correctness of the relief granted by the CIT(A). Revenue submits that when the profits are estimated by invoking the provisions of section 145 of the Act, there is no bar for making additions u/s.69C of the Act over and above the estimated profits. Of course, Revenue is also aggrieved against the lower profit rate of 13% determined by the CIT(A) when the assessee offered the profit rate at 24% on the turnover in the A.Y. 2011-12. Therefore, we have to now examine (1) if the additions u/s.69C to the estimated profits is allowable in law once the profits are estimated involving the provisions of section 145 of the Act; and (2) if the CIT(A)'s decision in approving the profit rate of 13% for A.Y. 2010-11 when the assessee returned income at the GP rate of 24% for the A.Y. 2011-12.

10. We have considered the submissions of Ld. DR for the Revenue who vehemently argued in favour of confirming of itemized additions in both the years. The fact of failure of CIT(A) in not adjudicating the itemized additions was specially highlighted by the Ld. DR. She also brought to our notice the fact that this is a case where survey action was undertaken and submitted that the profit percentages of such assessment years are always on higher side due to the discovery of discrepancies by survey team and they are not on par with the normal assessment years where such coercive action is not taken by the Department. To that extent, as per the Ld. DR, the order of the CIT(A) is erroneous and his decisions should not be sustained. The glaring fact of the existence of unbridgeable gap between the GP rates of 13% and 24% in the A.Yrs. 2010-11 and 2011-12 were also highlighted. Ld. CIT-DR also submitted that the order of CIT(A) cannot be described as a speaking order when the same constitutes an appealable order. Ld. DR submitted that the matter should be remanded to the file of CIT(A) for want of speaking order on each of the itemized additions before he takes any decision eventually. Bringing our attention to Form No.35, Ld. DR submitted that it is never the prayer of the assessee that the itemized additions should be deleted and gross profit should be estimated in the years under consideration.

11. We have also considered the submissions made by Mr. M.K. Kulkarni, Ld. Counsel for the assessee.

12. We have heard both the parties and find there are couple of issues that requires our attention (1) if the GP rates arrived at 164.14% for A.Y. 2010-11 and 60% for A.Y. 2011-12 in view of the itemized additions, is good enough reason for the CIT(A) to resort to changing the approach of

the AO and further resort to the GP estimations restricting to the normal GP rate of the assessee, which is surveyed u/s.133A of the Act, and (2) if the CIT(A) is justified in restricting the GP rate to 13% for A.Y. 2010-11 when the assessee himself offered the profit rate @24% in the subsequent A.Y. 2011-12.

Regarding the first issue, we find the AO made itemised additions/disallowances invoking the provisions of section 32, 69C, 40A(3), 40(a)(ia) and 37 and 14A etc. These are the disallowances made by the AO in view of the violations of the said provisions for the reasons of non-fulfilment of the conditions by the assessee specified in the Act. Such legal disallowances/additions cannot be confused with the 'profits' of the business of the assessee. In our view, the conclusion of CIT(A)'s order, is in the zone of errors by restricting to the GP rates without giving finding on itemised additions. In our view, the provisions of the Act were ignored along with the conditions specified therein. From that point of view, the conclusion given by the CIT(A) in Para No.12 in our view is without legal support. Alarming GP rates of 164.14% and 60% GP did not permit the CIT(A) to decide the itemised additions meaningfully in accordance with the provisions of section 250(6) of the Act.

Further, with regard to the said itemised additions, we find the CIT(A) merely extracted the reasons for making additions/disallowances and also extracted the contention of the assessee and has not adjudicated the grounds raised before him. The only reason for not adjudicating each of the itemised additions/disallowances in both the years is linked to the decision in Para No.12 wherein the estimated additions for A.Y. 2010-11 @13% is confirmed. No expressive reasons are mentioned by the CIT(A) justifying the said rate of 13% for this year. It is also not clear as to why 13% is sustainable when the assessee

himself offered the GP rate of 24% for the A.Y. 2011-12. Therefore, it is reasonable to presume that the order passed by the CIT(A) does not constitute a speaking order which should have been made by giving the reasons also on the itemised additions for both the assessment years. CIT(A) need not be guided by the GP rates of the assessee from the perspective of fairness, in a case like this where there is coercive action by the Department by way of invoking the provisions of section 133A of the Act. In such survey action, there is an element of gathering of incriminating evidences and the statements of the assessee which also assumes significance. By the estimations arrived at by the CIT(A), we are of the view that the discoveries made by the Department from the assessee's premises through invoking the provisions of section 133A of the Act have become redundant. Usually, the profits of the assessee are higher, normally in the assessment where action u/s.133A, 132, 131, 133(6) etc are invoked. The GP rates in such years need not be on par with the GP rates of the assessee normally either in earlier year or later assessment years. Therefore, we are of the view that both the assessments should be remanded to the file of CIT(A) for fresh adjudication after granting reasonable opportunity of being heard to the assessee. CIT(A) is directed to pass a speaking order by giving his reasons on each of the itemised additions in both the assessment years. CIT(A) shall grant reasonable opportunity of being heard to the assessee in accordance with the set principles of natural justice.

C.O. Nos.88 & 89/PUN/2017
(By Assessee - A.Yrs. 2010-11 and 2011-12)

13. Before us, Ld. Counsel for the assessee brought our attention to the Cross Objections and submitted that the objections raised by the assessee for both the assessment may be treated as 'not pressed'.

14. On considering the submissions of the assessee, we are of the opinion that the dismissal of the Cross Objections when the impugned orders are being remanded to the file of CIT(A) becomes premature. Therefore, we remand the Cross Objections filed by the assessee to the file of CIT(A) for fresh adjudication on each of the objections raised by the assessee. Accordingly, the Cross objections filed by the assessee for both the assessment years are allowed for statistical purposes.

15. In the result, ITA Nos. 2038 and 2039/PUN/2014 filed by the Revenue and CO Nos. 88 and 89/PUN/2017 filed by the assessee are allowed for statistical purposes.

Order pronounced in the open court on this 28th day of February, 2018.

Sd/-

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य / JUDICIAL MEMBER

(D. KARUNAKARA RAO)

लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 28th February, 2018
सतीश

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-2, Nashik
4. CIT-2, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "B Bench"
Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune