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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.2452 OF 2013

The Commissioner of Income Tax
Central-III, Mumbai. ..Appellant
Versus
M/s. Prime Developers ..Respondent

....
Mr. Ashok Kotangale i/b. Ms. Padma Divakar for the Appellant.
Mr. J. D. Mistri, Senior Counsel, a/w Mr. Atul Jasani for the Respondent.
....

CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.

DATE : 18th JULY, 2016

P.C.:

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 22nd March, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is a common order in respect of Assessment Year 2004-05, 2005-06, 2006-07 and 2007-08. This appeal is in respect of Assessment Year 2004-05.

2. This appeal raises the following questions of law for our consideration :-

> *"(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in directing the Assessing*

Officer to work out the taxable profits of the Project 'Prime Mall' by adopting net profit of 17.08% of the total gross sales?

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in directing the Assessing Officer to allow deduction towards remuneration and interest, even in case of estimated net profit?"

3. **Regarding Question 1:-**

(a) The respondent-assessee is engaged in the business of construction. During the subject assessment year the respondent-assessee undertook construction of a project called 'Prime Mall'. However in its return of income filed for the subject assessment year the respondent-assessee did not disclose any profits on its above project as it was following the Project Completion Method.

(b) On 20th April, 2006 there was a search on the respondent-assessee under Section 132 of the Act. During the course of the search it was found that during the previous year relevant to assessment year under consideration it was found that the respondent-assessee had sold 14 units in its Prime Mall Project and received 65% of the total sales consideration as 'on money'. Consequent to the search, the respondent-assessee contended that in the subject assessment year no income is chargeable to tax as it is following the Project Completion Method of Accounting.

Therefore the profit, if any, would be subject to tax on completion of the project which takes place only for the A.Y. 2006-07(90%) and A.Y. 2007-08. The Assessing Officer by an order dated 30th December, 2008 did not accept the respondent's contention of Project Completion Method and brought to tax, the entire amount received as 'on money' consideration i.e. 65% of total sales value (35% recorded plus 65% 'on money') of the 14 unit sold.

(c) Being aggrieved, the respondent carried the issue in appeal to the Commissioner of Income Tax(A) (CIT(A)). In appeal, by an order dated 30th October, 2009 the CIT(A) modified the order of the Assessing Officer to the extent it held that the total consideration received in respect of sales of 14 unit during the subject assessment year would be taxed at 40% as net profit of the total consideration in place of 65% in respect of sales of 14 units. The CIT(A) did not accept the respondent-assessee's contention that only 8% should be taken as net profit of the unaccounted turnover. This was in view of the fact that annexure-L found during the course of the search indicated the net profit at 28.18%.

(d) Being aggrieved, both the Revenue as well as the respondent-assessee carried the issue in appeal to the Tribunal. The Tribunal by its impugned order after considering the facts i.e. the seized documents and the respondent-assessee's books of accounts came to the conclusion that the reasonable percentage of net profit to be applied is 17.08%. The Tribunal rendered a finding that Annexure-L on which reliance was placed which indicated a net profit of 28.18% was merely an estimated working done by the respondent-assessee. In the above view, the issue was restored to the Assessing Officer to work out the taxable profits after adopting a reasonable net profit of 17.08% on its gross sales turnover of Rs.11.60 crores in the subject assessment year.

(e) The grievance of the Revenue before us is that the adoption of net profit of 17.08% as determined by the Tribunal is not correct. Although the questions as formulated does not state that the adoption of any particular rate of net profit, in submissions it is submitted that it has to be replaced/substituted by 65% as net profit as arrived at by the Assessing Officer.

(f) We find that the Revenue seeks to substitute the estimated net profit arrived at by the Tribunal with a new figure of net profit. This without in any manner showing that the estimate arrived at by the Tribunal in the impugned order is perverse. It is a settled position of law that in estimated net profit arrived at by the authorities is a question of fact and if the material on record does support the estimate arrived at by the Tribunal then it does not give rise to any substantial question of law (see ***CIT v/s. Piramal Spinning and Weaving Mills Ltd. 124 ITR 408***). In this case, we find that the net profit estimated at 17.08% is a very possible view on the facts found.

(g) In the above view, question no.1 as proposed does not give rise to any substantial question of law. Thus, not entertained.

4. Regarding Question 2:-

(a) Mr. Kotangale, the learned counsel for the Revenue does not make any submissions in support of the question as framed. The only grievance of the Revenue he states is that the issue of quantification of deduction permissible under Section 40(b) of the Act with regard to the remuneration and interest paid to the partners should be restored to the Assessing Officer for the purposes of determination particularly keeping in view the cap therein. This is particularly so in respect of remuneration paid to partners as the book profits consequent to the impugned order of the Tribunal would be redetermined.

(b) Mr. Mistri, the learned counsel for the respondent-assessee has no objection to the same.

(c) There can be no quarrel with the submissions of Mr. Kotangale. In any event, the Assessing Officer would need to redetermine the book profits of the respondent-assessee as a consequence of the impugned order of the Tribunal. At that stage the ceiling provided under Section 40(b) of the Act would also be considered while allowing deduction on account of remuneration and interest paid to the partners.

(d) However as nothing has been urged in support of the questions framed, we we are unable to see how a substantial questions of law arises in the context of the facts arising in this case. Therefore, question no.2 as framed is not being entertained.

5. Appeal is dismissed. No order as to costs.

(A. K. MENON, J.) **(M. S. SANKLECHA, J.)**