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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 08.02.2018

+ **ITA 314/2016**

PRINCIPAL COMMISSIONER OF INCOME-TAX-21

..... Appellant

versus

M/S MEHTA CONSTRUCTION CO.

..... Respondent

ITA 315/2016

PRINCIPAL COMMISSIONER OF INCOME TAX-2

..... Appellant

versus

M/S MEHTA CONSTRUCTION CO.

..... Respondent

ITA 316/2016

PRINCIPAL COMMISSIONER OF INCOME-TAX-21

..... Appellant

versus

M/S MEHTA CONSTRUCTION CO.

..... Respondent

ITA 317/2016

PRINCIPAL COMMISSIONER OF INCOME-TAX-21

..... Appellant

versus

M/S MEHTA CONSTRUCTION CO.

..... Respondent

Present:

Mr. Zoheb Hussain, Senior Standing Counsel for Revenue with Mr. Deepak Anand, Junior Standing Counsel for Revenue.

Mr. Balbir Singh, Senior Advocate with Ms. Rubal Maini, Mr. Rajesh Mahna, Mr. Achin Mittal, Mr. Vikram Kakkar, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VINOD GOEL

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)
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Admit.

1. The common question of law urged by the Revenue in these four appeals is as follows:-

Whether the lower Appellate Authority erred in setting aside the order of the Assessing Officer, who had rejected the Assessee's books of accounts for the AYs 2007-08, 2008-09, 2009-10 & 2010-11 and applied the G.P. Rate of 5% (for three years) and 3.5% for the AY 2008-09?

2. With the consent of counsel for parties, these appeals are heard finally.

3. Assessee is a Road Contractor. He, for the relevant assessment years, which are the subject matter of the present appeals, had claimed a gross turnover of Rs.19,67,67,039.08 for the AY 2007-08, Rs.42,78,04,114.60 for the AY 2008-09, Rs. 52,17,54,048.00 for the AY 2009-10 and Rs. 73,92,42,831.00 for the AY 2010-11.

4. The Assessing Officer conducted proceedings and asked for various information. By elaborate reasoned order, the Assessing Officer concluded that since the Assessee did not maintain the Stock Registers and certain other primary documentary evidence in support of its claim for expenditure and net profit rate of 0.46%, 0.88%, 1.5% for different years, and on a best judgment basis, invoking his powers

under Section 145, imposed the GP Rate of 5% and 3.5% in the one year i.e. AY 2008-09. The relevant position with respect to the turnover claimed, the GP Rate imposed and the orders made, are reproduced by way of a Chart which is as follows:

ITA No.	316/2016	314/2016	315/2016	317/2016
AY	2007-08	2008-09	2009-10	2010-11
AO Order	30.12.2009	31.12.2010	26.12.2011	30.03.2013
Rate of Income assessed by AO	5% instead of 0.88%	3.5% instead of 0.46%	5% instead of 0.89%	5% instead of 1.53%
Appeal No. before CIT(A)	245/09-10	365/10-11	298/11-12	137/13-14
CIT(A) Order	31.03.2010 Against Assessee	17.04.2012 in favour of Assessee	19.06.2012 in favour of Assessee (except a minor addition of Rs.2.5 lakh)	07.12.2014 Against Assessee
ITA No. before ITAT	3967/Del/2010	2561/del/2012	4366/Del/2012	474/Del/2015
ITAT Order	16.10.2015	16.10.2015	16.10.2015	16.10.2015

5. The Commissioner of Appeals, who considered the Assessee's contentions was of the opinion that the Assessing Officer's rejection

of the books was not justified. It was held that after considering the ratio of various judgments, the CIT(A) for the AY 2007-08 and 2008-09 held as follows:

“I have carefully considered the facts of the case, the important aspects which immerge from the present appeal are-

1. The Method of accounting has been accepted for several years on same set of facts. Reliance is placed on 294 ITR 655:

[Gauhati] MKB [Asia) P. Ltd, v. Commissioner of Income-Tax

2. Non maintenance of stock register cannot be a ground for rejection of account in every case it depends upon the nature of business.

324 ITR 95 (Delhi) Commissioner of Income-Tax v. Jas Jack Elegance Exports 192 Taxman 167 (Delhi) & Commissioner of Income-Tax- XII v. Poonam Rani.

3. The onus was on revenue to show that accounts were incomplete or incorrect and true profits could not be deduced from the books of accounts maintained by the appellant which were also duly audited and no adverse inference was drawn by the auditor. If expenses claimed remained unexplained, A.O could have disallowed the same without rejecting the books of accounts 325 ITR 13 (Delhi) Commissioner of Income-Tax v. Paradise Holidays.

4. The appellant has not been provided with details of comparable cases relied upon 68 ITR 796(Kerala) Joseph Thomas and Brothers. V.

Commissioner of Income-Tax, Kerala & 210 ITR 103 (Calcutta) Commissioner of Income-Tax. V. Eastern Commercial Enterprises [relied upon 125 ITR 713 (SC)] Kishinchand Chellaram V. Commissioner of Income Tax, Bombay City II.

5. The appellant should have been provided with an opportunity to rebut before rejecting the books of accounts and estimating the profits 64 ITR 175 (AP) S. Sarabhaiah Setty and Sons. V. Commissioner of Income Tax, A.P & 62 ITR 528 (AP) Yakub Versey Laljee & Another V. Commissioner of Income Tax, A.P

6. Estimate should be based on some evidence and material 8 STC 770 (SC) Raghubar Mandal harihar Mandal v. the State of Bihar

7. *Best judgment assessment to be made (estimation shall have a rational nexus to the available material and the circumstances of the cases 60 ITR 239 (SC) State of Kerala C. Velukutty.*

In view of the facts and circumstances of the case and judicial pronouncements relied upon by the appellant, the Assessing Officer was not justified in rejecting the books of accounts, by applying section 145(3) of the IT Act and estimating Net Profit @ 3.5% of the Gross Receipts. The addition made by the Assessing Officer to the tune of Rs.12991319/- is therefore, deleted. Appeal on these grounds is allowed."

6. This reasoning was adopted for another year i.e. AY 2009-10. However, in the other two Assessment Years, CIT(A) affirmed the reasoning of the AO, *inter alia*, in the following terms:

"12. The appellant has argued that the A.O. "has failed to appreciate that the registers are required to be maintained as "Must Roll" as the requirement of Labour Law for the business and Assessing Authority has failed in appreciating the expenses incurred" such like. The expenditure are closely connected, and incidental to the work of the execution of contract without which the contracts cannot be completed. The appellant has stated in his reply that 'sitewise details of labour charges details are filed'. No such, details were filed during appellate proceedings. The appellant was therefore, asked to clarify this. He stated that this refers to these details having been filed before the A.O. In the asstt. order, the AO. has observed that "The assessee has not furnished site wise details of labour charges claimed in the profit & loss account". The above statement of the appellant is therefore, factually incorrect and sitewise details of labour charges details have not been filed. In the asstt. order, the AO. has further stated that "The entire claim of expenses is made in cash. All these payments are through self made vouchers. The claim of such expenses lacks third, parties verification. The assessee has not furnished for verification the labour musters to examine the genuineness of claims of such expenses. Considering the facts mentioned in the

asstt. order, the appellant's arguments are not acceptable and the AO. had no alternative but to estimate the net profit.

13. The explanation given for the low N.P. rate is too vague and general. The rate of net profit estimated by the AO already takes these arguments into consideration. The estimate of income @5% of gross receipts of Rs.19,93,27,702/- is justified considering the line of business and the facts of the case. As discussed above, the A.O. has computed net income, separately for exceptional items (compensation on delayed payments) and non-exceptional items (other receipts). For exceptional items, the net income is the same as the gross receipts because the appellant has admittedly not incurred any expenditure on earning this income. Regarding non-exceptional items, the AO. has estimated net profit @ 5% of these receipts. In fact, in the same line of business, a higher rate of net profit has been upheld in the following decisions:

- 1. Zora Singh v CIT (2008) 173 Taxman 76 (P&H)*
- 2. Bandi Co-op. Labour & Construction Society v CIT (2008) 300 ITR 102 (P&H)*
- 3. CIT v Bhawan & Park Nirman (2002) 258 ITR 676 (Raj)*
- 4. Arihant Builders Dev. & Inv. P Ltd. v ACIT (2007) 106 ITO 10 (Indore)(SB)*
- 5. Bhagyanagar Construction P Ltd. v ITO (1993) 46 ITO 236 (Hyd.)*
- 6. ITO v Garg Jain & Assoc. (2008) 73 Taxman 53 [Chd.] (Mag)”*
- 7. Goyal Construction Co. v. ACIT (2003) 127 Taxman 46 (Agra) Mag)*
- 8. Jaspal Singh & Co. v. ACIT (1996) 89 Taxman 203 (Del) (Mag)*

14. Considering the facts, and the observations of the A.G. in the asstt. order, it is clear that had the A.G. not separately treated the exceptional and non exceptional items, and taken a flat N.P. rate on the entire receipts, he would have applied a higher N.P. rate. However, he has separately estimated income for both the heads and the net profit rate applied is justified in this context.”

7. The ITAT-whose orders are impugned before this court under Section 260 A, was of the opinion, firstly, that the Assessing Officer did not render any specific finding as to how correct profits could not be deducted from the books of accounts maintained by the Assessee. Earlier, it was noticed that the Assessee had maintained the books of accounts as required under Section 44 B of the Income Tax Act and that they were regularly audited. The ITAT, thereafter, went on to hold that the mere absence of a Stock Register (which though made in considering claims for expenses etc.) was inconclusive and that the Assessing Officer had to record a higher level of satisfaction, if he were to reject the books of accounts and impose GPA.

8. In so concluding, the ITAT relied upon the judgment of *Commissioner of Income Tax v. B.N. Aggarwal and Others* 259 ITR 754 (SC). As a consequence, all the appeals of the Revenue were rejected and the appeals of the Assessee for the two Assessment Years were allowed. The Revenue relies upon the findings of the Assessing Officer and highlights that besides the absence of Stock Register, the respondent-Assessee did not produce any material evidence in the form of invoices, contracts with its various sub-contractors and suppliers, the proof of quantities involved, muster rolls, vouchers etc. relating to supplies and all connected details which would have justified its claims.

9. Learned Senior counsel for the Assessee on the other hand contested the Revenue's submissions and stated that ITAT's findings are justified. It was submitted that mere absence of Stock Register *per se* could not have resulted in the rejection of books of accounts, which were regularly maintained and had been the subject matter of previous assessments. It was contended, moreover, that the Assessing Officer had made inquiries by

issuing notices under Section 131 and also conducted survey inquiries under Section 133 (6) by which various suppliers/sub-contractors were asked to appear in the proceedings. The Assessing Officer's order is absolutely silent on the justification or otherwise of the materials given by such third parties or the statements recorded by them. It was submitted that this established the genuineness of the expenses claimed by the Assessee. It was also highlighted that the peculiar nature of the business activity i.e. road contracts executed required assessments through sub-contractors in far flung areas and that a large number of suppliers, sub-contractors and labour contractors were therefore involved.

10. The lower Appellate Authorities, therefore took cognizance of these facts and held that the rejection of books of accounts were justified. In the present case, it is quite evident that the Assessee had maintained the books of accounts. On that score, the ITAT is correct, however, the proceedings before the Assessing Officer and his order would reveal that there are gaps with respect to the materials sought but omitted to be produced. These related to various aspects of the respondent-Assessee's road contract construction activity such as: (i) specific contracts entered into with sub-contractors/ labour contractors/suppliers; (ii) absence of any supporting primary materials such as invoices disclosing quantities purchased; (iii) the muster rolls or any other such materials or documentary evidence (including payment made to ESI, PPF on account of sub-contractors-even if by the contractors) to the workmen involved; (iv) any other proof of the quantities or materials utilized and their relative costs.

11. The court also notices that the Assessing Officer's order undoubtedly reflects that queries were made from various sub-contractors, however, as to

what was stated by them or what material was produced by them has not been discussed at all.

12. In these circumstances, the court is of the considered view that the ITAT and the CIT(A) rather superficially examined the material and set aside the findings of the Assessing Officer. At the same time, the Assessing Officer's order also is incomplete. In the peculiar circumstances, the matter is remitted to the CIT(A), who shall render fresh findings on the entire subject matter, after considering the materials produced. While, it is open to the CIT(A) to seek a remand report, with respect to specific aspects, the entire matter shall not be remanded for re-adjudication to the Assessing Officer.

13. The appeals are partly allowed in the above terms.

S. RAVINDRA BHAT, J

VINOD GOEL, J

FEBRUARY 08, 2018

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