आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक
IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

श्री सी.एम.गर्ग, न्यायिक सदस्य **एवं** श्री एल.पी.साहु,लेखा सदस्य के समक्ष

BEFORE SHRI C.M. GARG, JM & SHRI L.P. SAHU, AM

आयकर अपील सं./ITA No.191/CTK/2015

(**निर्धारण वर्ष /** Assessment Year : 2011 - 2012)

Ambika Construction Company, C/o Mangal Kumar Bhaumik, Ward No.11, Station Bazar, Baripada-757001	Vs.	DCIT, Balasore Circle, Balasore
स्थायी लेखा सं./PAN No. : **AAFFA 2848 B**		

(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by	:	Shri J.M.Pattnaik, Advocate
राजस्व **की ओर से** /Revenue by	:	Shri Subhendu Dutta, DR

सुनवाई की तारीख / **Date of Hearing**	:	22/01/2020
घोषणा की तारीख/**Date of Pronouncement**	:	17/03/2020

आदेश / O R D E R

Per L.P.Sahu, AM :

This is an appeal filed by the assessee against order of CIT(A), Cuttack, dated 27.02.2015 for the assessment year 2011-2012.

2. On perusal of the appeal record, we find that initially the appeal of the assessee was disposed off by the Tribunal vide order dated 29.05.2017. Thereafter the assessee carried the matter to the Hon'ble Jurisdictional High Court and the Hon'ble High Court quashed the order of the Tribunal vide order dated 24.04.2019 and remitted the matter back for consideration of the case of the assessee in the light of the decision as has been held by the Hon'ble High Court in Income Tax (Appeal) No.36 of 2015, vide order dated 20.08.2018 in the case of

Mohd. Asif Habibi Vs. Pr. CIT & Others. Thereafter as per the direction of the Hon'ble High Court the appeal of the assessee was fixed and heard finally on the following grounds :-

> 1. *For that on the facts and in the circumstances of the case the assessment as made is arbitrary and unjustified .*
> 2. *For that the order of assessment as made u/s.143(3) / 144 / 145(3) is improper and bad-in-law .*
> 3. *For that application of a rate of 6% on Gross Receipts is excessive and the income returned being reasonable should have been accepted.*
> 4. *For that the claim of Depreciation should have been considered separately after estimating the Net Profit.*
> 5. *For that the learned Commissioner failed to appreciate the contentions furnished by the appellant.*
> 6. *For that the learned Commissioner is not justified to confirm the assessment and dismiss the appeal*

3. At the outset, ld. AR did not press ground Nos.1 to 3, therefore, the ground Nos.1 to 3 are dismissed as not pressed.

4. Now, the grounds remained as ground Nos.4 to 6 relating to non-consideration of submissions of the assessee by the CIT(A) with regard depreciation which separately be considered after estimating the net profit.

5. Brief facts of the case are that the assessee is a civil contractor based in Mayurbhanj District, Odisha and filed its return of income on 24.05.2012 showing total income of Rs.22,92,120/-, which was processed u/s.143(1) of the Act. Subsequently, the return of the assessee was selected for scrutiny through CASS and statutory notices u/s.143(2) & 142(1) of the Act were issued to the assessee. During the

course of assessment proceedings, the assessee was asked to furnish the cash book and stock register, however, the assessee could not produce the same along with list of sundry creditors. Therefore, the AO completed the assessment after estimating gross profits @6% and passed the order accordingly.

6. Being aggrieved, the assessee appealed before the CIT(A) and the CIT(A) dismissed the appeal of the assessee.

7. Further being aggrieved, the assessee filed appeal before the Income Tax Appellate Tribunal.

8. Ld. AR before us filed his written submission which read as under :-

> *1. By now law which is set at rest is that the depreciation is to be allowed from estimated net profit and not from the gross turnover in the case of **Awasthi Traders v Commissioner of Income Tax and another,** reported in <u>[2016] 388 ITR 158 (SC)</u> and followed by this Hon'ble Tribunal in the case of **Builder Shree Vrs. ACIT** in <u>ITA NO.213/CTK/2015</u> order dt.31/08/2017 as well as in the case of **Shri Jagdeep Bansal vs ACIT Circle 2(1), Sambalpur** in M.A. <u>No.60/CTK/2017</u> arising out of ITA No.189/CTK/2015 order dt.20/08/2019.*
>
> *2. This being a case in which the Ld. A.O determined the net taxable business income at Rs.74,33,290/- without deduction of the depreciation claimed as per audited Balance sheet at Rs.45,99,281.00 the present appeal is preferred, as detailed below:*

Gross turnover	*<u>Rs.22, 06, 89,088.00</u>*
Net profit@ 6%	*Rs.1,32,41,345.00*
Less: Interest on capital	*Rs.21, 45,477.00*
Salary to partners	*<u>Rs.36, 62,578.00</u>*
	<u>Rs. 58,08,055.00</u>
	Rs. 74,33,290.00
Less Depreciation:	
	<u>Rs. 45,99,281.00</u>
	Rs. 28,34,009.00

> *Thus, in view of the law laid down by the Hon'ble Apex Court and followed by this Hon'ble Tribunal in the cases, referred to above, this appeal is liable to be allowed to the extent of allowing the depreciation out of gross profit.*

In addition to the above written submission, ld. AR further submitted that the AO should have considered the depreciation separately after estimating the net profit. Therefore, ld.AR submitted that the appeal of the assessee deserves to be allowed on the ground as raised above.

9. On the other hand, ld. DR relied on the orders of authorities below and submitted that the AO has rightly estimated the income of the assessee @6% of the gross receipt after considering all business expenses, depreciation and interest, therefore, assessee's contention to allow the depreciation separately, should not be accepted. Accordingly, ld. DR submitted that the appeal of the assessee deserves to be dismissed.

10. After considering the submissions of both the sides and perusing the entire material available on record along with the orders of the authorities below, we find that the sole issue as agitated by the assessee before us is as to whether the depreciation is to be allowed separately after estimating net profit of the assessee or not. Earlier the Tribunal did not accept the contention of the assessee to allow the depreciation separately vide order dated 29.05.2017. Thereafter the assessee challenged the order of the Tribunal before the Hon'ble High Court and the Hon'ble Jurisdictional High Court in W.P.(C)No.7842 of 2018, vide order dated 24.04.2019 remitted the matter back to the

Tribunal for consideration of the same as per the observations stated therein as under :-

> *"24.04.2019*
>
> *By way of this writ petition, the petitioner has challenged the order of the learned Income Tax Appellate Tribunal, Cuttack Bench, Cuttack dated 29.05.2017 (Annexure-1) in ITA No.191/CTK/2015(AY 2011-12).*
>
> *Learned counsel for the petitioner submits that issue(s) involved in the present appeal Income-tax is/are covered by a decision of this Court in ITA No.36 of 2015 disposed of on 20.08.2018. He served a copy of the said order on learned counsel for the Revenue who does not have any objection to the same.*
>
> *Perused the said order dated 20.08.2018 passed in ITA No.36 of 2015. In the said Appeal, following order has been passed :*
>
>> *"Mr. S.S. Mohapatra, learned Senior Standing Counsel enters appearance on behalf of the Income Tax Department and files his Memo of Appearance in Court today. The same be kept on record.*
>>
>> *Heard Mr. J.M.Patnaik, learned counsel for the petitioner and Mr. S.S.Mohapatra, learned Senior Standing Counsel (Income Tax).*
>>
>> *This Income Tax Appeal is taken up for consideration on the following substantial question of law.*
>>
>> *iii. Whether the learned I.T.A.T., Cuttack Bench, Cuttack is justified in one hand agreeing that Section 44AD of the I.T.Act is not attracted and on the other hand holding that in absence of the part record of the assessee estimation can be made keeping in mind the provisions of Section 44AD of the Act?*
>>
>> *Challenge in the present. Income Tax Appeal has been made to an order dated 26.05.2015 by which order the learned Income Tax Appellate Tribunal dismissed the appeal filed by the petitioner assessee, i.e. I.T.No.89/CTK/2015 for the assessment year 2010-2011 and affirmed the order passed by the CIT Appeal.*
>>
>> *Learned counsel for the appellant places reliance on a judgment of the Apex Court in the case of Awasthi Traders v. Commissioner of Income Tax and another, reported in [2016] 388 ITR 185 (SC) and submits that the gross turnover of the appellant during the assessment year in question, i.e., 2010-2011 was more than a sum of Rs.5 Crores and although the assessee's accounts for that year was duly audited and books of*

the accounts for the concerned year were produced before the Assessing officer the same was rejected iner alia on the ground that the assessee failed to produce his books of accounts for the previous year. He also submits that in any event the turnover of the appellant being more than Rs.40 lakhs as provided under the proviso to Section 44AD of the income Tax Act, 1961, the said provision ought not to have been applied to the case of the petitioner and it was the bounden duty of the Assessing officer to assess the petitioner based on the records produced by the assessee as well as the audit report submitted before it. He asets that in view of the proviso to Section 44AD, the estimate of 8 per cent as done thereunder is legally impermissible. Admittedly, the turnover in the present assessee's case is much more than rs.40 lakhs, i.e. Rs.5 Crores. Apart from that the claim of depreciation ought to have been accepted in terms of the proviso of the Income Tax Act and the Rules thereunder. Therefore, the assessment could not have proceeded on the basis of an estimate done under Section 44Ade, which is wholly inapplicable in the present case Sri Patnaik further submits that the learned Tribunal in various orders prior to the imp[ugned order being passed and even thereafter has held that where Assessing Officer adopts net profit rate in making assessment to the bests of his judgment allowing depreciation required to be made.

In view of the judgment rendered by the Apex Court in Awasthi Traders's case (supra) and the judgment of the learned Tribunal Cuttack Bench, Cuttack, we set aside the impugned order under Annexure-1 as well as the assessment order dated 16.01.2013 and the appellate order dated 24.01.2014 and remit the matter back to the Assessing Officer to proceed afresh strictly in accordance with law tihout applying section 44AD of the Income Tax Act to the facts situation of the present case by considering the judgment of the tribunal referred hereinabove. Such reassessment proceeding should be completed within a period of four months from today.

The writ application is accordingly disposed of."

Taking into consideration the above, it appears that the learned Tribunal has not considered the matter in its proper perspective. Only on that ground, the order of the learned Tribunal is quashed and the matter is remitted back to the learned Tribunal for consideration of the case in the light of the decision of this Court quoted supra.

Accordingly, the writ petition is disposed of."

Before us, ld. AR submitted copies of audit report, balance sheet as on 31.03.2011 and submitted that in the present case, the turnover of the assessee is Rs.22,06,89,088/- which is more than prescribed limit as per Section 44AD of the I.T.act, 1961, therefore, depreciation in this case separately be allowed. In this regard, ld. AR placed reliance on the order of the coordinate bench of the Tribunal in the case of Shri Jagdeep Bansal Vs. ACIT, MA No.60/CTK/2017 arising out of ITA No.189/CTK/2015, order dated 20.08.2019, wherein the depreciation has been directed to be allowed separately. On perusal of the assessment order, we find that the AO estimated the net profit @6% after considering the business expenses of the assessee along with the depreciation and interest, respectively, to which the CIT(A) has accepted the findings of AO. However, we on perusal of the Form 3CD filed along with the audit report by the assessee during the course of hearing, find that the gross contract receipts shown by the assessee is at Rs.22,06,89,088/-, which definitely exceeds Rs.40 lakhs, therefore, provisions of Section 44AD of the Act in the present case of the assessee would not be applicable. For completeness the order, we would like to reproduce the observations of the AO made in the assessment order at paras 6 & 7 as under :-

> *6 Considering the nature of business carried out by the assessee, the net profit disclosed @ 2.76% is extremely low. There are other assessees assessed in this very circle who do contract work of similar nature but declare much higher percentage of profit. After considering the facts*

and circumstances of the case and in the light of decisions of ld. CIT(A), Cuttack and Hon'ble ITAT, Cuttack bench, I deem it fair and reasonable to estimate the net profit (after all business expenses, depreciation and interest) at 6% of turnover.

7. In view of discussion in para 5 and para 6 above, the total income of the assessee is computed as under :-

Gross contract receipts :	*Rs.22,06,89,088/-*	
Net profit estimated @6% of gross receipts		*Rs.1,32,41,345/-*
Less: Interest on capital	*Rs.21,45,477/-*	
Salary to partners	*Rs.36,62,578/-*	*Rs.58,08,055/-*
		Rs,73,33,290/-
Add: income from other sources :		*Rs.20,18,030/-*
Total Assessed Income		*Rs.94,51,320/-*

It is clear from the above findings of the AO that the AO has calculated the net profit after considering all business expenses, depreciation and interest but it is not clear as to how much depreciation has been allowed by the AO. Therefore, this matter is sent back to the file of AO for proper calculation of depreciation allowed by him as per the provisions of Income Tax Act, 1961 after providing reasonable opportunity of hearing to the assessee. The assessee is directed to cooperate with the AO for early disposal of the case. We order accordingly.

11. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 17/03/2020.

Sd/-
(C.M.GARG)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(L.P.SAHU)
लेखा सदस्य / ACCOUNTANT MEMBER

कटक Cuttack; दिनांक Dated 17/03/2020

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
   Ambika Construction Company,
   C/o Mangal Kumar Bhaumik,
   Ward No.11, Station Bazar,
   Baripada-757001
2. प्रत्यर्थी / The Respondent-
   DCIT, Balasore Circle,
   Balasore
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

(**Senior Private Secretary**)

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack