

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"B" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 38/JP/2021
निर्धारण वर्ष/Assessment Years : 2012-13

Deputy Commissioner of Income Tax, Central Circle-03, Jaipur	बनाम Vs.	M/s Gunesh (India) Pvt. Ltd. 3-NA-51, Jawahar Nagar, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCG 5360 R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA. No. 21/JP/2021
निर्धारण वर्ष/Assessment Years : 2012-13

M/s Gunesh (India) Pvt. Ltd. 3-NA-51, Jawahar Nagar, Jaipur	बनाम Vs.	Assistant Commissioner of Income Tax ACIT Central Circle-03, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCG 5360 R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal (C.A.)
राजस्व की ओर से / Revenue by : Shri Sanjay Dhariwal (CIT)

सुनवाई की तारीख / Date of Hearing : 30/06/2022
उदघोषणा की तारीख / Date of Pronouncement : 14/07/2022

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

These two cross appeals filed by the assessee as well as department related to same assessee and for same assessment

year. Both these appeals are arising out of the order of the learned Commissioner of Income Tax, Appeals-4, Jaipur [Here in after referred to as Id. CIT(A)] dated 25.03.2021 for the assessment year 2012-2013 which in turns arise from the order of ACIT, Central Circle-3, Jaipur passed under section 147 r.w.s. 143(3) of the Income Tax Act, 1961 [here in after the Act"] dated 31.12.2019.

2. Since, both the appeal is related to same assessee and for the same assessment year, the same was argued on the same day by both the parties and therefore, disposed of by this common order.

3. The grounds raised by the **Department in ITA No. 38/JPR/2021** are as under:-

“1. Whether on the facts and in the circumstances of the case the CIT(A) was right in restricting the addition to Rs.91,85,756/- from Rs. 3,40,11,858/- made by the AO on account of bogus expenses/payment to masked sub-contractors/transporters.

2. Whether on the facts and in the circumstances of the case, the CIT(A) was right in applying GP rate on gross turnover instead of confirming the addition made by the AO.

3. The Appellant craves, leave or reserving the right to amend modify, alter add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

4. The grounds raised by the assessee in **ITA No 21/JPR/2021** are as under:

“1. On the facts and in the circumstances of the case and in law, Id.CIT(A) has grossly erred in rejecting the books of accounts by invoking the provisions of section 145(3) of the Income Tax Act, 1961.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in applying very high GP rate i.e. 4% (which is almost 2.5 times of declared GP) on gross contract receipts declared by assessee as against the GP rate of 1.59% (which looking to increase in turnover, is in parity with preceding years). Appellant prays that GP rate as declared by assessee deserves to be accepted as such and addition to be sustained equivalent to declared GP rate on sub contract charges of Rs.3,40,11,858/-.

Without prejudice to above and alternatively:

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in upholding addition to the tune of Rs. 91,85,756/- by applying GP rate of 4% on entire turnover. Appellant prays that payment to masked sub-contractors is even less than 10% of declared turnover, therefore, estimation of income, if any, can be done with respect to the payment made to sub-contractor of Rs. 3,40,11,858/- and not on entire turnover.

4. The appellant craves leave to add, alter, amend or substitute one or more grounds of appeal as and when necessary.”

5. The fact as culled out from the record is that the return of income was filed on 29.09.2012 declaring total income of Rs. 31,50,650/- and the same was proceed u/s. 143(1) of the Act. Thereafter, the case was reopened u/s. 148 after recording the reasons for satisfaction and obtaining due approval. Notice u/s. 148 was issued on 29.03.2019, which was duly served upon the assessee. The copy of the reasons recorded for issuing notice u/s. 148 were being provided vide letter dated 16.09.2019. In response to the statutory notices issued during the proceedings, the AR of the assessee filed reply by e-proceedings and details were filed from time to time. The assessee is seen to derive income from the business and profession.

5.1 Search action was conducted in the case of Gupta Group, Jaipur on 23.01.2019 in which the assessee was covered. During the search proceeding various documents were seized from the residence of director of the assessee company. On examination of these documents, it was found that the assessee has uses the name of some employees as sub-contractors/transporters to do arrangements in the books of accounts in the respect of sub-contracting and reducing tax liabilities.

5.2 Accordingly, notice u/s 143(2) & 142(1) of the Income tax, 1961 were issued along with questionnaire requiring certain details/ information, which was duly served upon the assessee. In response to the above notices, Shri Manish Agarwal, CA and A/R of the assessee, filed the reply through e-assessment proceedings.

5.3 On perusal of details available on record and filed by the assessee, it is seen that the assessee company has made bogus sub-contractors/transporters to do arrangements in the books of accounts in respect of sub-contracting for ultimate motive of reducing tax liabilities. The assessee/ company used 13 persons for mocked contractors during the year the assessee made 4 persons for masked contractors. The details of such sub-contractors that the assessee company has used for sub-contractors/transporters and reduce company tax liabilities are under

Name	PAN No.
(i) Akhileshwar Kumar	AQOPK3266G
(ii) Ashok Kumar Dhamera	AKBPA0686K

(iii) Basank Morolia	AIEPM0073B
(iv) Binesh Kumar Nagar	AKNPN9744Q
(v) Kailash Chand Sharma	BNOPS8033B
(vi) Kuldeep Singh Naruka	AFKPN2366N
(vii) Mukesh Kumar	ADIPK4764G
(viii) Nagendra Raghav Singh	BIYPS2527K
(ix) Sachin	ADGPV9358J
(x) Shimbhu Dayal Gurjar	BRTPG4278
(xi) Soha Lal Gaur	AIDPL4482G
(xii) Subhash Sharma	BCKPS8132G
(xiii) Sunil Kumar Sharma	ASPPS0101B

5.4 Therefore, the assessee was asked to explain regarding such payment made bogus/masked sub-contractor/transporter to book bogus expenditure/payment along with supporting evidences. In this case the information in possession of the department that the during the course of search action, the statement of one to the director Shri Mahesh Gupta was recorded u/s 131/132(4) of the IT Act, 1961. In his statement Sh. Mahesh Gupta has admitted that they made business concerns in the name of their employees. The employees do not know anything or do not know enough about it. The company uses the names of these concerns belonging to employees as sub-contractors/transporters to do arrangements in the books of accounts in respect of sub-contracting for ultimate motive of reducing tax liabilities.

5.5 On examination of the accounts of the assessee company, it was found that the 13 employees which are masked employees his contractor/transport shown as freight out ward, in the balance sheet of the assessee for the year ended on 31.03.2012. In addition, a survey action u/s 133A of the I.T. Act, 1961 was also conducted on

23.01.2019 at 05, Balaji Market, Neemuch and 25, Jawahar Nagar, Neemuch i.e. alleged office of these employees. The address 05, Balaji Market is the address of CA Niranjan Patidar's Associates. Shri Niranjan Patidar, CA has admitted that the ITRS of all the person masked as sub-contractor/transporter have been filed by him and the particulars or financial/income data required to be filled in the ITR were provided by Shri Mahesh Gupta. Therefore, on the basis of the statement of Shri Mahesh Gupta and Shri Niranjan Patidar, it is proved that Shri Sunil Kumar Sharama, Shri Basant Morolia, and Shri Akhileshwar were employees of M/s Gunesh India Pvt. Ltd. They were not doing any business. Hence, it is crystal clear that the assessee has shown bogus Sub contractor/transporter in the company balance sheet as on 31.03.2012.

5.6 After conducting further enquiries by the department, it was found that the above-mentioned person/employees have only salary income from M/s Gunesh India Pvt. Ltd. Further, on investigation the TDS- Credit data on ITBA- System (26AS) in respect of the above-mentioned employees, the assessee M/s Gunesh India Pvt. Ltd. has made the payment as mentioned above. However, no TDS has been deducted by the assessee. Similarly, no TDS was claimed by the said employees. Shri Mahesh Gupta one of director also admitted in his statement recorded during the course of search action that he has made bogus payments / freight to his employees and managed it by controlling their bank accounts. The payment for transportation work was transferred to current account of these employees which

was controlled by Shri Mahesh Gupta and Shri Manoj Gupta, accountant of M/s Gunesh India Pvt. Ltd. in respect of masked sub-contractor/ transporter to books bogus expenditure / payment is proved in this case.

5.7 Considering the facts and in the circumstances of the case and also considering the statements of Shri Mahesh Gupta, it is found that the assessee has claimed bogus expenses to tune of Rs. Rs. 3,40,11,858/- (As per 26AS) on account of payment of bogus sub-contract payments of three bogus sub-contractor i.e. to Shri Sunil Kumar Sharma at Rs. 6,88,365/-(As per 26AS) Shri Basant Kumar Morolia at Rs. 38,70,854/-(As per 26AS) and Shri Akhilesh Kumar at Rs. 2,94,52,639/-(As per 26AS) during the year under consideration. Consequently, a show cause notice was issued to the assessee on 07.11.2019 asking him to show cause as to why theses masked/bogus sub-contractors/transporter showing by assessee at amounting to Rs. 3,40,11,858/- (As per 26AS) regarding bogus payment/freight should not be considered as bogus/masked sub-contractors and added back to total income of the assessee company for the year under consideration. With regard to Sub-contractor/transporter receipt the assessee given a generic reply. The Id. AO did not convince with the reply of the assessee and therefore, after considering the facts and circumstances of the case and in the light of the above referred discussion, statement of director & accountant and reply filed by the assessee also considered and fact on the records it is considered that the assessee has made bogus payment/freight to masked sub-contractors/transporters and arrangements in the

books of accounts. Therefore, that the assessee company uses the names of these concern belonging to employees as sub-contractors/transporters to do arrangements in the books account and reducing tax liabilities. Therefore, made bogus payments/freight to his employees and managed it by controlling their bank accounts and reducing tax liabilities in the assessee company books. Hence, it is clear that the assessee has not furnished any clarification regarding to the above claim of Rs. 3,40,11,858/-.

6. Aggrieved from the order of assessment the assessee preferred an appeal before the Id. CIT(A). He has partly allowed the appeal of the assessee and the relevant finding of the Id. CIT(A) is extracted here in below:

“(viii) It is observed that the AO has treated the payments made to the sub-contractors as bogus but has accepted the receipts and Gross profit declared in the Return of Income. Thus, when the receipts are accepted, then the corresponding expenditure cannot be disallowed and in my opinion the profit element embedded in such expenditure on transportation would be subject to tax and not the entire expenditure on such transportation charges. The disallowance of entire such expenses would result into an unrealistic profit rate which will not be justified. In this regard, reference is placed by the appellant on the decision of Gujarat High Court in the case of CIT Vs. Bhola Nath Polyfab Ltd., 355 ITR 290 (Guj.) wherein it was held that only profit element embedded in purchases would be subjected to tax and not the entire amount. Similar views have been expressed by the Bombay High Court, as quoted by the appellant. The decision in these cases are found squarely applicable in the cases of the appellant.

(ix) Thus once it is established that the result declared by the appellant are not correct, provisions of Sec. 145(3) are applicable which the AO has failed to invoke. The Act provides coterminous power to CIT(A)'s as are available to the AO and by using those powers, I hereby invoke the provisions of Sec. 145(3)

in this case and reject the trading result declared by the appellant. After rejection of the books of accounts, a fair and honest estimation of income is required to be deduced. The Hon'ble Rajasthan High Court in the case of CIT Vs. Amrapali Jewels Pvt. Ltd. 65 DTR 196 has held that it is the discretion of the taxing authorities as to what should be the percentage of profit that should be applied and that the discretion should be exercised on settled practice.”

7. The Id. AR appearing on behalf of the assessee has placed their written submission which is extracted in below;

“Brief facts of the case are that assessee is a private limited company engaged in the business of providing services of transportation and handling of Cement, mainly for M/s Ultratech Ltd. at its various plants situated in North India. Apart from this, assessee owns a Petrol Pump at Shambhupura, Distt. Chittorgarh. Return of Income for the year under consideration was filed on 29.09.2012 declaring total income at Rs.31,50,650/-, which stood assessed u/s 143(3) of the Income Tax Act, 1961 ('The Act' in short) at a total income of Rs. 34,50,650/-. Subsequently, a search and seizure action was carried out in the case of “Mahesh Gupta Group” on 23.01.2019 to which assessee is also one of the member and accordingly business premises of the assessee was also searched in addition to residential premises of its directors, employees and business associates were also searched. As a result of search various loose papers, valuables and computer hard discs and pen drives were seized by the department from various places which include the business premises of assessee also. Besides statements of the directors, its employees and business associates were also recorded during the course of search. Based on the statements and the loose papers found during the course of search, Id. AO alleged that assessee had used names of some of its employees as sub-contractors in various years to reduce its tax liabilities. Accordingly the proceedings u/s 148 were initiated for the assessment year under appeal wherein it was concluded that transportation charges paid to three of the employees namely Shri Sunil Kumar Sharma, Shri Basant Kumar Marolia and Shri Akhileshwar Kumar in the shape of sub-contract charges were bogus expenditure and entire payment of Rs.3,40,11,858/- was added to the income of assessee and accordingly total income was assessed at Rs.3,71,62,510/-. While doing so Id. AO has ignored the fact that the actual transportation of the goods was carried out against such payments alleged as bogus and transportation charges were paid by the principal companies whose

goods were transported which was done after due verification of the actual transportation of goods. Aggrieved of the addition so made, assessee preferred appeal before Id. CIT(A), who had partly allowed the appeal vide order dated 25.03.2021 in appeal no. 1263/2019-20. While deciding the appeal of the assessee Id. CIT(A) invoked the provisions of section 145(3) and applied GP rate of 4% on gross transportation receipts and thereby restricted the addition to Rs.91,85,756/- and allowed relief to the tune of Rs.2,48,26,102/-. Now, assessee and department have filed cross appeals in respect of addition sustained and relief granted by Id. CIT(A) respectively.

Ground-wise submission is made as under:

Assessee's ground of appeal no.1

Not pressed.

Assessee's ground of Appeal No.2 and Departmental Grounds of Appeal No.1 & 2

Assessee in its ground of appeal has challenged the action of Id. CIT(A) in applying GP rate of 4% on gross transportation receipts as against GP rate of 1.59% declared by the assessee and thereby sustained the addition to the tune of Rs.91,85,756/- out of total addition of Rs.3,40,11,858/- made by Id.AO. On the contrary department has challenged the deletion of the addition of Rs. 2,48,26,102/- made by Id. CIT(A).

Brief facts pertaining to the grounds of appeal are that as stated above, during the year under appeal, the assessee company was engaged in the activity of transportation and handling of cement mainly for M/s Ultratech Ltd. The business activity of the assessee company can be described in three parts, One of handling, Second is of transportation and Third is of Petrol Pump.

Transportation is the main activity of the assessee company. Though it is called transportation as it involves transportation of goods but the core service is in nature of arranging transportation facility of the goods i.e. cement produced by the principal i.e. M/s Ultratech Ltd. from its plants to the designated places.

Truck transport is one of the most unorganized sector in our country and since large companies cannot transact with hundreds of truck owners and transporters, thus the need of the mediators like the assessee company arises who have their relations on both sides of the

spectrum. The assessee company has built up its reputation in the field with the passage of time and by providing services to various companies in the past. The biggest factor in transportation industry as far as the large companies are concerned is that they need somebody to mediate between the company and truck owner who they can trust with their precious finished goods. The need for an intermediary arises for this core factor of trust. When dealing with the assessee company, the principal company is fully assured that its material will certainly reach to its destination and in an unfortunate instance of loss of material they can recover full value from the assessee company.

The assessee company does not own many trucks and it relies exclusively on trucks belonging to others i.e. independent truck owners/transporters. The assessee company has a wide relationship network with truck owners and small transporters who provide their trucks, drivers etc. to transport the goods in real sense. As stated earlier, the industry is totally unorganized and the assessee company carries the risk of value of material transported through these transporters. Due to this very reason, the assessee company has to exercise control over financials of these sub-contractors and truckers.

The factories manufacturing cement are normally away from towns and cities. One of the major problem in outskirts is that the local strongman have to have a small proportion of work. So a part of transportation work is outsourced / sub-contracted to companies suggested by such local people.

The assessee company submits that profit margin in this activity is very low as assessee company is acting merely as an inter-mediatory who is arranging trucks for transportation which service is provided by third party who have charged at the prevailing market rates thus the profit margin left with the assessee company is very low. Further, invoice value for transportation has two variables, first weight carried and second distance travelled but the assessee company as an arranger is more concerned with weight carried and therefore, whenever it arranges vehicle for transport, its only concerns is its gross margin on Per Tonne basis and the distance is ignored when it agrees the price to be paid to a transporter/ truck owner. Therefore, if one is to compare net profit margin after a period of time, it may not necessarily show uniformity as for shorter distances, the rate of NP would be higher and for longer distances, the same will be low.

As stated above, for performing the work of transportation, since assessee company does not have any fleet of vehicles necessary for such transportation, it arranges vehicles from open market by hiring trucks directly and also through sub-contractors who carried out the same job at their end (i.e. entire arrangements starting from hiring of vehicle, loading of cement till the same is delivered/ unloaded at destination). Such sub-contractors are of two category, one who are independent and assessee company has no control over their working and other is controlled sub-contractors i.e. some of its employees who are appointed as subcontractors, on whose working assessee company has full control and against their services they get sub contract charges in lieu of salaries. However, the entire payment made to such sub-contractors towards performance of their duties in normal course of business were held as bogus by Id. AO solely on the basis of their statements recorded during the course of search by completely ignoring the fact that the transactions related to transport activity carried out by such sub-contractors is part of regular business of assessee company and services were actually rendered to the principal, i.e. M/s Ultratech Ltd., and due compliances regarding TDS etc. (wherever applicable) were done. Also, all the expenses incurred to execute the transportation work awarded to sub-contractors were duly recorded in their books of accounts and net income was disclosed by them in their respective Returns of Income filed in due course which were assessed as such.

At this juncture it is submitted that before Id. CIT(A) it was contended that in the business, assessee is engaged into, major direct expenses relate to freight payments, which entail liability to deduct tax at source. Assessee being a Private limited company, is liable to comply with TDS provisions and furnish TDS returns whenever any specified payment is made. Though, sub section 6 of section 194C provides relaxation for deduction of tax in case payee of such sum provides PAN to contractor. However, even in such cases, assessee needs to furnish such PAN details via TDS return and looking to the number of vehicles involved it is very cumbersome exercise. Thus, for the sole reason of reducing the compliance burden at the end of the assessee, it has appointed some of its employees as sub contractors, who were individuals and in most cases, were not liable to deduct tax at source (being not subject to audit u/s 44AB). It was also submitted that all these persons are under direct control of the management of assessee who to ensure the onwards payment of transportation charges has access to their bank accounts. It was submitted before Id. CIT(A) that

such arrangement was done to optimally utilize the resources and to reduce compliances burden and so far as such arrangements are within the four corners of law and do not result in any loss to revenue, the same are permissible. It was stated that no evidence was found as a result of search indicating any payment over and above the sub contract charges paid to such controlled sub-contractors in lieu of services rendered. It was thus submitted that there was no element of bogus expenditure recorded in the books of the assessee company. Basically, entire work sub contracted to employees has been done by those persons only who in fact actually rendered their services to the assessee presuming that they were the employees and not the sub contractors. It is not the case that no services were rendered or no transportation has taken place and no charges were paid out of the funds transferred by the assessee of the sub-contractors bank accounts and thus entire payments made to sub-contractors cannot be treated as bogus by any stretch of imagination. It is also a matter of fact that the principal to whom services are rendered are public limited companies and assessee company has no other relationship with them than the business relationship as stated above. Further the payments of transportation was released by the principal only on the confirmation by the recipient of the goods which is taken by the transporter and delivered to the assessee company who in turn handed over to the principal alongwith the bill of services rendered.

During the course of search Shri Mahesh Gupta, one of the director of assessee company in his statement accepted that the company has taken the services of its employees for transportation and shown their names as sub-contractor in its books. This fact was admitted by the employees also in their statements recorded during the course of search carried out at their residential premises. It was submitted before Id. CIT(A) that they all have rendered services to the assessee company and their remuneration was paid in the shape of sub-contract charges for which possibly they have stated as their salary in the statements recorded. The actual transportation as done at the end of sub-contractor's station cannot be denied since the principal company has made the payments after completion of transport i.e. upon the execution of the work and duly verified by the in-charge at the respective place of delivery as prescribed by the principal. It is also a matter of fact that neither Shri Mahesh Gupta nor any of the employee turned sub-contractor has stated in their statements recorded during the course of search that they never transported the goods and got the payment without actual transportation. Thus, it was submitted before Id.

CIT(A) that the payments made to them are not the bogus. It was further submitted that the Id. AO while referring the statements of Shri Mahesh Gupta has not considered the same in entirety and picked those portions of the same which suited her and deliberately ignored the portion which did not suit her. The relevant question and answer as appearing at page 9 of the reassessment order are reproduced here in below for sake of ready reference: (APB 127)

- प्रश्न 39 आपने 13 व्यक्तियों के नाम Transportation कार्य दिखाये जबकि वास्तव में उन व्यक्तियों ने कोई Transport कार्य नहीं किया है इस बारे में बताएं कि आपने उन 13 व्यक्तियों के नाम Transport का कार्य क्यों दिखाया और क्यों ना उन व्यक्तियों के नाम जो Transport कार्य दिखाया है, उससे जुड़ी राशि Bogus Expenditure मानते हुए disallowed कर दिया जावे ?
- उत्तर 39 **Transport के कार्य मे खर्चे तो हुए है इसलिए Sub Contract Transport खर्च की सारी राशि Disallow ना की जाए।** जो भी वास्तविक खर्चे हुए है, उनको देखकर मैं बाकी की आय पर आयकर जमा करा दूंगा।
- प्रश्न 40 कृपया बताए कि आप कहां से देखकर बताएंगे कि वास्तविक खर्चे कितने हुए है और कौन कौन से खर्चे हुए है ?
- उत्तर 40 मेरे और मेरे Employee (जिनके नाम से Sub Contract दिखाये है, के Residential / Business Premises पर कोई Sub Contract agreements & bill vouchers नहीं मिले है क्योंकि कभी बनाये ही नहीं गये है। लेकिन बैंक स्टेटमेंट्स और डीजल खर्चो को लेकर मैं वास्तविक खर्चे निकाल लूंगा और बाकी की आय बता दूंगा।

It was thus submitted that transport expenses are bound to incur to complete the job undertaken since the principal released the payment only upon the confirmation of actual physical transportation of goods. It is also relevant to state that the principals are independent corporate entity having no relation whatsoever with the internal arrangement of the assessee company for completion of transportation work awarded to it. It is also a fact that not a single instance was found as a result of search wherein the number of trips for which payment was received mismatches with the total number of trips for which the payment was made by the assessee company.

Ld. CIT(A) though had agreed with the submission that services were actually provided by the masked sub-contractors and total expenses claimed on this account was not bogus however, Id. CIT(A) invoked the provisions of section 145(3) and applied GP rate of 4% on gross transportation receipts by ignoring the fact that out of gross transportation receipts at Rs. 38,05,52,438/- (APB 20) only a sum of Rs. 3,40,11,858/- was paid to masked sub-contractors which is less than by 10%. Therefore, the action of the Id. CIT(A) in applying the exorbitant profit rate of 4% on the entire transportation receipts is totally

misplaced. It is also submitted that the transportation charges paid to other independent transporters were never doubted by the Id. AO nor any evidence was found during the course of search which suggest that the payments made to them was excessive or unreasonable. It is thus submitted that doubting the gross profit on such other receipts without any material and application of the profit rate of 4% deserves to be held as unreasonable and consequent addition be deleted.

With respect to the application of enhanced GP rate of 4%, it is submitted that assessee had declared GP rate of 1.59% on gross contract receipts. While applying this rate, Id. CIT(A) observed as under:

“(x) Thus in view of judicial pronouncements relied upon by the Id.A/R of the appellant and in the facts and circumstances of the case, the profit is required to be estimated on the basis of the past history of the case of the appellant itself, which is the best guide. During the appellate proceedings, the Id.A/R of the appellant has submitted the trading results of the previous years which is as under:

<i>Particulars</i>	<i>2009-10</i>	<i>2010-11</i>	<i>2011-12</i>	<i>2012-13</i>
<i>Gross Transportation receipts</i>	<i>28,27,12,098</i>	<i>38,00,69,861</i>	<i>30,94,02,302</i>	<i>38,05,52,438</i>
<i>Gross profit</i>	<i>56,01,560</i>	<i>50,17,507</i>	<i>78,56,380</i>	<i>60,36,341</i>
<i>GP (%)</i>	<i>1.98</i>	<i>1.32</i>	<i>2.54</i>	<i>1.59</i>

(xi) It is observed that the turnover for the year under consideration has increased from the previous years, however the GP rate has decreased from the preceding previous years. Therefore in view of the totality of facts and looking to the component of unverifiable bogus transportation charges, in my considered opinion, a GP rate of 4% be applied on the Gross transport receipt at Rs.38,05,52,438/- which comes to Rs.1,52,22,097/- as against the GP declared at Rs.60,36,341/- which would be justified in the facts and circumstances of the case of the appellant. Therefore the differential amount at Rs.91,85,756/- is hereby confirmed and the balance addition of Rs.2,48,26,101/- is directed to be deleted. Accordingly, this Ground of Appeal is partly allowed.”

From perusal of above, it is apparent that on one hand, Id. CIT(A) has observed that estimation of GP has to be on the basis of past history, on the other hand, has applied the GP rate of 4% as against 1.59% by not following the past history and is as high as 2.5 times of declared GP and that too without any basis. It is further submitted that in normal circumstances GP rate is inversely related to turnover, i.e. increase in turnover usually results in lower GP rate. In the instant case also, turnover of assessee has increased by around 23%, which has resulted in reduction in GP rate. It has long been the settled principle of law that the estimations should be fair and honest and should be based on some scientific method. In the instant case, average GP rate of past three years comes to 1.95%, as against which assessee has declared GP rate of 1.59%, which is very much justifiable in view of increase in turnover.

Hon'ble Gujrat High Court in the case of CIT vs Kiran Industries Pvt. Ltd. in tax appeal no. 449 of 2011 has held as under: "Having perused the documents on record with the assistance of learned counsel for the revenue, we notice that the Tribunal though confirmed the view of the revenue authorities with respect to the rejection of the books of account of the assessee, did not accept the recomputation of higher rate of gross profit on the premise that the average gross profit rate of last three years immediately preceding the year under consideration came to 14.79%. On such basis the Tribunal found that the claim of gross profit rate @15.27% cannot be stated to be low, On such basis, the assessee's appeal was allowed."

99 DTR 217 CIT Vs. Ram Singh (Raj.)

Accounts – Rejection – Estimation of income – Authorities concerned should make a honest and fair estimate of the income even in a best judgment assessment and should not act arbitrarily – Reduction by Tribunal of estimated addition by AO without recording any facts or comparable cases or past history was not sustainable – Matter is remanded for reconsideration.

322 ITR 71 (2010) CIT Vs. Bahal (AP) (Dr.) [Raj.]

S. 145 – Method of Accounting – Accounts – Best Judgment – Rejection of accounts

Assessing Officer rejected the books of account of the assessee on ground that assessee had not maintained indoor patient registers. Assessment completed under section 145 making addition under

different head. The CIT(A) deleted the addition on ground that no material was brought on record for estimating the income. The Tribunal and High Court upheld the order of CIT(A).

336 ITR 400 CIT v. Aero Club (Delhi)

Best judgment assessment – Assessment should be on rational basis – Profit margin disclosed by assessee cannot be rejected arbitrarily – Income-Tax Act, 1961.

In case of Mysore Fertiliser Co. v. CIT [1966] 59 ITR 268 (Mad.) it was held that the ITO shall make the assessment to the best of his Judgement; it means that he must make it according to the rules of reason and justice, not according to private opinion, but according to law and not humour, and the assessment is to be not arbitrary, vague and fanciful, but legal and regular.

It was held in case of CIT v. Surjit Singh Mahesh Kumar [1994] 210 ITR 83 (All.) that so long as the Best Judgement has nexus to material on record and the discretion in that behalf has not been exercised arbitrarily or capriciously, it is not open to scrutiny in reference proceedings to give rise to a question of law or to a mixed question of law and fact.

In case of CIT v. Eastern Commercial Enterprises [1994] 210 ITR 103 (Cal.) it was held that where the assessee has given a comparative instance of gross profit rate, it is necessary for the department to come to a finding as to the norm of the gross profit on the basis of comparative cases. Therefore, it is the duty of the Assessing Officer to counter the comparative statement cited by the assessee before he can have the option to estimate the gross profit.

It was observed by Hon'ble Court in case of Aluminium Industries (P.) Ltd. v. CIT [1995] 80 Taxman 184 (Gauhati) that additions to the profits of the assessee made solely on the ground that it was low without giving a specific finding that the accounts of the assessee were not correct and complete, or that the income could not be properly determined and deduced from the accounting method employed by the assessee, is not justified. The mere fact that there was a less rate of gross profit declared by an assessee as compared to the previous year would not by itself be sufficient to justify the addition.

In view of above, it is requested that in the absence of any finding by Id. CIT(A) as to why GP rate declared by assessee was not acceptable,

addition made by applying higher GP rate if not sustainable and deserves to be deleted.

At this juncture, it is submitted that department has challenged the action of Id. CIT(A) in upholding part addition, i.e. by applying GP on contract receipts treated as paid to masked sub-contractors. In this regard, as stated above, it is reiterated that no income can be earned without incurring expenses. In fact, in subsequent years, i.e. for A.Y. 2013-14 to 2019-20 in orders passed u/s 153A, Id.AO himself has made addition by applying GP rate and not the whole payments made to the masked sub-contractors was added to the income of the assessee (Paper book Volume-II pages 157 to 304). It is therefore submitted that grounds of appeal raised by the department are contrary to the accounting principles as well as are not in accordance with orders passed in subsequent assessment years by the Id. AO himself who has changed the stand while completing the assessment for subsequent years and thus such action deserves to be hold bad in law and consequent additions has rightly been deleted by Id. CIT(A).

Assessee's Ground of Appeal No. 3:

This ground of appeal has been raised by assessee without prejudice to grounds of appeal no. 2. In this ground of appeal, assessee has challenged the action of Id. CIT(A) in upholding addition of Rs.91,85,756/- by applying enhanced GP rate of 4% in respect of entire turnover.

In this regard, it is submitted that it is an undisputed fact that total turnover of assessee for the year under consideration was of Rs. 38,05,52,438.14 (APB 20), which comprises freight charges received of Rs. 3,40,11,858/- relating to masked/controlled sub-contractors, which constitutes merely 8.94% of total turnover. It is also a matter of fact that neither Id.AO nor Id. CIT(A) has pointed out even a single discrepancy in respect of portion of contract executed through independent sub-contractors. In fact books of accounts have been rejected by Id. CIT(A) solely for the reason that some of the employees were masked as sub-contractors and no specific defect whatsoever has been found out in respect of other independent / uncontrolled sub-contractors who contributed more than 90% of gross freight receipts. In the scenario, application of enhanced GP rate of 4% on gross transportation is absolutely unfair and without prejudice to our submission made in Grounds of appeal No. 2, it is humbly prayed that in the event the hon'ble bench is proceeded to estimate the income of the assessee by

applying a reasonable GP rate, the same should be applied on the receipts related to the turnover of Rs.3,40,11,858/-, i.e. pertaining to controlled sub-contractors and not on the gross receipts. It is thus submitted that the estimation of income to be restricted to the turnover which is through masked sub-contractors.”

8. In addition to the above written arguments the Id. AR of the assessee on the day or argument further submitted that the assessee is Private Limited company engaged in the business of transaction of goods of his corporate clients like ultra tech cements etc. The assessee company also runs petrol pump. As regards the non-deduction of TDS on transportation charges paid, it is submitted that as per statutory provision of the Act from the period of 1st October, 2009 to 31st May 2015 the TDS on payments made to transport operators was not applicable if the income receipt furnishes its PAN to the TDS deductor. In view these statutory provisions no TDS has been deducted. This fact is accepted by the AO also. Moreover, as the assessee is not having sufficient fleet of truck to engage the whole work load to be executed. Therefore, they have employed the person to search sufficient vehicle at negotiated corporate rate and that is why the same for the better administration the same were routed through the employee for better reconciliation and administration purpose, all the payments were made by account transfer in the bank account of the payee. The Id. AO has found any fault of the payment rate with that of the other transporter, merely there were employee of the company no disallowance of expenditure for which the receipt is coming by sufficient supporting evidences and the Id. AR has not at all doubted the resultant receipt. He has not appreciated the fact that

the corporate client after undertaking relevant verification of the truck number, lorry receipt and confirming the goods were reached at destination, made payments by the corporate client in those circumstances how the whole expenditure can be disallowed. Under these primary facts on records merely the transaction were undertaken with the employee and that too some of the portion on the reasons as explained and that too execute the work in efficient manner, whole expenditure cannot be considered as not genuine. The employee was motivated to work for the company by paying some margin and for that employee in addition to their regular salary made some more efforts to find out the truck which were employed in the work execution of main contract of the company and accordingly they have been benefited marginally. They have also filed the income tax returns and the same were accepted. This arrangement has in fact increased the turnover with that of the last year and reputation with the corporate client in execution of timely dispatch of their goods. The Id. AR further submitted that the Id. CIT(A) has considered the pleas of the assessee but not in full. He has estimated the profit @ 4% and that too on whole turnover as against the 1.58 % disclosed by the assessee and if at all that rate is to be applied it should be applied with respect to the transaction of the employee where the transaction with related parties were covered. The Id. CIT(A) estimated the profit @ 4 % arbitrarily when in the last 4-year profit average is much lower. The AO has not disputed that the work is not done. The Id. AR further submitted in those sub-contractors the income is considered and their assessment is also considered.

9. Au contraire, the Id. DR that the assessee is taking benefit of own wrong doing by using his employee for inflating the expenses. The relevant bank account and other records are in fact in the control of the assessee. The assessee has by adopting this technic reduced the profit and thus books of account are not complete and correct. The Id. AR of the assessee submitted that there cannot be tainted GP addition and thus considering the findings given by the AO based on search material be confirmed and that of the Id. CIT(A) be set-a-side. The Id. DR relied on the statement of the director where he has stated in the statement that they will submit the details of the overstated expenses which they failed to do. The relevant extract of the relied upon statement is extracted here in below

प्रश्न 39 आपने 13 व्यक्तियों के नाम Transportation कार्य दिखाये जबकि वास्तव में उन व्यक्तियों ने कोई Transport कार्य नहीं किया है इस बारे में बताएँ कि आपने उन 13 व्यक्तियों के नाम Transport का कार्य क्यों दिखाया और क्यों ना उन व्यक्तियों के नाम जो Transport कार्य दिखाया है, उससे जुड़ी राशि Bogus Expenditure मानते हुए disallowed कर दिया जावे ?

उत्तर 39 Transport के कार्य मे खर्च तो हुए है इसलिए Sub Contract Transport खर्च की सारी राशि Disallow ना की जाए। जो भी वास्तविक खर्च हुए है, उनको देखकर मैं बाकी की आय पर आयकर जमा करा दूंगा।

In the light of the above facts, Id. DR supported the action of the Id. AO of adding the whole amount. Alternatively, he has submitted that if at all estimate is to be made then in the rate of GP should be taken @ 5.63 % as justified by the assessing officer in assessment year 2013-14 which is place do on record vide page 173 volume II of assessee paper book. The relevant extract of the finding of the AO in that year is under:

5.9 Further, the assessee replied in case of Shri Mahesh Gupta that "GP rate of 3.50% as offered by Shri Mahesh Gupta on transportation receipt is rational" is not accepted. Shri Mahesh Gupta, director of the assessee-company, has accepted that alleged sub-contractors were only employees of the group and the sub-contract shown in their names was sham and only to reduce/deflate profits of the company M/s Gunesh India Pvt. Ltd. (The average gross profit declared by the dummy sub contractors for various years on transportation receipts appears to @1.40%. Further, Shri Mahesh Gupta has also offered gross profit @3.50% on transportation receipts. Thus, after consideration of gross profit declared by the sub-contractors and additional profit offered by Shri Mahesh Gupta average gross profit calculates to 4.90% (1.40+3.50) whereas as per working of gross profit for FY 2015-16 as seized from Shri Sunil Kumar Sharma comes to 6.63%. In light of gross profit offered by Shri Mahesh Gupta and profit declared by sub-contractors as well as working found from Shri Sunil Kumar Sharma, gross profit rate of 5.63% found to be reasonable to determine the gross profit on transportation receipts in the case of assessee.

10. In the rejoinder the Id. AR submitted that the Id. CIT(A) has already considered the profit @ 4 % while dealing with the appeal of the assessee on merit which is disputed by both the revenue and assessee. But at the same time, he has accepted that he has no grievance if in all fairness the profit as declared by Shri Mahesh Gupta @ 3.5 % be estimated considering all the facts and figure as against the profit declared by the assessee company @ 1.59%.

11. We have considered the rival contentions, submissions and decisions relied upon by both the parties. It is not disputed by both the parties that the transportation work has not been undertaken even through these 13 people who are also employee of the company. The only issue that the transportation charges are inflated by steering part of the transaction with that of the employee's name. The director of the company has already replied vide question no. 39 extracted above that the whole amount is not

consist of bogus expenditure. In the case of the assessee Id. CIT(A) has already by passing a reasoned order stated that the profit can be estimated @ 4 %. The revenue has challenged that action of the Id. CIT(A) and assessee has also contended that the profit declared by the assessee company @ 1.59 % be accepted. As regards the contention of the revenue that the whole tainted amount should be added has no base, there is no cogent evidence or argument placed before us as to why the detailed and reasoned finding of the Id. CIT(A) is not sustainable. Revenue has not brought anything on record that in real terms the transportation work billed to corporate client is in fact not done. Even in the search only the statement of Shri Mahesh Gupta is relied upon where in he has stated in fact work is done. Revenue has in this case only taken a plea that the transaction has been done though the employee for which the assessee has already established that the work has been done and the reason behind that also explained in that case the whole expenditure cannot be disallowed as revenue failed established that in real terms the work is not done and the expenses are bogus. Per contra the Id. AR argued that the work is executed and even the AO has accepted the turnover related this expenditure and there is no adverse finding at the time search or in the assessment order except that in the name of employees. Thus, in that state of affairs the only question is whether the expenses claimed through the employee's name and ultimately paid to other transporter are at arm's length or not? Since at this stage we have not been provided such analysis, we feel that it in the interest of the justice at best 3.5 % which is accepted by Shri Mahesh Gupta offered by him in assessment and

he is also key person in this case and therefore, we our considered view an addition @ 3.5 % can be sustained in this case also and that 3.5 % rate be added on the turnover related to employee of the assessee for an amount of Rs. 3,40,11,858/- to settle the issue in the interest of justice.

12. In the result, the appeal of the assessee is partly allowed and the appeal of the revenue is also partly allowed.

Order pronounced in the open court on 14/07/2022

Sd/-

(डा० एस. सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

Sd/-

(राठोड कमलेश जयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 14/07/2022.

*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- DCIT, Central Circle-03, Jaipur
2. प्रत्यर्थी / The Respondent- M/s Gunesh (India) Pvt. Ltd., Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA Nos.38 & 21/JP/2021 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar