

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH RAIPUR
(BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
& SHRI R.L. NEGI, JUDICIAL MEMBER)**

ITA. No: 270/RPR/2014
(Assessment Year: 2011-12)

M/s G.N. Construction, Old Bhatti Road, Kedarpur P.O. Ambikapur, Dist. Sarguja (CG) (Appellant)	V/S	The Income Tax Officer, Ward Ambikapur, Income Tax Office, Kharasia Road, P.O. Ambikapur, Dist. Sarguja, Ambikapur (CG) (Respondent)
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PAN: AAGFG7266A

Appellant by : Shri G.S. Agarwal, C.A
Respondent by : Shri O.P Choudhary, D.R

(आदेश)/ORDER

Date of hearing : 08-03-2018
Date of Pronouncement : 16 -04-2018

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:

1. This appeal by the assessee is directed against the order of the CIT(A)-Bilaspur dated 18.06.2014 pertaining to assessment year 2011-12.
2. The assessee has raised five substantive grounds of appeal:-
 1. That learned CIT (A) erred in rejecting the ground that the order passed by learned Assessing officer u/s 144 was not according to law.

Prayed that provision of Section 144 are not applicable, the assessment order be annulled and the income returned be accepted.

2. That the learned CIT (A) further erred in estimating Net Profit of 3% on gross receipt against 8% applied by learned Assessing Officer, rejecting the ground to accept the books result, thereby maintaining an addition of Rs. 57,43,976/-(65,25,456-7,81,480) to the book result.

Prayed to accept the book result.

3. That, without prejudice, the learned CIT (A) erred in dismissing the ground to allow depreciation amounting to Rs 37,02,663/-.

Prayed that even, without prejudice, where Net Profit rate is applied, depreciation is allowable, which be allowed as claimed in return at Rs. 37,02,663/-

4. That the learned CIT (A) further erred in not allowing remuneration and interest to partners claimed at Rs. and Rs. respectively, which be allowed.

5. That the learned CIT (A) further erred in confirming the disallowance of interest at Rs. 5,61,480/- u/s 40(a)(ia) made by learned AO for non compliance of TDS u/s 194A, which under the facts and the law of the case, is unjustified and the same be deleted.

3. At the very outset the counsel for the assessee stated that he is not pressing ground No. 4 and therefore the same is dismissed as not pressed.
4. With ground No. 1 the assessee challenges the validity of the assessment order framed under section 144 of the Act.
5. We have carefully considered the assessment order and we find that in spite of several notices the assessee did not attend the assessment proceedings and therefore the Assessing Officer was left with no choice but to frame an ex-parte order under section 144 of the Act.
6. We therefore do not find any infirmity in the order so framed. Ground No. 1 is accordingly dismissed.
7. With ground No. 2 the assessee has objected to the estimation of net profit by the CIT(A) @ 3% as against 8% applied by the Assessing Officer.

8. As mentioned elsewhere the assessment proceedings were never attended by the assessee and the Assessing Officer was forced to frame the assessment ex-party under section 144 of the Act.

9. Be that as it may, even if the assessment is framed as ex-party the Assessing Officer is bound to take into account all relevant materials and then framed the assessment to the best of his judgment. This means that the Assessing Officer is bound to consider the material available on his record. We find that the Assessing Officer has completely ignored the past financial results of the assessee. The past financial results of the assessee are as under:-

G.N. CONSTRUCTION, AMBIKAPUR-A.Y. 2011-12

Comparative Trading Results

Sl No.	Particulars	A.Y 2011-12	A.Y 2010-11	A.Y 2009-10	A.Y 2008-09
1	Date of Order	27.02.2014	29.06.2012	23.03.2011	29.12.2010
2	Order passes u/s	144(1)	143(3)	143(3)	143(3)
3	Gross receipts (Rs.)	21,75,15,204	21,56,57,249	5,73,37,186	6,15,57,130
4	Returned income (Rs.)	7,81,480	4,79,050	3,93,190	2,94,930
5	NP ratio after Remuneration & interest to partners	0.36%	0.22%	0.68	0.48
	Remuneration & interest paid to partners(Rs.)	14,78,783	13,50,695		
	NP before remuneration & Interest to partners (Rs.)	22,60,262	18,29,740		
	NP ratio before remuneration & interest to partners	1.04%	0.85%		
6	Additions by AO (Rs.)	4,47,25,739	4,19,574	1,81,000	3,39,000
7	Assessed income (Rs.)	4,47,25,739	8,98,624	5,74,190	6,34,930
8	% of assessed income over Gross receipts	20.56%	0.42%	1.00%	1.03%
9	Relief by CIT(A)	3,75,57,358	N.A.	N.A.	N.A.
10	Income after relief from CIT(A)	71,68,381	---	--	--

11 % of NP after relief from CIT(A)	3.3%	0.42%	1.00%	1.03%
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10. It can be seen from the above that the net profit rate for the year under consideration is better than the profit rate of assessment year 2010-11 and slightly lower than the profit of assessment year 2009-10 & 2008-09.

11. There is no dispute that the books of account of the assessee are audited and audited financial statements were available with the Assessing Officer at the time of the assessment proceedings. No doubt the assessee did not produce the relevant bills/vouchers nor any supporting evidence was produced at the time of assessment proceedings. But as mentioned else were the Assessing Officer should not have ignored the past history of the assessee in estimating the net profit @ 8%. Though the First Appellate Authority has reduced the net profit rate to 3% but at the same time he also ignored the past history of the assessee. In our considered opinion considering the nature of business of the assessee the profit rate as declared appears to be reasonable. No comparable cases have been brought on record by the Assessing Officer or the CIT(A) to justify the adoption of the profit rate. Therefore we are inclined to accept the profit rate shown by the assessee. The Assessing Officer is directed to accept the net profit rate as shown by assessee in its financial statements. The addition on this ground is directed to be deleted.

12. Ground No. 3 relates to the non allowability of the depreciation on adoption of profit rate.

13. The CBDT in its Circular No. 029D (XIX-14) dated 31.08.1965 has clarified the claim of depreciation on adoption of profit rate and the said Circular read as under:-

CIRCULAR NO. 029D(XIX-14)**Aug 31, 1965****Estimation of net profits and allowability of depreciation allowance—Instructions regarding****DEPRECIATION****ACCOUNTS****S 32****145**

Numerous instances have come to the notice of the Board where assessee's claim for depreciation duly shown in the return was not considered by the ITO because books of account produced were not properly maintained and it was necessary to estimate profits by invoking the proviso to s.13 of the Indian IT Act, 1922. The course generally followed in such cases was to estimate the net income. The decision of the Appellate Authorities in such cases was that the mere fact that net profits had been estimated could not be a ground for saying that depreciation claimed in the returns had been duly 'allowed' as provided under the Act. On the contrary, they held that since no depreciation was actually allowed in the past years the profit or loss under s. 10(2)(vii) would be computed without making any deductions for depreciation for arriving at the WDV of the asset.

2. The Board consider that where it is proposed to estimate the profit and the prescribed particulars have been furnished by the assessee, the depreciation allowance should be separately worked out. In all such cases, the gross profit should be estimated and the deductions and allowances including the depreciation allowance should be separately deducted from the gross profit. If it is considered that the net profit should be estimated it should be estimated subject to the allowance for depreciation and the depreciation allowance should be deducted there from.

3. Even where best judgment assessment 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 ITO 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.

14. Since the assessee has claimed the depreciation in its return of income and has furnished necessary details in its audited statement of account, in our considered

opinion, the claim of depreciation cannot be denied. In light of aforementioned circular of the board. We accordingly direct the Assessing Officer to allow the claim of depreciation as further provisions of the law. Ground No. 3 is allowed.

15. Ground No. 5 relates to disallowance of interest of Rs. 5,61,480/- paid to Mahindra & Mahindra Finance under section 40(a)(ia) of the Act. In our considered opinion due to the amendment brought in the relevant provisions of the Act this issue needs to be restored to the file of the Assessing Officer. The assessee shall furnish necessary details demonstrating that the payee has shown the receipt of the interest as its income and shall also furnished necessary certificate as provided. The Assessing Officer is directed to verify the details so furnished by the assessee and decide the issue afresh as per the amended provisions of the law. With these directions ground No. 5 is treated as allowed for the statistical purposes.

16. In the result appeal filed by the assessee is partly allowed.

Order pronounced in Open Court on 16- 04- 2018.

Sd/-

(R.L. NEGI)
JUDICIAL MEMBER
Raipur

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Sr. P.S/P.S
ITAT, Raipur