

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.808 of 2011

=====

M/S Shyam Bihari, a partnership firm having its office at prabhat Nagar, Bhagwanpur, P.O. Bhagwanpur, P.S. Sadar, District-Muzaffarpur through its partner Shyam Bihari, S/o Sri Mahendra Narayan Choudhary, R/o Prabhat Nagar, Bhagwanpur, P.O. Bhagwanpur, P.S. Sadar, District-Muzaffarpur

.... Appellant

Versus

1. Commissioner Of Income Tax, Muzaffarpur having its officer at Bela Kothi, Muzaffarpur
2. Asstt. Commissioner of Income Tax, Circle-2, Muzaffarpur having its office at Bela Kothi, Muzaffarpur

.... Respondent

=====

Appearance :

For the Appellant : Mr. D.V.Pathy, Adv.
: Mr. Sanjeev Kr. Anwar, Adv.
For the Respondents : Mr. Harshwardhan Prasad
: Mrs. Archana Sinha, Adv.

=====

CORAM: HONOURABLE MR. JUSTICE SHIVA KIRTI SINGH

and

HONOURABLE MR. JUSTICE VIKASH JAIN


ORAL ORDER

(Per: HONOURABLE MR. JUSTICE SHIVA KIRTI SINGH)

3. 07-05-2012 Heard the parties.


2. The assessee has preferred this appeal against the order passed by the Income Tax Appellate Tribunal, Patna Bench, Patna (hereinafter referred to as 'Tribunal') dated 31.01.2008 whereby ITA No. 58 (Pat) of 2007 relating to assessment year 2003-04 preferred by the appellant was dismissed along with another ITA No. 107 (Pat) of 2007 relating to the same assessment year, preferred by the Revenue.

3. As noted by the Tribunal, the assessee is a Civil Contractor and his business income is of contract work from government departments. In assessment year under



consideration the gross contract receipt of Rs. 4,71,00,968/- was the basis on which the assessing officer applied the proviso to Section 145 (3) and calculated the net profit at the rate of 8% of the gross contract receipt after consideration of expenses debited in trading and P/L account, depreciation and interest salary paid to the partners. In appeal the learned CIT (A) confirmed the order of the assessing officer rejecting the books of account and computing income as per estimate but on the basis of relevant facts and after noticing that the receipt of the assessee is in excess of Rs. 2.00 crores and net profit is below 5% and also considering the provisions of Section 44 (A)(D) of the Income Tax Act, he held that the net profit of 6% of the net contractual receipt i.e., gross contractual receipt less the value of material supplied by the contractee, if any, would be the estimated net profit from the contract business. The learned CIT (A) has also held that the salary and interest paid to the partners should be deducted out of the net profit subject to conditions and limits specified in Section 40 (b) of the Act. The learned CIT (A) has further held with regard to the income from interest of Rs. 3,11,956/- that the said receipt has to be assessed as income from other sources as in his view, it was not an integral part of the contract.

4. Before the Tribunal the appellant-assessee objected to inclusion of interest income being assessed as income from other sources on the ground that income was from money




deposited in FDR and NSC which was required to be furnished by way of security for securing the contract work and therefore it should have been treated as income from business and not from other sources. The other grievance of the assessee was that he should have been allowed depreciation allowance out of the net contractual receipt finally estimated at the rate of 6% on account of clear direction to this effect by the Board of Direct Taxes vide circular dated 31.8.1965.

5. The first claim with regard to the interest was disallowed by the Tribunal on the basis of decision of Income Tax Appellate Tribunal, Delhi Bench, Delhi (A) in the case of *DCIT Vs. Alloyed Contractors (2007) 105 ITD 1 (Delhi) (SB)*, the other grievance was also turned down on the basis of provisions of Section 44 (A)(D) of the Act by holding that since the coming into effect of that Section from 1.4.1994, the Act itself now provides for a method of estimating the income from business of civil construction or supply of labour for civil construction work. Despite noticing that the Section was applicable to those assesseees only whose gross receipts from the concerned business do not exceed Rs.40.00 lakhs, the Tribunal applied the said provisions or the principles thereof and did not permit taking into consideration Depreciation allowance after estimating the rate of net profit.

6. The two substantial questions of law raised in this appeal are as follows: (1) whether the Tribunal was in error in not

considering the element of depreciation in the estimating of income from execution of works contract? and (2) whether the Tribunal was in error in holding that interest accrued on security deposits in the nature of National Saving Certificates and FDR's is assessable as income from "other sources"?


7. Learned counsel for the appellant has placed reliance upon a judgment of the Calcutta High Court reported in 193 ITR 252 (*Commissioner of Income Tax Vs. Tirupati Woollen Mills Ltd.*) and upon a judgment of Karnataka High Court reported in 297 ITR 70 (*Commissioner of Income Tax Vs. Chinna Nachimuthu Construction*) to support his submission in respect of question no.2 noticed above. The judgment in the case of *CIT Vs. Chinna Nachimuthu Construction* was rendered in a case of similar nature where the assessee being a contractor, in order to secure a contract work was required to offer a bank guarantee to the contractee. There also the assessee had shown the interest accrued on the fixed deposit as business income but the assessing officer treated the interest as income from "other sources". The Karnataka High Court noticed that the investment of amount in fixed deposits by the assessee was only to provide a bank guarantee to the contractee in order to acquire the contract work. On such facts it held that the interest income could not be treated as a income from other sources and had to be treated as business income only. In that case reliance was also placed upon judgment of the



Supreme Court in the case of *CIT Vs. Govind Choudhury & Sons* reported in 203 ITR 881. In the Calcutta High Court judgment in the case of *CIT Vs. Tirupati Woollen Mills Ltd*, the facts were slightly different. The assessee earned income from fixed deposits and other deposits which was sought to be assessed as income from other sources. On a finding that the assessee had utilized its commercial assets which were lying in the form of surplus cash for earning interest, it was held that such earning arising from utilization of commercial assets would be the business income and hence revenue expenditure could be deducted from it.


8. In view of law laid down in clear terms in the judgment of Karnataka High Court noticed above, we have no hesitation in holding that the Tribunal as well as the subordinate revenue authorities erred in holding that interest accrued on security deposits to the extent used for the purpose of securing the contract work would also be assessable as income from “other sources”. This question is thus answered in favour of the appellant.

9. So far as first question of law is concerned, reliance has been placed on behalf of the appellant on the judgment of Rajasthan High Court reported in 321 ITR 400 (*Sri Ram Jhanwar Lal Vs. Income Tax Officer*). In that case the Tribunal held that since the gross receipts were in excess of Rs. 40 lakhs, the case was not covered under Section 44 (A)(D) of the



Income Tax Act but permitted guidance from those provisions of the Act and applied 8% net profit rate subject to interest and remuneration to partners as provided under Section 44 (A)(D) (2) of the Act. On appeal the Rajasthan High Court held that in taxing statutes adopting the principles underlying other Sections which are not applicable is not permissible. It was held that the Tribunal was not justified in adopting the principles underlying Section 44 (A)(D) of the Act when the said Section itself was not applicable. In the present case, it appears from the orders of the assessing officer, CIT (Appeal) as well as of the Tribunal that all of them have been guided by the provisions or the principles emanating from the provisions of Section 44 (A)(D) of the Act. In such circumstances, in our view the question of law actually falling for consideration would be whether the authorities under the Act including the Tribunal have erred in being guided by the principles underlying Section 44 (A)(D) of the Act when that Section is clearly not applicable to the case of the appellant as his gross contract receipt is well above Rs. 40 lakhs. This question is also answered in favour of the appellant on the basis of Rajasthan High Court judgment noticed above.

10. We have been taken through the provisions of circular of the Board dated 31.8.1965. According to that circular which is binding on the department and its authorities, where it is proposed to estimate the profit and the prescribed particulars



have been furnished by the assessee, the depreciation allowance should be separately worked out. In all such cases, as per the circular, the gross profit should be estimated and the deductions and allowance including the depreciation allowance should be separately deducted from the gross profit. If the net profit is required to be estimated, it should be estimated subject to the allowance for depreciation and the depreciation allowance should be deducted therefrom.

11. Since it is the case of the appellant that the authorities should not apply the principles emanating the Section 44 (A)(D) of the Act but should be guided by the binding circular of the Board, we find it necessary not only to set aside the order of the Tribunal but also the orders of the assessing officer and the learned CIT (Appeal) as those orders also suffer from error of law on both the points. Accordingly this appeal is allowed and the order under appeal passed by the Tribunal, the appellate order of the learned CIT (Appeal), Patna and also the order of Assessing Officer are set aside and the matter is remitted back to the Assessing Officer for passing a fresh order of assessment in accordance with law keeping in view the questions of law as answered by this Court.

(Shiva Kirti Singh, J)

(Vikash Jain, J)

Fahad./-