

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

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

श्री वी. दुर्गा राव, न्यायिक सदस्य एवं श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No.112/Viz/2013
(निर्धारण वर्ष/Assessment Year : 2008-09)**

**Dy.CIT, Circle-2(1)
Vijayawada**

**Vs. M/s ABC Engineering Works
Plot No.24, 2nd Road
Autonagar, Vijayawada
[PAN : AAFFA7383K]**

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

**Cross Objection No.79/Viz/2013
(Arising out of I.T.A.No.112/Viz/2013)
(निर्धारण वर्ष/Assessment Year : 2008-09)**

**M/s ABC Engineering Works
Plot No.24, 2nd Road
Autonagar, Vijayawada
[PAN : AAFFA7383K]**

**Vs. Dy.CIT, Circle-2(1)
Vijayawada**

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

**आयकर अपील सं./I.T.A.No. 210/Viz/2015 and 75/Viz/2017
(निर्धारण वर्ष/Assessment Year : 2010-11 and 2012-13)**

**M/s ABC Engineering Works
Plot No.24, 2nd Road
Autonagar, Vijayawada
[PAN : AAFFA7383K]**

**Vs. Dy.CIT, Circle-2(1)
Vijayawada**

**Dy.CIT, Circle-1(1)
Vijayawada**

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

*I.T.A. No.112/Viz/2013, 210,235/Viz/2015, 442,445/Viz/2016 and 75/Viz/2017
CO Nos.79/Viz/2013, 105-107/Viz/2019, A.Y.2008-09 to 2010-11
M/s ABC Engineering Works, Vijayawada*

**आयकर अपील सं./I.T.A.No. 235/Viz/2015, 442/Viz/2016,445/Viz/2016
(निर्धारण वर्ष/Assessment Years : 2010-11, 2009-10, 2008-09 respectively)**

Asst.Commissioner of
Income Tax
Circle-3(1), Vijayawada

Vs. M/s ABC Engineering Works
Plot No.24, 2nd Road
Autonagar , Vijayawada
[PAN : AAFFA7383K]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

**Cross Objection No. 105 - 107/Viz/2019
(Arising out of I.T.A.No.442 & 445/Viz/2016 and 235/Viz/2015)
(निर्धारण वर्ष/Assessment Years : 2008-09 to 2010-11 respectively)**

M/s ABC Engineering Works
Plot No.24, 2nd Road
Autonagar, Vijayawada
[PAN : AAFFA7383K]

Vs. Asst.Commissioner of
Income Tax
Circle-3(1), Vijayawada

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

राजस्व की ओर से /Revenue by : Shri D.K.Sonowal, CIT DR
निर्धारिती की ओर से / Assessee by : Shri G.V.N.Hari, AR

सुनवाई की तारीख / Date of Hearing : 06.08.2019
घोषणा की तारीख/Date of Pronouncement : 28.08.2019

आदेश /ORDER

Per Shri D.S.Sunder Singh, Accountant Member :

These appeals filed by the revenue are against the orders of the
Commissioner of Income Tax (Appeals) [CIT(A)], Vijayawada dated
24.12.2012, 31.03.2015 and 31.08.2016, by the assessee against the order of

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the CIT dated 27.03.2015 and against the order of the CIT(A) dated 30.09.2016 and cross objections filed by the assessee is in support of the order of the Ld. CIT(A) for the Assessment Year (A.Ys.)2008-09 to 2010-11. For the sake of convenience these appeals are clubbed, heard together and a common order is being passed as under.

I.T.A. No.445/Viz/2016, 112/Viz/2013 and CO No. 106/Viz/2019 and 79/Viz/2013

I.T.A. No.112/Viz/2013, A.Y.2008-09

2. All the grounds in this appeal are related to the other income admitted by the assessee in the return of income assessed separately as income from other sources. Brief facts of the case are that the assessee is engaged in the business of civil contract works, filed its return of income declaring total income of Rs. Nil on 30.09.2008. Subsequently, filed the revised return of income admitting taxable income of Rs.1,34,26,464/- on 29.10.2008. The return was processed u/s 143(1) and the case was taken up for scrutiny. During the previous year relevant to the A.Y. 2008-09, the assessee had received the gross contract receipts of Rs.69,50,82,879/- and arrived at net profit of Rs.2,25,17,950/-. During the assessment proceedings, the AO found that the bills and vouchers for expenses relating to items like sand, soil, metal, construction of compound wall, labour charges, repairs and maintenance of

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crusher etc. were mostly met by self made vouchers which are not amenable for verification. Therefore, the AO rejected the books of accounts and estimated the income @12.5% on main contract receipts and 8% on the sub contract receipts following the decision of Hon'ble ITAT Hyderabad in the case of KNR constructions and , arrived at the gross income of Rs.9,19,52,245/- and allowed the depreciation of Rs.7,04,04,166/- and arrived the income from contracts at Rs.2,15,48,079/. The AO also made separate additions towards the following receipts as other income

(a)	Interest on term deposits	14,40,509
(b)	Interest received on partners current accounts	77,72,358
(c)	Rental income from property	4,15,000
(d)	Dividend on chits	3,20,000
(e)	Net Insurance claims received	44,578
(f)	Scrap Sales	6,26,100
(g)	Interest received on I.T.Refund	7,66,095
(h)	Sundry creditors credit balances written off	1,51,16,482
	Total	Rs.2,65,01,122/-

However, no discussion was made in the assessment order relating to other items which were added separately as to why the said receipts required to be taxed separately after estimation of business income.

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3. Aggrieved by the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) held that except the receipts representing the rental income of Rs.4,15,000, dividend on chits of Rs.3,20,000/- and interest received on IT Refund of Rs.7,66,095/- all other items of the receipts constitute business income, hence directed the AO not to assess the same separately except rental income, dividend on chits and IT refund. For the sake of clarity and convenience, we extract order of the Ld.CIT(A) in para No.5B which reads as under : pg.5

"5B. Second grievance relates to items of other income added to the business income estimated. As stated already, there are 8 items, which the AO prima facie contested that all of them come under business head. First item is interest on term deposits-Rs.14,40,509/-. It is explained that while issuing bank guarantees for EMD of work orders obtained by the appellant, the banks require fixed deposits as counter guarantee. Unless the EMD are paid, works cannot be commenced. Thus the interest earned on these fixed deposits has nexus with the business of the appellant and hence this would not form part of other income and accordingly, the AO is directed to delete the same, as it is a part of business income. Second item is interest received on partners' current accounts and interest on partners' capital. These also being on business account, the amount of Rs.77,72,358 being business income cannot form receipts under the other sources and accordingly the AO is directed to delete this also. Like that net insurance claims received at Rs.44,578, scrap sales of Rs.6,26,100 and sundry creditors credit balances written off at Rs.1,51,16,482 forms business income and as such the AO is directed not to include these items under the head other income. Now, it leaves rental income from property at Rs.4,15,000, dividend on chits at Rs.3,20,000 and interest received on IT Refund of Rs.7,66,095 alone could form income from other sources and income from house property, which shall be brought to tax and the AO is directed accordingly."

Accordingly appeal of the assessee is partly allowed by the Ld.CIT(A).

4. Against the order of the Ld.CIT(A), the revenue has filed appeal before this Tribunal. During the appeal hearing, the Ld.DR argued that interest on term deposits, interest received on partners' current account, interest on partners' capital, rental income, insurance claims received, scrap sales and sundry creditors credit balances written off do not constitute business income. They are required to be taxed separately as income from other sources since the AO estimated the income on contract receipts. He further submitted that if the same is not taxed separately, all the above receipts would escape from the taxable income, hence requested to set aside the order of the Ld.CIT(A) and uphold the addition made by the AO. The Ld.DR relied on the decision of Krishak Bharati Cooperative Ltd. V.CIT (2014) 360 ITR 0209.

5. Per contra, the Ld.AR argued that interest income was received on fixed deposits made by the assessee as margin money for obtaining the contracts as Bank Guarantee. The Ld.AR further submitted that the source of deposits was withdrawals from the bank loan account or cash credit limits, therefore, argued that interest received from the current account is inter linked with the interest payment and incase of assessment of interest separately, the interest payment also required to be allowed as deduction. The Ld.AR further submitted that majority of the debit balances in current accounts represent

the accumulated losses transferred to the partner's current accounts and interest charged on the said balances, thus constitute business income and no separate addition is required to be made. The interest on borrowings is not allowed separately as expenditure in the hands of the firm since the books of accounts were rejected, hence argued that all such expenditure is deemed to have been considered in estimation of income, thus, argued that once the income is estimated, no separate addition is required to be made on partners' capital account.

5.1. With regard to the insurance claim receipts and scrap sales, the Ld.AR submitted that both are business receipts which are inter linked to the expenditure incurred, hence, no separate addition is warranted on account of insurance claims received on scrap sales / insurance claim.

5.2. With regard to sundry creditors credit balances written off, the Ld.AR argued that the sundry creditors balances written off represent trade creditors and once the business income is estimated after rejecting the books of accounts, the AO cannot make separate addition. In a nut shell, the Ld.AR argued that the assessee is engaged in only one business that is civil construction and all the transactions are from the same business. Therefore, once the books of accounts are rejected, the AO is not permitted to make use

of the same books of accounts, to make separate addition. The Ld.AR relied on the decision of Hon'ble High Court of Rajasthan in the case of Malpani House of Stones Vs. Commissioner of Income Tax (2017) 395 ITR 0385 (Raj).

6. We have heard both the parties and perused the material placed on record. In the instant case, the AO rejected the books of accounts and estimated the income @ 12.5% on main contracts and 8% on sub contract receipts and allowed the depreciation and made separate additions relating to the 8 items mentioned in para No.2 of this order.

6.1. With regard to the rental income, dividend on chits and interest on IT refund, the Ld.CIT(A) held that the same cannot be included in the business income and they are required to be separately taxed and there is no dispute on this issue.

6.2. With regard to the other income declared by the assessee in respect of interest on term deposits, interest received on partners' current account, insurance claims received, scrap sales, sundry creditors credit balances written off, the contention of the assessee is that they form part of business receipts, therefore, no separate addition is required to be made. The Ld.AR argued that the assessee is engaged in only one business i.e. civil contracts and maintaining books of accounts relating to civil constructions. Once, the AO

rejects the books of account, there is no requirement for relying on the same books of accounts and make separate additions on account of various items. The AO did not make any discussion in the assessment order as to why these items are required to be taxed separately. The AO simply made addition without giving any reasoning. Therefore, we have no option except to rely on the submissions made by the Ld.AR to arrive at the nature of receipts. During the appeal hearing also no reason was given by the Ld.DR with regard to nature of the receipts. With regard to interest on term deposits, the Ld.AR submitted that (i) interest was earned on term deposits from banks and the said deposits were placed for bank guarantees issued for payment of EMD for awarding of contracts. The very award of contract is rested on the provision of EMD for which Bank Guarantees were given in terms of the agreement and therefore argued that there is inextricable link between the guarantee and the execution of work contracts. This pre requisite is instrumental for initiation of work contract and which paves the path of revenue generation for the assessee. From the explanation offered by the assessee, we understand that the term deposits were made by the assessee for the purpose of obtaining the bank guarantee as margin money on which the assessee had received the interest. Since the deposits were made from the funds of the business and for

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the purpose of bank guarantee, the interest on term deposits are required to be treated as business income, but not to be taxed separately under other sources. The Ld.DR relied on the decision of Krishak Bharati Cooperative Ltd. (supra). The said case was related to revision u/s 263 and allowability of deduction u/s 80(IA) of the Act. The deduction u/s 80(IA) is to be allowed from the profits of the industrial undertaking but not the profits and gains of the business. The scope of profits and gains of the business are wider than the income derived from the industrial activity. With regard to deduction u/s 80(IA), the deduction is allowable only from the profits derived from the industrial activity. The interest earned on bank deposits would cover under the scope of business income, but not for industrial activity, therefore, the Hon'ble Delhi High Court held that the interest on bank deposits cannot be treated as profit and gain derived from the manufacturing activity by an industrial unit. Thus, the facts of the case law relied upon by the Ld.DR in Krishak Bharati Cooperative Ltd. are distinguishable, not applicable in the assessee's case. Accordingly we, hold that the interest on term deposits are required to be treated as business income, but not to be taxed separately under other sources.

7. The next issue is interest received on partner's current accounts. The assessee had the received interest on partners' current account to the tune of Rs.77,72,358/- which was stated to be advanced from the bank borrowings. The Ld.AR further submitted that the assessee is maintaining separate capital accounts and current accounts while the capital accounts are fixed capital accounts, current accounts are variable accounts. The major part of the debit balances in current accounts represent the losses ascertained by the company in the earlier years on which the assessee has charged the interest. Therefore, the same is to be treated as business income. The Ld.AR further submitted that the advances given to the partners are from the bank borrowings. Since the income is estimated and the interest paid to the bank was not separately allowed as deduction, the same partakes the character of business income. If the interest charged on the partners capital accounts required to be taxed as income from other sources, the interest paid to the bank to that extent of advances given to the partners out of borrowed funds required to be allowed as deduction separately. Therefore, the Ld.AR argued that basing on the principles of natural justice, when the interest paid by the firm is not allowable as expenditure, the interest earned on utilization of such borrowings also should not be added back to the income. The Ld.AR also

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relied on the decision of M/s Triveni Enterprises, Hyderabad Vs. ITO, Ward 6(1), Hyderabad vide ITA No.352/2011 dated 27.05.2011. In the instant case, as submitted by the Ld.AR, balances in the current accounts either represent the losses sustained by the firm or the advances made by the assessee company out of the borrowings made from secured and unsecured loans. The losses sustained by the firm debited to the partners' capital account is a business loss, hence, the interest charged on partners' current account relating to the accumulated loss also takes the character of the business income. Similarly, the assessee submitted that the firm has advanced the amounts out of the bank borrowings. Once the amounts are advanced from the borrowed funds and the interest receivable required to be taxed, the interest paid on borrowing also required to be allowed as deduction. As discussed earlier, the AO has not given any reason for making the addition and did not bring any evidence to show that the assessee had advanced the amounts to the partners with an intention to earn the interest income out of the surplus funds available. Therefore, following the decision of the Coordinate Bench of ITAT in the case of Triveni Enterprises, under the facts of the case, we hold that the interest on partners capital accounts is to be treated

as business income as held by the Ld.CIT(A), thus no separate addition is required to be made on account of interest on current account debit balances.

8. The next item of disallowance is net insurance claims received, scrap sales and sundry creditors credit balances written off. All the three items constitute business transactions which takes the character of business income. Further if the AO wants to tax the sundry creditors written off, the same should be taxed under section 41(1) of the Income Tax Act which is not the case of the AO. The AO has not brought on record any evidence to show that sundry creditors balances written off satisfy the conditions laid down in section 41(1) of the act. Therefore, we agree with the Ld.CIT(A) that no separate addition is required to be made with respect of sundry creditors credit balances written off. From the above discussion, it is established that interest received on partners current account, insurance claims, scrap sales and sundry creditors credit balances constitute business income. The assessee is engaged in the civil constructions and all the transactions are from the same business. It was informed during the appeal hearing that in the earlier years also the assessments were completed by estimation of income thus the expenditure claimed in the earlier years also was taken care in estimation. The department has not produced any evidence to show that interest on term

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deposits, interest received on partners current account are earned out of the surplus funds available to the assessee which was placed for earning the interest income as a separate source. Therefore, in the facts and the circumstances of the case the items discussed above constitute business income and no separate addition is required to be made, once the books of accounts are rejected by the AO. As per the provisions of section 29, the income referred to in section 28 shall be computed in accordance with the provisions contained in section 30 to 43 of the Act. However, the Hon'ble Jurisdictional High Court and other Hon'ble High Courts held that depreciation is required to be allowed from the estimated income, unless the AO computes the income or estimates the income clear off depreciation. Therefore, once the income is estimated after rejecting the books of accounts, the expenditure allowable from section 30 to 43 is taken care of except the depreciation as held by Hon'ble High Court of Andhra Pradesh in the case of CIT Vs. Y Ramachandra Reddy (ITTA No.48 of 2002) in order dated 30.07.2014. In the instant case, the AO has estimated the income @12.5% and in the assessment order and the AO did not specify for what reasons, the items are separately made addition. Hence, we hold that the Ld.CIT(A) has rightly directed the AO not to include the above items under the head 'other income'. We do not find

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any infirmity in the order of the Ld.CIT(A) and the same is upheld. The appeal of the revenue is dismissed.

Cross Objection No.79/Viz/2013, A.Y.2008-09

9. The assessee filed cross objection in CO 79/Viz/2013 with delay of 15 days. The reason explained in the petition for condonation of delay is due to professional preoccupation is neither convincing nor satisfactory. Hence, the cross objection filed by the assessee is dismissed.

I.T.A. 445/Viz/2016, A.Y.2008-09

10. In the assessment order dated 01.12.2010, the AO estimated the income @12.5% placing reliance on the ratio laid down in the case of M/s KNR Constructions of ITAT Hyderabad. The AO allowed the depreciation from the income so estimated. In a nut shell, the AO estimated the gross income @12.5% before depreciation on gross contract receipts and allowed the depreciation. Subsequently, the AO found that the depreciation was erroneously allowed contrary to the ratio laid down in the case of KNR Constructions, hence, the AO issued notice u/s 154 on 27.03.2015 proposing to make the disallowance of depreciation already allowed called for the objections of the assessee. The assessee objected for the proposed

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disallowance stating that the depreciation is statutory allowance and the deduction required to be allowed from estimated income. The assessee relied on the various decisions supporting the allowance for depreciation including the Jurisdictional High Court in Y.Ramachandra Reddy (supra). The AO rejected the objections of the assessee and held as per the ratio laid down in the case of KNR Constructions depreciation is taken care no separate deduction required to be allowed. Since it was a mistake apparent from record, the AO passed the order u/s 154 making addition of depreciation already allowed in the order passed u/s 143(3) dated 01.12.2010.

11. Aggrieved by the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) allowed the appeal of the assessee holding that the issue of rectification is wrong adoption of law and is not permissible to make rectification u/s 154 of the Act and relied on the decision of Hon'ble Supreme Court in the case of T.S.Balaram, ITO Vs. Volkart Bros [1971] 82 ITR 50 (SC). For the sake of clarity we extract relevant part of the order of the Ld.CIT(A) in para No. 5.3., 5.4 and 5.4.1.

5.3. The issue for rectification notice dated 2703.2015 was in respect of allowance of depreciation made earlier (factual issue). There can be no rectification u/s 154 of the Act for point of law, i.e. wrong adoption of the ratio laid down in the case of KNR Constructions as claimed by Assessing Officer. Points of law (legal issues) are subject to modifications / revisions/ reviews and appeals etc.

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Hence, there can be no rectification u/s. 154 of the Act on adoption of such ratios in income tax proceedings.

5.4 Hon' ble Supreme Court explained scope of provision u/s.154 of the Act as given below:

Mistake must be obvious and patent - A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions. A decision on a debatable point of law is not a mistake apparent from the record - T.S.Balaram, ITO v. Volkart Bros. [1971]82 ITR 50 (SC)'

5.4.1. In view of the above, the issue of allowability or otherwise of depreciation claim requires detailed examination of records / materials. Hence, it is not within the scope of provisions of section 154 of the Act."

12. We have heard both the parties and perused the material placed on record. The AO estimated the income @12.5% and allowed the depreciation originally in the assessment order. Subsequently, the AO sought to withdraw the depreciation u/s 154 of the Act and the reason assigned for withdrawing depreciation is wrong adoption of the ratio of case law in KNR Constructions. There are several decisions including the decision of jurisdictional High Court in the case of Y Ramachandra Reddy (supra), wherein the Hon'ble High Courts have held that even in cases of estimation of income, separate deduction required to be allowed for depreciation which is the statutory allowance. Therefore, the issue of allowability of depreciation or otherwise require detailed examination of records, facts and the case laws. As held by the Ld.CIT(A), there can be no rectification u/s 154 of the Act for point of law.

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Wrong adoption of the ratio laid down by the court is a point of law and the same is not maintainable for rectification u/s 154 of the Act. Even the Board Circular No.29-D(XXX-14) [F.No:45/239/65-ITJ] dated 31.08.1965 says that the gross profit should be estimated and the deductions and the allowances including the depreciation allowance should be separately deducted from the gross profit. Therefore, the AO has rightly computed the gross profit by estimation of income and allowing deduction on account of depreciation separately as per the Board Circular cited supra and the case laws. Hence, there is no mistake apparent from the record and the Ld.CIT(A) has rightly allowed the appeal of the assessee. We do not find any infirmity in the order of the Ld.CIT(A), hence we uphold the same and dismiss the appeal of the revenue.

Cross Object No.106/Viz/2019, A.Y.2008-09

13. The assessee filed cross objection supporting the orders of the CIT(A), however, cross objection was filed with delay of 919 days and no petition for condonation is filed, therefore, the cross objection filed by the assessee is dismissed in limine.

I.T.A. 442/Viz/2016, A.Y.2009-10

14. In this case, assessment was originally completed on 17.10.2011. The assessee filed the return of income declaring loss of Rs.3,24,29,291/- and afterwards filed the return of income declaring taxable income of Rs. Nil and claimed refund of Rs.82,62,010/-. The return was processed u/s 143(1) and the assessment was completed u/s 143(3) on total income of Rs.58,12,130/-. The AO estimated the income @12.5% after rejecting the books of accounts, placing reliance on KNR Constructions and allowed the depreciation. The AO considered the allowability of depreciation in para No.5 of the assessment order. Subsequently, the Id.CIT has taken up the case for revision u/s 263 and found that there was difference in the gross receipts admitted by the assessee in the return of income and the gross receipts as per the TDS Certificate. The Ld.CIT(A) found that the gross receipts as per the TDS certificates were Rs. 53,12,76,744/- against the admission of gross receipts at Rs.45,13,97,112/- by the AO as under.

Main contract receipts	-	Rs.15,74,78,946
Sub contracts	-	Rs.29,39,18,166
Total	-	Rs.45,13,97,112

14.1. The Ld.CIT furnished the gross receipts party-wise as per TDS certificates and the gross receipts admitted by the assessee in the profit and loss account and arrived at the difference of Rs.7,98,79,632/- short admission by the assessee. Thus, the Ld.CIT(A) held that the AO neither examined the gross receipts nor considered for estimation of income by the AO, hence, set aside the order of the AO dated 17.10.2011 passed u/s 143(3) and directed the AO to redo the assessment. The Ld.CIT further observed that the AO estimated the income and allowed depreciation from the income so estimated which is incorrect. According to Ld.CIT, once the income is estimated, the deduction allowable u/s 30 to 38 are deemed to have been considered and no separate deduction needs to be allowed for depreciation. Thus, the Ld.CIT remitted the issue back to the file of the AO to redo the assessment as per the directions given in the order u/s 263. The AO passed consequential order giving effect to the order of the Ld.CIT u/s 143(3) r.w.s. 263 by an order dated 31.03.2015. In the consequential order, the AO disallowed the depreciation originally allowed as directed by CIT in revision order u/s 263. Accordingly, the AO made the addition of Rs. 6,80,34,031/- to the income assessed u/s 143(3) by an order dated 17.10.2011.

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15. Aggrieved by the order of the AO dated 31.03.22015, the assessee filed appeal before the CIT(A) and the Ld.CIT(A) allowed the appeal of the assessee following the decision of Hon'ble High Court of Andhra Pradesh in the case of Y.Ramachandra Reddy and the decision of ITAT, Visakhapatnam in the case of DCIT, Circle -2(1), Vijayawada Vs. R.R.Constructions, Vijayawada vide ITA No.47/Viz/2013 dated 06.11.2015 in page Nos. 6 to 8 which reads as under :

"5.2. Hon'ble A.P. High Court in the case of CIT vs Y.Ramachandra Reddy (ITTA No.48 of 2002) in order dated 30072014 held the following

"Wherever the Parliament wanted to deviate from the ordinary procedure for determination of income or for that matter, the depreciation in the process of reckoning the taxable income specific provisions of that effect are made. While in some cases, such steps are reflected directly in the very provisions of the Act or in other cases they are in the form of the cross reference from other provisions-----"

"For example, Section 44AD of the Act provides for determination of the income of an assessee from the business at 8% of the total turnover or the gross receipts of the previous year under certain circumstances. Sub-section (2) is to the effect that if any deduction allowable under Sections 30 to 38, which takes in its fold the deduction such as depreciation and interest, shall be deemed to have been effected. The procedure under that section, however, applies only when the turnover is below a particular figure which at the relevant point of time was Rs.4000,000/-. As of now, it is Rs.1 crore. In the instant case, Section 44AD of the Act does not apply because the turnover was above the stipulated amount Therefore, the feasibility of deduction of turnover and interest cannot be said to have been taken away...."

"if an assessee is entitled to claim deduction of interest, be it under Section 36(1) of the Act or any other relevant provision and of depreciation under

*I.T.A. No.112/Viz/2013, 210,235/Viz/2015, 442,445/Viz/2016 and 75/Viz/2017
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Section 32 of the Act, in the ordinary course of assessment, there is no reason why the same facilities be pot extended to him, merely because the profit is determined on the basis of estimation as was done in the instant case. We are of the view that depreddation and interest, which are otherwise deductible in the ordinary course of assessment, remain the same legal character, even where the profit of assessee is determined on percentage basis.....

The conclusions arrived at by us, get support from the Circular dated 31.08.1965 issued by the Central Board of Direct Taxes. Though the circular was with reference to the 1922 Act, it holds good for the analogous provisions under the 1961

"In the instant case, we are concerned with the depreciation. The occasion to deny the deduction of depreciation or interest would arise if only the material placed before the Assessing Authority in proof of purchase of machinery and other items and payment of interest is disbelieved. No finding of that nature was recorded by the Assessing

5.2.1. Hon'ble ITAT, Visakhapatnam in ITA No47/Vizag/2013 order dated 06.11.2015 held that depreciation is an allowable deduction, even after estimation of net profit on gross receipts.

"10. We have considered the submissions made by either parties and also gone through the case laws relied upon by the A.R. We find that the ITAT Visakhapatnam bench in the case of Srivalli Shipping & Transports Pvt. Ltd. (supra) held the issue in favour of assessee. The ITAT while dealing with the similar issue held as under:

24, On consideration of rival contentions, we find merit in the submissions made by the assessee. The capital expenditure incurred is not allowed as deduction but the deterioration in their value is allowed as deduction with the name "depreciation". Hence, it is called non-cash expenditure and also called statutory deduction. While estimating the income, the trading results only are estimated on the basis of sales / gross receipts, meaning thereby, what is estimated is only the net profit before allowing any non-cash expenditure/statutory deductions. Further, the quantum of depreciation would also depend upon the value of assets. For example, a business man having lower version of Car or Air Conditioner would be entitled to claim lower amount of depreciation, since the cost of the lower version of car and Air conditioner will be less. Whereas another business man having higher version of Car and Air Conditioner would get higher amount of

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depreciation, since the cost of those assets shall be higher Hence, even if the level of operations and other things are equal between the two, the depreciation amount will be different due to the difference in the value of assets. Hence the total income shall also result in different figures between the two business men. - - The above said illustration would support the contentions of the assesses that the depreciation should be allowed separately. Accordingly, we direct the AO to allow the depreciation admissible to the assessee against the income estimated by us in the preceding paragraphs."

11, Considering the facts and circumstances of the case and also applying the ratios of the decision relied upon by the AR., we are of the opinion that depreciation is a allowable deduction, even after estimation of net profit on gross receipts. Accordingly, we direct the A.O. to allow the admissible depreciation against the income estimated from the contract receipts"

5.2.2. In appellant's own case for subsequent Asst. Year 2010-11, the then CIT(A) in the order No.75/CIT(A)/VJA/13-14, dated 31.03.2015 directed the Assessing Officer to adopt the rate of profit @ 12.5% instead of 9% to determine the income subject to allowance of depreciation.

5.2.3. In view of the above and following judicial discipline, depreciation claim of Rs.6,80,34,031/- is directed to be allowed.

16. Against the order of the Ld.CIT(A), the revenue has filed appeal before this Tribunal.

17. We have heard both the parties and perused the material placed on record. The AO estimated the income and allowed the depreciation originally. Subsequently, the Ld.CIT has taken up the case for revision u/s 263 and held that the assessment order passed by the AO allowing the depreciation is erroneous and prejudicial to the interest of the revenue and

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directed the AO to redo the assessment withdrawing the depreciation allowance already granted by the AO. However, the Ld.CIT kept the issue open for deciding the same on merits. Accordingly, the AO passed consequential order u/s 143(3) r.w.s. 263. On appeal, the first appellate authority allowed the appeal of the assessee and directed the AO to allow the depreciation which is being agitated by the revenue. The Ld.CIT(A) has followed the order of this Tribunal and the decision of Jurisdictional High Court and the Board Circular dated 31.08.1965 giving instructions to the field officers to make estimation of gross profit and to allow the depreciation from the gross profit. In the original assessment, the AO made discussion in detail in para No.5 allowing depreciation. Since the CIT(A) has followed the order of this Tribunal and the decision of Jurisdictional High Court, we find no error in the order of the Ld.CIT(A) and the same is upheld. Accordingly, the appeal of the revenue is dismissed.

CO No.105/Viz/2019, A.Y.2009-10

18. The assessee filed cross objections supporting the order of the CIT(A) with a delay of 919 days without filing condonation petition. Since the CO was filed without condonation petition, the Cross Objection filed by the assessee is dismissed in limine.

I.T.A. No.235/Viz/2015, A.Y.2010-11

19. In this case, the assessee admitted gross receipts of Rs.15,31,97,252/- relating to contracts and Rs.3,33,35,889/- pertaining to sale of chips. Since the books of accounts are not amenable for verification, the AO rejected the books of accounts and estimated the income @9% on gross receipts of Rs.15,31,97,252/- net of depreciation which worked out to Rs.1,37,87,752/-. Further the AO also estimated the income @15% on gross sales of chips of Rs.3,33,35,889 which was worked out to Rs.50,00,383/-. Accordingly, the AO computed the income of Rs.1,87,88,140/- against the income returned by the assessee, loss of Rs.2,30,71,542/-.

20. Against the order of the AO, the assessee went on appeal before the CIT(A) for granting Depreciation and the Ld.CIT(A) directed the AO to estimate the income @12.5% before depreciation following the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Y.Ramachandra Reddy supra. The Ld.CIT(A) taken the basis of assessee's own case for earlier years for estimation of income@12.5%. For the sake of clarity and convenience, we extract relevant part of the order of the CIT(A) in para No.5.3 which reads as under :

*I.T.A. No.112/Viz/2013, 210,235/Viz/2015, 442,445/Viz/2016 and 75/Viz/2017
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“5.3. For the year under consideration, the Assessing Officer by rejecting the books of account, estimated the income on total contract receipts by applying @9% profit rate. The contention of the appellant is that for Asst.Years 2008-09 and 2009-10 in its own case was 12.5% subject to allowance of depreciation. It is also seen that the Assessing Officer has not given any cogent reason as to why he has chosen 9% net profit rate instead of 12.5%. Therefore, it is not a good reason for estimating profit by applying lower rate than adopted in earlier years. Further, the appellant relied on a judgement of Hon’ble High Court of Andhra Pradesh in the case of CIT Vs, Y. Ramachandra Reddy in ITTA No. 48 of 2002 for allowance of depreciation. In view of facts and circumstances of the case and judicial opinion prevalent, the Assessing Officer is directed to adopt the rate of profit @ 12.5% instead of 9% to determine the income subject to allowance of depreciation.”

21. Against the order of the Ld.CIT(A), the revenue has filed appeal challenging the allowing of depreciation and interest on remuneration to partners.

22. We have heard both the parties and perused the material placed on record. In the instant case, the CIT(A) found that the AO estimated the income @9% without giving any reasoning and the Ld.CIT(A) followed the orders of the earlier assessment years, wherein the income was estimated @12.5% subject to allowance of depreciation, therefore, following the orders of the earlier years and the decision of Hon’ble Jurisdictional High Court in the case of Y.Ramachandra Reddy, the Ld.CIT(A) directed the AO to estimate the income @12.5% instead of 9% subject to allowance of depreciation. The facts are identical to the case of A.Y.2009-10 which was decided in favour of the assessee. Since the Ld.CIT(A) followed the order of

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the Hon'ble jurisdictional High Court and this Tribunal has also taken decision to allow depreciation from the estimated income, we find no error in the order of the Ld.CIT(A) and the same is upheld. Appeal of the revenue is dismissed.

CO No.107/Viz/2019, A.Y.2010-11

23. The assessee filed cross objection supporting the order of the Ld.CIT(A). However, the cross objection was filed with a delay of 1416 days without filing condonation petition. Since the assessee failed to furnish the condonation petition, the cross objection filed by the assessee is dismissed in limine.

I.T.A. No.210/Viz/2015, A.Y.2010-11

24. As stated in the earlier paragraphs, the AO passed assessment order u/s 143(3) on total income of Rs.1,87,88,140/- and the assessee went on appeal before the Ld.CIT(A) challenging the estimation of net income on the gross receipts. The assessee filed appeal and requested to allow depreciation on the income so estimated. Pending disposal of appeal by the Ld.CIT(A), the CIT, Vijayawada has taken up the order dated 27.03.2013 for revision u/s 263. Since the order passed was found to be erroneous and prejudicial to the interest of the revenue, the CIT held that the AO did not

*I.T.A. No.112/Viz/2013, 210,235/Viz/2015, 442,445/Viz/2016 and 75/Viz/2017
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examine the issue relating to interest on term deposits, interest received on partners current account, rental income from property, sundry creditors balance written off, interest on income tax refund. The CIT further observed that though the AO had estimated the income @9%, the same is not in consonance with the decided case laws and the assessee's own case for the earlier years, hence viewed that the AO ought to have estimated the income @12.5% as held in the earlier years, thus the Ld.CIT held that the order passed by the AO is erroneous and prejudicial to the interest of the revenue, accordingly set aside the order with a direction to redo the assessment in accordance with the law and established procedure on such matters after giving opportunity to the assessee.

25. Aggrieved by the order of the Ld.CIT u/s 263, the assessee is in appeal before this Tribunal and submitted that the CIT erred in holding that the order passed by the AO is erroneous and prejudicial to the interest of the revenue in respect of the following issues :

- (a) Interest of term deposits
- (b) Interest on partners current account
- (c) Rental income
- (d) Sundry creditors balance written off

*I.T.A. No.112/Viz/2013, 210,235/Viz/2015, 442,445/Viz/2016 and 75/Viz/2017
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- (e) Interest on income tax refund
- (f) Reexamining the possibility of enhancing the percentage of profit estimated by the AO @9% on gross receipts.

Challenging the order of the Ld.CIT, the assessee raised the following grounds of appeal.

1. *The order of Learned Commissioner of Income Tax, Vijayawada is contrary to the facts and also the law applicable to the facts of the case.*
2. *The learned Commissioner of Income Tax is not justified in invoking the provisions of S.263 of the Act in as much as the order dt.27-03-2013 u/s 143(3) of the Act is neither erroneous nor prejudicial to the interests of revenue.*
3. *The learned Commissioner of Income-Tax is not justified in directing the Assessing Officer to reexamine whether separate addition is warranted in respect of following incomes even after the net profit of the business is estimated as % of gross receipts.*

	Rs.
a) Interest on term deposits	1,70,837
b) Interest on partners' current account	2,27,12,838
c) Rental Income	03,01,250
d) Sundry Creditors balances written back	8,44,347
4. *The learned Commissioner of Income Tax is not justified in directing the assessing officer to make separate addition of Rs. 1,68,201 towards interest on refund received in terms of S244A of the Income Tax Act, 1961.*
5. *The learned Commissioner of Income Tax is not justified in directing the assessing officer to reexamine the possibility to enhance the percentage of profit estimated by the assessing officer @9% of gross receipts.*
6. *The learned Commissioner of Income Tax ought to have appreciated that the assessing officer initiated enquiries in respect of all the above issues and as such it is not a case of lack of inquiry 'to enable the learned Commissioner of Income Tax to invoke the provisions of S.263.*

*I.T.A. No.112/Viz/2013, 210,235/Viz/2015, 442,445/Viz/2016 and 75/Viz/2017
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7. *Any other ground that may urged at the time of appeal hearing."*

26. Ground No.1,2 and 7 are general in nature which does not require specific adjudication.

27. Ground No.3 is related to the interest on term deposits, interest on partners current accounts, rental income, sundry creditors balances written back. Except rental income all the other issues i.e. interest on term deposits, interest on partners current account and sundry creditors credit balances constitute business income as held by this Tribunal in this order in the earlier A.Y. 2008-09 in ITA N0.112/Viz/2013. As decided by the Tribunal in the assessee's own case in this order, the interest on term deposits placed for margin money for obtaining the bank guarantee, interest on current accounts of partners, constitute business income and taken care of in estimation of income. Similarly in the case of sundry creditors credit balances constitute business transactions as discussed in the earlier paragraphs. Since the interest on partners capital account, interest on term deposits and sundry creditors balances written back constitutes business income, no separate addition required. Therefore, we hold that there is no error in the assessment order which is prejudicial to

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the interest of the revenue with regard to items of interest on term deposits, interest on partners current accounts and sundry creditors balances written back. Accordingly, we set aside the order of the CIT passed u/s 263 on the items of interest on term deposits, interest on partners current account and the sundry creditors balances written back and allow the appeal of the assessee.

28. Ground No.5 is related to the estimation of income by the AO @9%. On the very same issue, the assessee went on appeal before the CIT(A) requesting for allowing depreciation from estimated income and the Ld.CIT(A) enhanced the estimation of income from @9% to 12.5% before depreciation and directed the AO to allow the depreciation. Therefore, since the appeal was pending before the CIT(A) on the very same issue and the Ld.CIT being parallel authority, CIT has no jurisdiction to invoke the provisions of section 263 of the Act on pending issues before the Ld.CIT(A). This view is supported by the decision of Hon'ble Madras High Court in the case of Smt. Renuka Philip.v.Income-tax Officer, Business Ward-XV(2)Chennai, [2019] 101 taxmann.com 119 (Madras), wherein Hon'ble High Court held that when the appeal is pending before the

*I.T.A. No.112/Viz/2013, 210,235/Viz/2015, 442,445/Viz/2016 and 75/Viz/2017
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Commissioner(A), the exercise of jurisdiction under Section 263 of the Act is barred. Therefore, we set aside the order of the Ld.CIT on this issue and allow the appeal of the assessee on this ground.

29. Ground No.4 is related to the interest on income tax refund which was granted to the assessee u/s 244A of the Act and other issue in Ground No.3 is rental income. Both the issues required to be taxed separately. The rental income required to be taxed under property, whereas the interest on income tax refund required to be assessed as income from other sources as discussed in detail in the assessee's case in this order. The Ld.AR also did not make any argument on both the issues. Therefore, we uphold the order of the CIT with regard to rental income and the interest on income tax refund. Accordingly, the appeal of the assessee is partly allowed.

30. Ground No. 6 is general in nature, Since we have discussed the appeal of the assessee item-wise, we consider ground No.6 need not be adjudicated separately. The assessee did not place any argument to support ground No.6, accordingly, ground No.6 is dismissed as not pressed.

I.T.A. No.75/Viz/2017, A.Y.2012-13

31. The assessee filed the return of income for the A.Y.2012-13 admitting loss of Rs.3,36,74,138/-. The case was taken up for scrutiny and during the

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course of assessment proceedings, the AO found that the books of accounts were defective and hence, the income was estimated @12.5% before depreciation. In addition to the above, the AO also estimated the income @15% on sale of metal and assessed the rental income separately, thus the total loss was assessed at Rs.2,17,96,060/-. Subsequently, the AO and found that the interest on partners' current account of Rs.2,61,21,106/- required to be taxed separately, hence, issued notice u/s 154 of the Act. After examining the objections filed by the assessee, the AO passed order u/s 154 modifying the assessment order u/s 143(3) dated 31.03.2015 making the addition of Rs.2,61,21,106/- representing the interest on current accounts of partners which resulted in taxable income of Rs.43,25,051/- against the total loss originally assessed at Rs.2,17,96,060/-.

32. Against the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) confirmed the order of the AO observing that the AO had only estimated the income on business and did not include Rs.2,61,21,106/- admitted by the assessee in the revised return on account of interest on partners capital accounts. The Ld.CIT(A) further observed that rectification u/s 154 is permitted, if there is a mistake apparent from

record. Since there was a mistake in the assessment order, the Ld.(A) viewed that the AO rightly passed the order u/s 154, accordingly upheld the order passed u/s 154.

33. Against the order of the CIT(A), the assessee is in appeal before this Tribunal.

34. We have heard both the parties and perused the material placed on record. In this order for the earlier assessment years in the preceding paragraphs, we have held that the interest on current account constitutes business income as per the detailed discussion made in this order. As per the submissions made by the Ld.AR, the issue is not a simple issue for invoking jurisdiction u/s 154 of the Act. The issue required to be examined from the point of view of allowability of interest charged on accumulated business losses debited to the partners current accounts and allowability of deduction on the bank borrowings. The issue is debatable whether the interest charged on accumulated losses required to be considered as business income or the income from other sources. Similarly the AR submitted that the amounts were advanced from the borrowed funds hence, whether the interest paid required to be allowed as deduction or not? Since the business income was estimated the AR argued that the

*I.T.A. No.112/Viz/2013, 210,235/Viz/2015, 442,445/Viz/2016 and 75/Viz/2017
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interest earned on partners capital accounts also constitute business income, thus no separate addition is warranted. Therefore, the issue is not a simple issue of mistake which is permissible for rectification u/s 154. The issue is complicated and mixed question of law and fact which required to be adjudicated after examining the facts and law in detail. Such legal issues are not permitted to be rectified u/s 154. Therefore there is no case for making rectification u/s 154. Accordingly, we set aside the order of the Ld.CIT(A) and allow the appeal of the assessee.

35. In the result,

- (i) Appeals of the revenue in I.T.A. No.112/Viz/2013, A.Y.2008-09, I.T.A. No.445/Viz/2016, A.Y.2008-09, I.T.A. No.442/Viz/2016, A.Y.2009-10 and I.T.A. No.235/Viz/2015, A.Y.2010-11 are dismissed.
- (ii) Appeals of the Assessee in I.T.A. No.210/Viz/2015 and 75/Viz/2017 are partly allowed.
- (iii) Cross Objections of the assessee in CO No.79/Viz/2013 is dismissed and CO No.105-107/Viz/2019 are dismissed in limine.

*I.T.A. No.112/Viz/2013, 210,235/Viz/2015, 442,445/Viz/2016 and 75/Viz/2017
CO Nos.79/Viz/2013, 105-107/Viz/2019, A.Y.2008-09 to 2010-11
M/s ABC Engineering Works, Vijayawada*

Order pronounced in the open court on 28th August, 2019.

Sd/-
(वी.दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

विशाखापटणम /Visakhapatnam

दिनांक /Dated : 28.08.2019

L.Rama, SPS

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee- M/s ABC Engineering Works, Plot No.24, 2nd Road Autonagar, Vijayawada
2. राजस्व/The Revenue - Dy.CIT, Circle-2(1), Vijayawada (ii) Dy.CIT, Circle-1(1), Vijayawada, Asst.Commissioner of Income Tax, Circle-3(1), Vijayawada
3. The Pr. Commissioner Income Tax, Vijayawada
4. The Commissioner of Income Tax (Appeals), Vijayawada
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 6.गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

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Sr. Private Secretary
ITAT, Visakhapatnam