

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Case No. : I. T. A. No. 30 of 2016 (O&M)

Date of Decision : July 14, 2016

The Commissioner of Income Tax, Patiala Appellant
vs.

M/s Ram Kumar, Govt. Contractor Respondent

CORAM : HON'BLE MR. JUSTICE S. J. VAZIFDAR, ACTING CHIEF JUSTICE.

HON'BLE MR. JUSTICE DEEPAK SIBAL.

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To be referred to Reporters or not ?

Whether the judgment should be reported in the digest ?

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Present : Mr. Zora Singh Klar, Senior Standing Counsel
for the appellant – Revenue.

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DEEPAK SIBAL, J. :

C. M. No. 1817-C-II of 2016 :

Through this application, condonation of delay of 183 days in re-filing the present appeal is sought for.

Allowed as prayed for.

CM stands disposed of.

Main Appeal :

An order dated 15.12.2015, passed by the Income Tax Appellate Tribunal, Division Bench, Chandigarh (hereinafter referred to as – the Tribunal) in MA No. 54/CHD/2015 in ITA No. 188/CHD/2014 was handed over to us by learned counsel appearing on behalf of the appellant

in Court today. The same is ordered to be taken on record as **Mark-A**.

The present is an appeal by the Revenue under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as – the Act) impugning therein the order passed by the Tribunal dated 15.07.2014 (Annexure A-3). At the time of hearing of the matter, the afore-referred order dated 15.12.2015 (Mark-A) was produced and also assailed.

The present appeal pertains to the assessment year 2010-11 and seeks to raise the following substantial questions of law :-

“1. Whether in the facts and circumstances of the case, the ITAT was right in law in directing the AO to apply the gross profit rate of 7% instead of 10% adopted by the AO, without appreciating the numerous and substantial deficiencies in the accounts pointed by the AO and that the rate of net profit of 10% was held to be reasonable in the case of CIT vs. M/s Shivam Construction Co. in ITA No. 167 of 2007 dated 07.05.2007 subject to allowing of interest and salary to the partners and disallowing the depreciation ?

2. Whether in the facts and circumstances of the case, the ITAT was right in law in allowing the depreciation claimed whereas the Hon'ble Punjab and Haryana High Court, Chandigarh has held in the case of Surinder Pal Nayyar vs. CIT, Ludhiana reported in 177 Taxmann 207 that the profit having been arrived at on the basis of gross receipts by taking into consideration all allowable expenses, no deduction on account of depreciation can be

separately allowed. ?”

The factual matrix of the matter, which, in brevity needs to be noticed is that the respondent-assessee is a Civil Contractor. After he had filed his return for the assessment year in question, his case was selected for scrutiny and in the proceedings which ensued, since according to the Assessing Officer, proper books of accounts were not produced by him, while rejecting his books of accounts, the Assessing Officer ordered that the assessee be assessed to tax after application of Net Profit Rate of 10%. No deduction on account of depreciation was allowed.

The assessment order was taken up by the assessee in appeal before the Commissioner of Income Tax (Appeals), Patiala (hereinafter referred to as – the Commissioner) who ordered substitution of the Net Profit Rate @ 6.5% in place of 10%. The other relief granted to the assessee was with regard to the claim of depreciation.

The Revenue challenged the order of the Commissioner by preferring an appeal against the same before the Tribunal, in which Net Profit Rate was ordered to be applied @ 7% instead of 6.5%, as applied by the Commissioner. The issue with regard to the claim of depreciation was not opined upon and for a decision on this issue, an application was filed by the Revenue, which, through order dated 15.12.2015 (Mark-A), was rejected. It is in the background of the afore-referred factual matrix that the present appeal has been filed by the Revenue seeking to raise therein the substantial questions of law as reproduced earlier.

We have heard learned counsel for the appellant and with his

able assistance, have also gone through the record of the case.

Two issues were pressed before us. With regard to the Tribunal ordering application of Net Profit Rate @ 7%, learned counsel for the appellant submitted that the same should be 10%, as assessed by the Assessing Officer and in any case, at least 8%, as per Section 44AD (1) of the Act, as it existed at the relevant time.

On the issue of the assessee having been allowed to claim depreciation, relying upon the provisions of Section 44AD (2) of the Act (as it existed at the relevant time), it was submitted by the learned counsel for the appellant that there was a complete bar to the same. Our attention was drawn to Section 44AD (2) of the Act, wherein it was provided that any deduction allowable under the provisions of Sections 30 to 38, which include the grant of depreciation under Section 32 of the Act, would be deemed to have been given full effect to while applying the Net Profit Rate in accordance with Section 44AD(1) of the Act and thus, it was submitted that once Net Profit Rate, on rejection of the books of accounts of the respondent-assessee had been ordered to be applied, no depreciation could separately have been allowed.

Before proceeding further with the matter, we deem it appropriate to refer to the provisions of Section 44AD (1) and (2) of the Act, as it existed at the time of the assessment year in question and the same is as under :-

***“44AD. Special provision for computing profits
and gains of business of civil construction, etc. -***

(1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an assessee engaged in the business of civil construction or supply of labour for civil construction, a sum equal to eight per cent of the gross receipts paid or payable to the assessee in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum as declared by the assessee in his return of income, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession";

***Provided** that nothing contained in this sub-section shall apply in case the aforesaid gross receipts paid or payable exceed an amount of forty lakh rupees.*

(2) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of sub-section (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed :

***Provided** that where the assessee is a firm, the salary and interest paid to its partners shall be*

deducted from the income computed under sub-section (1) subject to the conditions and limits specified in clause (b) of section 40.”

Circular No. 737 dated 23.02.1996, issued by the Central Board of Direct Taxes, which culled out the objects behind insertion of Section 44AD, is also extracted as under :-

“The Estimated Income Method of assessment for certain categories of businesses is prevalent in several countries. The Tax Reforms Committee has also recommended gradual introduction of the Estimated Income Method in certain areas to facilitate better tax compliance. Accordingly, a new Section 44 AD has been inserted to the Income-tax with a view to providing for a method of estimating income from the business of civil construction or supply or labour for civil construction work. The new section is applicable to all assesseees whose gross receipts from the above mentioned business do not exceed Rs.40 lakhs. Gross receipts are the amount received from the clients for the contract and will not include the value of material supplied by the client. The income from the above mentioned business will be estimated at 8 per cent of the

gross receipts paid or payable to an assessee. A taxpayer can voluntarily declare a higher income in his return.”

From a harmonious reading of the afore-quoted provision of the Act and the circular, it is abundantly clear that the provisions of Section 44AD of the Act were not applicable upon an assessee, whose gross receipts were exceeding Rs. 40 lacs.

On a query posed by us, it was admitted by the learned counsel for the appellant-Revenue that the gross receipts in the case of the respondent-assessee exceeded the amount of Rs. 40 lacs. That being so, in view of the afore-quoted proviso to Section 44AD (1), read with Circular No. 737 dated 23.02.1996 of the Central Board of Direct Taxes, as extracted above, we unhesitantly hold that Section 44AD would not apply in the case of the respondent assessee. Resultantly, the challenge to the claim of depreciation having been allowed by the Tribunal must fail.

So far as the challenge by the Revenue to the application of Net Profit Rate @ 7% is concerned, the same has been ordered to be applied by the Tribunal after considering the entire facts and circumstances of the case before it, which we do not find as arbitrary or perverse and resultantly, choose not to interfere with the same. The argument of the learned counsel for the appellant to apply Net Profit Rate of 8% as provided under Section 44AD (1) of the Act is also required to be rejected as in view of the proviso to Section 44AD (1) of the Act, since the gross receipts paid or payable in the case of the assessee are over Rs. 40 lacs, the provisions of Section 44AD

(1) of the Act, as reproduced above, would not be attracted in the case of the respondent-assessee.

The afore-referred view of ours on both the issues finds support from a Division Bench judgment of this Court in **Commissioner of Income Tax, Patiala vs. Harbhajan Singh and Co. - [2015] 60 taxmann.com 84 (Punjab and Haryana)**, wherein it has been held as under :-

“6. Section 44 AD (2) of the Income Tax Act, if read in isolation of a circular issued by the Central Board of Direct Taxes would, require us to answer this question, in favour of the revenue. A perusal of the circular, however reveals that it is clarified, that Section 44 AD (2) of the Act applies to assesseees whose gross receipts do not exceed `40 lacs. The assessee's gross receipts, as, referred to in the assessment order, admittedly exceeded `10 crores. A relevant extract from the circular issued by the Central Board of Direct Taxes is as follows :-

“The Estimated Income Method of assessment for certain categories of businesses is prevalent in several countries. The Tax Reforms Committee has also recommended gradual introduction of the Estimated Income Method in certain areas to facilitate better tax

compliance. Accordingly, a new Section 44 AD has been inserted to the Income-tax with a view to providing for a method of estimating income from the business of civil construction or supply or labour for civil construction work. The new section is applicable to all assesseees whose gross receipts from the above mentioned business do not exceed Rs.40 lakhs. Gross receipts are the amount received from the clients for the contract and will not include the value of material supplied by the client. The income from the above mentioned business will be estimated at 8 per cent of the gross receipts paid or payable to an assessee. A taxpayer can voluntarily declare a higher income in his return.”

7. *The circular having clarified that it applies to an assessee whose gross receipts do not exceed `40 lacs, we have no hesitation in holding that the ITAT has rightly allowed depreciation to the assessee.*

8. *As regards the first question namely reduction of the net profit rate from 10% to 6% suffice is to state that Tribunal has determined the net profit rate after considering the past net profit*

rate applied to the assessee and that there is no perceptible change, in the assessment year under consideration. The findings of fact being devoid of an arbitrary exercise of discretion or any perversity in the reasoning does not give rise to a substantial question of law. Consequently the questions of laws are answered against the revenue and the appeal is dismissed. [Emphasis supplied]”

In support of his submissions, learned counsel for the appellant pressed into service the following two Division Bench judgments of this Court :-

1. **Commissioner of Income Tax vs. Chopra Bros. India (P) Ltd. - [2001] 119 Taxman 866 (Punjab and Haryana)** and
2. **Surinder Pal Nayyar vs. Commissioner of Income-tax, Ludhiana – [2009] 177 Taxman 207 (Punjab and Haryana).**

We have gone through both the afore-referred judgments and find that neither of the judgments would apply to the facts of the case in hand.

So far as the case of **Chopra Bros. (supra)** is concerned, in that case, the Division Bench held that the provisions of Section 44 AD would apply w.e.f. 01.04.1994 as this Section had been made effective from that date. The issue with regard to the applicability of Section 44 AD of the Act, in a case where the gross receipts of the assessee exceed Rs. 40 lacs, was

neither considered nor decided.

The reliance of the counsel for the appellant on the judgment of this Court in **Surinder Pal Nayyar's** case (*supra*) is equally misplaced as a perusal of the judgment shows that in that case also, the issue with regard to applicability of Section 44 AD of the Act upon an assessee, having gross receipts more than Rs. 40 lacs, was neither considered nor decided.

In view of the above, finding no merit in the present appeal, the same is hereby ordered to be dismissed.

No costs.

(S. J. VAZIFDAR)
ACTING CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

July 14, 2016
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