

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

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 309/VIZ/2017
(Asst. Year : 2009-10)**

ACIT, Circle-3(1),
Visakhapatnam.

vs.

M/s. Raghavendra Constructions,
D.No. 10-183, Visalakshi Nagar,
Visakhapatnam.

(Appellant)

PAN No. AAEFR 6254 P
(Respondent)

**C.O.No. 57/VIZ/2017
(ITA No. 309/VIZ/2017)
(Asst. Year : 2009-10)**

M/s. Raghavendra Constructions,
D.No. 10-183, Visalakshi Nagar,
Visakhapatnam.

vs.

ACIT, Circle-3(1),
Visakhapatnam.

PAN No. AAEFR 6254 P
(Applicant)

(Respondent)

Assessee by : Shri C. Subrahmanyam – FCA.
Department By : Shri D.J.P. Anand – Sr.DR

Date of hearing : 01/12/2017.
Date of pronouncement : 20/12/2017.

ORDER

PER D.S. SUNDER SINGH, ACCOUNTANT MEMBER

This appeal by the revenue and the cross objection by the assessee are directed against the order of Commissioner of

Income Tax (Appeals), Vijayawada, dated 31/01/2017 for the Assessment Year 2009-10.

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2. Facts of the case, in brief, are that the assessee is a partnership firm, engaged in the business of civil contracts, filed its return of income for the Assessment Year 2009-10 on 30/09/2009 on a total income of Rs. 1,06,59,300/-. The return was processed under section 143(1) of the Act. The case of the assessee was selected for scrutiny under CASS and the assessment was completed under section 143(3) of the Act on a total income of Rs.1,52,85,740/-. The Assessing Officer found that assessee had received total contract receipts of Rs. 26,66,70,613/-. Out of which, an amount of Rs. 5,42,90,048/- was given for sub-contract works to others and received sub-contract commission @1%, amounting to Rs.5,42,901/-. Further, a sum of Rs. 12,68,58,376/- was received on sub-contract work awarded to the assessee by M/s. Mahalakshmi Construction Corporation Ltd., Pune. Thus, the main contract works executed by the assessee was Rs.8,55,22,189/-. The Assessing Officer in the assessment proceedings found that the expenditure debited to the profit & loss account in respect of various heads is incapable of

verification. It was also observed by the Assessing Officer that whether expenditure attracts section 40A(3) or not, is also not clear, since expenditure in respect of purchases and other expenditure is not incapable of verification. Thus, the Assessing Officer rejected the books of account and resorted to estimation of income @8% on the main contract receipts and @ 6% on the sub-contract receipts, apart from sub-contract commission of Rs.5,42,901/-, which was received by the assessee separately. The Assessing Officer placed reliance on the decision of the Jurisdictional High Court of Andhra Pradesh in the case of *Indwell Constructions vs. CIT* reported in 232 ITR 776 (1998) and held that all other disallowances are taken care of, hence, depreciation and remuneration paid to the partners are not to be allowed and accordingly assessed the total income of Rs.1,52,85,740/-.

3. Aggrieved by the order of the Assessing Officer, the assessee went to the Id. CIT(A), who allowed the appeal of the assessee and directed the Assessing Officer to allow interest and remuneration from the estimated income, subject to the condition that the resultant income should not be less than the admitted income of the assessee. The Id. CIT(A), while allowing the appeal of the assessee, followed the order of this tribunal in the case of

DCIT vs. R.R. Constructions in ITA No. 47/VIZ/2013, by order dated 06/11/2015. For the sake of convenience, the relevant portion of the order is extracted as under:-

"6.1 Hon'ble ITAT, Visakhapatnam in the case of *M/s.Ratna Constructions v.ACIT, Circle-2(1), Vijayawada* in ITA No. 370/Viz/2011 order dated 13.12.2013 held that A.O. should not disallow interest and remuneration payment to partners. Relevant excerpt of the order is reproduced below:

5. We have considered submissions of Id. Representatives of parties and orders of authorities below. It is a fact on record that the income of the assessee was estimated @ 8% by rejecting books of account. The dispute is only with regard to the fact that as to whether after estimating the income further deduction can be allowed towards remuneration and interest payment to the partners. The CIT in exercise of his power u/s.263 of the Act has directed the AO to disallow the expenditure claimed by following the decision of Hon'ble Jurisdictional High Court in the case of *Indwell Constructions (supra)*. However, it is to be noted that the Visakhapatnam Bench as well as the Hyderabad Benches of this Tribunal in a number of decision after taking into consideration the ratio laid down in *Indwell constructions (supra)* have held that even in case of estimation of income, further deduction towards interest and remuneration payment to partners is allowable. The ITAT, Hyderabad Bench in the case of *P. Eswar Reddy (ITA No. 668/Hyderabad/2009)* dated 31/01/2011 while considering an identical issue noted that the decision of *Indwell Construction (supra)* was delivered prior to the introduction of section 44AD of the Act. Hence, the Tribunal held that after the introduction of section 44AD of the Act, even in case of estimation of income further deduction towards remuneration and interest payment to partners is allowable. Same view was again reiterated by the ITA T Hyderabad Bench in the case of *Venkateswara Swamy Lorry Services (ITA No.903 & 353/Hyd/2009)* dated 25.11.2009. When the department preferred appeal against this order of the Tribunal, Hon'ble Jurisdictional High Court upheld the view of the ITAT Hyderabad in judgement dt. 25.6.2013 in ITTA No.82 of 2013 by holding that in view of CBDT circular dated 31.8.1965, relied upon by the Tribunal, interest has to be allowed separately even in case of estimation of profit. Since the view taken by the AO is in consonance with the decision of the coordinate benches of the Tribunal and that view is one of the possible views, the assessment order passed under

section 143(3) cannot be held to be either erroneous or prejudicial to the interests of the revenue on this issue. In the aforesaid view of the matter, we direct the AO not to disallow the interest and remuneration payment to partners. The order of the CIT is modified to this extent."

6.2. *Respectfully following the above decision of Hon'ble ITAT Vizag, I direct the A.O. to allow partners' salary as per provisions of section 40(b) of the Income Tax Act.*

6.3. *Similarly, depreciation is allowable (non cash expenditure) even after estimation of net profit on gross receipts was held by Hon'ble ITAT, Vizag in its order in ITA No.471Vizag/2013 (DCIT, Circle-2(1), Vja v. R.R.Constructions, Vja) and ITA No.154/Vizag/2013 (R.R.Constructions, Vja vs. DCIT, Circle-2(1), Vja) dated 06.11.2015. The same is reproduced below:*

"We have considered the submissions made by either parties and also gone through the case laws relied upon by the AR. We find that the ITAT, Visakhapatnam Bench in the case of Srivalli Shipping & Transports Pvt. Ltd. (supra) held the issue in favour of assessee.

The ITA T while dealing with the similar issue held as under:

24. On consideration of rival contentions, we find merit in the submission made by the assessee. The capital expenditure incurred is not allowed deduction, but the deterioration in their value is allowed as deduction with the name 'depreciation'. Hence, it is called non-cash expenditure and also called statutory deduction. While estimating the income, in ITA Nos.79 to 851Viz/2013 I.T.A.Nos.89 to 95/Viz/2013 Assessment Year 2004-05 to 2010-2011 Srivalli Shipping Transport results only are estimated on the basis of sales/gross receipts, meaning thereby, what is estimated is only the net profit before allowing any non-cash expenditure / statutory deductions. Further, the quantum of depreciation would also depend upon the value of assets. For example, a business man having lower version of Car or Air Conditioner would be entitled to claim lower amount of depreciation, since the cost of the lower version of car and Air Conditioner will be less. Whereas another business man having higher version of Car and Air Conditioner would get higher amount of depreciation, since the cost of those assets shall be higher. Hence, even if the level of operations and other things are equal between the two, the depreciation amount will be different due to the difference in the value of assets. Hence the total income shall also result in different figures between the two business men. The above said illustration would support the contentions of the assessee that the depreciation should be

allowed separately. Accordingly, we direct the AO to allow the depreciation admissible to the assessee against the income estimated by us in the preceding paragraphs."

11. Considering the facts and circumstances of the case and also applying the ratios of the decision relied upon by the AR., we are of the opinion that depreciation is a allowable deduction, even after estimation of net profit on gross receipts. Accordingly, we direct the A.O. to allow the admissible depreciation against the income estimated from the contract receipts."

6.4. I, therefore, direct A.O. to allow (1) eligible depreciation and (2) allowable partners' remuneration as per provisions of the Act subject to the condition that resultant income should not be less than admitted income of appellant."

4. Aggrieved by the order of the Id. CIT(A), the revenue is in appeal before this tribunal challenging the direction of the Id.CIT(A) that he should not have allowed the depreciation and remuneration paid to the partners, and the assessee is in cross objection supporting the order of the Id. CIT(A).

5. The revenue's case is that since Assessing Officer has estimated the income at 8% on main contract receipts and 6% on sub-contract receipts, and no separate deduction is required to be allowed on account of depreciation and the remuneration separately. The Assessing Officer stated to have considered all the disallowances, which are required to be allowed to the assessee while estimating the net profit. Therefore, no separate deduction is required to be allowed.

6. The case of the assessee is that the deduction is a statutory allowance, which is required to be allowed even if income is estimated as has been held by the Hon'ble Jurisdictional High Court in the case of *CIT vs. Y. Ramachandra Reddy* in I.T.T.A. No. 48/2002, by order dated 30/07/2014. The Authorised Representative of the assessee further submitted that in this line of business, maintenance of pakka vouchers are impossible since the assessee is engaged in the business of civil contracts, however, the assessee had maintained proper books of accounts with relevant vouchers and the books of accounts were properly audited by the qualified Accountant and the Assessing Officer has verified the books of accounts and vouchers, but did not find any defect, except the nature of non-verification of certain expenses. Therefore, he argued that depreciation and remuneration paid to the partners are required to be allowed from the estimated income and no interference is called for in the order of the Id. CIT(A).

7. We have heard both the parties and perused the material placed on record.

8. The assessee is in the business of civil contract works and has maintained books of account, which were duly audited by the qualified Accountant. During the assessment year under

consideration, the assessee received the total contract receipts of Rs.26,66,70,613/-, out of which he has given sub-contract works of Rs. 5,42,90,048/- and received the commission of Rs.5,42,901/-. From the balance amount of contract receipts of Rs.21,34,00,565/-, an amount of Rs. 12,68,58,376/- was received on sub-contract work given by M/s. Mahalakshmi Construction Corporation Ltd., Pune. Thus, the main contract works executed by the assessee was of Rs. 8,65,42,189/-. The Assessing Officer found that the items of expenditure debited to the profit & loss account under the heads bitumen, bricks, cements, gravel, metal, road metal, sand, steel and stone, construction expenses, consumable stores, earth work payments, repairs & maintenance, salaries, labour charges, transport charges etc. are not verifiable hence, made self paid vouchers. Many petty payments were made in cash and it is also not ascertainable whether the payments attract the disallowance under section 40A(3) of the Act or not. Therefore, the Assessing Officer rejected the books of account and estimated the income. During the hearing in appeal, Id.Authorised Representative for the assessee did not make out any case to controvert the findings given by the Assessing Officer with regard to nature of expenses and its capability of verification.

When the assessee cannot establish the genuineness of the expenses, we do not find any error in the action of the Assessing Officer for computing the income on estimate basis. Therefore, we uphold the order of the Id. CIT(A) with regard to estimation of income @ 8% on main contract receipts and @ 6% on sub-contract receipts, apart from sub-contract commission.

9. The next issue in revenue's appeal is with regard to direction of the Id. CIT(A) to allow depreciation and remuneration paid to the partners.

10. The assessee has claimed depreciation of Rs. 67,12,499/- and remuneration paid to the partners of Rs. 2,72,000/-, which is allowed by the Id. CIT(A). The depreciation is a statutory allowance which required to be allowed by the Assessing Officer, even if income is estimated as has been held by the Hon'ble Jurisdictional High Court of Andhra Pradesh in the case of Y. Ramachandra Reddy (supra). The Assessing Officer selected the case for verification of depreciation and as per the information available on record, he has verified the depreciation and found that there was no defect in the transaction. The Assessing Officer has observed that the suppliers had supplied wooden structures and the assessee is eligible for higher rate of depreciation. The

Assessing Officer has also viewed that no disallowance is required to be made on account of depreciation, hence, we are of the opinion that assessee is entitled for depreciation from the estimated income, since Id. CIT(A) while allowing the appeal, followed the order of this tribunal on similar facts and no material is placed to controvert the findings of the Id. CIT(A). Therefore, we uphold the order of the Id. CIT(A) and dismiss the appeal of the revenue. However, the resultant income should not be less than the returned income of the assessee.

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11. The cross objection filed by the assessee is in support of the order of the Id. CIT(A). As we have already upheld the order of the Id. CIT(A) in preceding paragraphs, this cross objection filed by the assessee stands allowed.

12. In the result, appeal filed by the revenue is dismissed and the cross objection filed by the assessee is allowed.

Order Pronounced in open Court on this 20th day of Dec., 2017.

Sd/-
(V. DURGA RAO)
Judicial Member

sd/-
(D.S. SUNDER SINGH)
Accountant Member

Dated : 20th December, 2017.

vr/-

Copy to:

1. The Assessee - M/s. Raghavendra Constructions, D.No. 10-183, Visalakshi Nagar, Visakhapatnam.
2. The Revenue - ACIT, Circle-3(1), Visakhapatnam.
3. The Pr.CIT-1, Visakhapatnam.
4. The CIT(A), Vijayawada.
5. The D.R., Visakhapatnam.
6. Guard file.

By order

Sr. Private Secretary,
ITAT, Visakhapatnam.

