

आयकरअपीलीयअधिकरण, विशाखापटणम पीठ, विशाखापटणम

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

**श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य एवं श्री एस बालाकृष्णन, लेखा सदस्य के समक्ष
BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No.4/Viz/2023 to 7/Viz/2023
(निर्धारण वर्ष / Assessment Year : 2013-14 to 2016-17)**

Sri Lakshmi Constructions,
Dr.No.26-3-560, SLN Towers
IV Floor, B.V.Nagar
Mini Bypass Road
Nellore

**[PAN : ABOFS2978J]
(अपीलार्थी/ Appellant)**

Vs. Deputy Commissioner of
Income Tax
Central Circle-1
Guntur

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से / Respondent by

: Shri M.V.Prasad, AR
: Shri O.N.Hari Prasada Rao, DR

सुनवाई की तारीख / Date of Hearing

: 02.03.2023

घोषणा की तारीख/Date of Pronouncement

: 29.03.2023

आदेश /O R D E R

Per Shri Duvvuru RL Reddy, Judicial Member :

These appeals are filed by the assessee against the orders of Commissioner of Income Tax (Appeals) [CIT(A)], Visakhapatnam-3 dated 30.11.2022 for the Assessment Years (A.Y.) 2013-14 to 2016-17. Since the grounds raised in these appeals are common, these appeals are clubbed, heard together and a common order is being passed for the sake of convenience as under. Facts are extracted from I.T.A.4/Viz/2023 .

2. Briefly stated the facts are that the assessee is a partnership firm, engaged in the business of electrical fabrication contracts filed its return of income as follows :

A.Y.	Returned Income
2013-14	87,90,419
2014-15	91,67,810
2015-16	92,67,150
2016-17	1,36,84,114

A survey operation u/s 133A of the Income Tax Act, 1961 (in short “Act”) was conducted at the business premises of the assessee on 19.02.2019 and some incriminating material in the form of daily cash payment vouchers, personal diaries of the managing partner, promissory notes, loose sheets and a pen drive (soft copy of books of accounts) were found and impounded, vide various annexures in SLC/A/1 to 20. Sworn statement of the managing partner of the firm has been taken on 20.02.2020, 25.02.2020, 28.02.2020, 02.03.2020 and 14.03.2020 and he owned up the impounded diaries, vouchers, loose sheets, promissory notes and the pen-drive as belonging to the firm and to him. After considering the information filed by the assessee firm and based on the impounded material found during the course of survey operations, the Assessing Officer (AO) made the following additions :

1. Unexplained cash credits : Rs.85,16,495/-
2. Estimation of income @8% on
main contracts and 4% on sub contracts : Rs.66,31,375/-

3. Aggrieved by the additions made by the AO, the assessee firm preferred appeal before the CIT(A). The Ld.CIT(A), after considering the submissions made by the assessee, deleted the addition made towards unexplained cash credits of Rs.85,16,495/- and confirmed the estimation of profits made by the AO for Rs.66,31,375/-. Since the appeal filed by the assessee was partly allowed by the Ld.CIT(A), the assessee preferred appeal before the Tribunal and raised the following grounds :

1. *The learned CIT(Appeals) has erred in facts and law while passing the order.*
2. *On the facts and circumstances of the case, the Learned CIT(A) is not justified in estimating the profit at Rs.66,31,375/- in absence of production of any vouchers for expenditure incurred.*
3. *On the facts and circumstances of the case, the Learned CIT(A) would have appreciated that the Assessing Officer has estimated the income without rejecting the books under section 145 of the I.T.Act and hence would have treated the estimation as invalid.*
4. *On the facts and circumstances of the case, the Learned CIT(A) ought to have appreciated that the appellant has categorically furnished reasons for low profits in this line of business by explained the nature of the contract works carried on by the firm and therefore, would have deleted the addition made.*
5. *On the facts and circumstances of the case the Learned CIT(A) ought to have appreciated that the original assessment was completed u/s 143(3) of the I.T.Act where the profit disclosed was*

accepted and also certain disallowances were made with regard to certain expenses. Hence estimation of income due to low profit and non production of vouchers amounts to considering the already decided issue which amounts to change of opinion. Therefore, the CIT(A) ought to have deleted the addition made again by estimating the profit.

6. *The appellant may add, alter, modify or substitute any other points to the grounds of appeal at any time before or at the time of hearing of the appeal.*

It was the submission of the Ld.AR that the Ld.AO has estimated the business profits at Rs.66,31,375/- without rejecting the books of accounts u/s 145(3). Once the AO accepts the books of accounts, the AO is precluded to estimate the profits, but he is entitled to disallow some expenditure, if he is not satisfied with the claim of the assessee. He further contended that the AO, without rejecting the books, estimated the profit @8% on main contract and 4% on sub contract works which amounts to Rs.66,31,375/-. He further submitted that the Ld.CIT(A) has discussed about the following decisions relied by the assessee firm with regard to ratio laid down by the various Hon'ble High Courts and Tribunals, which held that estimation of profit without rejecting the books of accounts is not permissible under the law :

(i) Hon'ble High Court of Madras in the case of Principal Commissioner of Income Tax, Chennai Vs. Marg Ltd. [2017] 84 taxmann.com 52 (Madras) held that

(ii) Hon'ble High Court of Karnataka in the case of Commissioner of Income Tax, Belgaum Vs. Anil Kumar & Co. [2016] 67 taxmann.com 278 (Karnataka) held that

(iii) Hon'ble High Court of Calcutta in the case of Swadeshi Commercial Co.Ltd. Vs. Commissioner of Income Tax, West Bengal vide ITA 219 of 2001 dated 18.12.2008 held that

He further contended that all the above Hon'ble High Courts have categorically held that profits of the assessee cannot be estimated without rejecting the books of accounts. He further argued that by following the above decisions of the various High Courts, Tribunals have taken the same view. Therefore, he pleaded to set aside the order passed by the AO, who estimated the profit of the assessee without rejecting the books of accounts. He further contended that the Ld.CIT(A) came to a conclusion that the AO made addition, as no vouchers were produced by the assessee in support of it's claim and confirmed the addition made by the AO, since the assessee could not substantiate it's claim even during the appellate proceedings.

4. Per contra, the Ld.DR submitted that it is a mistake committed by the AO by oversight. He has not rejected the books and estimated the profit. He relied on the detailed order passed by the Ld.CIT(A) and pleaded to confirm the order passed by the Ld.CIT(A).

5. We have heard both the parties and perused the material available on record. It is an admitted fact that the AO has estimated the profit of the assessee u/s 145(3), without rejecting the books of accounts. No doubt, all the decisions, which were relied by the Ld.AR cited above clearly held that the AO has no powers to estimate the profit without rejecting the books of accounts and the same ratio has been followed by various Tribunals. However, the Ld.CIT(A) came to a conclusion that the addition was made by the AO, on account of non production of vouchers in support of claim of expenditure and also the assessee firm has not substantiated its claim even during the appellate proceedings. The Ld.CIT(A) relied on the provisions of section 36 and 37 of the Act ,which laid down that the expenditure is to be incurred for the business or profession in order to be allowed in computing the income chargeable under the head “profits and gains of business and profession”. Therefore, in the absence of such evidence, the Ld.CIT(A) confirmed the estimation made by the AO @8% on main contracts and 4% on sub contracts. No doubt, the assessee has to establish the expenditure incurred for the purpose of its business or profession during the assessment proceedings and the onus lies heavily on the assessee to establish the nature of the expenditure with the support of documentary evidence. Then only, it is

entitled to claim the expenditure. In the present case on hand, if the AO is not satisfied with the explanation given by the assessee, he should have rejected the books of accounts and estimated the profit, according to the facts of the case. The AO ought to have disallowed the quantum of expenditure for which the assessee failed to produce documentary evidence. But the AO failed to do so and he simply without rejecting the books, estimated the profit @8% on main contracts and 4% on sub contracts, which is not permissible under the law. The same view has been taken up by various High Courts and Tribunals in the decisions cited as under :

(i) Hon'ble High Court of Madras in the case of Principal Commissioner of Income Tax, Chennai Vs. Marg Ltd. [2017] 84 taxmann.com 52 (Madras) held that

"The Tribunal has expressed its considered opinion that only when an assessee is not maintain books of account properly and the correct income cannot be estimated on the basis of the books of account, then only the books of account can be rejected. The Tribunal has gone on to hold that the Assessing Officer can estimate profit only thereafter"

"Owing to all that have been stated supra, there is no merit whatsoever in the appeal filed by the Revenue as the addition of income on estimate basis for certain projects has admittedly / concededly (as admitted / conceded by the Revenue before ITAT) been done without scrutiny and without rejecting the Books of Accounts. Equally, no substantial question of law arises."

(ii) Hon'ble High Court of Karnataka in the case of Commissioner of Income Tax, Belgaum Vs. Anil Kumar & Co. [2016] 67 taxmann.com 278 (Karnataka) held that

“The Tribunal has rightly held that when the books of account of the assessee had not been rejected and assessment having not been framed under section 144, the Assessing Officer and the Commissioner (Appeals) were in error in resorting to an estimation of income and such exercise undertaken by them was not sustainable. Section 145(3) lays down that the Assessing Officer can proceed to make assessment to the best of his judgement under section 144 only in the event of not being satisfied with the correctness of the accounts produced by the assessee. In the instant case, the Assessing Officer has not rejected the books of account of the assessee. To put it differently the Assessing Officer has not made out a case that conditions laid down in section 145(3) are satisfied for rejection of the books of account. Thus, when the books of account are maintained by the assessee in accordance with the system of accounting, in the regular course of his business same would form the basis for computation of income. In the instant case, it is noticed that neither the Assessing Officer nor the Commissioner (Appeals) have rejected the books of account maintained by the assessee in the course of the business. As such Tribunal has rightly rejected or set aside the partial addition made by the Assessing Officer for arriving at gross profit and sustained by the Commissioner (Appeals) and rightly held that entire addition made by the Assessing Officer was liable to be deleted. The said finding is based on sound appreciation of facts and it does not give rise for framing substantial question of law.”

(iii) Hon’ble High Court of Calcutta in the case of Swadeshi Commercial Co.Ltd. Vs. Commissioner of Income Tax, West Bengal vide ITA 219 of 2001 dated 18.12.2008 held that

“Such being the position, in our considered opinion, the learned Tribunal had wrongly decided the said question in holding that the gross profit was required to be estimated at the rate which he arrived at and therefore, we found that there is no substance in the submission made by Mr. Khaitan in the matter. Furthermore, since the relevant fact that the books of accounts were not rejected and had been taken into account for the purpose of deciding this question which has been raised in this appeal, we allow the appeal and answered the question in the affirmative in favour of the assessee. The appeal is therefore, disposed of.”

In the instant case, the Ld.CIT(A) has erred in confirming the order of the AO and arriving at a conclusion that if some vouchers / evidence pertaining to the claim of the assessee are not satisfactorily established

before the AO, the AO is not empowered to estimate the profits of the assessee without rejecting the books of accounts. If at all the assessee has not submitted the evidences for it's expenditure satisfactorily before the AO, then the only option for the AO is that he should reject the books of accounts and estimate the profits or he is empowered to disallow the expenditure whatever was incurred without any proof. But ignoring the established provision u/s 145(3), the AO has estimated the profit without rejecting the books. Therefore the question of estimation does not arise and it is bad in law. Hence, respectfully following the decisions cited supra, the ground No.2 raised by the assessee is allowed. Since the ground No.2 is allowed, remaining grounds need no adjudication and the appeal filed by the assessee is allowed.

6. In the result, appeals filed by the assessee are allowed for all the A.Ys 2013-14 to 2016-17 *mutatis mutandis*.

Order pronounced in the open court on 29th March, 2023.

Sd/-

(एस बालाकृष्णन)

(S.BALAKRISHNAN)

लेखा सदस्य/ACCOUNTANT MEMBER न्यायिक सदस्य/JUDICIAL MEMBER

Dated : 29.03.2023

L.Rama, SPS

Sd/-

(दुव्वूरु आर.एल रेड्डी)

(DUVVURU RL REDDY)

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

1. निर्धारिती/ The Assessee- Sri Lakshmi Constructions, Dr.No.26-3-560, SLN Towers, IV Floor, B.V.Nagar, Mini Bypass Road, Nellore
2. राजस्व/The Revenue – The Deputy Commissioner of Income Tax Central Circle-1, Guntur
3. The Principal Commissioner of Income-Tax (Central), Visakhapatnam
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम / DR,ITAT, Visakhapatnam
- 5..गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam