IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER

ITA No.57/CTK/2021
Assessment Year : 2016-17

M/s. Bhagbati Build & Constructions Pvt Ltd., At: Madhupatna, PO: Link Road, PS: Madhupatna, Cuttack	Vs.	Pr. CIT,-1, Bhubaneswar
PAN/GIR No.AAECB 1801 D		
(Appellant)	..	(**Respondent**)

Assessee by : Shri Sandeep Kumar Jena, AR
Revenue by : Shri Manoj Kumar Goutam, CIT (DR)

Date of Hearing : 8/3/ 2022
Date of Pronouncement : 29 /3/2022

O R D E R

Per C.M.Garg, JM

This is an appeal filed by the assessee against the order of the Pr. CIT-1, Bhubaneswar dated 16.3.2021 u/s.263 of the Act, for the assessment year 2016-17.

2. In the grounds of appeal, the contention of the assessee is that the Pr. CIT is not justified in exercising his jurisdiction by passing order u/s.263 of the Act and further stated that once the assessee has challenged the quantum proceedings in appeal before the ld CIT(A), the Pr. CIT should have to wait for the outcome of the same.

3. Facts of the case are that the assessee is a company engaged in the business of execution of works contract and sub-contractor mostly are road and earth work, where the involvement of labour components is more and profit percentage is less in comparison to civil building construction contracts. The Assessing Officer completed the assessment u/s.143(3) of the Act on 28.12.2018 at an assessed income of Rs.1,83,39,040/-.

4. Thereafter, Pr. CIT called for records of the assessee and noticed that while passing the assessment order, the Assessing Officer has made a fundamental error that while in one hand he has estimated the profit taking a cue from section 44AD of the Act, in the other hand, he has allowed depreciation of Rs.66,26,066/- as claimed by the assessee u/s 32 of the Act. The Assessing Officer has also allowed depreciation from the estimated profit stating therein that "considering the volume of the business of the assessee, the depreciation is allowed separately on the estimated profit 8% of gross receipts. The Ld. Pr.CIT observed that the AO's remark that he had allowed depreciation "considering the volume of business" is not based on any statutory provision, therefore, the allowance of depreciation from the estimated profit is an afterthought. In response to notice u/s.263 of the Act, there was no compliance from the side of the assessee. Therefore, Pr. CIT after discussing various judgments, hold that the assessment order is erroneous and prejudicial to the interest of the revenue and directed the AO to reconsider the issue of allowance of

depreciation from the estimated profit with a speaking order, after allowing reasonable opportunity of hearing to the assessee.

5. Ld A.R. submitted that in response to statutory notices u/s.142(1) and 143(2) of the Act, the assessee appeared before the AO and produced its books of account. However, the AO rejected the book result on the ground of non-production of cash book by the assessee and estimated the net profit @ 8% of the gross contractual receipt. He submitted that the Assessing Officer has made an addition of interest income at Rs.25,28,544/- by proportionately allowing expenditure at Rs.1,17,981/- in a very arbitrary manner. Therefore, the assessee has preferred appeal before the ld CIT(A) and appeal is pending for disposal. Ld A.R. submitted that pending disposal of the appeal by the ld CIT(A), the Pr. CIT initiated revision proceedings under section 263 of the Act on 3.8.2020 leveling the assessment order as erroneous and prejudicial to the interest of the revenue. Ld A.R. also submitted that during the pandemic COVID-19, the Pr. CIT issued notices and in response, the assessee attended the office of Pr. CIT but due to absence of revision authority, filed time petition. Therefore, immediately the revision proceeding was refixed for filing show cause notice on 8.3.2021, as last opportunity. Although the assessee appeared on the fixed date and sought for an adjournment to file the show cause reply, without considering the same, Pr. CIT has passed the impugned order.

6. Ld A.R. submitted that the proceedings u/s.263 of the Act has been initiated at the behest of audit objection, which is against the provisions of the Act. Ld A.R. referred to the judgement of Hon'ble Punjab & Haryana High Court in the case of CIT vs Shoana Woollen Mills (2007) 296 ITR 238 (P&H), wherein, it is held that mere audit objections and merely because different view could be taken were not enough to hold that the order of the AO was erroneous or prejudicial to the interest of the revenue.

7. Ld A.R. submitted that the Assessing Officer has not committed any error by allowing depreciation after estimation of profit @8%. For this proposition, he relied on the decision of Hon'ble Patna High Court in the case of **M/s Shyam Bihari Vs. CIT, [2012] 345 ITR 283 (Patna),** wherein, it has been held as under: -

> "10. We have been taken through the provisions of circular of the Board dated 31.8.1965. According to that circular which is binding on the department and its authorities, where it is proposed to estimate the profit and the prescribed particulars have been furnished by the assessee, the depreciation allowance should be separately worked out. In all such cases, as per the circular, the gross profit should be estimated and the deductions and allowance including the depreciation allowance should be separately deducted from the gross profit. If the net profit is required to be estimated, it should be estimated subject to the allowance for depreciation and the depreciation allowance should be deducted there from.

He also referred to the decision of ITAT, Hyderabad in **the case of M/s. Teja Constructions vs. JCIT** in **ITA No.958/Hyd/ 2011** dated **9.9.2011** wherein, the Tribunal has estimated the net income and thereafter allowed depreciation and interest & remuneration of the partners

from such estimated income. Ld A.R. also referred to the judgment of Hon'ble Supreme Court in the case of **Awasthi Traders v Commissioner of Income Tax and another, reported in [2016] 388 ITR 185 (SC),** wherein, it was held that the depreciation is to be allowed from estimated net profit and not from the gross turnover. Further in the case of Shri Ram Jhanwar Lai vs. ITO & Ors reported in (2009) 321 ITR 400 (RAJ),wherein, it was held that where the AO adopted the net profit in best judgment of assessment, depreciation is allowable.

8. Ld A.R. also submitted that in the case of the assessee, the A.O. has not estimated profit @ 8% merely taken clue from Sec. 44AD of the Act, as such Sec. 44AD which is presumptive estimation of profit for those assessees whose turnover is below 40.00 Lakhs, as such this provision is prima facie inapplicable to the appellant's case. He submitted that the Assessing Officer has taken a possible and plausible view by allowing depreciation separately and cannot be termed as unsustainable in the eyes of law so as to invite the invoking of section 263 of the Act. He submitted that once the Assessing Officer allows the claim, on being satisfied with the explanation of assessee, on an enquiry made during the course of assessment proceedings, the decision of Assessing Officer cannot be held to be erroneous, on ground that there is no elaborate discussion in that regard in the order. It is the practice that whenever any claim of the assessee is accepted, Assessing Officer may not discuss the same in his order. For this

proposition, ld A.R. referred to the decision of Mumbai ITAT in the case of Anil Shah v. ACIT [2007] 162 Taxman 39 (Mum.) (Trib.), wherein, it was held that **r**ecourse to Section 263(1) cannot be taken if the impugned order is erroneous but not prejudicial to the interest of the revenue; or if it is prejudicial to the interest of the revenue but not erroneous, therefore before invoking revision jurisdiction the commissioner should satisfy himself of the above twin conditions. He referred to the decision of Hon'ble Supreme Court in the case of **Malabar Industrial Co. Limited v. CIT [2000] 243 ITR 83 (SC).** He referred to the decision of Hon'ble Supreme Court in the case of **CIT vs. Max India Ltd. (2007) 295 ITR 282 (SC),** wherein, it was held that the phrase prejudicial to the interests of the under section 263 has to be read in conjunction with the expression erroneous order passed by assessing Every loss of revenue as a consequence of an order of the assessing officer cannot be treated as prejudicial interests of the revenue. He submitted that when an Income Tax Officer adopted one of the courses permissible in it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest revenue, unless the view taken by the Income Tax Officer is unsustainable in law." Hence, the assessment order under Sec. 143(3) of the Act cannot be levelled as erroneous and prejudicial to the interest of revenue and the Ld. Pr. C.I.T.

by exceeding his revision jurisdiction by setting aside the original assessment order on a fantasy ground which is completely diverted from sprit of Sec. 263 of the Act. Therefore in consideration of this submissions and cited judicial pronouncements (Supra) the impugned revision order passed u/s.263 is unsustainable under law, hence deserved to be quashed.

9. Replying to above, ld CIT DR supported the order of the pr. CIT u/s.263 of the Act. Ld CIT DR submitted that the Assessing Officer has rejected book results and estimated the profit @ 8% without examining why large number of entries were not made in the books of account as on the date of survey and allowed depreciation therefrom, considering the volume of business and arrived at a figure less than that proposed in the notice. Hence, the order of the Pr. CIT deserves to be upheld.

10. We have heard the rival submissions and perused the record of the case. First of all, we may point out that in this case, the Assessing Officer has passed scrutiny assessment order u/s.143(3) of the Act, 1961 (hereinafter 'the Act') on 28.12.2018. Thereafter, the Pr. CIT issued notice u/s.263 of the Act on 3.8.2020 fixing the date of hearing on 28.8.2020. Thereafter, another notice was issued on 1.3.2021 fixing the date for hearing on 8.3.2021 and the ld A.R. of the assessee requested for adjournment to file reply to show cause notice u/s.263 of the Act. Keeping aside the adjournment application, the Pr. CIT passed the impugned order on 16.3.2021. It is a matter of judicial notice that during the period of

commencing from 23.3.2020 to 22.3.2021 and thereafter, the pandemic situation due to COVID-19 was in full swing and all Government authorities and public was also directed to adhere to follow the direction issued by Govt. of India as well as respective State Government. In this situation, when the Pr. CIT fixed the first date of hearing on 28.8.2020 and thereafter after a lapse of approximately six months, he issued second notice on 1.3.2021 fixing the date of hearing on 8.3.2021 and the ld A.R. sought for adjournment seeking time to file reply to show cause notice u/s.263 of the Act, the Pr. CIT without considering the adjournment application of the assessee passed the order on 16.3.2021. Therefore, we safely presume that the pr. CIT has not allowed proper opportunity of hearing to the assessee before passing the impugned revisionary order u/s.263 of the Act.

11. From a bare reading of impugned order u/s.263 of the Act, especially paras 8 & 9, we observe that the main contention/allegation of the Pr. CIT against the assessment order is that the AO has rejected the book results and estimated profit at 8% without examining why large number of entries were not made in the books of account as on the date of survey and the AO allowed depreciation therefrom considering the volume of business and arrived at a figure less than that proposed in the notice. The Pr. CIT has also alleged that when the AO himself has held that there can be profit of more than 8% of gross receipts, the allowance of depreciation was clearly an error of judgment and not a legally or logically valid opinion of the AO,

therefore, the assessment is erroneous as well as prejudicial to the interests of the Revenue. The Pr. CIT with above observations set aside the impugned assessment order and directed the AO examine the issue and pass a speaking order on disallowance to be made etc in the light of the facts and evidence to be provided by the assessee and also relevant provisions of the Act.

12. From careful reading of the assessment order dated 28.12.2018, we observe that in para 6.6, the Assessing Officer has clearly observed that the assessee is a civil contractor and as per provisions of section 44AD of the Act, an assessee engaged in any business (excluding a few) including civil construction, whose total turnover/gross receipts does not exceed Rs.1 crore can declare profit on presumptive basis @ 8% of the turnover or gross receipts. He further noted that the turnover of the assessee is much higher than Rs.1 crore, the provisions of section 44AD are not applicable to the assessee. But there is no fixed percentage of profit prescribed in the Act for any category of assessee, therefore, keeping in view the provisions of section 44AD of the Act for any category of the assessee, therefore, keeping in view the provisions of section 44AD of the Act, it can be logically said that the assessee engaged in civil construction can earn profit less than or equal to or higher than 8% of the gross receipts. The AO further noted that there is no evidence on record to show that the assessee has earned less than or equal or more than 8% profit of turnover/gross receipts,

therefore, it is presumed that the assessee has earned profit at 8%. Thereafter, the AO allowed the netting of interest and taxed the net interest income of Rs.25,28,544/-. The AO before estimating the net profit has also allowed depreciation to the assessee.

13. On a vigilant and careful consideration of the observations and findings recorded by the AO at para 6.6, we are of the considered view that the AO has estimated the net profit at 8% keeping in view the provisions of section 44AD of the Act after noting that this provision is not applicable to the assessee but he took 8% of net profit as bench market for estimating the net profit.

14. From the relevant part of impugned revisional order passed u/s.263 of the Act, we observe that the Pr. CIT has only disputed the assessment order on a single issue that after estimating the net profit, the allowance of depreciation was clearly an error of judgment and not a legally or logically valid opinion of the AO. In the impugned order in last part of para 8, and notice u/s.263 of the Act paras 4 & 4.1, the Pr. CIT has referred to the judgment of Hon'ble Supreme Court in the case of Malabar Industrial Co ltd vs CIT, 243 ITR 83 (SC). wherein, it was held as under:

> "An incorrect assumption of fact or incorrect application of law will satisfy the requirement of the order being erroneous in the same category fall orders passed without applying principles of natural justice or without application of mind."

15. In view of above, we proceed to logically analyse the conclusions of the AO as to whether the AO while allowing depreciation out of net estimated profit made an incorrect assumption of facts or incorrect application of law to satisfy the requirement of order being erroneous and prejudicial to the interest of revenue. Ld counsel on this issue has submitted as under:

> "I) That so far as on merit of this case is concerned the Ld. A.O has not committed any error by allowing depreciation after estimation of profit @8%, **M/s Shyam Bihari Vs. CIT, [2012] 345 ITR 283 (Patna)** has observed as under: -
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> "10. We have been taken through the provisions of circular of the Board dated 31.8.1965. According to that circular which is binding on the department and its authorities, where it is proposed to estimate the profit and the prescribed particulars have been furnished by the assessee, the depreciation allowance should be separately worked out. In all such cases, as per the circular, the gross profit should be estimated and the deductions and allowance including the depreciation allowance should be separately deducted from the gross profit. If the net profit is required to be estimated, it should be estimated subject to the allowance for depreciation and the depreciation allowance should be deducted there from.
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> " Also in **the case** of **M/s. Teja Constructions vs. JCIT** in **ITA No.958/Hyd/2011** dated **9.9.2011** wherein the B Bench of the Tribunal has estimated the net income and thereafter allowed depreciation and interest & remuneration of the partners from such estimated income.
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> ii) Also in a very identical case the law is also well set at rest by Hon'ble Supreme Court that the depreciation is to be allowed from estimated net profit and not from the gross turnover in the case of **Awasthi Traders v Commissioner of Income Tax and another, reported in [2016] 388 ITR. 185 (SC).** Further in the case of **Shri Ram Jhanwar Lai vs. ITO** & **Ors** reported in **(2009) 321 ITR (RAJ) 400,** it was held that 'where the AO adopted the net profit in best judgment assessment, depreciation is still allowable',

which has been followed by this Hon'ble Tribunal **in the case of Builder Shree Vrs. ACIT jn ITA NO.213/CTK/2015 order dt.31/08/2017.**

iii) That in the case of the appellant the Ld. A.O. has not estimated profit @8% merely taken clue from Sec. 44AD of the Act, as such Sec. 44AD which is presumptive estimation of profit for those assessee whose turnover is below 40.00 Lakhs, as such this provision is prima facie inapplicable to the appellant's case. That in this case the Assessing Officer has taken a possible and plausible view by allowing depreciation separately and cannot be termed as unsustainable in the eyes of law so as to invite the invoking of section 263 of the Act.

iv) That if the Assessing Officer allows the claim, on being satisfied with the explanation of assessee, on an enquiry made during the course of Assessment Proceedings, the decision of Assessing Officer cannot be held to be erroneous, on ground that there is no elaborate discussion in that regard in the order. It is the practice that whenever any claim of the assessee is accepted, Assessing Officer may not discuss the same in his order. Please see **Anil Shah v. ACIT [2007] 162 Taxman 39 (Mum.) (Trib.)** Recourse to Section 263(1) cannot be taken if the impugned order is erroneous but not prejudicial to the interest of the revenue; or if it is prejudicial to the interest of the revenue but not erroneous, therefore before invoking revision jurisdiction the commissioner should satisfy himself of the above twin conditions. Please see **Malabar Industrial Co. Limited v. CIT [2000] 243 ITR 83 (SC).** Further in the case of **CIT vs. Max India Ltd. (2007) 295 ITR 282 (SC)** "it was held that the phrase prejudicial to the interests of the under section 263 has to be read in conjunction with the expression erroneous order passed by the assessing Every loss of revenue as a consequence of an order of the assessing officer cannot be treated as prejudicial interests of the revenue. For example, when an Income Tax Officer adopted one of the courses permissible in it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest revenue, unless the view taken by the Income Tax Officer is unsustainable in law." Hence, the assessment order under Sec. 143(3) of the Act cannot be levelled as erroneous and prejudicial to the interest of revenue and the Ld. Pr. C.I.T. by exceeding his revision jurisdiction by setting aside the original assessment order on a fantasy ground which is completely diverted from sprit of Sec. 263

of the Act. Therefore in consideration of this submissions and cited judicial pronouncements (Supra) the impugned revision order passed u/s.263 is unsustainable under law, hence deserved to be quashed.'

16. In view of above written submission of the assessee, we observe that the Hon'ble Supreme Court in the case of Awasthi Traders (supra) has held thus:

> "that admittedly, the proviso to section 44AD of the Income-tax Act, 1961, was applicable to the assessee in view of the fact that its income for the assessment year in question, i.e., 2009-10, was above &#8377 40 lakhs and therefore, the bar to the entitlement for depreciation under section 44A(2) of the Act would not apply. Grant of depreciation under section 32 of the Act would, therefore, become mandatory. However, if on verification, it was found that the income of the assessee was less than Rs. 40 lakhs and, therefore, the proviso to section 44AD of the Act had application, the Department may seek modification of the Court's order."

17. The above preposition rendered by Hon'ble Supreme Court has been followed by Co-ordinate Benches of the Tribunal. Therefore, in view of judgment of Hon'ble Supreme Court in the case of Awasthi Traders (supra), the income of the assessee for the relevant assessment year 2016-17 was above the prescribed limit of Rs.1 crore, therefore, the bar to the entitlement for depreciation under section 44A(2) of the Act would not apply and grant of depreciation under section 32 of the Act would become mandatory. In the present case, there is no dispute that the gross receipts/turnover of the assessee from civil construction work was more than Rs.1 crore and the AO estimated the net profit @ 8% keeping in view the percentage provided in section 44AD of the Act, but said provision neither applied by the AO nor applicable to the case of the assessee.

Therefore, in view of judgment in the case of Awasthi Traders (supra), and other judgments of Co-ordinate Benches of the Tribunal, the bar to the entitlement for depreciation u/s.44AD of the Act would not apply to the present case. Respectfully following the judgment of Hon'ble Supreme Court in the case of Awasthi Traders (supra), we hold that the AO was right in allowing depreciation after estimating the net profit at 8% of gross receipts of the assessee without applying the provisions of section 44AD oif the Act as the total turnover was more than Rs.1 crore. Therefore, we decline to accept the contention of Pr. CIT that the order of the AO is erroneous and prejudicial to the interest of the revenue on account of allowance of depreciation to the assessee after estimating the net profit @ 8% on the gross receipts. Therefore, in view of foregoing discussion, we hold that the assessment order cannot be alleged as erroneous and prejudicial to the interest of the revenue. Therefore, the impugned revisionary order u/s.263 of the Act cannot be held as sustainable and thus, we quash the same by allowing the ground of appeal of the assessee.

18. In the result, appeal of the assessee is allowed.

Order pronounced on 29/3/2022.

Sd/-	sd/-
(Arun Khodpia)	**(Chandra Mohan Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 29 /03/2022
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : M/s. Bhagbati Build & Constructions Pvt Ltd., At: Madhupatna, PO: Link Road, PS: Madhupatna, Cuttack
2. The Respondent. Pr.CIT-1, Bhubaneswar.
3. The CIT(A)-1, Bhubaneswar
4. DR, ITAT, Cuttack
5. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack