

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

**ITA No.1810/Kol/2016 &
ITA No.422/Kol/2017**
Assessment Year :2009-10

ACIT, Circle-1, Aayakar Bhawan, City Centre, Durgapur-713216	V/s.	Sri Rakesh Kumar Chowdhury, C-6/6, Allaudin Khan Bithi, City Centre, Durgapur- 713216
Shri Rakesh Kumar Chowdhury, C-6/6, Allaudin Khan Bithi, City Centre, Durgapur-713216 [PAN No.AEAPC 6754 K]	V/s.	ACIT Circle-1, Aayakar Bhawan, City Centre, Durgapur-713216
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Appellant	Shri Soumitra Chowdhury, Advocate
राजस्व की ओर से/By Respondent	Shri S. Dasgupta, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	02-08-2018
घोषणा की तारीख/Date of Pronouncement	31-08-2018

आदेश /ORDER

PER S.S.Godara, Judicial Member:-

The Revenue and assessee have filed their instant cross-appeal for assessment year 2009-10 against the Commissioner of Income Tax (Appeals)-Durgapur's common order dated 08.06.2016, passed in case No.96/CIT(A)/DGP/2015-16, in proceedings u/s. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file(s) perused.

2. We advert to rival pleadings. The Revenue's grievance inter alia reads that the CIT(A) has erred in deleting the disallowance(s) / addition(s) of ₹1,22,62,036/- claimed as labour payments without any bills receivable or any

work-in-progress and the same was shown was to be outstanding at the end of the year without any proof of genuineness, in reversing assessment findings holding expenditure claimed in case of Shri Amlesh Thakur amounting to ₹55,16,719/- as bogus, in deleting section 40A(3) disallowance of ₹25,00,000/- in rejecting the books of account and estimating profits @ 9% of the total turnover; thereby going against the fact on record and also in considering revised submissions in light of case law *GOETZE (INDIA) LTD vs. CIT* (2006) 284 ITR 323 (SC); respectively. The assessee on the other hand pleads that the CIT(A) has erred in law and on facts in estimating net profit @ 9% on gross receipts of ₹281,24,470; coming to ₹25,31,226/- as well as in confirming section 68 addition of unexplained cash credits of ₹8.25 lac despite the same forming as cash sales; respectively.

3. We advert to relevant assessment order dated 30.12.2011. The assessee claimed himself to have derived income from contractor, material suppliers and other sources. The Assessing Officer first of all disallowed his labour charges claimed of ₹122,62,034/- from 01.08.2008 to 31.03.2009 in absence of any bills receivable in balance-sheet nor work-in-progress being recorded in profit and loss account. He thus treated the same to be assessee's unexplained investments.

4. Next comes the second issue of material supplies of ₹55,16,319.24 from Shri Amlesh Thakur. The Assessing Officer found the payees in question to be dummy parties not supplying any supporting evidence of sales / purchases details. The Assessing Officer therefore treated the latter business of material supplies itself to be *non est*. All this culminated in the addition in issue of ₹55,16,719/- as unexplained cash credits out of the corresponding gross receipts of ₹155,68,753/- since the taxpayer had himself offered the remaining sum of ₹100,52,034/- for assessment.

5. The Assessing Officer further declined assessee's "computer snag" plea to disallow cash payments of ₹2.05 lac u/s. 40A(3) of the Act followed by yet another section 68 addition of unexplained cash credits amounting to ₹8.25

lac by rejecting the relevant explanation claiming the same to be cash receipts from supply of materials.

6. The CIT(A) affirmed the Assessing Officer's action in entirety as per his first round lower appellate order dated 20.09.2012. The assessee filed appeal before this tribunal. A co-ordinate bench in its order dated 25.06.2014 restored the file back to the CIT(A) for fresh adjudication.

7. The CIT(A) took up consequential proceedings. His second round lower appellate order under challenge runs into 48 pages in all in *inter alia* taking note of the corresponding ground raised, assessment findings in issue, first round order dated 28.09.2012 and assessee's pleadings before the tribunal finally culminating in remand direction, his submission in second innings, Form No.26, written submissions, Assessing Officer's remand report dated 27.04.2016 followed by counter comments and reconciliation statement; respectively. The CIT(A) thereafter rejects assessee's books to estimate his gross profit @ 9% on turnover of ₹289,79,740/- reduced by cash deposits of ₹8,25,000/- (supra) = ₹2,81,24,740/- coming to ₹25,31,326/- from contract business. He then holds section 40A(3) to be no more applicable after altogether rejection of books and confirms section 68 addition of cash deposits of ₹8.25 lac as follows:-

(i) Conclusion

In this case, in the original Profit & Loss account two receipts have been shown, relating to the receipt of Rs. 1,33,80,987/- as contractual receipt against which there is no dispute for source of the same. Another receipt of Rs. 1,55,68,753/- has been shown by the appellant in his originally assessed return. The appellant says that out of aforesaid receipt all these receipts were pertaining to earlier years which were wrongly shown. The details were collected from the respective payers. The evidences relating to aforesaid claims were sent to the A.O. The A.O. accepted the evidences to the extent of Rs. 1,15,94,313/- but for remaining Rs. 39,74,440/- the appellant could not produce any evidence before the A.O. Therefore, the source of the same remained unverified before the A.O. As the appellant was insisting that remaining payments of Rs. 19,80,950/- and Rs. 7,70,227/- was also received from M/s. Hindustan Steelworks Construction Limited. Therefore, the letter u/s. 133(6) was issued to state Bank of India in order to know the details of credit made in the bank account of the appellant. The SBI, Durgapur main branch has submitted that aforesaid cheques were received from M/s. Hindustan Steelworks Construction Limited. A letter was issued u/s. 133(6) to M/s. Hindustan Steelworks Construction Limited for reply.

M/s. Hindustan Steelworks Construction Limited submitted his reply dated 23.06.2016 as under:

"Kindly refer to letter No.CIT(A)/DGP/2016-17/97 dt. 17.06.2016 regarding the above mentioned subject matter; this is to confirm you that the following payments were made to Shri Rakesh Choudhury by HSCL as per details furnished below:

1) Cheque NO.031074 dt. 31.03.2008	-Rs.7,70,227.00(Released of SD)
2) Cheque NoA09719 dt. 10.11.2008	-Rs.10,00,000.00(Released of SD)
3) Cheque NoA09720 dt. 10.11.2008	-Rs.2,59,200.00(Release of withheld)
4) Cheque NoA09721 dt. 10.11.2008	-Rs.7,21,750.00 (Release of withheld & Guarantee commission)

	Rs.27,51,177.00

It is regretted that we could not furnish earlier the above information due to non availability of cheque references. In this connection photocopies of payment vouchers on account of payment made to M/s. R.K. Engineering Works are also enclosed herewith for necessary action at your end."

Thus, the total source of transaction of the appellant was explained to the extent of Rs. 1,43,45,490/-. Considering the aforesaid facts it is seen that out of receipt shown of Rs. 1,55,68,753/- whereas the source of Rs. 1,43,19,930/- is only explained. It is seen that the appellant was not able to substantiate his claim of Rs. 8,25,000/- and sources of the same could not be proved, therefore, the same is treated as unexplained which has been added by the A.O separately u/s 68 and the action of the A.O is upheld on addition of Rs. 8,25,000/- which is dealt separately.

Comments on addition made by the A.O on the issue of labour outstanding and bogus purchase.

Perusal of observation made by the A.O for making addition Rs. 1,22,00,000/- shows that the A.O has made addition merely on the ground that no receivable was shown in the balance sheet whereas the appellant says total payment of Rs. 90,19,331.20/- has been made against labour payment for the current year and Rs. 48,67,154.67/- has been made for the outstanding expenses of labour for previous year thus total payment of on account of labour has been made of Rs. 1,38,86,458/- by the appellant during the year. The submission of appellant shows that the appellant has withdrawn cash of Rs. 19,765808/- from SBI, Rs. 8410000/- Centurian Bank Of Punjab and Rs. 4000000/- from Vijaya Bank totaling at Rs. 24606808/- which has been claimed for payment against expenses.

In this regard the appellant submitted as under:-

"During the course of assessment assessing officer assess our unexplained investment Rs. 1/22/62/034/-. It is made by him from manufacturing of our two accounts based on assumption. Actually we have payable labour charges as on 31. 03.2008 Rs. 1,70,94,398.84/-. During the year my total labour charges was Rs. 90/19/331.20/- have paid labour expenses Rs. 1,38,86,485.87/- which includes labour charges of earlier year of Rs. 48,6,154.67/-. All the relevant materials from which I made this representation enclosed herewith. We have maintained day to day accounts we have payable labour charges on 31.03.2009 is Rs. 1,22,27,244.17/-. We have paid this amount in the financial year 2009-10. Assessing Officer passed the order u/s 139 for the assessment year 2010-11 after accepting the same. During the financial year 2008-09, we have withdrawn cash Rs. 1/9-6-808/- from SB! Rs. 84,10,000/- from Centurian Bank of Punjab Rs. 40/00/000/- from Vtjaya bank thus the total cash withdrawn by me Rs. 3,22,83,117.00/-. Amount deposited into bank from Gross Bill Received, refund of security deposit, collection from sundry debtors and from Sales Tax refund. During the course of hearing we have submit the details of amount received from bill from security deposit, from sundry debtors

and from Sales Tax refund. All this transaction entered in our books of accounts. A yearly cash receipt and cash payment statement enclosed herewith for your ready reference. Statement is made from our cash book and ledger. Needless to say we have maintained our dally books of accounts. During the year we have paid Rs. 1,38,86,48.87 for wages. Thus the accounts revealed that we have sufficient capacity to pay the labour charges as well as other expenditure from our sources. Nothing is unexplained arise from our accounts/ therefore assessing officer was not justified in addition of Rs. 1,22,62,034/-. What is material the same of payment, my entire contract receipt has been comes in my account. But my giant portion of receipt invested in no business activities for which labour charges payable at the end of the assessment year 2009-10 comes at Rs. 1/22/2~244.17/-. ! have tackled the situation in my own capacity but in no circumstances it comes as unexplained investment. Assessing Officer should examine the sources of my receipt but he failed to pay his good effort for finding the reason better he shaped himself as a revenue officer and try to put a burden of tax on me by any hook and crook. Thus the unexplained investment arrived by assessing officer is unwarranted and uncalled for and is to be deleted. “

Perusal of above submission shows that the A.O. has not examined the corresponding withdrawal of the aforesaid payment. Rather the outstanding expenditure shown on labour head was judged in terms of receivable of the receipt. Perusal of balance sheet shows the appellant has no outstanding receivable of any payment from the aforesaid contractor but he has invested funds in various items. Having no receivable does not justify the conclusion that assessee will not be able to pay, or this liability tantamount to be bogus if there is no corresponding receivable from the same job, is not correct. What was required is that to examine the source of payments in the respective years. The A.a has not examined the sources of payment or payment, therefore, addition on this account is without any finding merely on conjecture and surmise.

It is also seen that the A.O has added Rs. 55,00,000/- on account of bogus purchase as against which the appellant has shown sale of Rs. 1,55,00,000/- no other purchase has been shown against aforesaid sale.

Now coming to the disallowance of Rs. 55,16,719/- which have been added as unexplained credit on the ground that Rs. 55,16,719/- was claimed as purchase of raw material from Mr. Amalesh Thakur but the same was not proved. The appellant has already submitted before the A.O that

- "1) In response of your specific query for supply of materials, we are being stated, that has been mistakenly entered in our accounts, now deleted.
- 2) In response of your specific query for purchase, it is our humble submission, that previously our Accounts mistakenly include "Sale of Materials", so under matching principle we have booked "Purchase". Thereafter when our Accounts are being rectified, sales of materials are being deleted, correspondingly purchases of Rs. 55,16,719.14 is also been deleted."

Though the appellant at later stage has submitted that the aforesaid receipt has been shown inadvertently as a receipt from supply sale is in fact, receipt pertaining to earlier years or it is a security deposit which is capital in nature but for sake of argument if sale is taken as true then there cannot be any sale without any purchase and supply of material cannot be denied as it was supplied to government department, therefore, corresponding purchase should have been allowed.

Keeping in view of the aforesaid fact at assessment time itself the books of accounts of the appellant should have been rejected and addition should have been made. Therefore, keeping in view of the aforesaid facts the addition made on account of bogus expenses is not sustainable.

Whether revised Audit report filed before appellate proceeding is acceptable.

First of all, it is to decide whether revised audit report filed by assessee on during present appeal proceedings can be accepted in terms of the provision of the Income tax act. In this regard, **section 44AB** of the Act is relevant which provides that :-

Every person,-

(a) carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds forty lakh rupees in any previous year [***]; or

(b) Carrying on profession shall, if his gross receipts in profession exceed ten lakh rupees in any [previous year; or

(c) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under 50a[section 44AD or section 44AE or section 44AtJ [or section 44BB or section 44BBB], as the case may be, and he has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, in any 51a[previous year]] 52[***]

The following clause (d) shall be inserted after clause (c) of section 44AB by the Finance (No. 2) Act, 2009, w.e.f. 1-4-2011 :

(d) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year get his accounts of such previous year [***] audited by an accountant before the specified date and [furnish by] that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed:

In the instant case assessee had filed the tax audit report at the time of filing of the return u/s 139(1) of the Act, but that audit report was no incomplete and accurate as is evident from the revised audit report. The tax audit report either not filed with the return and filed during the course of assessment proceedings cannot be even accepted as held in following case laws:-

In the case of Commissioner of Income-tax v. Jaideep Industries 180 ITR 81 Hon'ble Punjab & Haryana High Court has held as under:-

Section 80J(6A) clearly lays down that deduction claimed shall not be admissible unless the assessee also furnishes along with the return the audit report in prescribed form duly signed and verified by the accountant. There could indeed be no escape from the conclusion that the requirement of the audit report being filed along with the return of income was mandatory. Thus/ the Tribunal erred in holding that audit report filed during the assessment proceedings could also satisfy the requirement of the aforesaid section.

In the instant case, audit report though filed with return of income as filed u/s 139(1) of the Act, but it was not accurate and not based on complete and accurate accounts. The facts are evident from the revised accounts and tax audit report which proves that there is lot of variations in the figures provided by assessee himself. This is the case of filing of revised accounts and revised tax audit report and not acceptable because it is not permissible under the Income tax Act under any provision. Even return cannot be revised by Assessee during assessment proceedings.

In the case of Goetze (India) Ltd. v. Commissioner of Income-tax (2006) 284 ITR 323 Hon ble Supreme Court has held as under:-

Section 1] read with section 119(5) of the Income-tax Act (1961 - Return of income - General - Assessment year 1995-96 - Whether an assessee can amend a return filed by him for making a claim for deduction other than by filing a revised return - Held, no.

The facts of assessee case are similar to the facts of the above case as decided by Hon'ble Supreme Court. In the present case also, assessee want to revise his claim of deduction/ expenditure in appeal proceedings by filing the revised profit & loss and revised audit report which is not permissible, hence revised accounts of assessee are not accepted.

The books of accounts of the appellant are not reliable

Now coming to the addition of Rs. 1,88,53,753/- as made by assessing officer in assessment order on 30-12-2011, without consideration of revised profit & loss account and revised tax audit report the decision is to be taken. It is undisputed fact that the appellant is contractor/supplier to the Govt. Under taking of Durgapur Steel Plant and Hindustan Steelworks Construction Limited. All the receipts shown in his profit and loss account are from the aforesaid under takings in lieu of contractual job/supply of material by the appellant. It is also accepted that in contractual business the profit margin is not around 67.37% as it has been assessed by the A.O. It is also established from enquiry that receipts of Rs. 1,43,45,490/- shows from supply of material was intact receipt from security deposits or contractual receipts which were shown either earlier year or were supposed to be shown as capital receipt, on return of security deposits. The aforesaid amount has been inadvertently shown as a revenue receipt in the profit & loss account of the appellant. The confirmation obtained from Durgapur Steel Plant and Hindustan Steelworks Construction Limited clearly shows that the aforesaid receipts were pertaining to contractual work or security deposits. The aforesaid facts have been accepted by the A.O in his remand report to the extent of Rs. 1,15,94,313/- and remaining amount of Rs. 27,51,177/- was confirmed by Hindustan Steelworks Construction Limited as realize of security deposits. The estimated profit & Loss which is on record in the assessment folder showing only contractual receipt to the extent of Rs. 1,33,80,987/- without any supply sale shows that there is force in the appellant's submission that his balance sheet and income were not prepared correctly.

As it is proved that the appellant was misguided by the CA and the CA disclosed all the bank deposits as a receipt of the current year whereas the fact was that it was containing the deposits which were either shown in earlier years as income or the same were capital receipt and that to match the same 'auditor booked expenses in the name of Mr. Amalesh Thakur which was bogus.

It is further evident from the record of the appellant that the receipt declared in the last year of P&L A/c to the extent of Rs. 50,00,000/- dated 31.03.2008 got inadvertently declared in the subsequent year. Therefore, there is force in the submission of the appellant that expenses were inadvertently debited in the P&L A/c of the appellant at least to that extent, there could have not been any genuine expenses, hence, for matching principal to neutralize the entry the bogus claim was made without any basis.

Considering the claim that the receipt though from explained sources but was incorrectly disclosed in the next year and purchase and other expenses entry were just for neutralizing the same which was mistake of the representative, it tantamount bogus and false debit. Keeping in view that the appellant is working as contractor with M/s. Hindustan Steel works Construction Limited and MI5 Durgapur Steel Plant

which are government under taking, therefore, no payment can be made to the appellant without work, therefore, keeping aside the labour issue, wrong showing of receipt etc. and also keeping in view that his books of accounts were not maintained properly, it requires rejection and estimation of profit which is based on various judgment of Hon'ble Courts.

The reliance for rejection of books of accounts is placed on the decision of Hon'ble Allahabad High Court in the case of Awadhesh Pratap Singh Abdul Rehman & Bros vis. CIT 201 ITR 406(AII) "It is difficult to catalogue the various types of defects in the account books of an assessee which may render rejection of account books on the ground that the accounts are not complete or correct from which the correct profit cannot be deduced. Whether presence or absence of stock register is material or not, would depend upon the type of the business. It is true that absence of stock register or cash memos in a given situation may not per se lead to an inference that accounts are false or incomplete. However, where a stock register, cash memos, etc., coupled with other factors like vouchers in support of the expenses and purchases made are not forthcoming and the profits are low, it may give rise to a legitimate inference that all is not well with the books and the same cannot be relied upon to assess the income, profits or gains of an assessee. In such a situation the authorities would be justified to reject the account books under section 145(2) and to make the assessment in the manner contemplated in these provisions." The appellant's books deserves to be rejected.

Considering the aforesaid facts the appellant's books of accounts, documents to be rejected. As regards, the claim of the assessment of income at 8% u/s. 44AD is concerned the same is not accepted considering the decision made in case of M/s TEJA CONSTRUCTIONS vs. ASSISTANT COMMISSIONER OF INCOME TAX ITAT, HYDERABAD 'A' BENCH which is as under:-

"The judgment of Hon'ble Supreme Court in the case of Brij Bhushan Lal Parduman Kumar vs. CIT 1978 CTR (SC) 134 : (1978) 115 ITR 524 (SC) where it was held: "reversing the decision of the High Court, that since in substance and in reality the materials supplied by the Government always remained the property of the Government and the assessee merely had custody and fixed or incorporated them into the works, there was not even a theoretical possibility of any element of profit being involved in the turnover represented by the cost of such materials. Though, ordinarily, when a works contract was put through or completed by a contractor, profit from the contract was determined on the value of the contract as a whole and not by considering the several items that would go to form such value of the contract, where, as in this case, materials were supplied at fixed rates by the Government to the contractor solely for being used, fixed or incorporated in the works on the terms that they would remain the property of the Government and any surplus should be returned to the Government, the real total value of the entire contract would be the value minus the cost of such materials so supplied. Since no element of profit was involved in the turnover represented by the cost of the materials supplied by the Government to the assessee, the income or profits derived by the assessee from such contracts had to be determined on the basis of the value of the contracts represented by the cash payments received by the assessee from the Government exclusive of the cost of the materials received For being used, fixed or incorporated III the works,"

"On the other hand, the learned Departmental Representative submitted that the books of account of the assessee are not reliable. The assessee has not produced the proper vouchers and bills in support of the claim of the assessee, hence the AO having no option other than making an estimation of

income as such, he estimated the income of the assessee. The AO after rejecting the books of account made a reasonable estimate of the income at a reasonable percentage of gross receipts at 10 per cent. However the CIT(A) reduced the same to the tune of 9 per cent and he supported the order of the CIT(A).

We have heard both the parties and perused the material on record. In the present case, the AO rejected the books of account on the reason that, the assessee has not maintained proper books of account and also failed to produced vouchers for verification and the expenditure claimed by the assessee are not substantiated. The assessee in earlier years also has not maintained the proper books of account. The assessee's past track records show that the assessee has neglected the presenting of the books of account in accordance with law. When the assessee claimed any expenditure, it is mandatory on the part of the assessee to produce the books of account supported by proper bills and vouchers. Since the assessee has not produced the proper books of account, true profits or loss cannot be deduced from the books of account of the assessee. The AO having no other option rejected the books of account and estimated the income at 10 per cent of gross receipts. But the position is that, the assessee is carrying on three kinds of contracts, as in earlier years, i.e., (i) own contracts, (ii) contracts taken from the sub-contractors, (iii) contracts given to other parties on sub-contracts. The assessee had a higher rate of profit on the contracts executed by the assessee itself. In these contracts, the assessee agreed that his income is at 9 per cent of the gross receipts. Thus, accordingly the AO is directed to estimate the income on the contracts executed by the assessee's own at 9 per cent. In case of contracts taken by assessee on subcontract, the income to be estimated at 8 per cent of the gross receipts. In case of contracts given by the assessee to the 3rd party on sub-contract, income to be estimated at 4 per cent. This is, because, when the assessee gives contract to the other parties on sub-contract, the assessee cannot keep the same percentage of profit at 9 per cent, it has to forgo certain portion of profit i.e., around 5 per cent to the sub-contractors. Similar position in the case of contracts taken by assessee on sub-contract from other parties. Further, the assessee is entitled for depreciation and remuneration, and interests to partners on the profit estimated by AO at applicable rates, because the income estimated as above of the assessee is before the depreciation and interest and remuneration of the partners. Accordingly, we direct the AO to compute the income of the assessee afresh. Accordingly, this ground of the assessee appeal is partly allowed."

The aforesaid judgment was followed in case of Income Tax Appellate Tribunal-Hyderabad M/s Balaji Constructions, Vs Department of Income Tax, ITA No. 1349/Hyd/2012, A.Y. 2009-10 wherein it was held that in case of M/s. Teja Constructions V/s ACIT (supra), the co-ordinate bench of Income-tax Appellate Tribunal had directed to estimate the profit in case of main contractor at 9% in case of work executed on sub-contract basis at 8% and on sub-contract given to third party at the rate of 5%. The same principle was again reiterated by the co-ordinate bench in case of ACIT v/s. M/s. Teja Constructions (ITA No. 1191/Hyd/2011 dated 17.02.2012 wherein the Income-tax Appellate Tribunal held in the following manner:- Balaji Construction, Kadapa.

"However, the issue is covered by the order of the Income-tax Appellate Tribunal in the assessee's own case for the earlier year. For that year the Income-tax Appellate Tribunal has estimated the profits of the assessee @ 9% on own contract works, 8% on contracts taken by the assessee on subcontracts and @ 5% on contracts given by the assessee to 3rd party on sub-contracts."

Considering the aforesaid judgment and keeping in view of the fact that appellant failed to establish that he was engaged any kind of material supply or in sub-contractee job, he is treated as a contractor only, because direct payment has been received by the appellant and service has been rendered directly to the contractee. No cognizance of his revised balance sheet is taken as discussed above. Though the source of the receipt claimed from sale supply are explained but the appellant himself has shown as a receipt in his original profit & loss account. The submission of appellant shows that the appellant has withdrawn cash of Rs.19,765808/- from SBI, Rs.8410000/- Centurian Bank of Punjab and Rs.400000 from Vijay Bank totalling at Rs.24606808/- which has been claimed for payment against expenses. It shows that the appellant had contractual activity more than what he has shown in his revised balance sheet. The aforesaid expenditure made in cash apart from other payment justifies the activity shown in original profit & loss account. Therefore, entire receipt except unexplained cash deposit of Rs.8,25,000/- which has been added separately is taken on receipt. Therefore 9% of gross profit is applied over the gross receipt of the appellant and his income is worked out as under:

Gross receipt Rs.2,89,49,740/-(-) Rs.825000 = Rs.28124740/-

At the applicability of the 9% on Rs.28124740/- = Rs.25,31,226/- is income from the contractee business. The AO is directed to recomputed the income and give credit to the aforesaid decision.

As the appellant failed to give plausible explanation for incorrect/inaccurate books of account and incomplete audit report furnished along with return of income. which is equivalent of not getting / not furnishing the books of audit report. Hence, assessee is also liable for penal action under section 71B of the Act.

(j) Next ground relates to the payment made in excess of Rs.20,000/- by assessee otherwise than by crossed account payee cheques/DDs violating the provisions of Section 40A(3) of the IT Act, 1961.

In this regard it is settled law that once the books has been rejected then not other addition can be made to the income of assessee. Similar view has been taken by the Special Bench (Kolkata) of this Tribunal in the case of ITO vs. Kenaram Sana & Subhash Saha (2008) 116 TTJ (Kol) (SB) 289; (2008) 8 DTR (Kol)(SB)(Trib) 124: (2008) 301 ITR 171 (Kol)(SB)(AT, wherein disallowance made in terms of s. 40A(3) has been deleted. Respectfully following the decision of the jurisdictional High Court in the case of Inidwell Construction (supra), besides the Special Bench decision of this Tribunal noted above, we are of the considered opinion that the income of the assessee having been determined by resorting to estimation, there is no scope for any further disallowance either in terms of s. 40(a)(ia)/40A(3) or otherwise.

(K) Next ground of appeal relates to the addition of Rs. 8,25,000/- made by the AO on unsustainable explanation that 'Cash received from supply of materials & deposited at bank. Before the AO appellant failed to explain as why the cash sales was not entered in the cash book.

During the appeal proceeding it was claimed as cash sale proceed but the same could not be confirmed by the respective payers. The appellant further claimed that the above cash deposit was made in order to clear the Issued cheque,s .The deposit was claimed to be made on dated 17.10.2008, 02.02.2009 and 23.02.2009 and the same has also been made part of receipt of sales supply to the tune of Rs. 1,55,68,735/-. As the appellant could not submit the corresponding deposit and withdrawals and no evidence was submitted in this regard,. The appellant took various pleas in this regard which he could not substantiate .Therefore, aforesaid of Rs. 825,000/- could not be explained which has been added by the A.O u/s. 68, hence, the same is confirmed. “

All these leaves both the parties aggrieved to the extent of their above respective pleadings.

8. We find that some key facts to be emerging from instant cross appeal. First and foremost aspect before us is that of the taxpayer's gross receipt vis-à-vis the relevant contract business. The Revenue fails to dispute a very clinching finding duly accepted in Assessing Officer's remand report indicating correspondence with the taxpayer dated 18.04.2016 during remand proceedings that he had duly accepted an amount of ₹133,80,987/- to be representing contractual receipts derived from the payee M/s Steel Authority of India Ltd. The relevant TRACES Form 26AS to this effect is at page 1 of the paper book. The assessee's contract receipts to this extent can therefore not be disputed.

9. Mr. Dasgupta vehemently argues at this point of time that the Assessing Officer had rightly made all four disallowances / additions(s) (supra) which have been wrongly deleted in lower appellate proceedings. He accuses that the assessee of having adopted blatantly false pleas of computer snag and thereafter filing self contradictory books on each occasion in various lower appellate proceedings. We find no substance in the instant arguments more particularly in view of the fact that Form 26AS available in department's website itself records corresponding business receipt of ₹133,80,987/- (supra). The Revenue further reliance on GOETZE (INDIA) LTD case law (supra) is also rejected as their lordship make it clear that the same nowhere impinges appellate authorities jurisdiction to entertain a new claim in absence of revised return.

10. Next issue between the parties is about assessee's books of accounts having been rejected in the CIT(A)'s order resulting in gross profit estimation @ 9%. The fact remains that instant taxpayer proved only the contractual receipt income without corresponding expenditure right from scrutiny to the CIT(A)'s second lower appellate order under challenge. This forms the precise reason for the learned lower appellate authority to reject the relevant books of account as per various judicial precedent. Learned Departmental

Representative fails to dispute that assessee's entire contractual receipts could not be treated as his income in these fact and circumstances. His corresponding expenditure has admittedly not been proved. We therefore find no fault in the CIT(A)'s action rejecting assessee's books.

11. Next comes the equally significant aspects of the rate of gross profit estimation. The CIT(A) has taken 9% without even considering the corresponding profit rate in preceding or succeeding assessment year despite the fact that the assessee has been carrying out his contract business as a going concern. We thus reduce the impugned gross profit estimation from 9 to 8% being broadly guided by section 44AD of the Act with a clear-cut rider that same shall not be taken as precedent in any other case.

12. The Revenue's remaining grounds seek to revive labour charges, expenditure claim section 40A(3) disallowance (supra) no more carry merit as the above rejection of books followed by gross profit estimation takes care of all other aspects as per CIT vs. Banawri Lal Banshidhar (1998) 229 ITR 229 (All). The Revenue's appeal ITA No.1810/Kol/2016 fails.

13. The assessee's next endeavour in his appeal is to reduce his revenue receipts to the extent of ₹155,68,733/-. He takes us to page 10 of the paper book indicating the following component therein:-

Date	Name of clients	Payment source	Cheque No.	Net credit in bank account	Remarks
02.04.08	SAIL DSP	Bill amount received from DSP FY 2007-08	433256	8,252,700.00	Cheque issued on 31.03.08 TDS deducted in financial year 07-08
05.04.08	HSCL	Security deposit (SDBG) amount released by HSCL	31074	770,227.00	Part release of security deposit (SDBG)
09.07.08	SAIL DSP	Refund of Hold Amount by DSP for the FY 2007-08	437577	227,290.00	Refund by DSP, TDS deducted in FY 07-08
02.08.08	SAIL DSP	Security deposit (SDBG) released by SAIL DSP	438902	114,323.00	SDBG. Released by DSP
17.10.08	LOAN CENTURION BANK	Cash drawn Rs.500000/- & cash deposited Rs.400000/- to honour the clearing of post dated cheque issued to Mr. Dinesh Electricals & Rs.100000/- paid to our staff payment		400,000.00	Cash drawn Rs.5.00 lakh on 16.10.08 from Centurian Bank a/c No.198(OD) it is against Rs.825000/- cash credit
12.11.08	HSCL	Security Deposit		1,980,950.00	Hold amount

		(SDBG) & Hold amount released by HSCL			released on 12.11.08 against which TDS dedt. In FY 07-08 & gross amount of turnover shown in FY 07-08
20.12.08	HSCL	Hold amount released by HSCL	409735	3,000,000.00	TDS deducted FY 07-08 & gross amount of turnover was shown in 07-08
02.02.09	LOAN VIJAYA BANK	Cash drawn Rs.500000/- & cash deposited Rs.400000/- to honour the clearing of post dated cheque issued to Burnwal store & R.100000/- paid to our staff payment		4000,000.00	Withdrawn form Vijaya Bank account No.264 dt. 27.01.09 Rs.500,000.00 it is against Rs.825000/- cash credit
03.02.09	WB Govt.	Refund of sales tax credit by LOCUP		123,984.00	Refund from sales tax cheque no. 178357, dated 21.01.2009
23.03.09		Cash drqwn Rs.20000/- & cash deposited Rs.25000/- the shortfall Rs.5000/- was from out pocket		25,000.00	Withdrawn from ICICI Bank Ac. No.262 account it is against Rs.825000/- cash credit.
		GRAMD TOTAL		15,294,484.00	

This is followed by supportive payment vouchers, letters and invoices etc. forming part of lower authorities record. The Assessing Officer's remand report extracted in page 35 of the lower appellate order duly accepted assessee's explanation to the extent ₹115,94,313/-. We do not see any merit therefore in the CIT(A)'s appellate action once again including the very sum to be part of impugned assessment year's turnover in the nature of revenue receipts included for gross profit estimation. We therefore direct exclusion of this amount of ₹1,15,94,313/- at least from assessee's turnover at this stage.

14. Next comes the remaining component of ₹39,74,440/-. We find that the relevant factual position is no different in case of M/s HSCL's other sums of ₹7,70,227/- and ₹19,80,950/- as well as tax refund credits of ₹1,23,984/- totaling to ₹26,75,161/- involving the very kind of credits which could not have been taken as part of the relevant turnover since not in the nature of business receipts pertaining to the relevant previous year. We make it clear that payees concerned have duly supported the taxpayer's case to this effect in remand proceedings that these sums are not his business receipts. The said payers have also not deducted the mandatory TDS u/s. 194C of the Act wherever

applicable. We thus accept assessee's pleadings qua the instant sum of ₹28,75,161/- hereinabove.

15. This leaves us with the remaining amount of cash deposits of ₹8,25,000/-. It has come on record that this assessee derives no other income apart from the above contract business hereinabove. The same sufficiently indicates that cash deposits are his cash sales to be assessed @ 8% in tune with our foregoing discussion. The Assessing Officer is accordingly directed to assess 8% gross profit thereupon as per law. The taxpayer's cross appeal ITA No. 422/Kol/2017 is partly accepted.

15. This Revenue's appeal ITA No.1810/Kol/2016 is dismissed and assessee's cross appeal ITA No.422/Kol/2017 is partly allowed.

Order pronounced in the open court 31/08/2018

Sd/-

(लेखा सदस्य)

(Dr. A.L. Saini)

(Accountant Member)

Kolkata,

*Dkp, Sr.P.S

दिनांक:- 31/08/2018 कोलकाता ।

Sd/-

(न्यायिक सदस्य)

(S.S.Godara)

(Judicial Member)

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Shri Rakesh Kr. Chowdhury, C-6/6, Allaudin Khan Bithi, City Centre, Durgapur-713216
2. राजस्व/Revenue-ACIT, Cir-1, Aayakar Bhawan, City Centre, Durgapur-713216
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of
Office/DDO

आयकर अपीलीय अधिकरण,

कोलकाता ।