

Court No. - 35

Case :- INCOME TAX APPEAL No. - 89 of 2013

Appellant :- M/S Akrati Promoters And Developers

Respondent :- Deputy Commissioner Income Tax -4

Counsel for Appellant :- Suyash Agarwal

Counsel for Respondent :- C.S.C. It, Suyash Agarwal
With

Case :- INCOME TAX APPEAL No. - 222 of 2016

Appellant :- M/S Akrati Promoters And Developers Agra

Respondent :- Pr. Commissioner Of Income Tax Agra And Another

Counsel for Appellant :- Suyash Agarwal

Counsel for Respondent :- S.C., Manu Ghildyal, S.S.C. I.T.

Hon'ble Bharati Sapru, J.

Hon'ble Rohit Ranjan Agarwal, J.

(Delivered by Rohit Ranjan Agarwal, J.)

1. These two appeals of the assessee filed under Section 260 A of the Income Tax Act, 1961 challenges the order of Income Tax Appellate Tribunal, Agra Bench, Agra (hereinafter called as 'Tribunal') dated 28.2.2013 passed in Income Tax Appeal No.129/Agr/2012 for assessment year 2008-09 and order dated 21.4.2016 passed in ITA No.152/Agr/2014 for assessment year 2009-2010.

2. The Appeal No.89 of 2013 was admitted on 20.9.2013 on the following substantial question of law:-

“i. Whether, in view of the fact that the case of the revenue is confined under Section 40A(2)(a) and not section 37 of the Act, the finding of the Tribunal that the appellant did not get sub-contracts executed through Sri Sanjay Agarwal, Sri Subodh Agarwal and Sri R.R. Agarwal is impermissible and suffers from self contradiction?

ii. Whether, expenditure incurred by the appellant in execution of work through sub-contractors could have

been disallowed, to any extent, under Section 40A(2)(a) in absence of any finding as to the expenditure being excessive or unreasonable having regard to the statutory factors enumerated therein?

iv. Whether, even otherwise, the finding of the Tribunal that the appellant did not get the work executed through the sub-contractors Sri Sanjay Agarwal, Sri Subodh Agarwal and Sri R.R. Agarwal is wholly perverse and against the entire weight of evidence and against the business practice as consistently accepted by the revenue authorities in the earlier assessment years?

v. Whether, any part of the expenditure incurred by the appellant in the earlier years and it, corresponding liability carried in the appellants books of account in the present year could be disallowed under Section 40A(2)(a)?

3. Appeal No.222 of 2016 was admitted on the same question for the assessment year 2009-10 on 20.12.2016.
4. As both the appeals arise out of same question of law, as such they are being heard and decided together by a common order.
5. Assessee/appellant during the assessment year in question was a partnership firm, but w.e.f. 28.8.2012 was taken over with all its assets and liabilities by a company known as Akрати Technimont Ltd.
6. Facts of Appeal No.89 of 2013, which is in respect of assessment year 2008-09, assessee/appellant filed its return of income disclosing income of Rs.30,06,670/-. The assessee firm was engaged in business of civil work contracts. Case of the assessee was selected for scrutiny, and notices under Section 143(2) and 142(1) of the Act were issued. Representative of the assessee firm appeared and produced

the books of account before the assessing authority. During course of assessment proceedings, to verify the genuineness of payments claimed to have been made to sub-contractors, summons under Section 131 of the Act were issued. In response to the said, Sanjay Agarwal, Subodh Agarwal and R.R. Agarwal appeared and the statement on oath were recorded. During the assessment year in question, assessee had disclosed expenditure of Rs.2,55,49,027.78/- to 21 different sub-contractors towards execution of work contract. Out of the said amount, assessee incurred expenditure of Rs.61,76,126/- on 3 sub-contractors namely Sanjay Agarwal (Rs.21,57,500/-), Subodh Agarwal (Rs.26,09,254/-) and R.R. Agarwal (Rs.14,09,372/-). Assessing Authority vide order dated 10.4.2011 disbelieved and disallowed the entire expenditure of Rs.61,76,126/- being payment made to the said 3 sub-contractors and work executed by them. An appeal was filed challenging assessment order before the Commissioner of Income Tax (Appeals), who on 31.1.2012 partly allowed the same, however, as regard the ground raised against disallowance of expenditure under Section 40A(2)(a) of the Act was rejected.

7. The assessee as well as the Revenue filed cross appeals before the Tribunal. On 28.2.2013, the Tribunal partly allowed the appeal of the assessee, out of total expenditure of Rs.61,76,126/- disallowed by the assessing authority under Section 40A(2)(a), Tribunal upheld the disallowance of Rs.12,35,225/- and allowed remaining 80% expenditure of

Rs.49,40,900/- while the appeal of the department was dismissed.

8. Sri Rakesh Ranjan Agarwal, learned Senior Counsel assisted by Sri Suyash Agarwal, learned Counsel for the assessee submitted that the Tribunal had wrongly disallowed 20% of the amount while deleting the addition of Rs.49,40,901/- made by the assessing authority. He submitted that the Tribunal while recording the finding had held that the assessee has carried out contract work, may be not from the three sub-contractors named above but by other parties, thus the case of the assessee did not fall under Section 40A(2)(a) of the Act and case of the assessee fell under Section 37 of the Act, and the Tribunal should have granted entire relief to the assessee once it arrived at the finding that the sub-contract was not carried out by the three contractors named above and it confirmed the finding of the assessing authority as well as the first appellate authority.

9. Sri Manu Ghildyal, learned Counsel appearing for the department submitted that the three sub-contractors named above, namely Sanjay Agarwal, Subodh Agarwal and R.R. Agarwal are the sons and relatives of the partners of the firm and are persons covered under Section 40A(2)(b) of the Act. He further invited the attention of the Court to the findings recorded by the assessing authority, wherein these three sub-contractors were examined by the A.O. and the affidavit filed by them was considered.

10. According to Sri Manu Ghildyal, learned Counsel for the Department, the A.O. recorded finding that the three sub-contractors at the most would be the supervisor staff of the assessee firm, as they were being paid salary and they did not have sufficient balance in their bank account so as to pay the employees for execution of work such as filling of earth etc. He further submitted that one of the sub-contractors Sanjay Agarwal was entitled for total payment of Rs.21,000/- only in the return of the assessee, it was claimed that he had made a payment of Rs.21,75,000/-, as such the excess payment of Rs.21,54,000/- was correctly disallowed. Similarly in case of Subodh Agarwal also the amount of Rs.26,09,254 was disallowed. Further the A.O similarly disallowed Rs.14,03,972/- in case of R.R. Agarwal.

11. We have heard learned Counsel for the assessee as well as the learned Counsel for the Revenue and perused the material on record.

12. As it is the case of the assessee itself that during the assessment year in question, the assessee had given contracts to twenty one sub-contractors for execution of various work. As far as the expenditure incurred to the tune of Rs.61,76,126/-, by the three sub-contractors Sanjay Agarwal, Subodh Agarwal and R.R. Agarwal, who are the sons and relatives of the partners of the assessee firm, the assessing authority recorded a categorical finding and disallowed the payments so made to them under Section 40A(2)(a) of the Act, on the ground that all these three sub-contractors did not have sufficient amount in their bank accounts so as to incur such

expenses for execution of work and disallowed the expenditure so made by the assessee firm as regard these three sub-contractors. The CIT (A) also held that mere filing of affidavits of three persons in support of the claim that work was sub-contracted to them, unless corroborated cannot be taken on its face value. It was further held that these sub-contractors could not produce any shred of evidence to establish that they had actually carried out any work as claimed by them.

13. The Tribunal while considering the grounds so raised recorded a categorical finding that the sub-contract was not carried out by the above named three sub-contractors and confirmed the finding of the A.O. as well as the first appellate authority. However, the Tribunal considering the facts and circumstances of the case came to conclusion that the sub-contract was carried out by other mode and not by these sub-contractors, and it disallowed 20% of the expenditure as claimed as payment to sub-contractor while it confirmed the deletion of the balance amount of addition of Rs.49,40,401/- made by the assessing authority.

14. As, it is an admitted case that all the three sub-contractors are relatives of the partners of the assessee firm, and assessing authority recorded categorical finding had rightly disallowed the expenditure claimed in view of provisions of Section 40A(2)(b) of the Act. The argument raised by learned Counsel for the assessee does not have any force that it is a case under Section 37 and not under Section 40A(2)(a) of the Act. As the expenditure claimed by the assessee while

computing the income chargeable under the head profit and gain of business or profession was disallowed, as payment has been made to persons referred in clause (b) of Section 40A(2) of the Act. The said finding has been confirmed by the first appellate authority as well as the Tribunal.

15. Learned Counsel for the assessee could not deny the factum of relation of the sub-contractors with the partners of the assessee firm, nor would justify the payments so made by the firm to the sub-contractors who did not have the means and the source to make expenses for the work contract, as the balance in the saving accounts was negligible in comparison to the alleged work contract executed by them and the payments so made.

16. As Section 37 of the Act envisages for any expenditure made for the purpose of business to be allowed in computing the income, while Section 40A puts a barrier for expenses of payments not deductible in certain circumstances as enumerated in the said section.

17. In the present case, as it was found by the taxing authorities that payment made by the assessee firm to three sub-contractors out of 21 work contracts given by it was to the relatives of the partners of the firm, as such same was disallowed in view of Clause (b) of Section 40A(2) of the Act. Thus, the authority had rightly disallowed the expenditure so claimed by the assessee.

18. Considering the facts and circumstances of the case, we are of the considered opinion that the Tribunal has recorded a

categorical finding of fact which needs no interference by this Court, and the appeal is **dismissed**. The Appeal No.222 of 2016 which was admitted on the identical question of law for the assessment year 2009-10 is also dismissed. The questions of law are, therefore, answered in favour of the Revenue and against the assessee.

Order Date :- 3.9.2019

S. Singh