

आयकर अपीलीय अधिकरण “बी” न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, PUNE

(Through Virtual Court)

**BEFORE SHRI INTURI RAMA RAO, AM
AND SHRI S. S. VISWANETHRA RAVI, JM**

Sl. No.	ITA No.	Name of Appellant	Name of Respondent	Asst. Year
1-4	773/PUN/2015 774/PUN/2015 709/PUN/2016 802/PUN/2017	B.C. Biyani Project Pvt. Ltd., Biyani Chambers, Jamner Road, Professor Colony, Bhusawal – 425201. PAN : AACCB3617R	JCIT, Range-1/DCIT, Circle-2, Jalgaon.	2010-11 2011-12 2012-13 2013-14
5-8	841/PUN/2015 842/PUN/2015 864/PUN/2016 566/PUN/2017	DCIT, Circle-2, Jalgaon.	B.C. Biyani Project Pvt. Ltd., Biyani Chambers, Jamner Road, Professor Colony, Bhusawal – 425201. PAN : AACCB3617R	2010-11 2011-12 2012-13 2013-14

Assessee by : Shri Sanket Joshi
Revenue by : Shri Deepak Garg
Shri S. P. Walimbe

सुनवाई की तारीख / Date of Hearing : 27.10.2021
घोषणा की तारीख / Date of Pronouncement : 14.12.2021

आदेश / ORDER

PER BENCH :

These are the cross appeals filed by the assessee company as well as by the Revenue directed against the separate orders of ld. Commissioner of Income Tax (Appeals)- 2, Nashik ('CIT(A)' for short) dated 17.03.2015, 29.02.2016 and 06.12.2016 for the assessment years 2010-11, 2011-12, 2012-13 and 2013-14 respectively.

2. First, we shall take up the cross appeals of the assessee as well as the Revenue in ITA No.773/PUN/2015 and ITA No.841/PUN/2015 for the assessment year 2010-11.

3. Briefly, the facts of the case are as under :-

The assessee is a private limited company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of execution of Government Contracts. The return of income for the assessment year 2010-11 was filed on 31.03.2011 declaring total income of Rs.3,97,10,060/-. Against the said return of income, the assessment was completed by the Joint Commissioner of Income Tax, Range-1, Jalgaon ('the Assessing Officer') vide order dated 25.03.2013 passed u/s 143(3) of the Income Tax Act, 1961 ('the Act') at a total income of Rs.54,69,74,040/-. While doing so, the Assessing Officer made several disallowances. Out of which, three disallowances, with which we are concerned, as follows : (i) Disallowance of Interest over loan given to sister concern of Rs.1,90,56,762/-; (ii) Disallowance of labour charges u/s 40(a)(ia) of Rs.15,16,16,600; and, (iii) Disallowance u/s 41(1) of Rs.94,59,495/-.

4. Being aggrieved by the above disallowances, an appeal was preferred before the Id. CIT(A), who vide impugned order, had granted relief in respect of addition of interest u/s 36(1)(iii) of Rs.1,90,56,762/- by returning a finding of fact that the interest free funds are more than the borrowed funds and the advances to the sister concern be presumed to have been made out of the free funds and, therefore, no disallowance u/s 36(1)(iii) was warranted placing reliance on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Reliance Utilities & Power Ltd., 313 ITR 340.

5. As regards to the addition u/s 40(a)(ia), the Id. CIT(A) considering the following facts that

- (i) The appellant has claimed substantial payments to site labourers to the extent of Rs.14,52,00,000/- and Rs.19,83,86,562/- in AYs. 2010-11 & 2011-12 respectively.
- (ii) The appellant has made payments to site labourers through its employees/supervisors to the group/gang leaders of the site labourers, who are generally from Orissa, Assam & Bihar.
- (iii) The appellant company has maintained vouchers for the said payments to group/gang leaders which are duly signed by the recipient group/gang leaders. The names of the said persons are appearing in the list of payments given by the A.O. in the remand report.
- (iv) The appellant company has maintained vouchers for payments to each individual labourers or even names of the individual site labourers to whom payments have been made through group/gang leaders.
- (v) All the above payments to site labourers are made in cash, though impliedly payment to each individual labourer is below Rs.20,000/- at a time on one day.
- (vi) No labourer could be produced for verification by the appellant before the A.O. after 4 years, as the said labourers are stated to be from Orissa, Assam & Bihar and have left the sites after work at sites has been completed.

concluded that no disallowance u/s 40(a)(ia) can be invoked in respect of the labour payment as the TDS officers had not made order u/s 201 of the Act. The ld. CIT(A) further held that the provisions of section 40A(3) have no application to the labour payments as the payment to each individual labour at site does not exceed Rs.20,000/- in a single day.

6. However, the ld. CIT(A) taking into account the fact that the assessee had failed to produce the labourers before the Assessing Officer for verification for one reason or other and no proper vouchers and evidences for the expenditure were maintained, doubting the genuineness of the

expenditure, disallowed to the extent of 30% of the labour payment i.e. Rs.14,52,00,000/- being Rs.4,35,60,000/-. The ld. CIT(A) also confirmed the addition on account of alleged bogus credit of Rs.94,59,495/- u/s 41(1) of the Act, vide para 13.5 by citing that the assessee had failed to file the confirmations from the parties during the course of assessment proceedings or the proceedings before the ld. CIT(A).

7. Being aggrieved by the order of the ld. CIT(A), which is against the assessee, the assessee is in appeal before us in ITA No.773/PUN/2015 for the assessment year 2010-11 and being aggrieved by the decision of the ld. CIT(A) that no disallowance u/s 36(1)(iii) is warranted, the Revenue is in appeal in ITA No.841/PUN/2015 for the assessment year 2010-11.

ITA No.773/PUN/2015, A.Y. 2010-11 – By Assessee

8. First, we shall take up the assessee's appeal in ITA No.773/PUN/2015 for the assessment year 2010-11 for adjudication.

9. The ground of appeal nos.1 to 4 raised by the assessee are dismissed as not pressed during the course of hearing of the appeal.

10. The ground of appeal no.5 challenges the decision of the ld. CIT(A) confirming the addition u/s 41(1) of Rs.94,59,495/- on account of alleged bogus sundry creditors. During the course of assessment proceedings, the Assessing Officer had called for the details of outstanding liabilities pertaining to the creditors. The Assessing Officer also carried out the verification of sundry creditors by exercising the power vested with him u/s 133(6) of the Act. On such verification, the Assessing Officer found that the assessee had shown excess liabilities of Rs.7,88,961/- in respect of 5 parties and in respect of 4 parties, the Assessing Officer found a sum of Rs.3,69,357/- was shown

excess by the creditors. In respect of 11 parties, no confirmation has been filed aggregating to sum of Rs.83,01,177/-. In the above circumstances, the Assessing Officer inferred that the sundry creditors appearing in the books of accounts are bogus. Accordingly, he brought to tax a sum of Rs.94,59,495/- invoking the provisions of section 41(1) of the Act. Even on appeal before the Id. CIT(A), the addition came to be confirmed.

11. Being aggrieved, the assessee is in appeal before us in the present ground of appeal.

12. It is submitted before us that the outstanding balances have been paid in the subsequent year upto assessment year 2013-14. This fact has been verified by the Assessing Officer during the course of regular assessment proceedings. It is further submitted that though this contention was not taken before the lower authorities, the fact that this issue was examined by the Assessing Officer during the course of assessment proceedings for the subsequent assessment years and these sundry creditors were paid would go to establish the genuineness of the sundry creditors. It is also submitted that merely because of non-submission of confirmations from the sundry creditors does not *ipso facto* establish that the sundry creditors are fictitious.

13. Without prejudice to the above, it is prayed that the issue may be remanded to the file of the Assessing Officer for the purpose of verifying the subsequent repayment and once the Assessing Officer is satisfied himself about the repayment of sundry creditors, Assessing Officer may be directed to delete the addition.

14. On the other hand, ld. Sr. DR has no objection to remand the issue to the file of Assessing Officer for the purpose of verifying the payment to the sundry creditors.

15. We heard the rival submissions and perused the material on record. The only issue in the present ground of appeal relates to the addition on account alleged bogus sundry creditors to the extent of Rs.83,01,177/-. From the perusal of the orders of the lower authorities, it would be clear that on account of failure of the assessee to produce the confirmations from the said parties, addition was made. We need not delve into the aspect whether mere non-production of confirmation from the sundry creditors entails the addition or not as both sides had agreed to remand the matter to the file of the Assessing Officer for the purpose of verification of fact whether or not the payments were made to the sundry creditors in subsequent period through banking channels. Once, it is found that the sundry creditors were paid in subsequent year it would undoubtedly establish the genuineness nature of the sundry creditors. Therefore, this ground of appeal no.5 is remanded to the file of the Assessing Officer with a direction to verify the evidence of payment made to the sundry creditors in subsequent year, if found so, not to make any addition as bogus credits in the present assessment year. As a result, this ground of appeal no.5 raised by the is partly allowed for statistical purposes.

16. The ground of appeal no.6 challenges the ad-hoc disallowance of 30% of the labour charges of Rs.14,52,00,000/- doubting the genuineness of the expenditure. During the course of assessment proceedings, the Assessing Officer disallowed the 30% labour charges of Rs.14,52,00,000/- by holding that the assessee had not complied with the TDS provisions invoking the provisions of section 40A(3) of the Act. However, during the course of

proceedings before the ld. CIT(A), the ld. CIT(A) taking note of the fact that no order u/s 201 was passed by the TDS Officers held that the provisions of section 40(a)(ia) have no application. Further, the ld. CIT(A) held that even the provisions of section 40(a)(ia) had no application to the subject-payment taking note of the fact that no single labour was paid a sum exceeding Rs.20,000/- on a single day. However, the ld. CIT(A) had disallowed 30% of the labour charges taking note of the fact that the assessee had failed to produce the labourers before the Assessing Officer for verification and no proper vouchers were maintained in respect of the said expenditure. Accordingly, disallowed ad-hoc disallowance of 30% of the direct labour charges.

17. Being aggrieved, the appellant is in appeal before us in the present ground of appeal.

18. It is submitted before us that the ld. CIT(A) had accepted that the assessee had maintained duly signed vouchers in respect of the labour payments and the reasons given for disallowance of 30% of labour charges that the assessee had not maintained the vouchers in respect of payment of labour charges is contrary to the observation made by the ld. CIT(A) in para (iii) on page 37 of his order.

19. The other argument advanced is that it is practically impossible to produce the labourers for verification as the labourers hail from States like Orissa, Assam and Bihar. The payments are made to the labourers through their group leaders, who in turn, distributed the same amongst the individual labourer. He further submitted that in the tender documents the value of labour charges was computed @ 30% of the total value of the contract. As against this, the assessee incurred only labour charges to the extent of 33%

which is within +/-10%. Thus, it was submitted that the labour charges claim is not excessive and unreasonable. Without prejudice to the above, it is submitted that in the assessment made u/s 143(3) for alleged assessment years 2005-06 to 2008-09, the Assessing Officer made ad-hoc disallowance of Rs.10,00,000/- only for assessment year 2008-09. For the assessment year 2007-08, ad-hoc disallowance of Rs.5,00,000/- was made and during the assessment years 2005-06 and 2006-07, no disallowance or labour charges was made. Therefore, it is pleaded that on the principle of consistency also no disallowance of labour charges to the extent of 30% can be made.

20. On the other hand, ld. Sr. DR placed reliance on the orders of the lower authorities.

21. We heard the rival submissions and perused the material on record. The issue in the present ground of appeal relates to the ad-hoc disallowance of 30% of the labour charges. It is a case of the Assessing Officer that the labour payments are subject to provisions of TDS. For non-compliance of TDS provisions, made the disallowance u/s 40(a)(ia) of the Act and also invoked section 40A(3) of the Act. However, on appeal before the ld. CIT(A), the reasoning of the Assessing Officer was turned down by the ld. CIT(A) by holding that the provisions of section 40A(3) have no application since no single payment exceeded Rs.20,000/- in single day. Further, the ld. CIT(A) also ruled out the applicability of the provisions of section 40(a)(ia) of the Act. During the remand proceedings before the ld. CIT(A), the assessee could not produce the labourers for cross-verification, coupled with the fact that the vouchers are self-made, the ld. CIT(A) made the ad-hoc disallowance of 30% of the labour charges.

22. From the perusal of the order of the ld. CIT(A), it is clear that the ld. CIT(A) had accepted factum of incurring the expenditure by observing that the works could not have been completed without engagement of the labourers. Thus, the genuineness of the expenditure is beyond the doubt but what is doubted by the ld. CIT(A) is the reasonableness of its expenditure having regard to the fact that the vouchers are self-made. The approach of the ld. CIT(A) cannot be sustained for the reason that having regard to the trade business practices, the vouchers in respect of the labour payments are clearly self-made by acknowledgement of receipt from the labourers or his gang leaders, which is not in doubt in present case. There is no doubt on cash entries made in the books of accounts, no material was brought on record by the ld. CIT(A) casting doubts on the genuineness of the labour payments. Recently, the Hon'ble Karnataka High Court in the context of payment of speed money to port workers, the approach of the lower authorities making ad-hoc disallowance was not accepted in the case of *Sri Ganesh Shipping Agency vs. ACIT*, 435 ITR 143 following its earlier decisions in the case of (i) *CIT vs. Clifford D'Souza* (IT Appeal No. 22 of 2011, dated 24-2-2015) and (ii) *CIT vs. Konkan Marine Agencies*, 313 ITR 308 (Kar.). Similarly, the Hon'ble Rajasthan High Court in the case of *CIT vs. Consulting Engineering Group Ltd.*, 365 ITR 284 held that in the absence of evidence of bogus payment, the disallowance of part of payment on estimate basis was held to be unjustified. Further, the jurisdiction of the ld. CIT(A) is only confined to deciding the reality of the expenditure which means the ld. CIT(A) has to render a finding as to whether the amount claimed as deduction was actually expended or laid out wholly or exclusively for the purpose of business. The reasonableness of the expenditure should be gone into only for the purpose of determining whether the amount was paid.

23. In the present case, nothing is discernable from the perusal of the order of the ld. CIT(A) that the ld. CIT(A) had made an attempt to test the reality of the expenditure. Nor can be it said that he doubted the reality of the expenditure, it cannot be also said that the total labour charges incurred is excessive or unreasonable having regard to the fact that tender documents computed 30% of the contract value as a labour component and the actual charges only 33% of the contract value which is merely 10% excess. Thus, in any event, it cannot be said that the labour charges incurred are excessive or unreasonable. Therefore, the decision of the ld. CIT(A) making the ad-hoc disallowance of labour charges at 30% cannot be sustained in the eyes of law. Accordingly, this ground of appeal no.6 stands allowed.

24. The ground of appeal nos.7 to 10 not pressed and the same are dismissed as not pressed.

25. The ground of appeal no.11 challenges the decision of the ld. CIT(A) confirming the blasting charges of Rs.40,20,100/- u/s 40(a)(ia) of the Act. The Assessing Officer made addition on account of blasting charges of Rs.40,20,100/- paid to M/s. Patidar Enterprises, Khargaon for non-deduction of TDS u/s 194C of the Act. Even on appeal before the ld. CIT(A), the same was confirmed.

26. It is submitted before us that the payee had already offered the receipt to tax in the return of income and, therefore, the benefit of second proviso to section 40(a)(ia) should be granted after due verification.

27. On the other hand, ld. Sr. DR has no objection if the matter is remanded back.

28. In the backdrop of the above facts, we remit this ground of appeal no.11 to the file of the Assessing Officer to examine the applicability of second proviso to section 40(a)(ia) after due verification of the evidence. Thus, this ground of appeal no.11 stands partly allowed for statistical purposes.

29. The ground of appeal nos.12 to 14 are not pressed and the same are dismissed as not pressed.

30. The additional ground of appeal no.1 challenges that the credit for TDS was not available in Form No.26AS. It being purely a legal issue, we remit this additional ground of appeal no.1 to the file of the Assessing Officer to allow the credit of tax deduction as reflected in Form No.26AS for the assessment year 2010-11. Thus, the additional ground of appeal no.1 stands partly allowed for statistical purposes.

31. In the result, the appeal filed by the assessee in ITA No.773/PUN/2015 for the assessment year 2010-11 is partly allowed for statistical purposes.

ITA No.841/PUN/2015, A.Y. 2010-11 – By Revenue

32. Now, we come to the Revenue's appeal in ITA No.841/PUN/2015 for the assessment year 2010-11.

33. The issue raised by the Revenue in the grounds of appeal relates to the disallowance of interest of Rs.1,90,56,762/- u/s 36(1)(iii) towards proportionate interest cost attributable to interest free advance given to sister concern. During the course of assessment proceedings, the Assessing Officer found that the assessee made interest free advances of Rs.15,88,06,348/- to its sister concern, namely, M/s. Amicitia Infrastructure Pvt. Ltd.. The Assessing Officer observed that the assessee company incurred interest

expenditure of Rs.7,80,20,484/-. Accordingly, he inferred that the proportionate interest cost attributable to interest free loan of Rs.15,88,06,348/- @ 12% should be disallowed.

34. On appeal before the ld. CIT(A), the ld. CIT(A) considering the fact that the assessee was in a possession of reserve funds whereas the interest free loan given to the sister concerns is less than the available reserve funds with the assessee, deleted the addition u/s 36(1)(iii) of the Act placing reliance on the decision of the Jurisdictional High Court in the case of CIT vs. Reliance Utilities & Power Ltd., 313 ITR 340 (Bom.-HC) vide para 6.5 of his order.

35. Being aggrieved by the above decision of the ld. CIT(A), the Revenue is in appeal before us.

36. The ld. DR placing reliance on the order of the Assessing Officer submitted that the ld. CIT(A) ought not to have granted relief.

37. On the other hand, ld. AR submitted that own funds available with the assessee company by way of share capital and reserve as on 31.03.2010 is Rs.29,30,91,020/- as against the interest free loans given to sister concern of Rs.15,88,06,348/-. Therefore, the question of disallowance u/s 36(1)(iii) does not arise. He further submitted that when the mixed funds is used for the purpose of making the interest free loan, presumption should be drawn that free funds are used for the purpose of making the interest free loan. He also relied upon the decision of the Hon'ble Supreme Court in the case of CIT vs. Reliance Industries Ltd., 410 ITR 466 (SC) affirming the decision of the Hon'ble Bombay High Court in the case of CIT vs. Reliance Industries Ltd., 161 DTR 420 (Bom.-HC) and CIT vs. Reliance Utilities & Power Ltd., 313 ITR 340 (Bom.-HC).

38. We heard the rival submissions and perused the material on record. The issue in the present appeal of the Revenue relates to the disallowance of proportionate interest on loans advanced to sister concern. The Assessing Officer was of the opinion that as the assessee had not charged any interest on the loan advanced to sister concern, namely, M/s. Amicitia Infrastructure Pvt. Ltd., the proportionate disallowance of interest should be made u/s 36(1)(iii) of the Act. The view of the Assessing Officer was turned down by the Id. CIT(A) taking into consideration the fact that the reserve funds available with the assessee company as on 31.03.2010 are much more higher than the amount of loan advanced to sister concern and presuming that the interest free loan was made out of the assessee company's own reserve funds not out of borrowed funds. In the present case, it is undisputed position that the free reserves as on 31.03.2010 are Rs.29.30 crores as against the interest free advance of Rs.15.88 crores made to the sister concern. Now, the law is settled to the extent when the mixed funds is used for the purpose of making the advance to sister concern on which no interest was charged, presumption should be drawn that interest free loan was made out of the free reserves. In such circumstances, no disallowance u/s 36(1)(iii) is required to be made. This proposition of law laid down initially by the Hon'ble Bombay High Court in the case of CIT vs. Reliance Utilities & Power Ltd. (supra) wherein it has been held that in a situation where the assessee has mixed funds partly of interest free funds and partly interest bearing funds, presumption is to be drawn that investments or interest free loan is made out of the own funds and this decision of the Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd. (supra) was affirmed by the Hon'ble Supreme Court in the case of CIT vs. Reliance Industries Ltd., 410 ITR 466 (SC) wherein it is held that presumption is drawn that the interest free loan is made out of own funds, the question of disallowance of proportionate interest of loans advanced to sister concern does not arise. The order of the Id. CIT(A) is based

on proper appreciation of fact and law as laid down by the Hon'ble Supreme Court (supra). Therefore, we do not find any reason to interfere with the order of the Id. CIT(A).

39. In the result, the appeal filed by the Revenue in ITA No.841/PUN/2015 for the assessment year 2010-11 is dismissed.

ITA No.774/PUN/2015, A.Y. 2011-12 – By Assessee

ITA No.842/PUN/2015, A.Y. 2011-12 – BY Revenue

40. Now, we shall take up the cross appeals of the assessee as well as the Revenue in ITA No.774/PUN/2015 and ITA No.842/PUN/2015 for the assessment year 2011-12.

41. Briefly, the facts of the case are as under :-

The assessee is a private limited company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of execution of Government Contracts and trading in coal. The return of income for the assessment year 2011-12 was filed on 16.02.2012 declaring total income of Rs.Nil. Against the said return of income, the assessment was completed by the Joint Commissioner of Income Tax, Range-1, Jalgaon ('the Assessing Officer') vide order dated 26.03.2014 passed u/s 143(3) of the Income Tax Act, 1961 ('the Act') at a total income of Rs.9,39,79,630/-. While doing so, the Assessing Officer rejected the book results in respect of the business of execution of civil contracts primarily on the ground that there is fall in the net profit as compared to the preceding years, no stock register and salary wages register had been maintained by the assessee company and the cash payment was made to the labourers. After rejecting the book results, the Assessing Officer had proceeded with estimation of net profit of 8% of the gross receipts of Rs.92,47,46,336/-. Further, the Assessing Officer also made

a disallowance of interest u/s 36(1)(iii) of Rs.1,58,05,530/- on the interest free loan given to sister concern, namely, M/s. Amicitia Infrastructure Pvt. Ltd.. The Assessing Officer also made other disallowances on account of bogus purchase of coal of Rs.26,42,369/-.

42. Being aggrieved by the above additions, an appeal was preferred before the Id. CIT(A), who vide impugned order held that the rejection of book results is not proper and just by holding that the defects pointed out does not warrant complete rejection of book results, but justify disallowance of 30% of labour charges and, accordingly, directed Assessing Officer to make ad-hoc disallowance of 30% of labour charges.

43. Hence, the Revenue is in appeal before us in ITA No.842/PUN/2015 for the assessment year 2011-12 challenging the decision of the Id. CIT(A) not the rejecting book results and the assessee is in appeal in ITA No.774/PUN/2015 for the assessment year 2011-12 being aggrieved by that part of the order of the Id. CIT(A) which is against the assessee directing Assessing Officer to disallow 30% of the labour charges.

ITA No.842/PUN/2015, A.Y. 2011-12 – By Revenue

44. Now, we shall take up the Revenue's appeal in ITA No.842/PUN/2015 for the assessment year 2011-12 challenging the decision of the Id. CIT(A) holding that rejection of book results is not just and proper.

45. On mere perusal of the assessment order, it would be apparent that the Assessing Officer had proceeded to reject the book results on the premise that there is a gross fall in the net profit rate for the current assessment year as compared to preceding year and also the books of accounts maintained are not complete as no stock, salary and wages registered maintained. The

provisions of section 145 of the Act as substituted by the Finance Act, 1995 w.e.f. 1.4.1997 prescribes that the Assessing Officer may make an assessment to his best judgement as provided u/s 144 in the cases where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee or where the method of accounting employed by the assessee had not been regularly followed by the assessee etc. In the present case, it is not the case of the Assessing Officer that the assessee has not followed the method of accounting employed regularly. The reasons given by the Assessing Officer for rejection of book results is that there is fall in net profit as compared to earlier years and the defects in the maintenance of stock and labour register. It is settled position of law that mere fall in the gross profit and does not form the basis for rejection of the book results as held by catena of following decisions :-

- (i) Pioneer Sports Ltd. vs. CIT, 2 ITR 305 (Lah);
- (ii) Pandit Bros. vs. CIT, 26 ITR 159 (Punj);
- (iii) Veeriah Reddiar (S) vs. CIT, 38 ITR 152 (Ker.);
- (iv) Perianna Pillai & Co. (RMP) vs. CIT, 42 ITR 370 (Mad.);
- (v) Durai Raj (M) vs. CIT, 83 ITR 484 (Ker.);
- (vi) International Forest Co. vs. CIT, 101 ITR 721 (J&K);
- (vii) Motiram Pesumal vs. CIT, 149 ITR 786 (MP);
- (viii) Namasivayam Chettiar (SN) vs. CIT, 38 ITR 579 (SC);
- (ix) Punjab Trading Co. Ltd. vs. CIT, 53 ITR 335 (Pun.); and,
- (x) Deputy Commissioner of Income-tax, Lucknow vs. Hanuman Sugar (Khandsari) Mills (P.) Ltd., [2013] 38 taxmann.com 53 (Allahabad).

46. The relevant paragraphs of the judgement of the Hon'ble Allahabad High Court in the case of Hanuman Sugar (Khandsari) Mills (P.) Ltd. (supra) are reproduced hereunder :-

“7. It may be mentioned that profit being low by itself cannot be a ground for rejection of the books of account as per the ratio laid down in the following cases:

1. *Punjab Trading Co. Ltd. v. CIT [1964] 53 ITR 335 (Punj & Har.), and*

2. *Motiram Pesumal v. CIT* [1984] 149 ITR 786 (MP)

Moreover, in the instant case, the A.O. has rejected the books of account and made the addition on estimate basis.

It may be mentioned that estimation is a question of fact as per the ratio laid down in the following cases:

1. *CC (Import) v. Stonemann Marble Industries* [2011] 2 SCC 758.
2. *Vijay Kumar Talwar v. CIT* [2011] 330 ITR 1/196 Taxman 136/[2010] 8 taxmann.com 264 (SC);
3. *New Plaza Restaurant v. ITO* [2009] 309 ITR 259/183 Taxman 33 (HP), and
4. *Sanjay Oilcake Industries v. CIT* [2009] 316 ITR 274 (Guj.).”

47. Similarly, even there is defect in the books of account such as defect in maintenance stock, wage register an appropriate adjustment from the accounts maintained, taxable income may be properly deduced from the accounts maintained by following regularly employed accounting method then the Assessing Officer bound to compute the profits in accordance with method of accounting as held by the Hon’ble Supreme Court in the case of CIT vs. A. Krishnaswami Mudaliar, 53 ITR 122 (SC). The relevant paragraphs of the said judgement of the Hon’ble Supreme Court in the case of A. Krishnaswami Mudaliar (supra) are reproduced hereunder :-

“The Judicial Committee of the Privy Council observed in Commissioner of Income-tax v. Sarangpur Cotton Manufacturing Co. Ltd. [1938] 6 ITR 36:

“... the section relates to a method of accounting regularly employed by the assessee for his own purposes ... and does not relate to a method of making up the statutory return for assessment to income-tax. Secondly, the section clearly makes such a method of accounting a compulsory basis of computation, unless, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom. It may well be that, though the profit brought out in the accounts is not the true figure for income-tax purposes, the true figure can be accurately deduced therefrom.”

The Board also observed:

“It is the duty of the Income-tax Officer, where there is such a method of accounting, to consider whether the income, profits and gains can properly be deduced therefrom, and to proceed according to his judgment on this question.”

Again as observed by this court in Commissioner of Income-tax v. McMillan and Co. [1958] 33 ITR 182, the expression “in the opinion of the Income-tax Officer”

in the proviso to section 13 of the Indian Income-tax Act, 1922, does not confer a mere discretionary power; in the context it imposes a statutory duty on the Income-tax Officer to examine in every case the method of accounting employed by the assessee and to see whether or not it has been regularly employed and to determine whether the income, profits and gains of the assessee could properly be deduced therefrom.”

48. Though the decision was rendered under pre-amended provisions of the act, the general principle laid therein can be very well applied in the context of amended provisions of section 145 of the Act. Furthermore, the approach of the Assessing Officer while rejecting the book results is also flawed for the following reasons :-

- (i) Though the Assessing Officer referred to certain defects in the maintenance of books of account, we are unable to discern from assessment order as to what kind of defects are found by Assessing Officer. It appears that Assessing Officer gave bald finding. It is not discernable from the perusal of the assessment order that the assessee company was given an opportunity to explain the defects and show-cause as to why the book results should not be rejected. It is requirement of law before proceeding to reject the book results, the Assessing Officer give an opportunity of being heard to the assessee.
- (ii) The Assessing Officer had not brought any evidence on record indicating defects in the maintenance of stock, salary and wages register and also has not given a finding as a result of such defects in the maintenance of books of accounts, as to how he could not deduce the profits and gains of business.
- (iii) Though the provisions of sub-section (3) of section 145 confer discretion on the Assessing Officer to make assessment in the manner as provide u/s 144, yet the Assessing Officer cannot exercise such discretion arbitrarily in the sense the estimate of

income should be based on some material on record. It should not be based on the guess works, conjectures of the Assessing Officer.

49. The law in this regard is laid down by the Hon'ble Supreme Court in the case of Lalchand Bhagat Ambica Ram vs. CIT, 37 ITR 288 (SC) vide para 23 of its judgement. The relevant observation of the Hon'ble Supreme Court (supra) as under :-

"The limits of our jurisdiction to interfere with finding of fact reached by the courts or tribunals of facts have been laid down by us in various decisions of this court. In Dhirajlal Girdharilal v. Commissioner of Income-tax [1954] 26 ITR 736 we observed that when a court of fact arrives at its decision by considering material which is irrelevant to the enquiry, or acts on material, partly relevant and partly irrelevant, where it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its decision, a question of law arises: Whether the finding of the court of fact is not vitiated by reason of its having relied upon conjectures, surmises and suspicions not supported by any evidence on record or partly upon evidence and partly upon inadmissible material. We also observed in Dhakeswari Cotton Mills Ltd. v. Commissioner of Income-tax [1954] 26 ITR 775 that an assessment so made without disclosing to the assessee the information supplied by the departmental representative and without giving any opportunity to the assessee to rebut the information so supplied and declining to take into consideration all materials which the assessee wanted to produce in support of the case constituted a violation of the fundamental rules of justice and called for interference on our part. In Mehta Parikh and Co. v. Commissioner of Income-tax [1956] 30 ITR 181 this court observed that the conclusions based on facts proved or admitted may be conclusions of fact but whether a particular inference can legitimately be drawn from such conclusions may be a question of law. Where, however, the fact finding authority has acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found, the court is entitled to interfere. In our decision in Sree Meenakshi Mills v. Commissioner of Income-tax [1957] 31 ITR 28 after discussing the various authorities on the subject we laid down that:

"(3) A finding on a question of fact is open to attack under section 66(1) as erroneous in law when there is no evidence to support it or if it is perverse."

The latest pronouncement of this court in Omar Salay Mohamed Sait v. Commissioner of Income-tax [1959] 37ITR 151 summarises the position thus:

"We are aware that the Income-tax Appellate Tribunal is a fact finding tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it this court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or

matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this court."

50. In the present case, the Assessing Officer considered it fit to estimate 8% of net of depreciation and interest without there being anything on record. This is nothing but a complete guess work without referring to any material on record for arriving at the same. For above reasons, we are of the considered opinion that the ld. CIT(A) is justified in holding that the rejection of book results is not just and proper. Accordingly, the ground of appeal no.1 raised by the Revenue stands dismissed.

51. The ground of appeal no.2 challenges the decision of the ld. CIT(A) deleting the addition being proportionate interest free loan of Rs.15,88,06,348/- given to sister concern, namely, M/s. Amicitia Infrastructure Pvt. Ltd.. The issue is elaborately discussed by us in the Revenue's appeal in ITA No.841/PUN/2015 for the assessment year 2010-11. For the reasons stated therein, we dismissed this ground of appeal no.2 raised by the Revenue.

52. In the result, the appeal filed by the Revenue in ITA No.842/PUN/2015 for the assessment year 2011-12 stands dismissed.

ITA No.774/PUN/2015, A.Y. 2011-12 – By Assessee

53. Now, we shall take up the assessee's appeal in ITA No.774/PUN/2015 for the assessment year 2011-12 challenging the decision of the ld. CIT(A) making ad-hoc disallowance of 30% of the labour charges. The issue was discussed in great detail in the appeal of the assessee in ITA

No.773/PUN/2015 for the assessment year 2010-11. For the reasons stated therein, we hold that no ad-hoc disallowance of labour charges is warranted. Accordingly, ground of appeal is allowed.

54. The ground of appeal nos.2 to 7 are dismissed as not pressed during the course of hearing of appeal.

55. In the result, the appeal filed by the assessee in ITA No.774/PUN/2015 for the assessment year 2011-12 stands partly allowed.

ITA No.864/PUN/2016, A.Y. 2012-13 – By Revenue

56. Now, we shall take up the Revenue's appeal in ITA No.864/PUN/2016 for the assessment year 2012-13 challenging the decision of the Id. CIT(A) holding that the rejection of book results is not just and proper. This issue was discussed in great detail in Revenue's appeal for the assessment year 2011-12 in ITA No.842/PUN/2015. For the reasons stated therein, this ground of appeal no.1 raised by the Revenue stands dismissed.

57. The ground of appeal no.2 challenges the decision of the Id. CIT(A) deleting the disallowance of Rs.1,57,90,717/- u/s 36(1)(iii) of the Act. This issue was discussed in great detail in Revenue's appeal for the assessment year 2011-12 in ITA No.842/PUN/2015. For the reasons stated therein, this ground of appeal no.2 raised by the Revenue stands dismissed.

58. The ground of appeal no.3 challenges the decision of the Id. CIT(A) deleting the addition of Rs.75,30,700/- made towards negative stock of coal. During the course of assessment proceedings, the Assessing Officer found that negative closing stock of coal 1280 MT on 23.11.2011 and negative closing stock of 1070 MT on 24.12.2011. Accordingly, the Assessing Officer

concluded that the assessee has made unaccounted purchase of coal on above dates and made addition of unexplained investment of Rs.75,30,700/-.

59. During the course of proceedings before the ld. CIT(A), it was explained that negative stock was reflected on account of typographical error committed. Substantiating the same, the assessee had also produced ledger extract of assessee in the books of third parties to whom the sale of coal was executed. The ld. CIT(A) accepted the explanation of the assessee and deleted the addition. Further, the ld. CIT(A) accepted the alternative submissions of the assessee that if it is assumed that 1280 MT was purchased on 23.11.2011 and question of negative stock of 1070 MT would not arise on 23.11.2011 and addition, if any, is warranted out in respect of out of Rs.40,96,000/- and in view of the fact that the additions made on account of labour charges can be telescoped against the addition of unexplained investment in purchase of stock then a question of addition does not arise.

60. We have carefully gone through the submissions and order of the ld. CIT(A). From the order of the ld. CIT(A), it appears that the ld. CIT(A) had considered the additional evidence without giving an opportunity of being heard to the Assessing Officer. Therefore, this issue is remanding to the file of the Assessing Officer for fresh consideration in accordance with law. Thus, this ground of appeal no.3 raised by the Revenue is partly allowed for statistical purposes.

61. In the result, the appeal filed by the Revenue ITA No.864/PUN/2016 for the assessment year 2012-13 stands partly allowed for statistical purposes.

ITA No.709/PUN/2016, A.Y. 2012-13 – By Assessee

62. Now, we shall take up the assessee's appeal in ITA No.709/PUN/2016 for the assessment year 2012-13.

63. The ground of appeal nos.1 to 7 are dismissed as not pressed.

64. The only ground of appeal pressed relates disallowance of 20% of the labour charges by the ld. CIT(A). This issue was discussed in great detail in assessee's appeal for the assessment year 2010-11 in ITA No.773/PUN/2015. For the reason stated therein, we allow this ground of appeal in favour of the assessee.

65. In the result, the appeal filed by the assessee in ITA No.709/PUN/2016 for the assessment year 2012-13 stands partly allowed.

66. Now, we shall take up the cross appeals of the Revenue as well as the assessee in ITA No.566/PUN/2017 and ITA No.802/PUN/2017 for the assessment year 2013-14.

67. Briefly, the facts of the case are as under :-

The assessee is a private limited company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of execution of Government Contracts and trading in choline. The return of income for the assessment year 2013-14 was filed on 29.03.2014 declaring total income of Rs.1,69,64,158/-. Against the said return of income, the assessment was completed by the Dy. Commissioner of Income Tax, Circle-2, Jalgaon ('the Assessing Officer') vide order dated 17.03.2016 passed u/s 143(3) of the Income Tax Act, 1961 ('the Act') at a total income of Rs.4,38,79,914/-. While doing so, the Assessing Officer made ad-hoc

disallowance of 20% on account of labour charges considering the orders of the Id. CIT(A) for the earlier years. The Assessing Officer also made a proportionate disallowance of interest on interest free loan advanced to sister concern of Rs.1,53,17,680/-.

68. Being aggrieved by the above disallowance, an appeal was preferred before the Id. CIT(A), who vide impugned order restricted the disallowance of labour charges of 7.5% and deleted the addition in respect of proportionate disallowance following its earlier year's decisions.

69. Hence, the Revenue is in appeal before us in ITA No.566/PUN/2017 for the assessment year 2013-14 challenging the deletion of addition in respect of proportionate disallowance and the assessee is in appeal in ITA No.802/PUN/2017 for the assessment year 2013-14 being aggrieved that part of the order of the Id. CIT(A) which is against the assessee i.e. restricting the disallowance of labour charges @ 7.5%.

ITA No.802/PUN/2017, A.Y. 2013-14 – By Assessee

70. Now, we shall take up the assessee's appeal in ITA No.802/PUN/2017 for the assessment year 2013-14 challenging the decision of the Id. CIT(A) restricting the ad-hoc disallowance of labour charges to 7.5%. At the outset, we find that there is a delay in filing the present appeal by 24 days. The assessee had filed a condonation petition praying for condoning the delay. In the condonation petition, the following reasons are mentioned for condoning the delay of 24 days :-

“The assessee submits that the present appeal is delayed by 24 days. It is submitted that the said delay is attributable to a reasonable cause. It may please be noted that similar addition made by the CIT(A) for the preceding three years i.e. A.Y. 2010-11 to 2012-13 has been contested by the assessee company by filing appeals before Hon'ble ITAT within time. Hence, it is submitted that there was no reason to take a deliberate decision to not challenge similar addition sustained by CIT(A) in A.Y. 2013-14. This fact clearly substantiates that the marginal delay of 24 days in filing the present appeal

was not intentional and hence, the said delay may please be allowed, in the interest of justice.”

71. On the other hand, ld. Sr. DR has no serious objection for condonation of delay for 24 days.

72. Having regard to the averments made in the affidavit praying for condonation of delay, we are of the considered opinion that it is fit case for condonation of delay for 24 days. Accordingly, we condone the delay of 24 days and admit the appeal for adjudication.

73. The only issue in the present appeal relates to the disallowance of labour charges to the extent of 7.5% by the ld. CIT(A). For the reasons stated by us in the assessee's appeal for the assessment year 2010-11 in ITA No.773/PUN/2015, we hold that no ad-hoc disallowance of labour charges can be made. Accordingly, this ground of appeal stands allowed.

74. The ground of appeal no.2 is not pressed during the course of hearing of appeal. Hence, the same is dismissed as not pressed.

75. In the result, the appeal filed by the assessee in ITA No.802/PUN/2017 for the assessment year 2013-14 stands partly allowed.

ITA No.566/PUN/2017, A.Y. 2013-14 – By Revenue

76. Now, we shall take up the Revenue's appeal in ITA No.566/PUN/2017 for the assessment year 2013-14 challenging the decision of the ld. CIT(A) allowing the relief in respect of proportionate disallowance and restricting the ad-hoc disallowance @ 7.5% of the labour charges.

77. The ground of appeal nos.1 and 2 challenges the ad-hoc disallowance of interest. This issue was discussed by us in great detail in Revenue's appeal for the assessment year 2010-11 in ITA No.841/PUN/2015. For the reason

stated therein, we do not find any merit in this ground of appeal nos.1 and 2. Accordingly, this ground nos.1 and 2 are dismissed.

78. The ground of appeal no.3 challenges the decision of the ld. CIT(A) restricting the ad-hoc disallowance of labour charges @ 7.50% of the total charges. The issue was discussed by us in great detail in the appeal of the assessee in ITA No.773/PUN/2015 for the assessment year 2010-11 and allowed in favour of the assessee. For the reasons stated therein, we dismiss this ground of appeal no.3 raised by the Revenue. Accordingly, this ground of appeal no.3 raised by the Revenue is dismissed.

79. In the result, the appeal filed by the Revenue in ITA No.566/PUN/2017 for the assessment year 2013-14 stands dismissed.

80. To sum up, the appeal of assessee in ITA No.773/PUN/2015 for A.Y. 2010-11 is partly allowed for statistical purposes. The appeals of assessee in ITA Nos.774/PUN/2015 for A.Y. 2011-12, ITA No.709/PUN/2016 for A.Y. 2012-13 and ITA No.802/PUN/2017 for A.Y. 2013-14 are partly allowed. The appeals of Revenue in ITA No.841/PUN/2015 for A.Y. 2010-11, ITA No.842/PUN/2015 for A.Y. 2011-12 are dismissed. The appeal of Revenue in ITA No.864/PUN/2016 for A.Y. 2012-13 is partly allowed for statistical purposes. The appeal of Revenue in ITA No.566/PUN/2017 for A.Y. 2013-14 is dismissed.

Order pronounced on this 14th day of December, 2021.

Sd/-

(S. S. VISWANETHRA RAVI)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(INTURI RAMA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 14th December, 2021.
Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-2, Nashik.
4. The Pr. CIT-2, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “बी” बेंच,
पुणे / DR, ITAT, “B” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.