

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Tax Case No.8 of 2012**

Smt. Madhu Soni, Prop. Bhilai Builders, 6/36, Sanichari Bazar, Durg,
Chhattisgarh.

---- **Appellant****versus**

Assistant Commissioner of Income Tax, Circle-I, Bhilai, Chhattisgarh.

---- **Respondent**

For Appellant	:	Shri Neelabh Dubey, Advocate
For Respondent	:	Ms. Naushina Ali, Advocate

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Judgment on Board**Per Navin Sinha, Chief Justice****1/9/2015**

1. The present appeal arises from order dated 22.1.2010 of the Income Tax Appellate Tribunal, Bilaspur Bench, rejecting C.O. No.30/BLPR/09 for the Assessment Year 2006-07.

2. The questions of law framed while admitting the appeal are as follows:

“(1) Whether a builder can be said to be involved in the construction of a building fulfilling the requirement of the words 'Civil Construction' in the Explanation to Section 44AD?

(2) Whether the words 'Civil Contractor' can be read into Section 44AD when the Legislature has used the words 'Civil Construction' and not 'Civil Contractor'?”

3. The Appellant is the proprietor of M/s Bhilai Builders. Return of income tax was filed on 28.3.2007. Pursuant to survey under Section 133A of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) her case

was selected for scrutiny leading to notice under Section 143(2) of the Act. The Assessing Officer held that the Appellant was a builder and not contractor and thus not entitled to benefit of Section 44AD of the Act making addition of gross profit @37%. The CIT (A) reversed the view holding that there was no difference between a civil contractor and constructor under Section 44AD restricting the addition to 16% gross profits. The Tribunal held that the Appellant was not a civil contractor but a land developer/promoter/builder, approving restriction of gross profits at 16%.

4. It is appropriate to set out Section 44AD in the relevant extract for the purpose of the present controversy :-

“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.

.....

Explanation.—For the purpose of this section, the expression “civil construction” includes—

- (a) the construction or repair of any building, bridge, dam or other structure or of any canal or road;
- (b) the execution of any works contract.”

5. Learned Counsel for the Appellant submitted that the distinction

sought to be drawn by the Tribunal between a civil contractor and a land developer/builder/promoter is not sustainable in view of the clear language of Section 44AD read with the Explanation. In a taxing statute, the language of which is clear, the Tribunal could not have read into it words not provided by the Legislature. If the Legislature intended to exclude a developer/builder/promoter, it would have provided so in the statute itself. Once the CIT (A) held that the Appellant was a civil contractor relief ought to have been granted under Section 44AD of the Act at 8% gross profit.

6. Learned Counsel for the Respondent submitted that there will be a distinction between a person engaged in a civil construction and a land developer/builder/promoter, who does the work on account of the clients. No books of accounts were maintained and valuer's report was also obtained with regard to the investment and construction raised by the Appellant.

7. Reliance was further placed on an order in (2014) 42 Taxmann.com 436 (Kerala) (Touch Home Builders and Realtors (P.) Ltd. v. Deputy Commissioner of Income Tax, Central Circle, Trivandrum) in support of the submission of distinction between a civil contractor and a builder.

8. We have considered the submissions, the statutory provisions, and the questions of law framed. The orders of the Assessing Officer, the Commissioner of Income Tax (Appeals) and the Tribunal have also been considered by us.

9. The Assessing Officer sought to draw a distinction between a contractor and a builder. The CIT (A) disagreeing held that there is no distinction between a civil contractor and a constructor under Section 44AD. The Tribunal reverted back to the Assessing Officer for drawing a distinction between a civil contractor and a land developer/builder/promoter.

10. To avail the benefit of Section 44AD the assessee was required to be

engaged in the business of civil construction. It then creates a fiction that for such assessee 8% shall be deemed to be gross profit chargeable to tax unless gross receipt paid or payable exceeded forty lakhs of rupees which is not the case presently.

11. The Explanation to Section 44AD provides that “civil construction” will “include” construction of any building. In other words, if an assessee is engaged in the business of civil construction and which expression includes construction of any building we see no reason why it will not include the construction of a building by a land developer/builder/promoter. The proviso to Section 44AD carves out an exception when the deeming fiction will not apply. Touch Home Builders and Realtors (supra) relied upon by the Respondent does not contain any analysis of the provisions of Section 44AD read with the Explanation.

12. Considering the meaning of the word “includes” in (1971) 3 SCC 550 (CIT v. Taj Mahal Hotel) it was observed as follows :-

“6.....The word “includes” is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, those words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include....”

13. A taxing statute has to be interpreted literally by giving meaning and effect to every word in the Act. The language of the Section read with the Explanation admits of no ambiguity. If the Legislature did not provide for exclusion of a land developer/builder/promoter from the definition of civil construction, nothing can be added, incorporated or inserted by adding to it which may amount to changing the language of the provision and the intention of the Legislature itself.

14. In (1969) 1 SCC 621 (New Savan Sugar & Gur Refining Co. Ltd. v.

CIT) it was observed as follows : -

“9....The duty of the Court is to interpret the words that Parliament has used, it cannot supply the gap disclosed in an Act or to make up the deficiencies. “If”, said Lord Brougham, in *Gwynne v. Burnell*, we depart from the plain and obvious meaning on account of such views (as those pressed in Argument on 43 Geo. 8, c. 99) we do not in truth construe the Act, but alter it. We add words to it, or vary the words in which its provisions are couched to supply a defect which the Legislature could easily have supplied, and are making the law, not interpreting it”.

15. The discussion and consideration by the Assessing Officer, the CIT (A) though in favour of the Assessee, and the Tribunal is cryptic and essentially leaves crucial issues undecided by proceeding on certain assumptions not borne out by the statutory provisions.

16. The impugned order dated 22.1.2010 in its present form is held to be unsustainable and is set aside. The matter is remanded to the Tribunal for fresh consideration and decision in accordance with law.

17. The appeal is allowed.

Sd/-

(Navin Sinha)
CHIEF JUSTICE

Sd/-

(P. Sam Koshy)
JUDGE