

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY
I.T.T.A.Nos. 452, 453 454 & 455 of 2015

COMMON JUDGMENT: (per Hon'ble Sri Justice Ramesh Ranganathan)

These appeals, under Section 260-A of the Income Tax Act, 1961 (for short "the Act"), are preferred against the common order passed by the Income Tax Appellate Tribunal in I.T.A.Nos.668, 670, 685 and 686 of 2009 for the assessment years 2003-04 and 2004-05.

For the assessment years under consideration, the books of accounts of the assessee were rejected by the Assessing Officer; and the profit was estimated at 12.5% of the gross receipts. In appeal, the Commissioner of Income Tax (Appeals), following the judgment of the Special Bench of the Tribunal, Indore in ***Arihant Builders, Developers and Investors P. Ltd. vs. ACIT***^[1], held that estimation of net profit at 8% was reasonable; and such a rate is in tandem with the spirit of the provisions of Section 44AD of the Act, which could be considered as a guideline for the purpose of applying a particular net profit rate in the case of civil contractors. With regards the works entrusted to the sub-contractor, the Commissioner of Income Tax (Appeals) followed the decision of this Court in ***Indwell Constructions vs. CIT***^[2], and held that no deduction from the income estimated can be allowed, once the books of accounts were rejected. The matter was remanded to the Assessing Officer to re-compute the total income of the assessee by adopting the profit in respect of contracts at 8%, and sub-contracts at 5%, after necessary verification of the claim regarding sub-contract without giving any further deduction in respect of depreciation, salary or interest to partners. Aggrieved thereby, both the assessee and the Revenue carried the matter in appeal to the Tribunal.

In the order under appeal before us, the Tribunal affirmed the order passed by the Commissioner of Income Tax (Appeals) holding

that, when the books of accounts were rejected, the only method available to the Assessing Officer was to estimate the profit; the profit ratio cannot be a constant factor for each and every year; the profit ratio would fluctuate depending upon various factors such as the place of execution of the contract, availability of raw material, labour and assessee's own funds etc; while estimating the profit, the authorities may take into consideration the profit ratio of similarly placed traders in the same locality and other factors; the profit ratio of the other assessees in that locality would be one of the factors to be taken into consideration, but that cannot be the sole criteria for fixing the profit ratio from the contract business; in similar orders, passed in the case of Krishnamohan Constructions, K.C.Reddy Associates, Sri Srinivasa Constructions and M.Bhaskar Reddy, the Tribunal had estimated the profit between 12.5% to 8% depending upon the factual situation; a bare reading of the earlier order of the Tribunal, in M.Bhaskar Reddy, showed that the Tribunal, after considering the judgment of the Supreme Court in ***State of Kerala vs. C.Velukutty***^[3] and the decision of the Special Bench of the Tribunal in ***Arihant Builders, Developers and Investors P. Ltd.***¹, and by taking a clue from Section 44AD of the Act, had estimated profits at 8%; Section 44AD of the Act would be applicable in respect of cases where the gross contract receipts do not exceed Rs.40 lakhs; where the gross contract receipts exceed Rs.40 lakhs, the provisions of Section 44 AD of the Act are not applicable; profit, in such cases, can be estimated either at lower than 8% or above 8% depending upon the factual situation; in Krishnamohan Constructions, the Tribunal, in I.T.A.Nos.116 and 117/Hyd/2007 for the assessment years 1993-94 and 1994-95, had estimated the profit only at 8% even though it had estimated the profit at 12.5% for the earlier assessment year 1992-93; the Commissioner of Income Tax (Appeals), after referring to the order of the Tribunal in Krishnamohan Constructions and ***Arihant Builders, Developers and Investors P.***

Ltd.¹, had estimated the profit at 8% for the main contract, and at 5% on sub-contract; the Tribunal was uniformly estimating the profits between 8% to 12.5% depending upon the factual situation, and 5% to 7% on the sub-contracts depending upon the factual situation; and, in their opinion, estimation of profit at 8% on the main contract, and at 5% on the sub-contract, was justified.

Section 44AD of the Act stipulates that, notwithstanding anything to the contrary contained in Sections 28 to 43C, in the case of an eligible assessee engaged in an eligible business, a sum equal to 8% of the total turnover or gross receipts of the assessee in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the eligible assessee, 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". Under the proviso thereto, the requirement of Clause (1) of Section 44AD would not apply in cases where the gross receipts exceed Rs.40 lakhs.

In the present case, the gross receipts, no doubt, are far in excess of Rs.40 lakhs and, as such, Section 44AD of the Act is not attracted. The Tribunal, however, held that Section 44AD of the Act serves as a guidance in estimating net profit even in cases where the gross receipts exceed Rs.40 lakhs also. The Tribunal has referred to the earlier orders passed in several other cases where profits were estimated at 8% of the gross receipts for the main contract, and at between 5% to 7% for sub-contracts.

As has been rightly held by the Tribunal, estimation of profits would depend on several factors, and would vary from one case to another. As the manner in which profits are to be estimated would depend on the facts of a given case, no question of law arises on such estimation either by the Commissioner of Income Tax (Appeals) or by the Tribunal, unless such an estimation is perverse. In the present case, we are satisfied that the order of the Tribunal does not suffer from

any such infirmity. We are also supported in this regard by an order passed by a Division Bench of this Court in I.T.T.A.No.21 of 2013 and batch dated 23.07.2013.

The appeals fail and are, accordingly, dismissed.

The miscellaneous petitions pending, if any, shall also stand dismissed of. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M. SATYANARAYANA MURTHY, J

Date: 22.12.2015
JSU

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

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[\[1\]](#) 291 ITR 41 (SB)

[\[2\]](#) 232 ITR 776

[\[3\]](#) 60 ITR 239