IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.63/CTK/2015
Assessment Year : 2011-2012

DCIT, Rourkela Circle, Rourkela.	Vs.	Shri Prashant Kumar Ahluwalia, DD-2, Civil Township, Rourkela.
		PAN/GIR No.AASPA 2953 N
(Appellant)	..	(**Respondent**)

ITA No.01/CTK/2015
Assessment Year : 2011-2012

Shri Prashant Kumar Ahluwalia, DD-2, Civil Township, Rourkela.	Vs.	DCIT, Rourkela Circle, Rourkela
PAN/GIR No.AASPA 2953 N		
(Appellant)	..	(**Respondent**)

Assessee by : Shri Sunil Mishra, Advocate
Revenue by : Shri M.K.Gautam, CIT, DR

Date of Hearing : 26 /08/ 2020
Date of Pronouncement : 17/09/2020

ORDER

Per C.M.Garg,JM

These are cross appeals filed by the revenue and assessee against the order of the CIT(A)-II, Bhubaneswar dated 28.11.2014 for the assessment year 2011-12.

2. The brief facts giving rise to these cross appeals are that a search and seizure operation u/s.132(1) of the Income tax Act, 1961 (hereinafter in short 'the Act') was conducted on 19.3.2012 and on subsequent dates in various residential and other premises belonging to KJS Ahluwalia & Group. The assessee is one of the key persons of the said group and filed the return of income u/s.139(1) of the Act 30.9.2011 declaring total income of Rs.1,43,47,34,050/-. Consequent to the search, notice u/s.143(2) & 142(1) were issued on 1.5.2013 and 31.7.2013 and in response to the said notices, the assessee filed submissions stating that the return filed u/s.139(1) of the Act may be treated as return filed in response to notice u/s.153A of the Act The Assessing Officer completed the assessment u/s.153A r.w.s 143(3) of the Act on 19.3.2014 determining total income of the assessee at Rs.1,48,48,05,920/- by making two disallowances viz; first disallowance u/s.14A r.w. 8D of I.T. Rules, 1962 of Rs.6,11,354/- and another addition on account of gross profit as reflected in the books of accounts with the rate of gross profit @ 56% of turnover of Rs.4,94,60,415/-. Aggrieved the assessee carried the matter in appeal before the ld CIT(A).

3. Ld CIT(A) after considering the stand of the Assessing Officer and explanation and submissions of the assessee granted part relief on the issue of addition u/s.14A r.w 8D of I.T.Rules and there is no ground neither from the department nor from the assessee regarding this issue. However, on the issue of gross profit addition, ld CIT(A) granted part relief to the

assessee and reduced the gross profit rate from 56% to 55%. Now, in these cross appeals, the assessee is challenging partly confirmation of addition of 1.12% of the net sales turnover (less mining royalty) of Rs.2,61,93,486/- and the revenue has challenged the order of the ld CIT(A) for reducing the gross profit rate from 56%, as determined by the AO, to 55% of sales/turnover. Since the sole ground in both the appeals relates to a single issue, therefore, for the sake of brevity and convenience, both appeals are being adjudicated together by this consolidated order.

4. We have heard the rival submissions and perused the materials placed on record of the Tribunal.

5. Ld A.R. of the assessee placing reliance on the decision of ITAT Bangalore 'B' Bench in the case of Shri G.T.Umesh vs ITO, in ITA No.1321/Bang/2017 for A.Y. 2009-2010 order dated 29.3.2019 submitted that the estimation of gross profit made by the AO and modified by the ld CIT(A) is not sustainable as when the books of account of the assessee has not been rejected and the assessment having not been framed u/s.144 of the Act, then it has to be held that revenue authorities were in error in resorting to estimation of income and such exercise undertaken by them is not sustainable in the eye of law and as per the provisions of the Income tax Act. Ld A.R further pointed out that section 145(3) lays down that the AO can proceed to make assessment to the best of his judgment under section 144 of the Act only in the event of not being satisfied with the

correctness of the accounts produced by the assessee. He further submitted that in the instant case, the AO has not rejected the books of account of the assessee and also has not made out a case that the conditions laid down under section 145(3) of the Act are satisfied in rejecting books of account. Therefore, the action of the AO in estimating gross profit @ 56% is not correct, justified and sustainable as per the proposition laid down by ITAT Bangalore in the case of Shri G.T.Umesh (supra). Finally, ld A.R. submitted that the appeal of the revenue may kindly be dismissed and that of the assessee be allowed by directing the AO to accept the returned gross profit of 53.88% declared by the assessee.

6. Replying to above, ld CIT DR drew our attention towards para 4 of the relevant assessment order dated 19.3.2014 and submitted that previous the current search and seizure operation, one more search was conducted on 12.11.2013 u/s.132 of the Act. The assessee filed settlement application u/s.245C of the Act on 9.9.2011 before the Settlement Commission (IT&WT), Additional Bench, Kolkata and the Settlement Commission passed order u/s.245D (4) of the Act on 28.3.2013 for assessment year 2004-05 to Assessment year 2010-2011 by estimating gross profit @ 56%. Ld CIT DR submitted that the assessee agreed to 56% of gross profit before the Settlement Commission for the said block period of 7 years and during the current assessment year i.e. A.Y. 2011-12, the assessee has shown profit @ 53.88% of total sales/turnover. Ld CIT DR

again drew our attention towards para 4 of the assessment order and submitted that the assessee vide order sheet entry dated 28.2.2014 has agreed for estimation of gross profit @ 56% of total sales/turnover as computed and estimated by Settlement Commission. Therefore, the AO without making any further inquiry and going deep into the issue, estimated the profit @ 56% of total sales/turnover, which is quite correct, reasonable and justified.

7. Placing reliance on the various decisions of Hon'ble High Courts, ld CIT DR submitted that u/s.246A of the Act, any assessee agreed by any of the order passed by the Assessing Officer may file appeal to the Commissioner of Income Tax (Appeals). He further explained that as per the decision of Hon'ble Kerala High Court in the case of CIT vs Vamadevan Bhanu, 330 ITR 559(Ker) that when the assessment was made on the basis of assessee's agreement, then the assessee cannot be presumed to be aggrieved and cannot appeal against such order passed under his agreement. He also placed reliance on the decisions of Hon'ble Bombay High Court in the case of Rameshchandra And Company vs CIT, 168 ITR 375 (Bom), Hon'ble P& H High Court in the case of Banta Singh Kartar Singh vs CIT, 125 ITR 239(P&H) and Hon'ble Madras High Court in the case of Ramanlal Kamdar vs CIT, 108 ITR 73 (Mad) and submitted that the appeal to ld CIT(A) lies only when the assessee aggrieved by the assessment or reassessment order and when the assessee, during the

assessment proceedings, has voluntarily agreed to accept a particular addition before the Assessing Officer, then the assessee cannot be held as aggrieved by that order and no appeal against such order is maintainable before any higher authority including ld CIT(A) and the Tribunal.

8. On merits of addition, ld CIT DR submitted that by accepting gross profit @ 56% as per the order of Settlement Commission for immediately preceding seven assessment years i.e. from A.Y. 2004-05 to 2010-2011, the assessee has stopped the AO for taking any further action or enquiry to verify the correctness of the books of account of the assessee and to adopt recourse available to him to record his dissatisfaction about the correctness or completement of accounts of the assessee as per requirement of sub-section(3) of Section 145 of the Act enabling the AO to make an assessment in the manner as provided in Section 144 of the Act. Ld CIT DR strenuously submitted that when the assessee, keeping in view of the order of Settlement Commission for immediately seven assessment years, wherein, the assessee himself agreed to accept gross profit rate of 56%, the assessee also agreed before the AO for adopting similar gross profit of 56% and ultimately stopped the AO for making any further enquiry and action as per the provisions of the Act, then the assessee by placing reliance on the decision of ITAT Bangalore in the case of Shri G.T.Umesh (supra) cannot allege that the gross profit addition on estimate basis cannot be made without rejecting the books of account of the assessee.

9. Ld CIT DR strenuously submitted that, as per para 4 of the assessment order, when the assessee has himself voluntarily offered 56% gross profit rate then, it was not required from the AO to do further enquiry or exercise u/s.145(3) and u/s.144 of the Act and the assessee cannot play hot and blow at the same time by challenging the partly confirmed addition by way of non-maintainable appeal. Ld CIT DR submitted that there is no whisper in the order of the first appellate authority as to why ld CIT(A) reduced the gross profit from 56% to 55% and, therefore, it has to be presumed that the reduction of gross profit by the ld CIT(A) has been done without application of mind and without considering the facts and circumstances of the case without any cogent, justified and reasonable cause as noted in para 4 of the assessment order by the AO. Ld CIT DR lastly contended that there is no logic to reduce G.P. from 56% to 55% without any basis by partly allowing non-maintainable appeal, thus, ld CIT(A) is not competent and eligible to grant any relief to the assessee. Therefore, the order of the ld CIT(A) may kindly be set aside by restoring that of the order of the Assessing Officer.

10. Placing rejoinder to above submission, ld A.R. submitted that if any addition has been confirmed by the ld CIT(A), then, the assessee has right to file appeal before the Tribunal and the appeal cannot be held as non-maintainable only because the assessee was agreed to any addition before the AO, without considering surrounding facts and circumstances of the

issue. Ld A.R. also submitted that the assessee never agreed for such estimation of addition @ 56% neither before the AO nor before the ld CIT(A). Therefore, the contentions and arguments made by ld CIT DR should be rejected and the gross profit as declared by the assessee @ 53.88% should be allowed by directing the AO to delete the entire addition on this issue.

11. Since there are cross appeals thus, the ld CIT DR is also entitled to place rejoinder on behalf of revenue on the department's appeal, therefore, with the direction and permission of the Bench, ld CIT DR submitted that no ground has been raised by the assessee before the ld CIT(A) challenging the addition on the allegation or contention that he was never agreed to the addition @ 56% of gross profit as per Settlement Commission order for immediately preceding seven assessment years and, therefore, the assessee cannot be allowed to make a new case at this belated stage before the Tribunal. He also submitted that neither in the form 35 submitted before the ld CIT(A) nor in the Form No.36 submitted before the Tribunal there is no such ground or contention of the assessee that he never agreed to estimate of 56% of sales/turnover before the AO during assessment proceedings, as noted by the AO, in para 4 of assessment order, thus, it has to be presumed that the assessee was, in fact, voluntarily agreed to this addition and he can not be deemed as aggrieved/person by this agreed addition.

12. On careful consideration of the rival submissions, first of all, we find it appropriate to adjudicate the legal contention of ld CIT DR that the appeal of the assessee is not maintainable against addition made by the Ao and partly confirmed by the ld CIT(A) on agreed basis during assessment proceedings. As per section 246A of the Act, any assessee agreed by any of the orders as listed in clause (a) of sub-section (1) of Section 246A of the Act including an assessment order passed u/s.143(3) of the Act may file appeal to the Commissioner of Income Tax (Appeals). At the same time, we further observe that as per various decisions as relied by ld CIT DR, including the decision of Hon'ble Kerala High Court in the case of Vamadevan Bhanu,(supra), the appeal of the assessee is not maintainable if assessment has been made on agreed basis. Similar view has been expressed by Hon'ble High Court in the case of Ramesh chandra and Company (supra) in the case of Banta Singh Kartar Singh (supra) and in the case of Ramanlal Kamdar(supra).

13. Now the legal position vivid from the provisions of section 246A of the Act alongwith the proposition laid down by various High Courts, as respectfully noted above, it is clear that when the assessee, during the assessment proceedings, has agreed to a particular addition, then he cannot be held aggrieved by such addition or disallowance, enabling him to file appeal before the ld CIT(A) u/s.250 of the Act. Keeping in view of above legal position and proposition laid down by Hon'ble High Courts

(supra), when we analyze the impugned addition made by the AO, then from para 4 of the assessment order, we find that the AO has made addition with the following observations:

> **<u>" Estimation of gross profit @ 56%</u>**
>
> Previous to the current search & seizure, one more search was conducted on 12.11.2009 u/s.132 of the I.T.Act, 1961. The assessee filed settlement application u/s.245C on 9.9.2011 before the Settlement Commission (IT &WT), Additional Bench, Kolkata on 9.9.2011. **The ld Settlement Commission passed order u/s.245D(4) of the Act on 28.3.2013 for the A.Y. 2004-05 to A.Y. 201-2011 by estimating gross profit @ 56%. The assessee agreed for 56% of gross profit in front of Settlement Commission**. During the current year, the assessee has shown gross profit of Rs.126,02,13,669/-, which is 53.88% of total sale. The assessee vide order sheet entry dated 28,.2.2014 is agreed for estimation of gross profit @ 56% of total sale as computed and estimated by Settlement Commission. Therefore, gross profit @ 56% of the total sale is calculated at Rs.4,94,60,515/- "

14. In view of above observation and findings of the Assessing Officer, it is clearly discernible that when the assessee vide order sheet entry dated 28.2.2014 had agreed for estimation of gross profit @ 56% on total sales, as computed and estimated by Settlement Commission for immediately preceding seven assessment years i.e 2004-05 to 2010-2011 and consequently, the AO without making any further enquiry or action available to him u/s.145(3) and 144 of the Act estimated the gross profit @ 56% on total sales/turnover.

15. At this juncture, we ae also required to address the contention of ld A.R. of the assessee that the assessee had never agreed to such estimation during the assessment proceedings before the AO as per the line of Settlement Commission. From Form 35, statement of facts and grounds of appeal filed by the assessee before the ld CIT(A), we are unable to see any allegation on Ground No.3 that the assessee was never agreed for addition on estimate basis @ 56% of sale/turnover during assessment proceedings before the AO. Further, ld A.R. has also filed copy of the written submission submitted before the ld CIT(A) on 31.3.2014 and on carefully reading of the written submission filed before the ld CIT(A), we are also unable to see any contention to challenge the addition made on estimate basis @ 56% that the assessee was never agreed to such addition before the AO. From the carefully vigilant reading of written submission para 3 to 3.4, it is very much clear that the assessee has challenged the gross profit addition made by the AO by alleging that doctrine of *res judicata* is not applicable to income tax proceedings, therefore, the order of Settlement Commission cannot be accepted but there is no whisper in the written submission that the assessee was not agreed to estimated addition @ 56% of sales/turnover by the AO. Similarly, from the Form No.36 filed before the Tribunal, the assessee has not taken any ground that the assessee during assessment proceedings before the AO never agreed to estimate of gross profit @ 56% in the line of order of Settlement Commission from A.Y. 2004-05 to 2010-

2011. Thus, we safely presume that the assessee neither before the ld CIT(A) nor before this Tribunal alleged or agitated the issue of estimate of gross profit @ 56% of sales/turnover by stating that the assessee was never agreed to such addition before the AO.

16. Before we reach to a logical conclusion, we find it appropriate to reproduce the relevant paras of the ld CIT(A) order at pages 11 to 12 as follows:

> …….
>
> " r) There is therefore, every possibility that the Department and society are absorbing risks and incurring higher costs of collection created by the ambiguity surrounding the affairs of the Appellant. The Appellant is liable and duty bound to reimburse these applicable risks and costs. Such reimbursement must provide adequate recompense for the time and effort taken and expense incurred by Revenue in effecting assessment and collecting taxes due, and will also help Revenue realize returns in line with the risks absorbed by it. The attendant risks also include those generated by the possibility that the Appellant may be encouraged to employ tactics similar to those employed in the instant case in future. Therefore, the action of the AO in estimating the GPM at a figure higher than the reported value of 53.88% is not entirely unjustified and is upheld. What remains therefore is what needs to be the value of the GPM adopted.
>
> It is indubitably clear that the figure of 56% adopted by the ITSC relates to the affairs of the Appellant, and therefore in any case involving estimations, constitute a fair and reasonable basis bearing reasonable nexus to the available material and the circumstances of the case. The figure of 56% is not wild, capricious or arbitrary, and is considered reasonable in accordance with the principles of justice, equity and good conscience.
>
> t) The Appellant has also argued that the assessee accepted the GP estimated by the ITSC to buy peace. It is held in this connection that

the *"buying of peace"* was necessarily the result of discovery of pejorative evidences and adverse findings by the Department and protracted negotiations and/or litigation by the Appellant with the Department and ITSC. The "buying of peace" cannot be held to automatically construe that a higher than usual or normal rate of GPM has been adopted. Also, according to the Appellant, the ITSC had estimated the GP @ 56% of the total sales matte by the assessee for the AY 2004-05 to 2010-11 and hence, the said rate was not applicable in this assessment year. The Appellant thereafter stated that it was a well settled that *"each assessment year is a separate self-contained period and the doctrine of res judicata is not applicable to income tax proceedings".* The ratio of the Hon'ble Supreme Court in the case *of Instalment Supply (P) Ltd.* v. *Union of India,* (1962) 2 SCR 644, 658 was cited which held that *"it was well settled that in the matter of taxation there is no question of res judicata because each year's assessment is final only for that year and does not govern later years".* The ratio of the Supreme Court in the case of *New Jehangir Vakil Mills Co. Ltd. vs CIT,* (1963) 49 ITR 137 was also cited which observed that the extent to which a decision given by an Income-tax Officer for one assessment year

u) In both the connections above, it is held by this office that the GPM reported by the Appellant for the impugned F.Y. 2010-11 of 53.88% has not been ignored and has rather been adopted as the basis for the computations of income in this order. The only difference is that due allowance has been given for statistical variations generated as a result of business dynamics, accounting practices, *et al* for which the figure adopted by the ITSC has been considered.

v) It is also not inconceivable when seen that what is being analyzed is the running of a large conglomerate, the figure arrived at by the ITSC factors in a reasonable variation (standard deviation). Considering all the facts and circumstances of this case, the said variation is estimated to be 1%, following which the GPM to be adopted is computed at 55%. This amounts to a "vote-of-confidence" of 1.12% (55% less 53.88%) in the accounts and affairs of the Appellant. This is analogous but not equivalent to a 98.88% Confidence Interval around the real mean founded in the subject of Statistics. The "premium" of 1.12% can also be considered to be the recompense to the Government in absorbing the risks and incurring higher costs of collection created by the ambiguity surrounding the affairs of the Appellant created through sampling in the audit of accounts and business dynamics.

w) The addition/assessment made on the count of differential GPM is therefore computed at 1.12.% (55% less 53.88%) of the Net Sales Turner (less Mining Royalty) of Rs. 233,87,03,900, which arrives at Rs. 2,61,93,484."

17. On perusal of the above findings of the ld CIT(A), we observe that the ld CIT(A), in para (r) (supra) noted that the action of the Assessing Officer in estimating gross profit margin (GPM) at a figure higher than the reported value of 53.88% is not entirely unjustified and is upheld. Thereafter, the ld CIT(A) in the same para stated that what remains therefore is what needs to be the value of the GPM adopted. Ld CIT(A) also observed that it is indubitably clear that the figure of 56% adopted by the ITSC relates to the affairs of the appellant, and, therefore, in any case involving estimations, constitute a fair and reasonable basis bearing reasonable nexus to the available material and the circumstances of the case. In the same para, the ld CIT(A) further observed that the figure of 56% is not wild, capricious or arbitrary, and is considered reasonable in accordance with the principles of justice, equity and good conscience. Thereafter, in para (t) (supra), the ld CIT(A) noted the contention of the assessee and in subsequent para (u) (supra), noted that the GPM reported by the Appellant for the impugned F.Y. 2010-11 (relevant to assessment year 2011-12) of 53.88% has not been ignored and has rather been adopted as the basis for the computations of income. The ld CIT(A) further observed that the only difference is that due allowance has been given for

statistical variations generated as a result of business dynamics, accounting practices, *at all* which the figure adopted by the ITSC has been considered.

18. Lastly, in para (v) and (w) (supra), ld CIT(A) observed that it is also not inconceivable when seen that what is being analyzed is the running of a large conglomerate, the figure arrived at by the ITSC factors in a reasonable variation (standard deviation). In the same para, ld CIT (A) also observed that the said variation is estimated to be 1%, following which the GPM to be adopted is computed at 55% and this amounts to a "vote-of-confidence" of 1.12% in the accounts and affairs of the Appellant. Ld CIT(A) observed that this is analogous but not equivalent to a 98.88% Confidence Interval around the real mean founded in the subject of Statistics. The "premium" of 1.12% can also be considered to be the recompense to the Government in absorbing the risks and incurring higher costs of collection created by the ambiguity surrounding the affairs of the Appellant created through sampling in the audit of accounts and business dynamics. With these hypothetical observations, without any factual matrix and only based on surmises and conjunctures, ld CIT(A) reduced the gross profit margin from 56% to 55% granting part relief to the assessee.

19. As we have already noted above that from 4 of the assessment order (supra in para 12 of this order), it is clear that in the line of ITSC order for preceding assessment years 2004-05 to 2010-2011, the assessee, before the AO during the assessment proceedings, agreed to estimation of

gross profit @ 56% of sales/turnover and this act of the assessee obviously stopped the AO from making further enquiry or observations and going deep into the books of account of the assessee and to take recourse of procedure mandated in section 145(3) of the Act. Thus, in our humble understanding, the assessee cannot be held as aggrieved from such addition which has been made on the voluntary consent of the assessee before the AO during assessment proceedings in the line of the Income Tax Settlement Commission. Therefore, first of all, we safely presume that the appeal of the assessee was neither maintainable before the CIT (A) nor before this Tribunal in view of the various decisions, as relied By ld CIT DR including the decision of Hon'ble Kerala High Court in the case of Vamadevan Bhanu (supra). Therefore, in our considered opinion, firstly, ld CIT(A) has admitted and adjudicated the appeal which was not maintainable as per provisions of section 246A r.w. 250 of the Act. Secondly, from relevant operating paras, as reproduced hereinabove, in para 15 of this order, including para (r) (supra), it is also clear that the ld CIT(A) held that the action of the AO in estimating the gross profit margin at the figure higher of 56% of sales/turnover than the reported value of 53.88% is not entirely unjustified and same is upheld. Thereafter, the ld CIT(A) after noting the arguments of the assessee recorded hypothetical observation without any basis only based on surmises and conjunctures and without referring to the financial results of the assessee, without referring to ITSC order and voluntary consent of assessee for estimating GP rate @ 56% of sales/turnover and reduced the GPM from 56% to 55% ignoring vital facts supporting the action of the AO. Therefore, in our opinion, ld CIT(A), first of all, admitted and adjudicated the non-maintainable appeal and, therefore, gave relief to the assessee without any justified reason and legal basis tenable under provisions of the Act. Therefore, the order of the ld CIT(A) on both counts is not sustainable and valid, therefore, we dismiss the same.

20. Before we record our final result, we also find it appropriate to consider preposition rendered by the ITAT Bangalore in the case of Shri G.T.Umesh (supra) in view of facts and circumstances of the present case. In that case, the AO estimated profit by applying G.P. rate @ 20% without rejecting books of account of the assessee and the AO did not make any addition on the agreement or consent of assessee. But in the case in hand, the assessee during assessment proceedings before the AO, voluntarily agreed to the estimation of G.P. @ 56% of sales/turnover and impliedly stopped the AO from making any further enquiry or going deep into the issue referring to the books of account of assessee. Thus, facts and circumstances of the present case are quite dissimilar and distinct from the case of Shri G.T.Umesh (supra). Therefore, we are of the humble opinion that the benefit of the ratio of the order of ITAT Bangalore in the case of

Shri

G.T.Umesh (supra) is not applicable to the present case in hand.

21. Now, we find it appropriate to adjudicate the grievance of the assessee raised by way of cross appeal in ITA No.01/CTK/2015. Ld A.R. of the assessee challenging the part confirmation of addition by the ld CIT(A) submitted that the ld CIT(A) has erred in estimating the GPM @ 55% of sales/turnover and thereby confirming the addition to the extent of Rs.2,61,93,484/- out of total addition of Rs.4,94,60,515/- made by the AO in estimating the GP @ 56% of the sales/turnover without finding any defect in the books of the assessee and without taking recourse of section 145(3) of the Act. Therefore, ld counsel placing reliance of the order of ITAT Bangalore in the case of Shri G.T.Umesh (supra), vehemently contended that the addition partly sustained by the ld CIT(A) is wrong and need to be deleted.

22. At the cost of repetition keeping in view observations of the AO in para 4 of assessment order, we may also point out that when the appeal of the assessee was not maintainable before the ld CIT(A) who allowed part relief to the assessee, then on the same hypothesis , the appeal of the assessee against partly confirmed addition cannot be held as maintainable and allowable before the Tribunal. Even if we consider the merits of the addition, then we find that the AO in para 4 of the assessment order clearly noted that the assessee voluntarily agreed for 56% of gross profit in front

of the Settlement Commission and the assessee is also agreed for estimation of 56% of the total sales/turnover in the light of Settlement Commission order passed for immediately previous seven assessment years for A.Y. 2004-05 to 2010-2011, for the year under consideration for A.Y. 2011-12. Therefore, we are unable to see any valid reason to interfere with the addition made by the AO in the line of the order of the Settlement Commission for immediately seven preceding assessment years by accepting voluntary consent of the assessee during assessment proceedings. We may reiterate that from Form No.35 filed before the first appellate authority & Form No.36 filed before this Tribunal, neither before the ld CIT(A) nor before the Tribunal, the assessee has not made any allegation or contention or ground alleging that he was never agreed before the AO for estimation of GP @ 56% in the line of the order of Settlement Commission (supra). Therefore, the assessee cannot challenge the same by way of a non-maintainable appeal before the Tribunal at this belated stage. This contention was first time raised during arguments before this Bench on 26.8.2020 but in our humble opinion, the assessee cannot be allowed to make a new case before the Tribunal at this belated stage without raising any ground before the ld CIT(A) and Tribunal.

23. On the basis of foregoing discussion, we reach to a logical conclusion that the AO was right in making addition on the consent of the assessee and keeping in view the order of ITSC for immediately previous seven

assessment years by estimating G.P @ 56% of sales/turnover. We also hold that the ld CIT(A) has granted part relief to the assessee in a non-maintainable appeal without any valid basis, thus, same is not sustainable and thus, we set aside the same.

24. In the result, appeal of the department is allowed and that of the assessee is dismissed.

Order pronounced on 17 /09/2020.

Sd/-	sd/-
(Laxmi Prasad Sahu)	**(Chandra Mohan Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 17 /9/2020
B.K.Parida, SPS(OS)

Copy of the Order forwarded to :

1. The Appellant : /Assessee: Shri Prashant Kumar Ahluwalia, DD-2, Civil Township, Rourkela

2. The Revenue: DCIT, Rourkela Circle, Rourkela
3. The CIT(A)-11, Bhubaneswar
4. Pr.CIT, Sambalpur
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack