

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH: 'G' NEW DELHI]**

BEFORE SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER

AND

SHRI YOGESH KUMAR US, JUDICIAL MEMBER

I.T.A. No. 5538/DEL/2016 (A.Y. 2011-12)

ACIT, Central Circle : 5, New Delhi. (APPELLANT)	Vs.	M/s. Shiv Naresh Sports Pvt. Ltd., E - 23, Karam Pura, New Delhi - 110 015. PAN No. AAEC57326L (RESPONDENT)
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Assessee by : Shri S. B. Gupta, C. A.;
Department by : Shri H. K. Choudhary, [CIT] - D. R.;

Date of Hearing	07/06/2023
Date of Pronouncement	18.08.2023

ORDER

PER YOGESH KUMAR US, JM

1. This appeal is filed by the Revenue against the order dated 23.08.2016 of the Id. Commissioner of Income Tax (Appeals)-24 (hereinafter referred to CIT (Appeals) New Delhi, for assessment year 2011-12.

2. The Revenue has raised the following substantive grounds of appeal :-

“1. The order of Ld. CIT (A) is not correct in law and facts.

2. On the facts and circumstances of the case, the CIT (A) has erred in law in deleting the estimation of income @ 50% of gross CWG receipts.

3. On the facts and circumstances of the case, the CIT(A) has erred in holding that once the assessee has produced books of accounts and bills/vouchers, its books cannot be rejected.

4. On the facts and circumstances of the case, the CIT(A) has erred in holding that absence of actual transaction cannot be made basis for rejecting books of account, if the assessee has furnished bills and vouchers.

5. On the facts and circumstances of the case, the CIT(A) has erred in deleting the estimation of income @ 3 % of gross non-CWG receipts.

6. On the facts and circumstances of the case, the CIT(A) has erred in deleting the addition of unexplained cash amounting to Rs. 6,25,000/-.”

3. Facts of the case are that the assessee engaged in the business of manufacturing of Readymade Sportswear garments and laying of synthetic tracks at various stadiums during Common Wealth Games. Search & Seizure action took place u/s 132 of the Income Tax Act, 1961 (herein after called as “the Act”) on 28.10.2010 at the business premises and residential premises of the Directors. Consequent upon this action u/s 132 of the Act and vide order u/s 127 of the Act, the assessee’s case was Centralized with Central Circle-5, New Delhi and notice u/s 142(1) of the Act was issued to assessee on 25.04.2012 requiring the assessee to file a return of income, for which assessee replied that return filed u/s 139 of the Act dated 20.2.2012 to be treated as return filed in response to notice u/s 142(1) of the Act. In the return filed u/s 139 of the Act, the assessee declared income of Rs.8,56,08,490/-. While framing the assessment order u/s 143(3) of the Act, the AO rejected the books of accounts and made following additions:-

1	<i>Estimation of income at 50% of gross receipts on account of Common Wealth Games projects</i>	Rs.31,63,90,518
2	<i>Estimation of income at 3% of other gross receipts</i>	Rs.50,36,342
	Sub-Total	Rs.32,14,26,860/-
	<i>Discussed in the assessment order, however, no addition made:</i> Unexplained physical cash	6,25,000/-
3		
	Grand Total	32,20,51,860/-

4. The addition on account of unexplained cash to the tune of Rs.6.25 lakhs was made on account of non-explaining the cash found during the course of search action. The total cash found during the course of search action was Rs.12,73,500/-, out of which searched team seized the cash of Rs.11,48,000/-. Out of the same, of Rs.6.25 lakhs was found at premises E-23 Karnapura, New Delhi, out of this Rs.5.50 lakhs was seized and assessee was asked to explain the same and the assessee was not able to explain the cash of Rs.6.25 lakhs. Hence, addition was made on the said count at Rs.6.25 lakhs. Against the said addition, assessee went in appeal before Id. CIT(A). The Id. CIT(A) observed that the AO is not justified in rejecting the books of accounts and also he deleted all the above additions made by AO. Aggrieved by the order of the CIT(A) dated 23/08/2016, the revenue is in appeal before us by way of above grounds.

5. Ground No. 1 is a general ground and, therefore, does not require any comment or adjudication.

6. Ground No. 3 & 4: Rejection of accounts - CIT(A) has erred in holding that books of account cannot be rejected if the assessee has produced books of accounts and bills/ vouchers, even if there is absence of actual transaction.

7. The Id. A.R. submitted that the AO issued show-cause notice dated 25.03.2013 to the assessee proposing to reject the books and to estimate the income. Assessee replied to the show cause notice vide letter dated

28.03.2013. Eventually, AO rejected the books in the assessment order dt. 28.3.2013. For rejection of accounts, the AO has made reference to higher Cement Consumption by relying upon Various reports of agencies. Further A.O. referred to the investigation of Cement suppliers, Labour contractors, Sub-contractor, vehicle hirers. In this regard, AO alleged that there is no proper correlation between purchase of cement, transportation and storage of the cement. The assessee could not produce any confirmation from the CWG authorities. The assessee has not been able to produce parties for verification. The notice u/s 133(6) of the Act to the parties were returned un-served. A.O. referred to payment by assessee to M/s Belhasa Projects and Deduction by CWG Authorities. A.O has also alleged that assessee has not maintained complete books of accounts, no information/details/evidences including supporting bills and vouchers were furnished by the assessee. The assessee has not produced stock registers for many of the consumables. The ld. A.R. made submission on each issue raised by AO in the Assessment order which are as follows:

Issue No. 1 – With regard to Cement Consumption:-

8. The ld. A.R. submitted that assessee has purchased cement during FYs 2009-10 and 2010-11 of Rs. 1,48,26,267/- and Rs. 12,53,86,414/- respectively, totaling to Rs. 14,02,12,681/- from 26 suppliers located in Delhi. The ld.AO has not drawn any adverse inference in assessment order of AY 2010-11 in respect of cement purchased during FY 2009-10 of Rs. 1,48,26,267/- and that purchase has thus attained finality. Out of the purchase of 6,17,289 bags of cement for Rs. 12,53,86,414 during FY 2010-

11, assessee declared closing stock of 5,24,216 bags valued at Rs. 9,22,77,918 as at 31.3.2011, which was sold in the immediate succeeding FY 2011-12. Thus, 93,073 bags of cement were only consumed in FY 2010-11, of which 75,868 bags were consumed in the CWG stadium projects and 17,205 bags in other civil projects. According to ld. A.R., the assessee has submitted Stadium-wise detail of cement consumption as a reply to AO in letter dated 21.03.2013. He submitted that out of total 26 suppliers have borne transportation expenses at their end. The assessee has borne transportation expenses of the cement procured from the remaining 23 suppliers. The assessee had purchased cement from 26 suppliers. During the course of search upon the assessee, out of total 26 suppliers, the revenue carried out survey u/s 133A upon 6 parties. Further, during the course of assessment proceedings, AO issued summons u/s 131(1) of the Act to 14 suppliers, of which 8 appeared in person before the AO and confirmed the same. In case of other suppliers, they have filed reply before in AO's Daak Counter. Later, notice u/s 133(6) of the Act was issued to all 26 cement suppliers, of which notice remained unserved upon 5 parties and reply was not filed in case of 4 parties. The assessee furnished explanation and provided new addresses to ld. AO. Thereafter, AO did not made any further investigation though the A.O. was duty bound to carry out further investigation.

9. The Ld. AO made allegation that -Normally cement is procured by a contractor from two or three suppliers. The cement dealers did not provide documentary evidence of delivery, loading and unloading of cement and

were not aware of the mode of transport, vehicle number and destination of delivery. The A.O. held that the purchase of cement is not genuine and has been made to reduce actual profit.

10. However, the Id. CIT(A) considered the entire facts and circumstances of the issue and observed as under: –

- *Enquiry or investigation has been conducted with respect to all the cement suppliers. The noting sheet entries of the AO show that the parties have been produced before the AO. In investigation, all cement suppliers confirmed and owned up their transactions with the assessee. They were reputed cement dealers having sizeable cement turnover. They submitted original invoice, proof of receipt and payment by way of account payee cheque/RTGS and their books of account. No fault has been found with the purchase bills of the assessee by the AO. They explained the process from placing of order till delivery through transport from railway siding and payment. They confirmed that they purchased cement directly from C&F agent of reputed cement manufacturer companies like ACC, Ultra Tech, Gujarat Ambuja etc. who deliver cement at railway siding to the transporter irrespective of the fact that the freight is paid by the dealer or assessee-buyer. Thus, they gave delivery to the assessee at Railway site, Shakurbasti. Delivery challans are not allowed by VAT Deptt. The depositions/evidences received from the parties are in support of the assessee rather than the AO.*
- *No incriminating document or material or books of account indicating any cash received by the assessee from any cement supplier, or cash paid by the cement dealer to the assessee, against cheque issued by assessee to suppliers was found or noticed from the premises of the assessee searched upon or survey upon dealers.*

- *There was no cash withdrawal from bank account of cement suppliers corresponding to cheques received from assessee against cement supplies.*
- *Outcome of investigation of cement suppliers has not been confronted to the assessee, although assessee had requested AO to confront materials through his letters dated 12.3.2013, 18.3.2013 and 21.3.2013.*
- *The documents submitted by the parties before the AO, obtained by the assessee post-assessment from the AO and submitted to CIT(A) during appellate proceedings, after due examination were found to be correct by CIT(A).*
- *VAT Deptt. has not drawn any adverse inference with respect to assessee's purchase of cement. Copy of order passed by VAT Officer, Ward-52, Delhi in the case of assessee was submitted by assessee.*
- *No enquiry has been made by the AO with cement manufacturers like Ultratech Cement, Shree Cement, Birla White, J.P. Cement etc. to examine the role of cement suppliers as intermediaries passing on the purchase order procured from the assessee to these cement manufacturers.*
- *With respect to transportation arrangements, statement dt. 21.3.2013 of assessee's director Sh. S.P. Singh clarifies the position, wherein he deposed on oath that "in some cases the delivery of the cement is arranged by the suppliers and most of the cases we have arranged our own transportation". The statement dt. 21.3.2013 has been verified from the books of the accounts comprising of Freight paid ledger account and GRs issued by transporters which show that the transportation, cartage and loading and unloading expenses of cement, to the tune of Rs. 23,51,536, are borne by the assessee direct for cement procured from 26 suppliers except for 3 suppliers. These three suppliers provided transportation details and the copy of account of the assessee in their books to the AO. The fact that the parties could not*

produce transportation expenses vouchers cannot be held against the assessee. Actually, the statement of the proprietor of Manoj Brothers that cartage was borne by the assessee can be seen from the assessment order itself. Thus, the assessee has borne cartage expenses for cement purchased from all suppliers except 3 suppliers, and this is supported by evidence in assessee's own books as well as evidence furnished by the suppliers

- *AO has placed too much reliance on the initial statement of Sh. S.P. Singh dated 05.01.2011, and has ignored the subsequent clarification in his own statement dated 21.03.2013 before the AO himself and also evidence available on the assessment record in the form of books of account of the assessee and the uncontroverted evidence furnished by the parties.*
- *The assessee had brought the aspect that the actual amount of cement purchased in FY 2010-11 is Rs. 12,53,86,414 (6,17,289 bags) of which closing unsold stock as at 31.03.2011 was Rs. 9,22,77,9181 (5,24,216 bags) and, therefore, assessee had only declared cement consumption of Rs. 3,31,08,496 (93,073 bags), while AO had alleged consumption of Rs. 14,02,12,681. The assessee had brought closing stock to notice of AO in its letters dated 12.02.2013 and 28.03.2013. The tax audit report submitted by assessee to AO also shows the stock of cement. The closing stock of cement as at 31.03.2011 was sold in the succeeding financial year and accordingly, sale revenue realized there from was credited to profit & loss account.*

According to ld. A.R. the above finding of the ld. CIT(A) to be upheld as the cement purchases are genuine.

11. The Ld. Departmental Representative submitting on the above ground of Appeal, relied on the findings and the conclusions of the A.O. and prayed for dismissal of the above grounds.

Issue No. 2: With regard to three Labour Contractors

12. The ld. A.R. submitted that to verify the genuineness of the expenditure of Rs. 1.49 Crores debited on account of upkeep of the synthetic track and civil works carried out at the various stadia, survey u/s 133A was conducted on 08.04.2011 at the premises of all the 3 labour contractors namely, J.K. Constructions. Neha Enterprises and Vee Pee Brothers.

13. The ld. AO made allegation that the assessee has not entered into any written contract with any of the three parties. The parties have been making the payment to the laborer in cash without any receipt for labour payments. The parties have neither paid any ESI/PF nor maintained any bill book. The parties did not have any cash balance at the time of execution of project and the entire sum received from the assessee has been withdrawn in cash.

14. However, ld. CIT(A) observed that:-

“During survey and before the AO, the parties have described the work done by them by way of labour supply work for civil construction work carried out by the assessee at various sites. The parties have been doing similar work for other government departments in the past. The bank statements of these parties depict various transactions other than those relating to the assessee. There is balance in their bank accounts even prior to the receipt from the assessee. There are deposits received by cheque from various agencies and these too have been withdrawn in cash. Some of these cash withdrawals have been used to pay the labourers at

the assessee's site. It is neither necessary nor feasible, that only receipts from the assessee would be utilized to make payments to the labourers at the assessee's site. As far as cash withdrawals are concerned, it is in the very nature of the business of labour-supply that payment is made to labourers on a daily basis by way of cash, each labourer receiving the daily wage. It is also not necessary that a written contract has to be entered into between two parties to a transaction. These parties have produced work orders received by them from the assessee, which has not been disputed by the A.O. Regarding the ESIC/PF, these parties have produced the copies of their ESIC and EPF returns before the A.O.”

The ld. A.R. submitted that above findings of the ld. CIT(A) to be upheld as the AO overlooked the above facts observed by the ld. CIT(A).

15. The Ld. Departmental Representative relied on the findings and observations of the A.O. and sought for dismissal of the above ground.

Issue No. 3: M/s Inderjit Mehta Construction Pvt. Ltd. (IJMCPL)

16. The ld. A.R. submitted that M/s Inderjit Mehta Construction Pvt. Ltd. (IJMCPL) is the sub-contractor of the assessee of the CWG work, had also bid for the CWG contracts from DDA/CPWD, but lost to the assessee. Subsequently, the assessee sub-contracted part of the total work to the said party after mutual negotiations for Rs. 3.47 crore against which assessee deducted Rs. 57.98 Lakhs due to non-execution of awarded work by IJMCPL and eventually paid Rs. 2.89 crore to IJMCPL

17. The ld. AO alleged that - IJMCPL did not apparently produce its books and bills and thus he disbelieved the transaction of the assessee with IJMCPL.

18. The ld. CIT(A) held that:-

“During survey conducted at the premises of IJMCPL in Bhatinda, no incriminating evidence has been found with respect to the transactions with the assessee. IJMCPL has also provided information in great detail to the AO about the work done by it at the stadium sites. The IJMCPL has filed the returns regularly and has produced the relevant documents before the AO. Records and documents as an evidence of services provided by IJMCPL to the assessee, copy of bills, books of accounts, proof of site material receipts, copy of bill of machine used to execute work, copy of ledger accounts, records of skilled and unskilled employees for the sub-contract work were produced by IJMCPL to the Investigation Department as well as to the AO during the course of statements recorded during assessment proceedings. IJMCPL has also worked for other government agencies too; that is not disputed by the AO. Non-submission of books and bills apparently cannot be held against assessee.”

Therefore, the ld. A.R. submitted that the conclusion of the AO that this party is bogus is not tenable and stands on flimsy premise. Per contra, the Ld. Departmental Representative relied on the orders of the A.O.

Issue No. 4: Travelling Expense/Vehicle Hire Expense

19. The ld. A.R. submitted that Assessee had paid Rs. 21,84,012/- as vehicle hiring charges to two brothers namely Sh. Alok Gandhi (Rs. 17,12,622) and Sh. Rajan Gandhi (Rs. 4,71,390) for vehicles used by engineers, since as per the tender conditions, the assessee was to hire some

vehicles for the engineers of the CPWD/DDA for overseeing the work at various sites.

20. The Id. AO made allegation that in the absence of books of accounts produced by Gandhis or written agreement between assessee and Gandhis, the expense is bogus and not allowable. However, the Id. CIT(A) observed that:-

“The assessee was under contractual agreement with its principals CPWD/DDA for supplying vehicles to their inspecting engineers. Copy of agreements was submitted to the AO by assessee, which the AO has ignored. Sh. Alok Gandhi from whom the vehicle was hired has appeared before the AO and has confirmed that he provided vehicles on hire to the assessee. His statement is mentioned in the assessment order and is also confirmed from the order sheet noting of the AO dated 07.03.2013 and 11.03.2013. Similarly, Rajan Gandhi also confirmed the hiring of vehicles to assessee. The parties in order to prove their statement have also submitted copies of their return of income, details of vehicle no., and driver, bills raised, TDS certificate and some log books. The fact that assessee has paid a sum of Rs. 21,84,012/- to Sh. Alok Gandhi and Rajan Gandhi for hiring of vehicles is undisputed. The AO never informed to the assessee that he intended to draw adverse inference on account of these parties; therefore, assessee did not have the opportunity to submit the objections. It is not necessary that a written agreement has to be entered into between parties for every transaction. The supporting documents in support of the transaction were provided by the assessee and the persons who hired vehicles. In any case, these parties have less than the limit of 10 vehicles laid down in Sec.44AE of the Income Tax Act, 1961 and are therefore not required to maintain books of accounts. Therefore, if indeed the books of accounts were not produced by these parties before the AO, this solely cannot cause prejudice to the assessee.”

The ld. A.R. submitted that above findings of the ld. CIT(A) to be upheld as there is no sufficient material to hold otherwise.

21. The Ld. Departmental Representative by relied on the findings of the assessment order.

Issue No. 5: M/s Belhasa Project

22. The ld. A.R. submitted that the ld. AO has stated in his Order that M/s Belhasa Projects had supplied some material for synthetic track for which the assessee has made a payment of Rs. 3.89 crores. However, M/s Belhasa Projects does not have permanent establishment (PE) in India.

23. The ld. AO made allegation that the assessee has failed to produce any agreement or any other evidence to prove the genuineness of the transaction.

24. However, the ld. CIT(A) observed as under:-

“The seized material itself includes the invoices, packing list and the Bill of Entry for Home Consumption with respect to material supplied by M/s Belhasa Project. The purchase bills have not been controverted by AO. The ledger account of the said party in assessee’s books is a running account and has entries pertaining to the earlier assessment year i.e., AY 2010-11. The AO has not made any adverse observation in his order for AY 2010-11 in respect to the transaction with the said party. The Profit & Loss account does not show any debit of any amount towards consultancy fees. Thus, no disallowance is called for under this head too.”

The Ld. AR relied on the above findings of the Ld. CIT(A) and the Ld. Departmental Representative relied on the findings of the A.O.

Issue No. 6: Deduction by CWG Authorities

25. The Id. AO made allegation that the assessee has reduced Rs. 7.62 Crores from the gross receivables of projects receipts. But, in order to claim any deduction, it is necessary to first book the entire contract receipts and then claim a deduction. The assessee has not taken any legal recourse to recover difference of the projects for which it is otherwise entitled to including seeking arbitration proceedings with the authorities. Since the assessee has right to receive income accruing to it, the claim of deduction is premature. The assessee may consider the said deduction in the year subsequent to the year in which the receivables are offered to tax.

26. However, the Id.CIT(A) observed as under:-

“It is undisputed that the principal agencies namely, CPWD/DDA/ Govt. of Delhi refused to sanction the entire contracted amount, reducing receivable amount by sum of Rs. 7.62 Crores. The assessee has not contested this reduction with the principal-agencies. The assessee has written it off as irrecoverable, even before taking it into its books of accounts. The assessee has simply reduced the gross receivables by this amount and credited the balance amount to the Profit and Loss A/c. Such accounting practice is neither illegal nor irregular. At most, technically the assessee could have credited the entire contractual amount to the P & L. account and then claimed deduction in the same year itself as a bad debt, since there is no requirement under section 36(i)(vii) that the bad debt has to be claimed in a year subsequent to the year in which it was offered to tax. The assessee has not claimed the deduction twice. Thus, the allegation of the AO was untenable.”

On the above reasons, he submitted that order of ld. CIT(A) to be upheld. The Ld. Departmental Representative relied on the orders of the A.O. and sought for reversal of the finding of the CIT(A).

Issue No. 7 – Non-production of books of accounts and Stock Register and Details

27. The ld. AO made allegation that the assessee has not maintained complete books of accounts. No information/details/evidences including supporting bills and vouchers were furnished by the assessee. The assessee has not produced stock registers for many of the consumables.

28. On the other hand, the ld. CIT(A) observed that:-

- *Before rejecting books, AO had given a finding that the expenditure debited in respect of purchase of cement, payment of labour supply, hiring of vehicles, crediting of net contact amount receivable were suspect. This view of the AO is not supported by any justified reason or evidences. The findings of the AO with respect to the bogus expenditure, in absence of the supporting material, have to be rejected.*
- *The order sheet noting of the AO dated 18.03.2013 shows that all the books of accounts including cash books, bank books, journal book, journal ledger, debtor ledger, creditor ledger and stock register along with the vouchers and bills were produced before the AO in soft copy. Further, Assessee produced complete books of accounts in hard copy on 26.3.2013. Thus, AO's finding about books of accounts is incorrect.*
- *Regarding stock register, assessee submitted stock register to AO. Even the Form 3CD report submitted by the assessee along with its return of income clearly shows the auditor's certification regarding the stock of raw material, raw material consumed, closing stock etc., but the A.O. has not led any evidence to reject the auditor's report.*

Further, various judicial pronouncements state that the rejection of the books of accounts solely on the basis of stock register not being produced is not maintainable unless there is any incriminating evidence or circumstances.

- *It has not been established that the books of accounts maintained by the assessee were incorrect or incomplete or the method of accounting adopted by the assessee was such that the true profits of the business could not be deduced there from. Therefore, the basic preconditions of section 145(3) are not satisfied.*
- *Hence, according to the ratio laid down by the Hon'ble Delhi High Court in the case of CIT v. Poonam Rani (2010) 326 ITR 223 (Del), it is clearly evident and therefore, held that the AO was not justified in rejecting the books of the accounts of the assessee. Accordingly, there would be no case for estimation.*
- *CIT(A) thus reversed the findings of rejection of books, and the estimation of income.*

29. The ld. A.R. further submitted that the ld. CIT(A) in his order has nowhere held that the once the assessee has produced books of accounts and bills/vouchers, the books of accounts cannot be rejected. Nor has the ld. CIT(A) in his order observed that absence of actual transaction cannot be made basis for rejection of books of account, if the assessee has furnished bills and vouchers. In fact, ld. CIT(A) in his order has observed that no transaction of the assessee is bogus; complete books of accounts were produced by assessee; complete details as called for by the AO were submitted. Therefore, the ld. CIT(A) held that rejection of accounts is illegal.

30. The ld. A.R. submitted that the assessee had not only produced before AO complete books of accounts in soft and physical forms but also had

replied to all the questionnaires and SCN issued by the AO through its letters submitted during assessment proceedings. The ld. AO was time and again informed that all the details sought by him had been duly furnished.

- The Assessing Officer had asked the assessee to produce 16 parties/creditors who supplied goods or services to assessee, out of which 11 appeared in person for statement on oath. The remaining five parties also submitted detail in Daak Counter of the AO. Thus, all the witnesses called for by the Assessing Officer submitted complete detail of their transaction with the assessee along with supporting documents. With respect to the five parties who did not appear in person before AO, assessee had requested AO to issue summons to them in case he still desired their attendance. AO has not made any further investigation nor has confronted outcome of any investigation to assessee nor has drawn any adverse inference in the order. Even otherwise, failure of the assessee to produce creditors, job workers or any other party cannot be a ground for rejecting books of accounts as held by the Hon'ble High Court of Delhi in the case of *CIT v. Jas Jack Elegance Exports (2010) 324 ITR 95*.
- With respect to non-service of notice u/s 133(6) upon 5 parties, assessee submitted that 1 party had submitted its response and notice was thus in fact served upon it. The notice to 2nd party was incorrectly addressed by AO. The assessee provided new address of the remaining 3 parties.

- Further, with regard to 4 parties upon whom notice u/s 133(6) had been served but had not furnished their reply to AO, assessee stated to AO that it had no power to compel the parties to submit reply to AO.
- The AO has not made any further investigation upon these 9 parties nor has confronted outcome of any investigation to the assessee nor has drawn any adverse inference in the assessment order.
- The assessee had submitted complete detail of all purchase and expenses along with relevant bill/supporting of the same. No purchase/expense claimed by the assessee remained unverified. The Assessing Officer has not even made any allegation with respect to the amount of purchase/expense remained unverified. Even if otherwise, any expense remains unverified, it could at the most become a ground for disallowing that particular expense but the same cannot be held as a ground for rejection of books of accounts as a whole as held by the Hon'ble Delhi High Court in the case of *CIT v. Paradise Holidays (2010) 325 ITR 13*.
- The assessee had maintained stadium-wise income ledgers and had submitted stadium-wise detail of revenue earned. Further, assessee had submitted comparative statement matching revenue as per contract with CWG authorities (BOQ) and expense incurred on account of cement, labourcontractors sub-contractor. AO has not doubted about the correctness of the detail. Thus, on one hand, AO has accepted the

revenue declared by the assessee on account of BOQ, but has unfairly disallowed the corresponding expense incurred.

- The assessee has been maintaining regular books of account, which were duly audited by independent statutory auditor under the Companies Act, 1956 and by tax auditor u/s 44AB of the IT Act, 1961 who had not found any fault and, therefore, had not expressed any qualification in the accounts of the assessee.

31. The ld. D.R. submitted that from the books of accounts of the assessee the true income of the assessee cannot be deduced, as such after careful examination of the facts and circumstances of the case, the ld. AO rejected the books of accounts and Ld. Departmental Representative relied on the observation of the ld. AO in his order.

32. We have heard both the parties and perused the materials available on record. The assessing officer, while framing the assessment could reject the books of accounts by invoking the provisions of section 145(3) of the Act by pointing out the defects in the books of accounts due to which he is unable to rely on the books of accounts maintained and not in a position to deduce true income of the assessee for the assessment year under consideration. Before rejecting the books of accounts, he should point out the defects in the books of accounts. Even some defects are pointed out but such defects too are arbitrary and does not suit the true test and requirements of section 145(3) of the Act. For rejecting the books of accounts, the ld. AO has to record any of the following defects:-

- a) Where the assessing officer is not satisfied about the correctness or completeness of the accounts; or
- b) Where method of accounting, cash or mercantile has not been regularly followed by the assessee; or
- c) Accounting standards as notified by Central Government have not been regularly followed by the assessee.

33. In the present case, there is no allegation by the assessing officer that the assessee has not fulfilled the above three conditions. More so, the present assessee is a Private Limited Company, which is required to maintain the books of accounts as per Company Act and required to be audited under Company Act as well as Section 44AB of the Act by a qualified Chartered Accountant. The assessee has duly got audited books of accounts under Company Act and also under Income Tax Act by a qualified Chartered Accountant. There is no adverse remarks made by statutory auditor as well as by Income Tax auditor which could provoke the assessing officer to reject the books of accounts. If there is a decline in the gross profit rate or net profit rate as compared to earlier assessment years and there may be hundred one reasons for the same and the assessing officer shall bring on record specific defects in the books of accounts of the assessee before invoking the provisions of section 145(3) of the Act. The rejection of accounts cannot be made simply on the reason that lower net profit rate in comparison to earlier years or with the other assessee placed in similar circumstances. The power vested with the AO u/s 145(3) of the Act has to be exercised judicially and not arbitrarily. When the assessing officer does

not accept the assessee's method of accounting, then he has to resort to the provisions of the section 145(3) of the Act for computation of income by adopting such other basis as determined by him. The power vested with the ld. AO u/s 145(3) of the Act are not arbitrary. On the other hand, the A.O. should exercise the same with the utmost care and judicially. A.O. has to give clear findings for invoking the provisions of section 145(3) of the Act by bringing reliable material on record on the basis of which he has arrived at the conclusion with regard to correctness or completeness of accounts of the assessee or the method of accounting employed by the assessee. We have carefully gone through the reasons advanced by AO for rejecting the books of accounts to hold that accounts are not complete or correct from which correct profit cannot be deduced. The reasons advanced by assessing officer as discussed above cannot be said that valid reason to reject the books of accounts as the assessee's books of accounts duly audited under relevant Act and it is certified by qualified Chartered Accountants. The ld. AO not commented anything on the duly certified audit report furnished by the qualified Chartered Accountants when it has been certified that books of accounts are reflects true profit of the assessee's firm for the relevant assessment year. In such situation, the ld. AO not justified in rejecting the books of accounts of the assessee. Further observed that, the A.O. has not brought on record any evidence to prove that any expenditure and income recorded by the assessee is not supported by evidence or is bogus. The Ld. Departmental Representative has also not pointed out anything to controvert the findings of the CIT(A). Thus, we find no merit on the Ground No. 3 & 4 accordingly, Ground No. 3 & 4 of the Revenue are dismissed.

34. The next ground for our consideration is ground Nos.2 & 5 with regard to deletion of estimation of income on CWG projects and non-CWG projects.

Estimation of income @ 50% of Gross CWG receipts and @ 3% of Gross non-CWG receipts:

35. Pursuant to rejection of accounts, AO has estimated income @ 50% of Gross CWG receipts and @ 3% of Gross non-CWG receipts, on the basis of various reports on CWG matters and material available on record and huge profitability reported in CWG projects.

36. The AO has alleged that - Reports of 'various agencies' states that the cement consumption at various stadium sites and total consumption could not have been more than Rs. 14.37 lacs and Rs. 25 to 30 lakhs respectively.

37. Ld. CIT(A) reversed the findings of the estimation of income by holding that:

- Through various letters dated 20.02.2015, 13.03.2015, 10.04.2015, 22.04.2015, 12.05.2015, 13.05.2015, 22.09.2015, 20.10.2015, 08.12.2015, 31.12.2015, 06.04.2016 and 23.05.2016, CIT(A) directed AO to examine his records and produce the copies of the response received from various agencies and other materials in his hands showing huge profitability reported in CWG projects.
- Finally, on 31.05.2016 AO submitted that the reports were not traceable in spite of best efforts. He further stated that even the reports could not be found from Investigation Wing and, thus, expressed his inability to produce the desired report.

- The CIT(A) thus held that there is no evidence whatsoever on record to support the AO's vague reliance on report of "some agencies". It is also clear from the assessment order itself that these documents have not been provided or confronted to the assessee. The same were not produced even during appellate proceedings, despite best efforts of the subsequent incumbent AOs.
- The AO's allegation that the cement consumption could not have exceeded Rs. 25 to 30 lacs is completely unsubstantiated and without any evidentiary basis.
- The net profit declared by the Assessee is 15.26%, which Assessing Officer has not found faulted with viz.-a-viz. in other comparative cases or even the assessee's own case for the preceding years.
- Hence, according to the ratio laid down by the Hon'ble Delhi High Court in the case of *CIT v. Poonam Rani (2010) 326 ITR 223 (Del)*, it is clearly evident and therefore, held that the AO was not justified in rejecting the books of the accounts of the assessee. Accordingly, there would be no case for estimation.

38. During the course of hearing before us, ld. DR relied upon AO's order and reiterated the contents of Assessment Order in support of estimation of income.

39. The ld. AR for the assessee, besides relying upon the CIT(A)'s order, made further submissions against estimation of income at the aforesaid rates as under:

- The assessee had repeatedly requested AO to provide the 'agency reports' or any other document or material which are contemplated to be used against him, but never provided by AO.

- Keeping in view the CPWD Works Manual 2010, which stipulates that works contract shall not be awarded at the rate of cost plus 15%, Net profit declared by the assessee for CWG Project in its audited accounts of 15.26% is substantially high. Hence, NP rate @ 50% estimated by AO is wholly baseless.
- The net profit rate in the works contract business of construction of synthetic track declared by the assessee in the immediate preceding year was 8.81% on gross revenue from construction projects of Rs.8,70,67,558/-, which had been duly accepted by the same Assessing Officer, whereas the net profit rate declared by the assessee for the year under consideration is 15.26% on gross revenue from construction projects of Rs. 51,17,73,578/-. Similar is the case for AYs 2012-13 and 2013-14 assessed u/s 143(3). It is submitted that the rule of consistency is an important aspect of tax proceedings and views should not be changed on the same set of facts and the position of law remaining the same, the rule of res judicata notwithstanding. In the case *CIT v. Inani Marbles P. Ltd.*, (2009) 316 ITR 125 (Raj), it was held that since in the earlier year the gross profit rate declared and accepted was 2.51 per cent, the same rate would be applicable for the year in question also.
- The net profit rate of 15.26% declared by the assessee in its audited accounts in itself is twice the rate of 8% stipulated in section 44AD of the IT Act, 1961 for construction business and, therefore, the net profit declared by the assessee is much more than sufficient.

40. The Id. D.R. relied on the order of the assessing officer.

41. We have heard both the parties and perused the materials available on record. It is to be noted that the assessing officer when reject the books of accounts, he thereafter usually conducts the assessment in the manner as prescribed u/s 144 of the Act (best judgement assessment). In other words, in a case where the books of accounts are rejected u/s 145(3) of the Act, the assessments to be made u/s 143(3) of the Act but in the manner prescribed u/s 144 of the Act only. In the present case, the assessment is not framed in the manner prescribed u/s 144 of the Act. As the A.O failed to site any industry comparables past history of the assessee or any other basis in support of his estimations @ 50% hence the assessment is totally arbitrary. Thus, it means that the Id. AO blowing hot and cold in the same stream, which cannot be appreciated. In our opinion, once the books of accounts of the assessee are rejected, then income of the assessee to be estimated on the basis of proper material available on record. In the present case, though Id. AO has mentioned that he has rejected the books of accounts, he relied on the figures in the same books of accounts to make additions on various counts, which cannot be appreciable. In our opinion, the assessing officer on mere suspicion has rejected the books of accounts though there must be something more than mere suspicion to support the assessment order passed u/s 143(3) of the Act, the rule of law on this subject has been fairly and rightly stated by Hon'ble Supreme Court in the case of Dhakeswari Cotton Mills Ltd. Vs. CIT reported in 26 ITR 775 (SC). In our opinion, there is no valid reason to reject the books of accounts of the

assessee and we do not find any infirmity in the order of Id. CIT(A) in accepting the books of accounts of the assessee. As we already held in earlier ground Nos.3 & 4 that the rejection of books of accounts is not justified, consequently, there is no question of estimation of income of the assessee and the assessment to be made on the basis of books of accounts of the assessee only, as such, the declared income of the assessee to be accepted. Accordingly, these Ground Nos. 2 & 5 of revenue are also rejected.

42. Next ground for our consideration in ground No.6 is with regard to deletion of additions made on account of cash found during the course of search at Rs.6.25 lakhs.

Unexplained Cash amounting to Rs. 6,25,000/- Cash Seized:

43. Relevant undisputed facts -

- During the course of search proceedings, total cash Rs. 12,73,500/- was found from the office premises of the assessee and the residence and lockers of its directors. AO made addition in the order of Rs. 6,25,000/-. However, AO has not made any separate addition in the final total income.
- Assessee explained that cash found is as per regular books maintained by assessee and thus duly appearing in its cash book. Assessee submitted cash book extracted from the hard drive seized during search with its letter dated 12.3.2013 to AO. It was further submitted that all the cash vouchers and bills may not indisputably

be entered and incorporated in the cash book on the same date, which is usually the reason for non-matching of cash balance in hand with cash book as on the date of search. It is a well-settled law that if an assessee does not furnish explanation during the course of search but furnishes explanation during the course of assessment proceedings, such explanation has to be duly considered.

44. The Assessing Officer did not concur with the explanation and evidences submitted by the assessee stating following reasons:

- i. During the course of search operation the assessee could not provide satisfactory explanation.
- ii. During the course of assessment proceedings the assessee could not provide any specific explanation with evidence.
- iii. The explanation of the assessee was found to be vague and is an afterthought and that assessee was having excess cash as compared to the balance appearing in the cash book for which explanation was provided.

45. The Id. CIT(A) held that –

- Genuineness of the cash book submitted by the assessee was not doubted by the AO.
- The opening cash balance Rs. 12,95,805 as on 28.10.2010 (date of search and seizure) is actually more than cash found Rs. 12,73,500.
- Therefore, it is difficult to understand what prompted the AO to conclude that the assessee could not provide satisfactory explanation for the cash found, especially after submission of the cash book itself, which is not doubted.

46. During the course of hearing, ld. DR relied upon AO's order and ld. AR for the assessee relied upon ld. CIT(A)'s order.

47. We have heard both the parties and perused the materials available on record. It was the case of the assessee that though there was a discussion by the ld. AO in his assessment order on this issue, no addition has been made while computing the total additions made by ld. AO in the final part of the assessment order. Considering the fact that the Assessing Officer has not doubted genuineness of the cash book submitted by the Assessee, the opening cash balance as on 28/10/2010 was Rs. 12,95,805/- on the day the search and seizure operation conducted is actually more than the cash found i.e. Rs.12,73,500/-, therefore, the observation of the A.O. that Assessee could not provide satisfactory explanation for the cash found that too after submission of the cash book itself which is not doubted is erroneous. Thus, we find no error in the findings and conclusions of the CIT(A) and we do not find any merit in this ground of appeal of the revenue. Accordingly, this ground is also rejected.

48. In the result, revenue appeal is dismissed.

Order pronounced in the open court on : **18/08/2023.**

Sd/-
(Dr. B.R.R. KUMAR)
ACCOUNTANT MEMBER
Dated : 18/08/2023
R.N, Sr. PS*

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Copy forwarded to :-

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI