

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “B” BENCH

**(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI AMARJIT SINGH, ACCOUNTANT MEMBER)**

**ITA. No: 2920/AHD/2014 & C.O. No. 314/Ahd/14
(Assessment Year: 2010-11)**

ACIT,Circle-1, Bhavnagar	V/S	Shri Chotubha Shivubha Sarvaiya P/o, Jaydeep Const. Co., 40/41, Madhav Complex, Shastrinagar Bhavnagar-364001
(Appellant)		(Respondent)

PAN: AGBPS 6488F

**Appellant by : Shri Alok Singh,CIT/DR
Respondent by : Shri Tushar Hemani, P.B. Parmar**

(आदेश)/ORDER

Date of hearing : 14 -11-2019
Date of Pronouncement : 14 -01-2020

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. This appeal filed by the Revenue is directed against the order of the Ld. CIT(A)-XX, Ahmedabad dated 22.08.2014 pertaining to A.Y. 2010-11 and

assessee has also filed C.O. The Revenue has taken following grounds of appeal:

- 1.The Ld.CIT (A)-XX, Ahmedabad has erred on facts and circumstances of the case in restricting addition made on account of entire Sundry Creditors outstanding on 31.03.2010 to Rs.34,50,413/- out of the total addition of Rs.8,20,81,677/-*
- 2.The Ld.CIT (A)-XX, Ahmedabad has erred on facts and circumstances of the case in deleting disallowance of Rs.3,26,812/- made on account of depreciation claim.*
- 3.It is therefore, prayed that the order of the CIT (A) be set aside and that of the Assessing Officer be restored to the above extent.*

2. Facts of the case are that the assessee is engaged is in the business of construction work.
3. The assessee was in the business of construction work. During year under consideration the assessee has disclosed total contract receipt of Rs.135640311/- on which he has disclosed net profit of Rs.7584978/-. The Net profit rate comes to 5.59% for the year under consideration which is slightly on higher side as compared to last years net profit rate of 5.35%. which was declared on total receipt of Rs.173174494/-. In the profit and loss account the assessee has also disclosed income from other heads including interest and discount/ Kasar at Rs.2302071/-. After reducing the other income from the net profit declared, the resultant net profit comes to Rs.5282908/- which give rise the net profit rate of 3.89%. The net profit declared by the assessee was on very lower side for this line of business. Therefore, during the course of assessment proceedings the assessee was required to explain the reasons for disclosing net profit on such lower side. In his reply the assessee has argued that he has declared better net profit as compared to last year therefore the declared profit should be accepted.

4. The arguments of the assessee have been considered carefully but are found not acceptable for the reasons that on verification of the accounts and details furnished during the course of assessment proceedings, it was noticed various expenses including labour expenses claimed at Rs.58089199/-, transportation and loading expenses & carting expenses claimed at Rs.1641676 and material purchased 21562798/- are not completely vouched and are not fully verifiable. During the year under considered the assessee has claimed labour expenses of Rs. 58089199/-, however, the payment of labour expenses has been reported only of Rs.3,29,00,0007-. It was also noticed that the assessee has already shown Unpaid labour at the beginning of the year as on 01.04.2009 for Rs.4,86,71,677/- and after accumulation of current years unpaid labour, the assessee has disclosed Unpaid Labour at the end of the year at Rs.7,38,56,677/- . This being very abnormal feature, the assessee was required to explain the reason for such huge amount of unpaid labour as no labour/ person will remain with out receiving his daily wages. The persons doing labour/ wages are of no means and can not survive with out timely receipt of their wages. No person will wait for his labour receipts for years/ months. Therefore, vide letter dated 01,02.2013 the assessee was asked to produce all persons in the name of which unpaid labour was outstanding. To verify the genuineness of the labour expenses, in more than 100 cases of labours, letters were issued on the addresses given by the assessee seeking confirmation from them but surprisingly all the letters except one Setter received back un served with postal remarks that 'not known' or xnot found on given address'. The one person to whom the letter was served also did not confirm the labour payment or out standing labour expenses in his name. List of these persons/ labours is being attached to this order.

5. But ld. A.O. was not convinced with the plea of the assessee and disallowed labour expenses of Rs. 8,20,81,677/-.
6. So far ground no. 2 is concerned, assessee purchased JCB Machine and three Tata LPK during the year under consideration and also submitted copies of invoice along with ledger account have already been submitted to the A.O. and regarding put to use in business, it is mentioned in the invoices i.e. 29.09.2009 and 30.09.2009 and have registered with the transport department within a week time after put to use and copies of RC books of all four vehicles was submitted before the A.O. But ld. A.O. rejected the claim of the assessee on the ground that three of them purchased on 30.09.2009 and one was purchased on 09.10.2009. The vehicles purchased on 30.09.2009 cannot be considered to be used on the same day in the absence of any evidence. And further stated that these vehicles registered with RTO only 05/13.10.2009 and 50% depreciation claimed was disallowed.
7. Against both the disallowances, assessee preferred first statutory appeal before the ld. CIT(A) who partly allowed the appeal of the assessee with following observations:

4.35. Since the labour expenditures claimed by the appellant are not fully verifiable as a part of them were shown unpaid at the year end and the payments are also shown majority in cash. As the claim is not verifiable therefore the books of accounts of the appellant are rejected invoking the provisions of Section 145(3) of the Act. Therefore, after rejection of the same the income has to be estimated only on the basis of the N.P. rate in the prevalent road construction industry. In this regard reliance is placed on the decision of Hon'ble Jaipur ITAT in the case of Rajaram Rajender Bhandari & Party V. ACIT (2005) 95 TTJ 97 (JP) whereby it has been held that when defects are found in accounts, total turnover/sales can be estimated proportionately after invoking provisions of section 145 however, while applying G.P. rate, Assessing Officer is required to make rational estimate having regard to nexus of material on record.

4.36. In this regard, the provisions of Section 44AD although applies on the small contractors and would not directly apply over the instant case being the turnover of the appellant greater than the monetary limits but certainly those provisions applies having the similar nature of business whereby the estimation of income has been prescribed @ 8% of the total turnover/gross receipts.

4.37. In this regard reliance is also placed on the decision of Hon'ble Mumbai ITAT in the case of ACIT Vs. Mahesh Enterprise [2013] 38 taxmann.com 249 (Mum.) whereby it has been held that under circumstances of rejection of books of account in case of assessee being a civil contractor with presumptive statutory rate as prescribed under section 44AD provide a good guideline for purpose of estimation of income.

4.38. In this regard, reliance has been placed in the case of K. Kannan Vs. ACIT, Cir.I Tax Appeals No.679 & 680 of 2013 dtd. 1.10.2013 of Hon'ble Madras High Court whereby the N.P. rate as applied by the CIT(A) at 5% of the turnover was confirmed discarding the application of N.P. rate at 8%, by the Hon'ble ITAT. The ground and the finding in the instant case is reproduced as under:-

"1. Whether in the impugned assessment year, income can be assessed at 8% rate on the gross contract receipts invoking S.44Ad of the Act 'when the turnover of the assessee had exceeded the Rs. 40 lakh limit prescribed in the Act? And whether the Tribunal can uphold such a patently erroneous assessment especially after making a specific finding in the beginning of para 7 of the impugned order that S.44AD of the Act has no application in the instant case as the turnover has exceeded Rs. 40 lakhs.

In the aforesaid case, as per the past history against the N.P. rate of 3.69% in the preceding years the Id. CIT(A) estimated the N.P. rate at 5% which was subsequently confirmed by the Hon'ble High Court.

It has been pleaded by the appellant that in the instant case there was increase in the N.P. rate in the year under consideration but excluding the interest and kasar income there was slight decrease therein which warrant addition/disallowance to the extent to an extent 4.39. In view of the aforesaid discussion, since in the instant case, the turnover is more than the monetary limits as prescribed under the provisions of Section 44AD but considering the various submissions of the appellant and also the facts of the case it is reasonable to estimate the N.P. rate @8% of the total turnover/gross contracts which works out to Rs. 1,10,35,390/- (contract receipts Rs. 13,56,40,311/- + interest and discount income Rs.23,02,071/- = Rs. 13,79,42,382/-) as against the net profit of Rs.75,84,9787- for the year under consideration. Thus, for difference of the above net profits, the addition of the net profit to the tune of Rs.34,50,413/- (Rs.1,10,35,390/- (-) Rs.75,84,978/-) is

justified and same is confirmed. The relief is granted for the balance addition/disallowance. No any deductions would be allowed out of the same and any deduction allowable under the provisions of Section 30 to 38 be deemed to have already given full effect to and no further deduction under those sections shall be allowed. It is needless to mention that interest income and kasar income have been treated by the A.O. as business income only and same are part of the gross receipts. In view of the above, the grounds of the appellant are partly allowed.

8. So far ground relating to depreciation is concerned, ld. CIT(A) granted relief to the assessee.
9. Now Revenue has come before us and filed second statutory appeal.
10. We have gone through the relevant record and impugned order. Assessee made certain submissions before the ld. CIT(A) who called for remand report. And thereafter decided the matter on merit. And assessee also cited an order of Coordinate Bench in assessee's own case wherein in similar facts and circumstances, appeal of the Revenue was dismissed and relief was granted to the assessee with following observations:

4. We have heard both the parties and perused the material placed before us. The facts of the case are that the assessee derives income from construction work. For the year under consideration, the assessee disclosed the contract receipt of Rs.17.31 crores on which net profit declared was Rs.92.66 lakhs. The net profit rate works out to 5.35% which is admittedly higher than the net profit rate of 5% of preceding year. The Assessing Officer found that the labour expenses of Rs.5.58 crores were not verifiable. He, therefore, rejected the books of accounts u/s 145(1) and applied the net profit rate of 8% which resulted in the addition of Rs.54,48,596/-. On appeal, the CIT(A) noticed that for the year under consideration, the GP rate as well as the NP rate - both is better than the immediately preceding year. He was, therefore, of the opinion that there was no justification for application of net profit rate of 8%; however, for unverifiable nature of labour expenses, he sustained the lump-sum disallowance of Rs.4 lakhs out of labour charges. The Revenue is in

appeal against the deletion of net profit addition while the assessee is in cross-objection against the disallowance of Rs.4 lakhs out of wages.

5. At the time of hearing before us, the learned Counsel for the assessee furnished the copy of the assessment order for Assessment Year 2007-08 which was passed u/s 143(3) of the Act, wherein the NP rate of less than 3% was accepted by the Assessing Officer. The learned Departmental Representative was unable to explain when in the earlier years the lesser net profit rate than the net profit declared by the assessee in the year under consideration have been accepted, then what was the justification for application of net profit rate of 8%. Admittedly, the nature of the business remained the same in the preceding years and in the year under consideration. When in the immediately preceding two years lesser net profit rate have been accepted by the Revenue, then in our opinion, there was no justification for application of net profit rate of 8% in the year under consideration, merely because the labour expenses were not verifiable. The CIT(A) has already sustained some disallowance on ad-hoc basis for unverifiable nature of labour expenses. Considering the facts of the case and the history of the assessee's case which was been accepted by the Revenue, we do not find any infirmity in the order of the CIT(A) in this regard. Therefore, the only ground in the Revenue's appeal and Ground No.1 of the assessee's Cross-objections are rejected.

11. Thus, in parity with the ITAT order, we dismiss this appeal of the Revenue.

12. Now we come to C.O. No. 314/Ahd/2014. The assessee has taken following grounds of appeal:

- 1. The Ld.CIT (A)-XX, Ahmedabad has erred on facts and circumstances of the case in restricting addition made on account of entire Sundry Creditors outstanding on 31.03.2010 to Rs.34,50,413/- out of the total addition of Rs.8,20,81,677/-*
- 2. The Ld.CIT (A)-XX, Ahmedabad has erred on facts and circumstances of the case in deleting disallowance of Rs.3,26,812/- made on account of depreciation claim.*
- 3. It is therefore, prayed that the order of the CIT (A) be set aside and that of the Assessing Officer be restored to the above extent.*

13. In this case, assessee is engaged in the business of construction work. AO found that unpaid labor expenses at the beginning of the year were Rs.4,86,71,677/-, labor expenses claimed during the year were Rs.5,80,89,1997/-,

labor expenses paid during the year were Rs.3,29,00,000/- and accordingly, outstanding labor expenses at the end of the year were Rs.7,38,56,677/-.

14. Thereafter A.O. issued notices u/s 133(6) to around 100 laborers for seeking their confirmation most of such notices were returned unserved. Hence, AO took a view that labor expenses were unverifiable and also doubted genuineness of the same. Resultantly, AO made addition of Rs.8,20,81,677/-.

15. In appeal before the Id. CIT(A) estimated income at Rs.1,10,35,391/- being NP @ 8% of total contract receipts of Rs.13,79,42,382/-. However, since assessee had already disclosed income of Rs.75,84,978/-.

16. Similar issue has been decided in AY 09-10 and A.O. found that there was certain unverifiable labor expenses and hence, AO estimated NP @ 8% which culminated into an addition of Rs.54,48,596/-.

17. In appeal before the Id. CIT(A) partly confirmed a lump-sum addition of Rs.4,00,000/- and deleted the balance and deleted the balance addition broadly on the count that profitability had improved and that there was no justification in applying NP @ 8%. Co-ordinate Bench in assessee's own case for A.Y. 2009-10 in ITA No. 2901/Ahd/2012 and C.O. No. 54/Ahd/2013 wherein ITAT observed that when A.O. had accepted NP less than 3% in A.Y. 07-08, there was no justification for Net Profit were @8%.

18. In support of its contention, assessee. filed a yearwise chart as follows:

AY	FY	Labor expenses	Contract receipts	Ratio
----	----	----------------	-------------------	-------

10-11	09-10	8,62,72,450	13,56,40,311	63.60%
09-10	08-09	11,82,47,374	17,31,74,494	68.28%
08-09	07-08	8,72,55,430	14,09,67,464	61.89%
07-08	06-07	5,78,54,923	7,55,06,401	76.62%

19. Thus, ratio of “labour expenses” to “contract receipts” for the year under consideration is in line with the ratio of earlier years. Earlier a lump sum disallowance of Rs.4,00,000/- was confirmed in earlier year 2009-10 wherein total contract receipts were Rs.17,31,74,494/- whereas total contract receipts during the year under consideration i.e. A.Y. 2010-11 are Rs.13,56,40,311/- i.e. less than A.Y. 2009-10.

20. Therefore in the interest of justice and seeing the past performance and lump sum addition was made of Rs. 4,00,000/- against contract receipt of Rs. 17,31,74,494/- to meet the ends of the justice we would like to lump sum Rs. 3,00,000/- are against the total receipt of Rs.13,56,40,311/-.

21. In the result, this ground of assessee is partly allowed. And a lump sum disallowance of Rs.3,00,000/- is confirmed .

22. Now we come to next ground with regard to claimed on the depreciation. As we can see, assessee purchased three vehicles on 30.09.2009 and one were purchased on 09.10.2009. In our considered opinion, vehicles were purchased on 30.09.2009 and put to use on the same day will be allowed for 50% depreciation a vehicle which was purchased on 09.10.2009 will not be allowed

for 50% depreciation. In the interest of justice, this matter is set aside to the file of the Assessing Officer to decide the matter as per provisions of law after considering our finding and thereafter will decide the claim of the depreciation. In the result, this ground is partly allowed.

23. In the result, C.O. of the Assessee is partly allowed.

Order pronounced in Open Court on	14- 01- 2020
-----------------------------------	--------------

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER True Copy
Ahmedabad: Dated 14/01/2020

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER

Rajesh

Copy of the Order forwarded to:-

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

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad