

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

INCOME TAX APPEAL NO. 2/2011.

The Commissioner of Income
Tax-IV, Aayakar Bhawan, Nagpur.

....**APPELLANT.**

VERSUS

Sunil Vishwambharnath Tiwari,
Hindustan Colony, Wardha Road,
Nagpur.

....**RESPONDENT.**

Mr. Anand Parchure, Advocate for the Appellant.
Mr. N.S. Bhattad, Advocate for Respondent.

CORAM : B.P. DHARMADHIKARI
& P.N. DESHMUKH, JJ.

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Date of Reserving the Judgment : 31.08.2015.

Date of Pronouncement : 11.09.2015.

JUDGMENT. (Per B.P. Dharmadhikari, J)

Heard Shri Anand Parchure, learned Counsel for the appellant and Shri N.S. Bhattad, learned Counsel for the respondent.

2. By this appeal filed under Section 260A of the Income Tax Act, 1961, the appellant - Income Tax Department has sought to raise following two questions, as substantial questions of law :

“(1) *Whether on the facts and in the circumstances of the case that ITAT was correct in holding that the entire amount of gross total income of the assessee is eligible for deduction under section 80IB of the Income Tax Act ?*

(2) *Whether on the facts and in the circumstances of the case, the ITAT was justified in holding that the dis-allowance made under section 40(a)(ia) of the Income Tax Act separately is not permissible under the scheme of the Income Tax Act ?”*

3. The facts in brief are, that the assessee whose eligibility to claim deduction under Section 80IB (10) of the Income Tax Act, 1961 (hereinafter referred to as “**the Act**” for short), is not in dispute, filed a return in

Assessment Year 2006-07 for accounting period 01.04.2005 to 31.03.2006, claiming deduction of Rs. 16,82,121/- under that provision. It was taken up for scrutiny, and an order under Section 143(3) of the Act came to be passed, dis-allowing the expenses under Section 40[a][ia] of the Act for not deducting TDS at source. Thus, payment of Rs.83,00,738/- under the head Subcontract payment; Rs. 1,75,000/- as Commission payments and Rs.7,96,375/- as Advertisement Payment was dis-allowed.

4. The Assessing Officer though allowed deductions under Sections 80IB(10) of the Act, assessed total income of Rs.92,71,375/- on account of above dis-allowance. The assessee filed an appeal before the CIT (Appeals), which held that there could not have been such separate treatment to income and deductions under Section 80IB of the Act needed to be allowed on gross total income of the assessee. Income Tax Department preferred further appeal before the ITAT, which rejected that appeal.

5. Shri Parchure, learned counsel appearing on behalf of the appellant/department submits that the correctness or otherwise of dis-allowance is not in dispute before this Court. Violation of Section 194C and 194H of the Act is accepted, and as such, the dis-allowance was not arising out of eligible business. He states that the word “derived from” cannot have

such wide impact, so as to include any income which can in some manner be attributed to the business. It is further submitted that in present matter, the assessee can claim these expenses as per the provisions in Section 40[a][ia], if TDS is paid in later year. Thus, in subsequent assessment years, the assessee would be able to claim deduction from his profit, on account of these expenses, hence, purpose of having Section 40[a][ia] itself gets defeated. He submits that the judgment of this High Court in **CIT / Shirke Constructions and Equipments Ltd. (246 ITR 429)** is not attracted here.

6. Shri Bhattad, learned counsel for the respondent – assessee on the other hand states that in said matter decided by this Court, the assessee M/s. Shirke Constructions and Equipments Ltd., also had other sources of income, and hence application of mind therein needs to be understood properly. Here, the respondent – assessee (Sunil Vishambharnath Tiwari) does not have any other source of income, except eligible business and this fact is not in dispute. Therefore, the deduction of payment made to contractor is out of eligible profits and even if ignored for the purpose of computing net income, it gets added only to the eligible income. Disallowance of expenditure only adds to it and that income does not become taxable. The fact that the assessee had filed 'nil' return, cannot be lost sight of.

7. According to him, technical violation pointed by Shri Parchure, learned counsel does not result in change of nature of income and as such, the concurrent view of CIT (Appeals) and ITAT needs to be upheld.

8. After hearing the respective counsel, we find that the fact that TDS was not effected by the respondent assessee, is not in dispute. In view of the scheme of Section 40 of the Act, as TDS is not effected, payment to contractors cannot be deducted, as those expenditure become inadmissible. The expenditures therefore are added back to the income, which is nothing but, eligible income. This income which is eligible for deduction in terms of Section 80IB(10) of the Act, therefore, only increases by said figure of disallowed expenditure.

9. CIT (Appeals) has in this background referred to the above referred judgment in case of Shirke Constructions and Equipments Ltd (supra), wherein distinction between certain Sections of Chapter VI-A, which refer to deduction out of gross total income and other sections of Chapter VI-A, which do not make such reference to gross total income, has been explained. CIT (appeals) has correctly pointed out that the deduction allowable under Section 80IB(10) of the Act is with reference to the respondents gross total income. Hence, dis-allowance under Section 40[a]

[ia] cannot be treated separately and it gets added back to the gross total income of the assessee. Section 40 itself points out that due to error of assessee, such expenditure cannot be deducted while computing income chargeable under the head “profit and gains of business or profession”. That is the only limited effect of the lapse on the part of the respondent - assessee in the present matter.

10. ITAT has considered these facts and upheld the same.

11. We therefore, do not find any substantial questions of law arising in the matter. Appeal is accordingly, dismissed. No costs.

JUDGE

JUDGE

Rgd.