IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'C' NEW DELHI)
BEFORE SHRI C.L. SETHI, JUDICIAL MEMBER
AND SHRI K.G. BANSAL, ACCOUNTANT MEMBER

I.T.A. No.3310/Del/2011
Assessment year : 2006-07

Asstt. Director of Income-tax, Circle-1(2), (Intl. Tax), New Delhi	Vs.	M/s Italian Thai Development Public Co. Ltd.,301-302, 3rd Floor, Sagar Tower, District Centre, Janakpuri, New Delhi

AND

Cross Objection No. 288/D/2011
(In I.T.A. No.3310/Del/2011)
Assessment year : 2006-07

M/s Italian Thai Development Public Co. Ltd., 301-302, 3rd Floor, Sagar Tower, Distt. Centre, Janakpuri, New Delhi PAN No.AABCI 2013 D	Vs.	A.D.I.T., Circle 1(2), Inter-New Delhi
(Appellant)		(Respondent)

Assessee by : S/Shri S.R. Wadhwa, Asit K. Das, Advoates & Sumeet Sareen, FCA
Department by : Shri Ashwani Kumar Mahajan, CIT-DR

Date of hearing: 02-09-2011
Date of pronouncement: 22-09-2011

ORDER

PER K.G. BANSAL: AM

This appeal of the revenue and the cross objection of the assessee are in relation to the order passed by the CIT(A)-VII, New Delhi, on 26.04.2011

in Appeal No.51/2010-11 for assessment year 2006-07.

1.1 The revenue has taken two grounds in the appeal questioning the findings of the learned CIT(A) in regard to rejection of books of account and the consequent deletion of the addition made by the Assessing Officer. On the other hand, the assessee has challenged the validity of the assessment on the ground that notice u/s 143(2) of the Income-tax Act, 1961 ("The Act" for short), has not been served on the assessee. Since the cross objection is jurisdictional in nature, we proceed to decide the same at the outset.

2. In this connection, it has been mentioned in the assessment order that the assessee-company filed its return on 29.11.2006 declaring loss of Rs. 25,70,58,700/-. In this return, refund of Rs. 5,05,95,897/- was claimed. The return was taken up for scrutiny and for this purpose, the notice u/s 143(2) of the Act was issued and served on the assessee. In response to this notice, representatives of the assessee from Deloitte Haskins & Sells attended from time to time. This finding was challenged before the learned CIT(A). For this purpose, an affidavit has also been filed on behalf of the company deposing inter alia that the notice u/s 143(2) has not been received

by the assessee. The learned CIT(A) forwarded this affidavit to the Assessing Officer for her comments. It was submitted that as per records a notice u/s 143(2) dated 28.09.2007 was issued to the assessee. This notice was dispatched by speed post on 04.10.2007 as per acknowledgement of the dispatch with code No.902-10, in which the entry in respect of the assessee appears at serial No.15. It was further submitted that the envelope containing the notice was not received back by the office to show that it remained undelivered. It was argued that in view of the decision of Hon'ble Delhi High Court in the case of CIT Vs. Madhsy Films (P) Limited, it can be taken that the notice has been served. This report was handed over to the representatives of the assessee. On its behalf, it was submitted that an affidavit has been filed from the branch manager of the company categorically deposing that no notice u/s 143(2) has been served on the assessee. Thus, the presumption of service stands rebutted. The service of the notice within the prescribed time is mandatory as per the decision of Hon'ble Delhi High Court in the case of CIT Vs. Luner Diamonds Ltd. (2005) 281 ITR 1. It was further submitted that the Assessing Officer has not furnished any proof about the service of the notice. The evidence produced by the Assessing Officer does not bear the stamp of the post office and thus, it has no validity. As per the provisions contained in section 282

of the Act and section 27 of General clauses Act, it has to be shown that the envelope has been properly addressed, requisite stamps have been affixed and it has been posted by registered post acknowledgement delivered. The facts of the case of CIT Vs. Madhsy Films (P) Ltd. have been distinguished by stating that the notice dated 25.10.2002 was duly posted at the correct address and it was not received back, therefore, a presumption was raised that it had been served within two to three days of its posting. The assessee had not filed affidavit to the effect that it had not received the notice. Thus, the presumption u/s 27 of the General Clauses Act had not been rebutted by the assessee. In this case, the presumption has been rebutted.

2.1 The learned CIT(A) considered the facts of the case and submissions made before him. It is mentioned that assessment records clearly indicate that the notice was correctly addressed and it was sent by speed post on 04.10.2007. There is nothing on record to indicate that the notice was not served or it was served on an unauthorized person. Therefore, a statutory presumption is to be drawn that it has been served. Accordingly, it has been held that there is force in the submissions of the assessee. As a result, the relevant ground has been dismissed.

3. Before us, learned counsel for the assessee submitted that the return of income for this year had been filed on 29.11.2006, therefore, the notice could be validly served on the assessee upto 20.11.2007. Our attention has been drawn towards the affidavit of the branch manager dated 20.10.2010, affirming inter alia that the assessee had not received notice u/s 143(2) dated 28.09.2007. Further, our attention has been drawn towards "Statement of Facts" filed before the learned CIT(A). In paragraph No.4, it is stated that no notice u/s 143(2) has been served on the assessee. The Assessing Officer served a questionnaire dated 25.06.2008, seeking certain information and clarifications from the assessee. In this questionnaire and reply thereto, the Assessing Officer and the assessee have referred to the notice dated 28.09.2007. The notice was never served on the assessee. Therefore, the assessment is legally unsustainable. Our attention has been specifically drawn towards assessee's reply letter dated 14.07.2008, in which a reference had been made to the notice under section 143(2). According to the learned counsel, the assessee came to know about the notice when the questionnaire dated 25.06.2008 was received. On these facts, the arguments are that the presumption contained in General Clauses Act is rebutted by filing the affidavit. There is no proof with the Assessing Officer that the envelope was

properly addressed, stamped and posted. Therefore, the assessment is bad in law.

3.1 In reply, the learned CIT-DR referred to the findings of learned CIT(A), which have been summarized by us. It is submitted that the assessee never raised any dispute before the Assessing Officer regarding non-service of the notice. In her questionnaire dated 25.06.2008, the Assessing Officer referred to the notice u/s 143(2) issued on 28.09.2007. This questionnaire was responded to by the representatives of the assessee on 14.07.2008 by way of a written letter. This letter refers to notice issued u/s 143(2). It is further submitted that the affidavit was filed after lapse of more than two years from the issuance of questionnaire dated 25.06.2008. The affidavit does not disclose any evidence on which it is based. Therefore, it cannot be relied upon. Every Assessing Officer has to issue a number of notices every day. The practice followed is that these notices are taken to the post office, entered into a sheet supplied by the post office and handed over to the post office after obtaining acknowledgment from the concerned clerk. Such acknowledgment is available on the sheet by way of initials of the clerk, which is being shown to the members of the Tribunal. The office copy of the notice shows that it has been properly addressed. The

acknowledgment from the clerk shows that it has been properly stamped. There is no evidence of return of the notice as un-served by the postal department. Therefore, it is argued that the notice has been served on the assessee as per presumption of the General Clauses Act.

3.2 In the rejoinder, the learned counsel submitted that there is no legal necessity for taking objection before the Assessing Officer in respect of service of the notice and the issue can be raised for the first time before the CIT(A).

4. We have considered the facts of the case and the submissions made before us. The facts are that a notice u/s 143(2) was prepared on 28.09.2007, the office copy of which is on record. This notice has been properly addressed as seen from this copy. As per the sheet of the postal department, envelope containing this notice and other envelopes were handed over to the post office as the sheet bears the initial of the clerk. This procedure has been followed as an established procedure for handing various communications from the department to the assesses and others. Section 27 of the General Clauses Act contains a presumption that where any Central Act requires any document etc. to be served by post, then the service shall be

deemed to be effected where the envelope is properly addressing, proper stamps affixed thereon and posted by registered post, and unless the contrary is proved, the service is deemed to have been effected at the time at which the document would be delivered in the ordinary course of post. In view of this provision, a presumption arises that the notice has been served on the assessee within 2-3 days of posting. This presumption is sought to be rebutted by the affidavit of the branch manager. However, this affidavit does not disclose the basis for deposing that the notice was not received till date. No inquiry has been made from the post office. The affidavit has been filed after a long time from the issuance of the notice. With efflux of time, memory is likely to fail. Thus, there is no basis to support the affidavit.

4.1 The learned counsel relied on a number of cases to the effect that service of the notice within time is mandatory. There is no quarrel about this proposition. The question in this case is – whether, notice dated 28.09.2007 has been served on the assessee? The learned CIT(A) has relied on the decision of Hon'ble Delhi High Court in the case of Mayawati Vs. CIT and others (2010) 321 ITR 349. The facts of the case are quite different and, therefore, the ratio of that case is not relevant for our purpose. Nonetheless, the facts stays that the notice dated 28.09.2007 has been validly posted and

the presumption of its service has not been rebutted by any cogent evidence. Therefore, it is held that the notice has been duly served on the assessee.

5. We now turn to the appeal of the revenue. In this appeal, there has been a reversal of the findings regarding rejection of books of account. Consequently, the estimation of profit at 10% of the amount raised in the bills on the NTPC Ltd. has not been accepted. The facts mentioned in this connection in the assessment order are that the auditors made a number of observations in respect of the accounts. These observations have been reproduced in paragraph no. 3 of the assessment order. In order to ensure that the loss has been correctly declared, the AO verified a number of expenses debited to profit and loss account, which are briefly discussed hereunder:

(i) expenses in connection with addition to site office at camp were verified and thereafter it has been mentioned that the assessee is constructing the dam and not the building. Although the building is required for the office, labour quarters, staff quarters etc., but the site office construction expenses exceeding Rs. nine crore do not appear commensurate with the requisite facility. Proper documents have not been maintained in respect of these expenses. Therefore, 50% of these expenses, amounting to Rs. 4,71,66,300/- have been disallowed;

(ii) purchases and outstanding sundry creditors were examined. After considering the explanation of the assessee, it has been

mentioned that the assessee could not submit stock register in respect of diesel and lubricant purchased from parties other than HPCL and Bharat Shell Ltd. Perusal of account of Asha Enterprise shows that it raised bills aggregating to Rs. 91,93,697/-, out of which only Rs. 74,97,195/- have been paid, leaving balance payable at Rs. 16,97,902/-;

(iii) purchases from Central Tyres were also verified and it is mentioned that this concern raised bills in two series having invoice numbers of three digits and five digits. The Sales-tax Department was affixing its stamp on the bills at the check post, but such stamps are not there on all the bills. Particularly, these stamps are not there on the invoices having the number in five digits. The genuineness of expenses has not been proved;

(iv) in view of these observations, 50% of expenditure in respect of purchases from Asha Enterprise and Central Tyres are held to be disallowable. Purchases of diesel from sundry suppliers have also been held to be disallowable.

5.1 The AO thereafter referred to various comments made by the auditors. After considering the submissions made by the assessee, it has been held that the books are not complete in all respects. A reference has been made to the method of computation of profit adopted by the assessee, which is stated to be in accordance with AS-7, issued by the Institute of Chartered Accountants of India. The assessee has followed percentage completion method for recognizing revenues. At the beginning of the project, total receipts, after taking escalation claims into account, have been fixed at Rs. 821,01,76,529/-. This includes the contract receipts as per agreement amounting to Rs. 718,99,91,590/- and estimated escalation

claims of Rs. 102,01,84,939/-. The total expenditure has been estimated at Rs. 951,83,67,460/-. This involves estimation of loss at the very beginning at Rs. 130,81,90,931/-. The assessments for assessment years 2003-04 to 2005-06 have been completed on the basis of aforesaid estimation of revenues and expenditure from the whole of the contract. Expenditure of Rs. 238,78,93,025/- was incurred in the previous years relevant to assessment years 2003-04 to 2004-05. This constituted 25.09% of the total cost. Accordingly, 25.09% of total revenue has been accounted for in these three years. Thus, total revenue of Rs. 88,67,27,527/- has been accounted for in these three years. Thereafter, revenue has been recognized for this year on similar basis. The AO did not accept the aforesaid working on the ground that there is no firm data regarding the estimation of total cost at Rs. 951,83,67,460/-. In view of this and non-verifiability of expenses mentioned earlier, the books of account have been rejected and the profit of this year has been estimated at 10% of the bills raised in this year.

6. Various submissions were made before the ld. CIT(Appeals). He considered the facts of the case and the submissions made before him. It is mentioned that the assessee has maintained regular books of

account, which are audited by the "accountant" as defined under the Act. The books of account maintained in the regular course of business, which have been audited, and the report does not contain any adverse remark by the auditor have normally be accepted as correct unless there are adequate reasons to come to the conclusion that these are incorrect or unreliable. The burden to prove that such books are incorrect or unreliable is on the AO. The AO had not recorded any finding that the assessee has not maintained any stock record of diesel and lubricant. Otherwise also, non-maintenance of stock register of these items would not render the accounts incomplete and would not be sufficient ground to reject the books u/s 145(3) of the Act. It is further mentioned that the AO has recorded the finding to the effect that some other expenses are not verifiable. This also does not constitute sufficient ground for rejection of account as in such a case the expenses may be estimated. The assessing authority has to look into the substance of the matter so as to avoid putting the assessee under unreasonable hardship or liability. It is the duty as well as the right of the Assessing Officer to consider whether the books disclose true state of affairs and correct income can be deducted therefrom. These rights and duties have to be exercised in a judicious manner by bringing cogent material and reasons on record. In view of these findings, it has

been held that the AO was not right in rejecting the accounts. As a corollary to this finding, the application of rate of 10% to the revenues of this year for determining profit has also been rejected. The revenue is in appeal against these findings.

7. The ld. DR initially submitted in a brief manner the method adopted by the AO for computation of income. It is submitted that the assessee had followed percentage completion method for determining the profit. This method has been accepted by the AO. However, he checked various expenses and found that proper bills were not maintained. He also did not accept the method of computing profit as the very initial estimate was a loss for which no justification was there. Finally, he did not make any separate addition in respect of expenditure checked by him. He rejected the books of account u/s 145(3) and applied the rate of 10% to the receipts of this year for determining the income. Section 44BBB regarding "special provision for computing profits and gains of foreign companies engaged in the business of civil construction etc. in certain turn-key power projects" provides for taxation @ 10% of the amount paid or payable to the assessee on account of civil construction, erection, testing or commissioning. The assessee is carrying on similar business

and, thus, the AO adopted the rate of 10%. It is further submitted that the assessee estimated loss of Rs. 130,81,90,931/- from the execution of the project, for which no firm basis existed. The fact that assessments for earlier three years have been completed on this basis is not material in so far as assessment of this year is concerned because in past no discrepancy was found in the books. In this year, the AO has found discrepancies and, therefore, the method of completing assessment in earlier years was not binding for computing profits of this year. In particular, he referred to the site expenses for which there were no invoices, purchases made by the assessee for which payment was not made in this year leading to sundry credit at the end of the year, discrepancy in the serial number of the bills from Central Tyres and the comments of the auditors. As mentioned earlier, these comments have been reproduced on page numbers 2 and 3 of the assessment order. The ld. DR referred to the query raised by the AO in respect of some of the comments. He enquired about the documents maintained for control of inventory of material consumed and deduction of tax at source from wages and salary. No satisfactory explanation was furnished. Therefore, the AO issued a show cause notice for rejecting the books of account and thereafter recorded findings in this matter. It is argued that the AO was right in rejecting the

books of account and estimating the profits. On the other hand, the ld. CIT(Appeals) merely stated that the books of account are maintained in regular course of business and the same have been audited. Thereafter, he recorded the finding that even if there were some deficiency in books in regard to maintenance of vouchers, the AO could have disallowed unvouched expenses. No verification was made or got made in respect of such expenditure and in fact the whole of the addition has been deleted. It is urged that in view of the aforesaid, the matter may either be restored to the file of the AO or the ld. CIT(A) for deciding this matter again.

8. In reply, the ld. counsel submitted that the assessee is a foreign company and it has entered into an agreement with NTPC Ltd. for civil work of a dam. It had filed the return of income showing loss of about Rs. 25.70 crore. Against the aforesaid, the total income has been assessed at about Rs. 11.68 crore. There is a wide gap between the two figures for apparently no reason. He referred to the finding of the AO recorded on page nos. 19 and 20 regarding the method adopted by the assessee to compute profit or loss. This is based upon the initial estimation of loss of Rs. 130,81,90,931/-. The assessments for assessment years 2003-04 to 2005-06 have been completed on the basis of aforesaid

estimation of loss. In other words, the figure of estimated loss has been accepted in earlier assessment years by the AO in scrutiny assessments. Therefore, this figure cannot be objected to now as it would disturb the consistent method followed by the assessee for computing the profit or loss. In any case, this loss was estimated on a reasonable basis and it was explained to the AO also. In this connection, our attention has been drawn towards page no. 151 of the paper book, being the part of submissions made before the AO in letter dated 22.12.2008, in which it is mentioned that the assessee was asked to provide calculation of provision of loss which was submitted in letter dated 17.11.2008. Complete budget/estimated calculations are provided in annexure-13 of this letter. On perusal of the same, it may be observed that complete break-up of the cost is provided in detail. Therefore, it will not be justified to hold that estimation of revenue and cost of the project, prepared in accordance with AS-7, is without any basis. It is further submitted that bidding for any contract requires detailed projection of cost expected to be incurred in the execution of the contract. In view of the same, the cost is estimated before commencement of the project and is revised regularly on the basis of actual performance. Therefore, objection to the total project cost on the basis of 25% work completed does not

hold good. At this stage, we may also reproduce the calculation submitted by the assessee and reproduced by the AO on page nos. 19 and 20 of the assessment order:-

"**Computation of revenue as per Accounting Standard-7**

Calculation of revenue on the basis of 'Percentage of Completion Method'

Information available

	Amount (Rs.)	Amount (Rs.)	
(A) Total fixed price Revenue as per Agreement			
- As agreed originally (as per Agreement)	718,99,91,590		
- Others-Escalation, claims etc.	102,01,84,939		821,01,76,529
(B) Total Estimated cost	951,83,67,460		951,83,67,460
(C) Total estimated profit/(loss)			(130,81,90,931)
Calculation of Percentage Completion			
(D) Cost incurred till date			
-2003-04	1,04,95,805		
-2004-05	87,81,29,885		
-2005-06	149,92,67,335		238,78,93,025
(E) Cost incurred till date	238,78,93,025		25.09%
Total estimated cost	951,83,67,460		
Revenue to be recognized till date			
(F) = (A) & (E)			205,97,04,393
Revenue to be recognized in 2005			
(G) Revenue recognized till last report date	(31/3/2005)		88,67,27,527
(H) Additional revenue to be recognised for the year			117,29,76,865
(I) Less: Amount billed toNTPC during 2005-06			116,82,11,448
(J) Reversal of Opening unbilled revenue			(25,94,98,241)
(K) Further unbilled revenue to be recorded			26,42,63,658
Provision for loss			
(L) Total anticipated loss		=(C)-(A)	130,81,90,931
(M) Excess of cost over revenue till 31 March,2006		=(D)-(F)	32,81,88,632
(N) **Provision for loss to be recognized**			**98,00,02,299**
(O) Less: Recognised till 31 March, 2005			(-) 13662497
(P) **Difference to be accounted for**			**96,63,39,802**

8.1 The ld. counsel referred to the remarks of the auditor, reproduced by the AO on page nos. 2 and 3 of the assessment order. These were dealt with para-wise. The case of the ld. counsel is that none of the remarks has any bearing on the correctness of the books of account and, therefore, remarks cannot form the basis for rejection of books of account. In past, the books were maintained in the same manner which had been accepted.

8.2 Coming to verification of expenses made by the AO, it is submitted that expenditure on addition to site office at Camp has been capitalized by the assessee. Since this expenditure had not been claimed as revenue expenditure, disallowance of any part of the expenditure is highly unjustified. There is also an error in calculating the amount of expenditure at Rs. 9,43,32,601/-. Purchase of lubricant from Asha Enterprises is duly backed by the invoices. No enquiry has been made to verify the genuineness of the purchases. Therefore, the remarks of the AO are conjectural in nature. Purchases from Central Tyres were also duly vouched and payments were made by way of cheques. Obviously, the

assessee cannot be and is not in a position to explain as to why there are two series of invoices bearing three digit numbers and five digit numbers. The expenditure also cannot be held to be bogus simply because on some bills stamp of sales-tax department has not been affixed. Looking to all these facts, it is argued that the AO erred in making disallowances and thereafter covering these disallowances by estimating income at 10% of the receipts. On the other hand, the ld. CIT(Appeals) has properly appreciated the facts of the case that proper books have been maintained. The books have been duly audited, percentage completion method has been followed for accounting revenues on the basis of the expenditure and, thus, neither any disallowance could have been made nor the profit could have been estimated.

8.3 At this juncture, we may examine various cases cited before us in the course of hearing. The ld. DR relied on the decision of Mumbai Bench of the Tribunal in the case of DCIT Vs. Samir Diamond Exports (P) Ltd., (1999) 71 ITD 75. In this case, the AO had noted that there was a sharp decline in the gross profit rate from 11.7% in the immediately preceding year to 5.99% in this year. The contemporaneous and corroborative evidence had admittedly been destroyed. On these facts,

the action of rejection of books was upheld and the submission of the assessee that it was his prerogative to main books in a manner it likes and the AO could not reject them because books have been accepted in past, was rejected. Further, the ld. DR relied on the decision of Hon'ble Supreme Court in the case of S.N. Namasivayam Chettiar Vs. CIT, (1960) 38 ITR 579. It has been held that the power to estimate profit by rejection of books of account arises only where the assessee has not followed a regular method of accounting or where the method is such that profits and gains cannot be properly deducted. It means that the method adopted by the assessee must prima facie prevail where it is regularly employed. However, the AO can exercise this power when true profits cannot be determined. He also relied on the decision in the case of Bhai Sunder Dass Sardar Singh (P) Ltd. Vs. CIT, (1972) 84 ITR 106 (Del). In this case, the AO had estimated the profit of the assessee in respect of a contract on account of low profit rate of 9%. By rejecting the accounts he applied the rate of 12.5%. Before the AAC, it was admitted that full quantitative details might not be available in respect of stores of the value of Rs. 1,30,000/- consumed in execution of the contract. He considered the facts and reduced the addition to Rs. 10,000/-. The Tribunal also considered the additional material that net

profit for the next year was 9.9%. The addition was reduced to Rs. 6,000/-. The Hon'ble Delhi High Court held that there was material before the Tribunal to make estimated addition and no question of law arises from the order of the Tribunal. The ld. DR also relied on the decision of Hon'ble Allahabad High Court in the case of Awadhesh Pratap Singh Abdul Rehman And Brothers Vs. CIT, (1994) 210 ITR 406. In this case, the assessee had not maintained stock register and cash memo for sale. The vouchers for expenses were also not forth coming. The income returned was abysmally low when compared to a very high turnover. The Tribunal recorded a finding of fact that the claim for sustaining books of account was not meritorious. The Court held that this is a question of fact and no question of law arises therefrom.

9. In regard to the aforesaid, the case of the ld. counsel is that the books are audited and a regular system of accounting has been followed, which has been accepted in past. On revenue account, the AO has pointed out only minor discrepancies in respect of purchase of lubricant and tyres. In fact, these are not discrepancies but only doubts raised by the AO. In such a situation, the books could not have been rejected.

10. We have considered the facts of the case and submissions made before us. The facts are that the assessee is executing a turn-key project involving civil works for construction of a dam. It has maintained books of account on a regular basis in the course of business on the same basis as in past. These books have been duly audited also. Therefore, it is claimed that the provision contained in section 44BBB are not applicable and the income or loss has to be determined on the basis of the books of account. We are of the view that these submissions are in conformity with the provision contained in section 44BBB(2). Thus, the assessee can claim that the profit ought to be assessed on the basis of the books and presumptive rate of 10% is not applicable to this case.

10.1 Further, the assessee has been accounting for the receipts on percentage completion basis and, thus, it is following AS-7. For doing so, the assessee had worked out the estimate of receipts and expenditure at the beginning of the project. The estimate leads to loss of Rs. 130,81,90,931/-. Receipts have been taken as per agreement. The expenditure has been estimated. From year to year both these figures

can undergo change because of escalation in cost and claims made on account of escalation. However, the facts show that all escalation claims have not been fully accepted, leading to further loss with the progress of the work. On the aforesaid basis, returns have been filed for assessment years 2003-04 to 2005-06. In these returns, the receipts have been estimated on the basis of actual expenditure incurred. From the expenditure, the percentage of work completed is ascertained and the revenue is recognized accordingly. This very method has been followed in this year. The AO examined the books. He referred to some discrepancies in the accounting of expenditure incurred on addition to site office at camp. This expenditure is capital in nature and has not been claimed by the assessee as revenue expenditure. The averments made by the ld. counsel in this behalf have not been responded to by the ld. DR. He also examined expenditure incurred in respect of purchase of lubricant from Asha Enterprises. Nine items have been mentioned on page no. 7 in respect of such purchases. He also examined purchase of tyres from Central Tyres. 22 items have been listed on page no. 11. Five items bear five digits invoice numbers and the rest bear three digits invoice numbers. The expenses listed by the AO are miniscule compared to the overall expenditure. It is also mentioned that position in respect of

purchases from Ankit Electricals (P) Ltd. and Alpha Technical Services (P) Ltd. is same as in respect of Central Tyres. However, the details of purchases from these parties have not been mentioned. Thus, the position which emerges is that the assessee has followed regular system of accounting of the revenue as per AS-7, the books have been maintained and audited. The question is-whether, the ld. CIT(Appeals) was right in accepting the books of account?

10.2 As mentioned earlier, the AO has doubted the estimate of cost made initially. However, such estimation has been accepted in past and it forms the basis of assessment for three preceding years. Therefore, any change in this estimation would lead to disturbing past assessments which have been accepted. No evidence has been brought on record that such estimation was not bona-fide. Therefore, adopting a new basis of assessment will be against the rule of consistency. Having accepted a particular amount of estimate for expenditure on the whole project, it is not now open to the revenue to challenge this cost and thereafter follow a totally different method for assessment. The facts of the case of Samir Diamond Exports (P) Ltd. (supra) are distinguishable, inasmuch as the books of account were incomplete and corroborative and contemporaneous

evidence had admittedly been destroyed. Therefore, it was held that the books should be rejected in this year in spite of the fact that the books were accepted in past. Further, the facts of the case of S.N. Namasivayam Chettiar (supra) are also distinguishable because the Tribunal had recorded a finding that true profits cannot be determined for various reasons mentioned in its order. Such reasons do not exist in this case. The facts of the case of Bhai Sunder Dass Sardar Singh (P) Ltd. (supra) are also distinguishable because the assessee had no evidence regarding consumption of stores of the value of Rs. 1,30,000/-. However, it may be stressed that in this case also the Tribunal had taken into account the past results of the assessee for estimating the profit. The AO has not done so in the case at hand. The facts of the case of Awadhesh Pratap Singh Abdul Rehman And Brothers (supra) are quite distinguishable as stock register was not maintained and purchase and sales were not verifiable. These circumstances do not exist in this case. Having regard to the facts of the aforesaid cases, we are of the view that the AO could not have rejected the books of account and taken recourse to the provision contained in section 44BBB for estimating the income, especially when the provision is not applicable to the case of the assessee.

10.3 Coming to the discrepancies mentioned, expenditure in respect of site office has been capitalized and, thus, no addition can be made. The AO has made observations about purchases from Asha Enterprises, Central Tyres, Ankit Electricals (P) Ltd. and Alpha Technical Services (P) Ltd. The remarks are in the nature of raising suspicion. Nonetheless, the case of the ld. counsel is that all the bills are in possession of the assessee, which can be produced before the AO at any point of time. In view thereof, we restore the limited issue of verification of purchases from the aforesaid parties to the file of the AO and decide whether any purchase from these parties is not genuine. If it is found so, he may make disallowance only in respect of purchases which are found to be non-genuine.

10.4 Before parting, we may also mention that although the auditors have made a number of notes to the accounts, the case of the ld. counsel is that none of the notes has any reflection on authenticity of books or the system of accounting. This submission has not been controverted by

the ld. DR in any manner. Therefore, we are of the view that no adverse conclusion can be drawn from these notes.

11. In the result, the appeal is treated as partly allowed as discussed above, and the cross objection is dismissed.

Sd/- sd/-

(C.L. Sethi) (K.G. Bansal)
Judicial Member Accountant Member

SP Satia
Copy forwarded to:-

1. M/s Italian Thai Development Public Company Limited, 301-302, 3rd Floor, Sagar Tower, District Centre, Janakpuri, New Delhi-58.
2. Asstt. Director of Income-tax, Circle 1(2), (Intl. Tax.), New Delhi.
3. The CIT
4. The CIT (A)- , New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

Assistant Registrar.