

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AGRA BENCH: AGRA  
BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER, AND  
DR. MITHA LAL MEENA, ACCOUNTANT MEMBER**

**ITA No. 330/Agra/2016  
(ASSESSMENT YEAR: 2011-12)**

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| Smt. Archana Dutta, Prop. M/s<br>Dutta & Dutta Construction, Co.,<br>77E Dutta & Dutta Construction,<br>Govind Nagar, Mathura.<br>PANNo.AFXPD7557B<br><b>(Assessee)</b> | <b>Vs.</b> | ACIT,Circle-3,<br>Mathura.<br><br><br><br><br><b>(Revenue)</b> |
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|                    |                                    |
|--------------------|------------------------------------|
| <b>Assessee by</b> | <b>Shri Anurag Sinha, AR.</b>      |
| <b>Revenue by</b>  | <b>Shri Waseem Arshad, Sr. DR.</b> |

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|------------------------------|-------------------|
| <b>Date of Hearing</b>       | <b>26.03.2018</b> |
| <b>Date of Pronouncement</b> | <b>14.05.2018</b> |

**ORDER**

**PER, A. D. JAIN, JUDICIAL MEMBER:**

This is assessee's appeal for A.Y. 2011-12, raising the following grounds:

- “1. *BECAUSE, the authorities below while framing the assessment under section 144 of the Act and sustaining the addition made therein was highly unjustified in discarding the past history of the 'appellant'.*
2. *BECAUSE, while doing so the Ld CIT(A) erred in law in overlooking and thereby not considering the binding*

*decisions of the Hon'ble Allahabad High Court and Hon'ble ITAT, Agra Bench.*

3. *BECAUSE, while confirming the addition the Ld CIT(A) was highly unjustified in holding that if books are not maintained presumptive rate of 8% should have been applied by the AO ignoring the fact on records that appellant has maintained Books of Accounts which are audited and case do not fall under the provisions of section 44AD of the Act.*
4. *BECAUSE, upon overall consideration of the facts and in the circumstances of the case the authorities below was highly unjustified in treating the 'Capital Introduction' amounting to Rs.6,00,000/- as 'unexplained credit' liable for addition under section 68 of the 'Act'.*
5. *BECAUSE, after having rejected the books of accounts by invoking provisions of section 145(3) of the 'Act' and thereafter computing Business Profit after application of profit rate there is no valid basis for making separate addition of Rs. 9,157/- under section 43B of the Act.*
6. *BECAUSE, alternatively, in any view of the matter, entire addition of Rs.6,00,000/- cannot have been validly made by the Authorities below as the same is liable to be telescoped to the extent of addition made against extra profit.*

7. *BECAUSE, the 'appellant' denies levy of interest under section 234B of the Act as the Income of the assessee is subjected to TDS."*

2. The assessee is engaged in the business of Civil Contractor and work of road construction under government departments. Return of income was e-filed on 24.09.2011 declaring total income at Rs. 17,96,170/- and the case was selected for scrutiny under CASS. However, the assessment was completed by the AO at a total income of Rs.1,29,00,280/- after making an addition of Rs.1,01,18006/- by estimating profit @ 12% of the gross receipt, addition of Rs 3,76,950/- on account of short term capital gain, disallowance of Rs. 6,00,000/- on account of unexplained capital introduction and addition of Rs. 9,157/- under section 43B of the Income Tax Act, 1961.

3. Apropos Ground Nos. 1 to 3, the AO has made this addition, observing as the following:-

*"The assessee created as situation where by the assessment u/s 144 to the best of my judgment is the natural and logical corollary of the circumstances created by assessee himself. In view of the above facts and circumstances the books of accounts of assessee is rejected u/s 145(3) and applying the ratio decidendi of Hon 'ble Punjab & Haryana High Court in the case of 'CIT Vs. Prabhat Kumar', and apply the rate of*

*12% of net profit on the gross contract receipts to compute the taxable income. In this way addition of Rs. 1,01,18,006/- being 12% of the contract receipt from civil contract of Rs. 8,43,16,720/- added to the income of the assessee.”*

4. The Id. CIT(A) has held as under:

*“5.3 I have gone through the assessment order, submissions of the assessee and legal position in this regard. I find that the A.O, due to non-cooperation of the appellant, and in the absence of details furnished by the appellant as the assessee created a situation where by the assessment u/s 144 was the natural and logical corollary of the circumstances created by assessee himself, had rejected books of accounts u/s 145(3) and applying the ratio decidendi of Hon'ble Punjab & Haryana High Court in the case of 'CIT Vs. Prabhat Kumar' had applied the rate of 12% of net profit on the gross contract receipts to compute the taxable income. As no details were furnished by the appellant, the books of account cannot be relied on, as true profit cannot be deduced from it. During the assessment stage, as well as during the appellate proceeding, no explanations were furnished by the appellant regarding the same. In the absence of proper and complete details from where the true profit can be deduced, the AO correctly rejected books of accounts. Once books of accounts are rejected then the AO has to estimate the income, but the estimation has to be done in a*

*proper manner and on some basis. Section 44AD of the Act states that if books of accounts are not maintained then presumptive taxation rate @ 8% can be applied, the same should have been done by the AO in this case also.*

*The case of the appellant is squarely covered by the decision of the Hon'ble Agra, ITAT in the case of Mahesh Chandra Contractor, vs. Income-tax Officer, in ITA No. 359/Agra/2011 in this case also the assessee was a civil contractor. Gross receipts from civil contract work was Rs.1,90,96,014/-. The Assessing Officer noticed that the assessee has shown Net Profit rate of 0.6% excluding interest income. The assessee was asked to produce complete set of account books alongwith all bills and vouchers. The assessee produced only computerized cash book and ledger, and failed to produce relevant bills and vouchers of purchase and expenses. The Assessing Officer rejected the books of account of the assessee and estimated the profit applying 8% profit rate on total receipts of Rs. 1,90,96,014/-. My predecessor confirmed the order of Assessing Officer in applying the N.P. rate @ 8% and the same was also upheld by the Hon'ble Agra ITAT Respectfully following the decision of the Hon'ble Agra ITAT (supra) and after, going through entire facts and records, I find that the AO correctly rejected the books of accounts, but the profit rate should have been of 8% and not 12%.”*

5. The Id. CIT(A) has, thus, reduced the net profit rate from 12% to 8% as against 2.21% shown by the assessee. While doing so, the Id. CIT(A) has applied the provisions of section 44AD of the Act Section 44AD (1) applies eight per cent of the gross profit to an 'eligible business'. Explanation(b)(ii) (as applicable) to section 44AD defines 'eligible business', as a business whose total turnover or gross receipts in the previous year do not exceed an amount of Rs.40 lakhs. The assessee's gross receipts from the eligible business in the concerned previous year were of Rs.8,43,16,720/-, i.e., much above the cap prescribed by section 44AD. Thus, the provisions of section 44AD of the Act are not applicable and they have been erroneously applied by the Id. CIT(A).

6. Now, the remaining question is regarding the rate to be applied. Books of account were rejected. Therefore, the past history of the assessee is the best guide in determining the rate to be applied. As per the assessee's past history (impugned order pages 8 to 9), in A.Y. 2010-11, the rate of 4.17% was applied. In A.Y. 2009-10, the rate applied was 3.67%. In A.Y. 2008-09, the rate assessed was 4.63%. So, as per this past history of the assessee, the average rate comes to 4.16%, which is directed to be applied, as against that of 2.21% shown by the assessee.

7. Regarding Ground Nos. 4 and 6, the AO noticed capital addition of Rs.35 lakh. He added Rs.6 lakhs as unexplained introduction of capital, since though the

assessee had stated this amount of Rs.6 lakhs to be out of her past savings, she could not prove this contention. The ld. CIT(A) has confirmed the addition.

8. The ld. Counsel for the assessee states that the entire amount of Rs.6 lakhs cannot be added and some credit of past savings needs to be given. It has been argued that alternatively, this addition be telescoped with the trading addition of Rs.1,01,18,006/-.

9. The ld. DR, on the other hand, submits that the addition made has rightly been confirmed, as the alleged past savings were not proved by the assessee. It has been contended that then, trading addition and income from other sources cannot be telescoped, as held in 'M/s Hycons Infrastructure (India) Ltd. Vs. DCIT', order (DPB16-29) dated 23.10.2013, passed by the ITAT, Hyderabad, In ITA No.1787/Hyd/2011, for A.Y. 2007-08.

10. In this regard, since no evidence of alleged past savings has been brought on record, no credit out of such non-existent past savings is allowable, as correctly contended by the Department. However, apropos the assessee's alternative contention, 'M/s Hycons Infrastructure' (supra), it is seen, itself takes into account the settled legal position (para 28 of the report) that the AO cannot make any further disallowance, once incomes are estimated, following the principles laid

down in 'Indwell Constructions vs. CIT', 232 ITR 776 A.P. But since in 'M/s Hycons Infrastructure' (supra), the incomes were brought to tax as 'income from other sources', the Tribunal confirmed the incomes under the head 'other sources'. 'M/s Hycons Infrastructure' (supra) is, thus, a decision rendered in the peculiar facts of that case. In the present case, on the other hand, the addition made has been made as unexplained introduction of capital. Now, it is trite that the intangible addition made to the book profits during an assessment proceedings is as much a part of the assessee's real income, as that disclosed in the books of account. That being so, the assessee can very well avail the benefit of such addition for explaining the source of cash credits u/s 68 of the IT Act, i.e., unexplained introduction of capital in the present case.

11. In view of the above, accepting the assessee's alternative plea, the addition of Rs. 6 lakhs is ordered to be telescoped against the trading addition of Rs.1,01,18,006/-.

12. Coming to Ground No.5, the AO made addition of Rs.9,157/- u/s 43B of the IT Act, as though the amount was shown as payable, there was no evidence of actual payment thereof. The Id. CIT(A) has confirmed the addition. The matter, as rightly contended, is covered in favour of the assessee by the order of the Hon'ble Jurisdictional High Court in 'CIT vs. Banwari Lal Banshidhar', 229 ITR 229

(All.), wherein, it has been held that when G.P. rate is applied, that would take care of everything. This addition is, hence, deleted.

13. In the result, the appeal is partly allowed.

**Order pronounced in the open court on 14/05/2018.**

**Sd/-**

**(DR. MITHA LAL MEENA)  
ACCOUNTANT MEMBER**

**Sd/-**

**(A.D. JAIN)  
JUDICIAL MEMBER**

Dated: 14/05/2018

*\*AKV\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR