

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.01.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Revision) Nos.31 to 34 of 2017
and CMP Nos.14472 to 14475 of 2017

Tvl.ITD Cementation India Ltd.,
Now at No.3, Vijayaraghava Road,
T.Nagar, Pearl Glow, 1st Floor,
Chennai - 600 017 ... Petitioner in all Cases/Respondent

..Vs..

State of Tamil Nadu
represented by The Joint Commissioner (CT),
Chennai (Central) Division,
Chennai - 600 018. ... Respondent in all Cases/Appellant

Tax Case Revision filed under Section 38 of the TNGST Act,
1959 against the order of the Tamil Nadu Sales Tax Appellate
Tribunal (Additional Bench), Chennai dated 25th day of June 2015
and passed in STA Nos.109 & 110 of 2015 and 200 & 201 of 2014
against the order of the Appellate Deputy Commissioner (CT) III
(FAC) Chennai 6

(a)dated 11.12.2013 and made in Appeal no.101/2013(VAT) and
102/2013 (VAT (in TC Nos.31.32/17)

B) dated 31.07.2013 and made in Appeal Nos.4/2013(VAT) and
5/2013 vat (in TC 33 & 34/2017) respectively against the order
of the assistant Commissioner (CT) T.Nagar (East) Assessment
Circle, chennai

(a)dated 31.01.2012 and made in Tin:33101561882/2006-07 and
tin:33101561882/2007-08 and tin:33101561882/2008-09 (in TC
Nos.31 to 33/17) and

(B)dated 20.02.2012 and made in tin: 33101561882/2009-10 (in TC
No.34/2017) Respectively.

For petitioner : Mr.Adithya Reddy
in all cases for Mr.S.P.Asokan

For Respondent : Mr.V.Haribabu
in all cases Additional Government Pleader

ORDER

(Order of the Court was made by S.MANIKUMAR, J)

Tax Case (Revision) cases, TC(R) Nos.31 to 34 of 2017 are filed against the separate orders made in, STA Nos.109, 110 of 2015 and 200 & 201 of 2014 dated 25.06.2015, respectively.

2. Short facts leading to the Tax Cases (Revision) are that Tvl.ITD Cementation India Limited, Chennai / revision petitioner, was assessed for the periods between 01.01.2007 and 31.03.2007, 01.04.2007 and 31.03.2008, 01.04.2008 and 31.03.2009 & 01.04.2009 to 31.03.2010 for the Assessment years 2006-07, 2007-08, 2008-09 and 2009-10, respectively, were passed under the Tamil Nadu Value Added Tax Act, 2006.

3. Vide assessment orders, the assessment officer rejected the gross profit claimed by the revision petitioner. While arriving at the deemed sales turn over on the civil works contract executed, for the respective assessment years, the assessing officer adopted a notional gross profit of 10% and arrived at the corresponding deemed sales turn over under Section 5 of the Tamil Nadu Value Added Tax Act, 2006. The assessing officer also assessed sale of assets and reversed certain ineligible ITC. The Assessing Officer also levied penalty under Section 27 of the Tamil Nadu Value Added Tax Act, 2006.

4. Being aggrieved, the assessee / revision petitioner, filed appeals in A.P.Nos.101, 102, 4 and 5 of 2013 to the appellate authority viz., the Appellate Deputy Commissioner (CT)-III, Chennai. The Appellate Deputy Commissioner, sustained the reversal of ITC, but allowed the appeals preferred by the assessee on other aspects.

5. Being aggrieved, appellate Joint Commissioner (CT), preferred STA Nos.109 & 110 of 2015 and 200 & 201 of 2014, respectively, before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai. After considering the rival submissions and the material on record, the tribunal vide separate orders in STA Nos.109 & 110 of 2015 and 200 & 201 of 2014 dated 25.06.2015, allowed the appeals.

6. Being aggrieved by the orders of the tribunal, instant

Tax Case (Revision) Nos.31 to 34 of 2017, have been filed by the assessee, on the following substantial questions of law.

"(1) Was the Tribunal correct in discarding the actual book gross profit certified by a Chartered Accountant for calculation of deemed sale value of goods transferred during the execution of works contracts and adopting a notional 10% Gross Profit for such calculation when not even a single purchase or other turnover omission has been pointed out in the accounts maintained by the petitioners?

(2) Was the Tribunal correct in giving a judgment entirely based on perverse assertions that had no relation to either the established facts or the accounts maintained by the petitioners in the normal course of their business, audited and certified by a Chartered Accountant?"

7. Supporting the substantial questions of law, learned counsel for the petitioner submitted that the Appellate Deputy Commissioner (CT) has correctly relied on the exact Gross Profit calculated by a qualified Chartered Accountant, from the book of accounts of the petitioner and the tribunal has erred in adopting a thumb rule of 10% Gross Profit, disregarding the finding of fact, arrived at.

8. While disputing the existence of any such universal convention, learned counsel for the petitioner submitted that such a thumb rule adoption of 10% Gross Profit disregarding the actual gross profit, as per books of accounts has no statutory sanction or judicial approval. Learned counsel further submitted that the Appellate Deputy Commissioner (CT) has correctly relied on the exact gross profit calculated by a qualified Chartered Accountant from the books of accounts of the petitioner.

9. Learned counsel for the petitioner further submitted that the Tribunal has failed to consider a simple fact that the profit earned by a company is not always proportional to its professional capabilities, but it is mostly decided by a complex interplay of competing factors dominating the market.

10. Learned counsel for the petitioner further submitted that neither the assessing officer nor the appellate authority, has recorded any factual finding to the effect that the petitioners did not maintain proper accounts as stipulated under rule 8(5) of the TNVAT Rules, 2007. The Tribunal did not call for and examine the accounts maintained by the petitioners, and in such circumstances, the tribunal ought not to have held that "the petitioner did not maintain the proper accounts, as stipulated in the relevant Rules; that the petitioner have not

maintained correct and complete accounts disclosing their purchase turnovers, salaries, wages, contract receipts and all other expenses and receipts and not a single purchase or other omission has been pointed out by any of the assessment, inspecting or appellate authorities". According to the learned counsel for the petitioner, adoption of Gross Profit of 10% by the assessing officer and the Tribunal, was "merely on surmises and approximation".

11. Per contra, inviting the attention of this Court, to the assessment order, for the abovesaid years, Mr.V.Haribabu, learned Additional Government Pleader (Taxes) submitted that though the dealer, in the objections had stated that 10% Gross Profit as not warranted, perusal of the accounts by the assessing officer revealed that the dealer had not added transport charges, loading and unloading charges, on the purchase of goods incorporated, into works contract.

12. Learned Additional Government Pleader (Taxes) also pointed out that the assessing officer has considered that the dealer had simply computed the total purchases for the period between 01.01.2007 and 31.03.2007, 01.04.2007 and 31.03.2008, 01.04.2008 and 31.03.2009 & 01.04.2009 to 31.03.2010 of the Assessment years 2006-07, 2007-08, 2008-09 and 2009-10, respectively, without adding freight charges, loading and unloading charges and other incidental charges, incurred on the goods, before incorporating them into works contract. Learned Additional Government Pleader further submitted that in the abovesaid circumstances, adoption of 10% Gross Profit by the department, was right.

13. Responding to the above, learned counsel for the revision petitioner submitted that the assessing officer has erred in not taking note of the fact that freight charges have been included, in the certificates given by the Chartered Accountant. According to him, gross profit of Rs.15,66,306/- for the period from January 2007 to March 2007, was only 2.89% on the contract receipt of (turn over) Rs.5,41,74,338/-. Similarly, for the subsequent year, 2007-08, it was Rs.3,96,22,491/- (3.56% Gross Profit), on the contract receipt of (turn over) Rs.111,13,51,039/-. For the assessment year 2008-09, the Gross Profit was Rs.10,10,69,979/- (3.33%) on contract receipt of (turn over) Rs.303,68,66,798/- and lastly, for the assessment year 2009-10, the gross profit was Rs.6,82,36,765/- (3.50%) on the contract receipt of (turn over) Rs.194,96,21,865/-.

14. Learned counsel for the petitioner further submitted that when certificates of the Chartered Accountant, debiting the trading account of the assessee (extracted from the annual

reports in respect of the purchases for the period from 01.01.2007 and 31.03.2007, 01.04.2007 and 31.03.2008, 01.04.2008 and 31.03.2009 & 01.04.2009 to 31.03.2010 of the Assessment years 2006-07, 2007-08, 2008-09 and 2009-10, respectively), were submitted, the assessing officer / tribunal, ought to have considered the same, and allowed the claim of the petitioner, instead of adopting a thumb rule of 10% gross profit and working of the liability, in terms of the same.

15. According to the learned counsel for the revision petitioner, certificates issued by the Chartered Accountant ought to have been treated as proof of their trading account and gross profit earned. It is also his contention that books of accounts and annual reports were submitted by the Tax Case (Revision) petitioner, for the abovesaid assessment years.

16. Refuting the abovesaid submission and inviting the attention of this Court to the order of the tribunal, Mr.V.Haribabu, learned Additional Government Pleader (Taxes), submitted that the dealer has not maintained proper accounts, as stipulated under Rule 8(5) of the Tamil Nadu Value Added Tax Rules, 2007. Dealer has not produced any accounts for the period between 01.01.2007 and 31.03.2007, 01.04.2007 and 31.03.2008, 01.04.2008 and 31.03.2009 & 01.04.2009 to 31.03.2010 of the Assessment years 2006-07, 2007-08, 2008-09 and 2009-10, respectively, to arrive at the taxable turn over under Section 5 of the Tamil Nadu Value Added Tax Act, 2006. Learned Additional Government Pleader (Taxes) submitted that on surmises, the dealer has chosen to adopt 5% Gross Profit to arrive at the deemed sales turn over. According to him, certificate of the Chartered Accountant alone is not sufficient. The Assessee ought to have produced related accounts, to support the certificates issued.

17. Mr.V.Haribabu, learned Additional Government Pleader also pointed out that though the tribunal has considered several decisions, wherein, 15% of gross profit has been accepted, as the norm, in the case on hand, taking note of the conventional method of adopting 10% gross profit by the department, and working out the liability, in respect of works contract, in vogue, since the introduction 3(B) of the Tamil Nadu General Sales Tax Act, 1959 and continued in force, even for the liabilities, relating to Section 5 of the Tamil Nadu Value Added Tax Act, 2006, 10% Gross profit has been rightly adopted. Learned Additional Government Pleader (Taxes) further submitted that order of the tribunal dated 25.06.2015 in STA Nos.109 & 110 of 2015 and 200 & 201 of 2014 for the Assessment years 2006-07, 2007-08, 2008-09 and 2009-10, does not call for any interference.

18. On the contention that a conventional method of 10% of gross profit is being adopted and liability worked out, learned counsel for the revisions petitioner submitted that, at no point of time, the department had informed the petitioners of the said practice, and placing reliance on the judgment of Kerala High Court in Income Tax Referred Case No.67 of 1966 dated 06.09.1967, in the matter of Joseph Thomas & Bros Vs. Commissioner of Income Tax, Kerala [reported in [1968] 68 ITR 796 (Ker)], submitted that there is violation of principles of natural justice, and that details of adopting 10% Gross Profit, were not furnished to the assessee.

19. Earlier, we directed the learned Additional Government Pleader (Taxes) to file proof of conventional method of adopting 10% of gross profit and working out the liability, thereon.

20. On this day, proceedings of the Assistant Commissioner (CT), Kilpauk Assessment Circle, dated 15.06.2015 have been produced supporting the stand of the department.

21. Heard the learned counsel for the parties and perused the materials available on record.

22. After considering the rival submissions of the parties, on the aspect as to whether reliance can be made to the certificate issued by the Chartered Accountant for arriving at the gross profit, for the abovesaid assessment years, and whether adoption of 10% by the assessing officer was proper or not, the tribunal framed the following two points for consideration.

- "1. Whether the adoption of 10% notional Gross Profit on the purchases effected, while arriving deemed sale turnover by the Assessing Officer is correct or not?
2. Whether the order of the Appellate Deputy Commissioner (CT) is sustainable or not?"

23. The tribunal, discussed and answered the issue, in favour of the revenue, as hereunder.

"The adoption of 10% notional Gross Profit:

The one and only dispute is whether liability on the deemed sales turnover to be fixed by adopting 5% Gross Profit as being done by the respondent dealer or by adopting 10% Gross Profit as being levied by the learned Assessing Officer in the impugned order.

The respondent dealer have opted to pay tax under section 5 of the TNVAT Act 2006, which is reproduced as below.

"5. Levy of tax on transfer of goods involved in works contract:

(1) Notwithstanding anything contained in this Act, but subject to the provisions of this Act, every dealer, shall pay, for each year, a tax on his taxable turnover, relating to his business of transfer of property in goods involved in the execution of works contract, either in the same form or some other form, which may be arrived at in such manner as may be prescribed, at such rates as specified in the First Schedule.

Explanation. - Where any works contract involves more than one item of work, the rate of tax shall be determined separately for each such item of work.

(2) The dealer, who pays tax under this section, shall be entitled to input tax credit on goods specified in the First Schedule purchased by him in this State."

It is the duty of the respondent dealer to furnish the value of materials used in the execution works contract with appropriate inclusion of gross profit relatable to those materials. In practice it is not humanly possible to cull out each and every item transferred along with related Gross Profit. Thus the liability on the part of the dealer have to be arrived notionally be calculating deemed sales taxable turnover. Hence, it has been a practice of the dealers to adopt 10% Gross Profit on the purchase value of the items used in the purchase value of the items used in the works contract and thereby arrived a deemed sales turnover for which tax at the respective rate is being paid to the Department. This conventional method of adopting 10% Gross Profit and working out the liability in respect of works contractors have also been accepted by the Department. This has been in vogue ever since the introduction of Section 3B of the TNGST Act 1959 and continued to be in course even for the liabilities pertaining to Section 5 of the TNVAT Act 2006.

Further, the full bench of Hon'ble Andhra Pradesh High Court in the case of State of Andhra Pradesh V. Seven Hills Constructions reported in [2012] 54 VST 66 (AP) [page 91 and 92] has held that where books of accounts are separately maintained, for works contracts, each year ascertaining profits arising there from would present no difficulty. Unlike other components, the profit element in the value of the goods may necessitate estimation in cases where the books of accounts are not maintained annually, but project-wise. Estimation of profit would then be a matter for determination by the assessing authority after taking into consideration all relevant factors

including the profits which are, ordinarily, made in similar works executed by other contractors; profits earned by the contractor-dealer in works contracts executed by him in the previous years; the profit percentage norms accepted in the industry for works contracts of a similar kind; etc. While the assessing authority may adopt any other reasonable method, judicial pronouncements and authoritative texts would serve as a useful guide in such estimation. Reference in this context can be made to A.T.Brij Paul Singh v. State of Gujarat [1984] 4 SCC 59, P.M.Paul v. Union of India AIR 1989 SC 1034, Mohd. Salamatullah v. Government of Andhra Pradesh AIR 1977 SC 1481, Dwaraka Das v. State of Madhya Pradesh [1999] 3 SCC 500, Government of Andhra Pradesh v. E.C.Techno Industries [1989] 2 ALT 320, Superintending Engineer v. P.Radhakrishna Murthy [1996] 3 ALT 1137, G.V.Malla Reddy & Co., Hyderabad v. A.P.State Trading Corporation Ltd., Hyderabad [2010] 4 ALD 331 and Hudson on "Building and Engineering Contracts" (Tenth Edition, by I.N.Duncan Wallace), wherein the manner of estimation of profits for different works contracts have been dealt with and, in some of the cases, the percentage of profits estimated at 15 per cent has been accepted as being reasonable. We may not be understood to have held that in all cases 15 per cent should invariably be accepted as the norm. We have merely indicated broadly the factors which the assessing authority should bear in mind while estimating the profit percentage in the facts and circumstances of the case before him.

The Hon'ble Supreme Court in the case of Gannon Dunkerley's case [1993] 88 STC 204(SC), has held that the measure for the levy of tax contemplated by articles 366 (29A) (b) is the value of the goods involved in the execution of a works contract, that the value of such goods for levying tax cannot be assessed on the basis of the costs of acquisition of the goods by the contractor, but also the value of goods at the time of incorporation of the goods in the works; and that the costs of incorporation of the goods in the works such as labour charges cannot be made a part of the measure for levy of tax contemplated by the said article. Thus a legal fiction whereby the total turnover of the dealer is deemed to be the value of the goods purchased and supplied or used in the execution of such contracts in that year; that it provides another method for arriving at the turnover of the dealer and the value of the goods would not only include:

- the costs of acquisition of goods by the contractor dealer
 - the transportation charges incurred by him to deliver the goods to the situs of the works wherein they are incorporated
 - costs of establishment relatable to supply of material involved in the execution of the works contract
 - other charges borne by the contractor dealer in relation to these goods till its incorporation in the works and
 - also the profits relatable to the value of such goods.
- Thus it is necessary to find out the correct Gross Profit involved in the course of execution of the works contract as evident from the books of accounts of the respondent dealer. The Appellate Deputy Commissioner (CT) being a First Appellate Fact Finding Authority has failed to arrive at the correct percentage of Gross Profit to be adopted for arriving liability under Section 5 of the TNVAT Act, 2006.

The respondent dealer Tvl.ITD Cementation provide solution in the filed of Civil Engineering using new and innovative methods. The Company is credited with pioneering the art of integrating engineering and innovation with construction practices. ITD Cem has optimum human resources commensurate with the required expertise and major equipment required for successful execution of the projects it undertakes. The Company is accredited with ISO 9001:2008; ISO 14001:2004 and OHSAS 18001:2007 Certifications. Over the years ITD Cem has built may iconic projects; notable amongst these are the 2nd Container Terminal at Chennai, road projects for NHAI. The Company has build Maritime Structures in major ports in Chennai, Ennore and Tuticorin. Keeping in view of the nature of projects executed the Gross Profit of 5% is far below that the appreciable percentage."

24. From the material on record, it could be deduced that while doing so, the tribunal has also verified the audited Profit & Loss statement and Balance Sheet of the assessee / revision petitioner, for the relevant years.

25. Ultimately, the tribunal held as follows:

" The Appellate Deputy Commissioner (CT) has erred in relying on the above all India Balance Sheet, and concluded the Gross Profit is less than 5%, whereas actual gross profit should be calculated on the transfer of property in goods in the same form or

some other form relating to the transactions in the state of Tamil Nadu only. Moreover the above audited balance sheet relates to the year ended on 31st December, whereas the financial year as per definition section 2(42) of the TNVAT Act 2006, means financial year, i.e From 1st April to 31st March. Thus the Appellate Deputy Commissioner (CT) has compared an apple with an orange to certify the Gross Profit ratio of the respondent dealers @ 5% which is a factual error."

26. Analysing the input / output purchases of the goods, in execution of works contract, the tribunal held that

"The input and output analysis in respect of the materials used in the course of execution of works contract reveals that the respondent dealer have purchased inputs such as Iron & Steel, Cement, Sand, Gravel, Electrical Items and Hardware items etc for use in the execution of Industrial Civil Works Projects. These inputs are used for execution of Mega commercial projects such as Sea Port Terminals, Roads for National Highways Authority of India and other civil structures."

27. After considering the audited profit and loss statement, balance sheet, certificates issued by the chartered accountant, for the relevant years, the tribunal ordered, as hereunder.

"The respondent dealer have not maintained the proper accounts as stipulated under rule 8(5) of the TNVAT Rules 2007. The respondent dealer failed to produce related accounts so as to arrive a taxable turnover under Section 5 of the TNVAT Act 2006. Merely on surmise and approximation the respondent dealer had chosen to adopt 5% Gross Profit to arrive the deemed sales turnover. Thus the Assessing Officer is left with no other options except to follow the convention and procedures as being adopted by other dealers of this type of business namely civil works contractors adopting 10% Gross Profit to arrive deemed sale turnover under Section 5 of the TNVAT Act 2006.

Furthermore, the respondent dealers are dealing in the execution of Mega projects such as National Highways Projects, Commissioning of Air Ports and Sea Port Terminals which requires extensive calibrations and adoption of latest technology innovations. The transfer of property in goods in the execution of above works contract was in addition to the value addition with innovative technologies. The estimation of Gross Profit at 5% is definitely at lower side. The adoption

of 10% value addition towards Gross Profit and other expenses relatable to the purchases by the Assessing Officer is fairly in order.

The Assessing Officer thus rightly levied VAT liability by adding 10% gross profit on the above purchase turnover reported under 4% and 12.5% commodities respectively. Thus the following difference of deemed sale turnover resulted due to difference of Gross Profit between 10% & 5%

(i) for the year 2006-2007 (Jan 2007 to Mar 2007) is in order:-

Difference in deemed sales taxable turnover	Rate of tax	Difference of VAT due
Rs.11,97,420.00	4%	47,897.00
Rs.2,04,664.00	12.5%	25,583.00
Rs.14,02,084.00		73,480.00

(ii) for the year 2007-08 is in order:-

Difference in deemed sales taxable turnover	Rate of tax	Difference of VAT due
Rs.2,90,29,320.00	4%	11,61,173.00
Rs.49,73,491.00	12.5%	6,21,686.00
Rs.3,40,02,811.00		17,82,859.00

(iii) for the year 2008-09 is in order:-

Difference in deemed sales taxable turnover	Rate of tax	Difference of VAT due
Rs.5,41,85,444.00	4%	21,67,418.00
Rs.1,05,73,253.00	12.5%	13,21,657.00
Rs.6,47,58,697.00		34,89,075.00

(iv) for the year 2009-10 is in order:-

Difference in deemed sales taxable turnover	Rate of tax	Difference of VAT due
Rs.214,92,270.00	4%	8,59,691.00
Rs.67,97,384.00	12.5%	8,49,673.00
Rs.282,89,654.00		17,09,634.00

28. The tribunal ordered as hereunder

(i) In STA No.109 of 2015

"In view of the above findings, this Tribunal holds that adoption of notional 10% Gross Profit on the purchase value to arrive the deemed sales turnover under section 5 of the TNVAT Act 2006 by the Assessing Officer is correct and therefore upheld. The order of the Appellate Deputy Commissioner (CT) is set-aside in respect of assessment of difference of deemed sales turnover, accordingly and order of the Assessing Officer dated 31.01.2012 for the year 2006-2007 under TNVAT Act, 2006 is upheld and restored.

(ii) In STA No.110 of 2015

"In view of the above findings, this Tribunal holds that adoption of notional 10% Gross Profit on the purchase value to arrive the deemed sales turnover under section 5 of the TNVAT Act 2006 by the Assessing Officer is correct and therefore upheld. The order of the Appellate Deputy Commissioner (CT) in deleting the turnover of Rs.3,40,02,811.00 is set-aside accordingly and the order of the Assessing Officer is restored.

(iii) In STA No.200 of 2014

"In view of the above findings, this Tribunal holds that adoption of notional 10% Gross Profit on the purchase value to arrive the deemed sales turnover under section 5 of the TNVAT Act 2006 by the Assessing Officer is correct and therefore upheld. The order of the Appellate Deputy Commissioner (CT) is set-aside accordingly.

(iv) In STA No.201 of 2014

"In view of the above findings, this Tribunal holds that adoption of notional 10% Gross Profit on the purchase value to arrive the deemed sales turnover under section 5 of the TNVAT Act 2006 by the Assessing

Officer is correct and therefore upheld. The order of the Appellate Deputy Commissioner (CT) is set-aside accordingly."

29. Though, learned counsel for the revision petitioner urged that the certificate issued by the Chartered Accountant, for the period between 01.01.2007 and 31.03.2007, 01.04.2007 and 31.03.2008, 01.04.2008 and 31.03.2009 & 01.04.2009 to 31.03.2010 of the Assessment years 2006-07, 2007-08, 2008-09 and 2009-10, respectively, corroborated the accounts and balance sheet and therefore, the certificates issued by the Auditor, ought to have been given weightage, for the calculation of gross profit, which according to him, was actually earned by the assessee, and further reiterated the grounds of challenge for reversal of the orders of the tribunal, this Court is not inclined to accept the said contentions, for the reason that the tribunal, after considering the audited Profit & Loss statement, balance sheet for the relevant years, revenue receipts and such other materials, and despite the fact that in a series of judicial pronouncements extracted supra, wherein 15% of the gross profit had been adopted, taking note of the fact that the dealer had not maintained proper accounts, as stipulated under Rule 8(5) of the TNVAT Rules, 2007 and failed to produce the related records, to arrive at a taxable turn, over under Section 5 of the TNVAT Act, 2006, and though, gross profit claimed to have been earned for the relevant years was between 2.89% to 3.56%, held that the approximation of the dealer at, 5% profit was merely on surmises, not supported by any proper accounts, for the period between 01.01.2007 and 31.03.2007, 01.04.2007 and 31.03.2008, 01.04.2008 and 31.03.2009 & 01.04.2009 to 31.03.2010 of the Assessment years 2006-07, 2007-08, 2008-09 and 2009-10, respectively, and thus, the tribunal has accepted the case of the department, by adopting the conventional method of deducting the gross profit at 10%.

30. At this juncture, it is relevant to extract one of the orders passed by the assessing officer Assistant Commissioner (CT), Kilpauk, Assessment Circle dated 15.06.2015.

PROCEEDINGS OF THE ASSISTANT COMMISSIONER (CT)

KILPAUK ASSESSMENT CIRCLE

PRESENT: Tmt.P.Geetha

STATION:#57, 69, 61 & 63, Dowlath Towers, 7th Floor,
Taylors Road, Chennai - 600 010.

TIN/33111122127/2009-10

DATE: 15.06.2015

Sub: TNVAT Act 2006 - Kilpauk Assessment
Circle - Tvl. Sreerosh Properties (P) Ltd., - Surprise
Inspection on 10.03.2013 - Certain Defects noticed for

the year 2009-10 - Implementation of the Proposal -
Notice issued - Orders passed - Regarding.

Ref: 1. Commercial Tax Officer, Group VIII,
Enforcement (East), Chennai - 6, VA 6 / 2013-14 dated
17.03.2015.

2. This office notice in TIM
33111122127/2009-10, dated 13.04.2015

3. Dealer's letter dated 25.04.2015.

Note: An Appeal against this Order lies before the
Appellate Deputy Commissioner (CT)-Central, Chennai -
600 006 within 30 days of receipt of this Order.

Tvl.Sreerosh Properties (P) Ltd., are dealers in
Flat promoters doing business in Building construction
at No.10/A/23 Sreejivanthi, Lakshmi St., Chennai - 10.
Their place of business was inspected surprisingly on
10.3.2013 by the Enforcement wing (Central), Chennai -
6. During the course of inspection, they have noticed
certain defects and a proposal has been received in
the reference cited. Based on the proposal, a notice
was issued for the assessment year 2009-10, in the
reference cited as follows.

1)Tax levied on the difference noticed in the purchase
turnover between balance sheet and monthly returns
filed.

On verification of balance sheet and the monthly
returns filed by them it was noticed that there is
difference in purchase turnover between the balance
sheet and the monthly returns filed. The purchase
difference is treated as the purchase omission and the
deemed sale value is arrived as follows:

Purchase turnover as per balance sheet	: Rs.1,18,55,835.00
Purchase turnover as per monthly return	: Rs.1,17,30,884.00
Difference	: Rs. 1,24,951.00
Add G.P. at 10%	: Rs. 12,495.00"

31. Perusal of the same shows that the department has
adopted the conventional method of adopting 10% gross profit,
and accordingly has worked out the liability.

32. Though learned counsel for the revision petitioner submitted that in the absence of furnishing any material in support of the contention that adoption of the conventional method of arriving at 10% gross profit, there is violation of the principles of natural justice, and in that context, relied on a decision of the Kerala High Court in Income Tax Referred Case No.67 of 1966 dated 06.09.1967 in the matter of Joseph Thomas & Bros Vs. Commissioner of Income Tax, Kerala [reported in [1968] 68 ITR 796 (Ker)], this Court is not inclined to accept the said contentions, for the reason that in the reported case, the question referred was whether, on the facts of the said case, there was, non compliance of the provisions of Section 142 (3) and if so, whether the assessment order passed under Section 143(3), was vitiated.

33. Section 142(2) of the Income Tax Act, 1961, states that for the purpose of obtaining full information in respect of the income or loss of any person, the Income Tax Officer, may make such enquiry, as he considers necessary, and as per Section 142 (3) of Income Tax Act, 1961, the assessee, shall, except where the assessment is made under Section 144, be given an opportunity of being heard, in respect of any material gathered on the basis of any enquiry, under sub-section (2) and proposed to be utilised for the purpose of the assessment.

34. Reading of sub section 3 of Section 142 makes it clear that except where an assessment is made under Section 144 of the Income Tax Act, 1961, the assessee shall be given an opportunity of being heard, in respect of any material gathered on the basis of any enquiry.

35. Joseph Thomas & Bros' case relied on by the assessee / revision petitioner, has no reliance to the facts of this case. First of all, adoption of 10% of gross profit and working out liability, in respect of works contract in vogue, ever since the introduction of Section 3B of the Tamil Nadu General Sales Tax Act, 1959 and stated to be continued, even for the liabilities relating to Section 5 of Tamil Nadu Value Added Tax Act, 2006, is not a material gathered on the basis of any enquiry. Further, no provision has been pointed out by the assessee, to this Court, regarding furnishing of any document, while adopting the conventional method of adopting 10% of gross profit and working out the liability on works contract. We are of the view that the said judgment is inapposite to the case on hand.

36. Going through the material on record, we are of the view that the tribunal, has considered the submissions of the learned counsel, perused the relevant documents, stated supra, and passed a well considered orders in STA Nos.109 & 110 of

2015 and 200 & 201 of 2014 dated 25.06.2015, and that the same do not call for any interference. Reasons assigned by the tribunal, are tenable. Hence, Tax Case (Revision) Nos.31 to 34 of 2017 are dismissed. No costs. Consequently, the connected Civil Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar (CS-iv)

//True Copy//

Sub Assistant Registrar

Note to office:
Issue order copy by 18.01.2018
and upload the same immediately.

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To

1. The Joint Commissioner (CT),
State of Tamil Nadu
Chennai (Central) Division,
Chennai - 600 018.
2. the sales tax appellate tribunal,
(additional branch), chennai 104.
3. The appellate Deputy commissioner (CT) iii (FAC)
greams road, chennai 6
4. the Assistant commissioner (CT) t.nagar (East) assessment
circle, chennai

+1cc to Mr.ADITHYA REDDY, Advocate, S.R.No. 2017
+1cc to the Spl. Government Pleader (taxes), S.R.No. 2424

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