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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 848/2018**

SHRI YASH DEV BAHL

..... Appellant

Through: Dr. Rakesh Gupta, Mr. Somil
Agarwal and Mr. Rohit Kumar Gupta,
Advocates

versus

DEPUTY COMMISSIONER OF INCOME TAX Respondent

Through: Mr. Ashok K. Manchanda, Sr.
Standing Counsel

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

ORDER
07.09.2018

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On 10th August, 2018, the following order was passed:-

“This appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) impugns the order dated 06.03.2018 passed by the Income Tax Appellate Tribunal in ITA No.6804/Del/2017. The appeal relates to assessment year 2013-14. The appellant is an individual.

2. *In the return for the assessment year 2013-14, the appellant had declared income of Rs.14,10,850/-, including income of Rs. 3,07,967/- under Section 44AD of the Act, being 12% of Rs. 25,66,390/- received from M/s. Y.D. Builders & Hotels Pvt. Ltd.*

3. *The appellant had claimed that he had acted and performed work as a sub-contractor, in terms of the contract dated 8.11.2012*

with M/s Y.D. Builders and Hotels Pvt. Ltd. Appellant-assessee holds 37.3% shares in M/s. Y.D. Builders and Hotels Pvt. Ltd. and the other shareholder is his son. M/s. Y.D. Builders and Hotels Pvt. Ltd. had been awarded work order by the Delhi Development Authority on 17.09.2011, for an estimated cost of Rs.15,92,26,466/-, which was to be completed in 18 months.

4. The assessment order records that the sub-contract dated 8.11.2012 was on a plain paper and was not registered or notarized. Further, Rs.25,00,000/- had been credited in the account of the appellant on the last day of the financial year, i.e., 30.3.2013. By invoking Section 44AD of the Act, 88% of the aforesaid amount was treated as deemed expense incurred during the period relevant to the assessment year. In order to ascertain genuineness of the transaction and claim under Section 44AD of the Act, the appellant was asked to file cash flow statement for the financial year 2012-2013. As per statement filed, opening balance on 1.4.2012 and the closing balance on 31.3.2013 was identical, i.e., Rs. 5630, indicating that no activity and work was undertaken.

5. The Assessing Officer felt that the claim under Section 44AD of the Act was a sham and not genuine, for no contractual work was rendered and performed. Referring to the purported contract dated 08.11.2012 between the appellant and M/s. Y.D. Builders and Hotels Pvt. Ltd., the Assessing Officer had the following observations to make:-

“51 95% of the contract/work order price shall be against monthly RA bill against completion of works and its certification by engineer-in-charge upon.

(i) Submission of RA bills along (a) the names of the labour employed for the (b) salaries paid to them (c) Amount of PF deducted from the salary of the labour (d) contractor's contribution (e) amount deposited in RPFC against each labour and (f) copy of the challan for the amount deposited in RPFC till previous month duly certified by the project manager's/engineer-in-charge.

(ii) The development work done by the contractor shall be tested and certified by DDA or PWD approved laboratory certificate shall be submitted by contractor.

(iii) Bitumen content test certificate shall be provided by the contractor from DDA/PWD approved laboratory.

(iv) Measurement sheet duly signed by the engineer-in-charge/project manager,

(v) Submission of receipts of procurement of bitumen from the supplier.

(vi) Material reconciliation statement shall be submitted by the contractor with each RA bill.

The assessee has to fulfill all the above terms as per the work order but he did not produce even a single document from the above mentioned documents in order to prove that he has actually done a business covered u/s 44AD. Instead, he categorically stated that when

TDS is deducted it means the work has been done by the assessee & insisted that "the assessee is under no legal obligation to maintain any regular books of contract income and TPS amount duly tallies as per form 26AS. That the assessee has not maintained any other record and regular account books as per provisions of section 44AD of I T.Act. Hence except bank a/c work order and gross contract receipts the assessee does not possess any other record/documents. "The assessee was asked to explain the source of 88% expenses incurred by him to do this contractual work. The assessee vide letter dated 29.01.2016 submitted as under:

<i>Date</i>	<i>Particulars</i>	<i>Amount</i>	<i>Remarks</i>
<i>14.07.12</i>	<i>Cheque issued to advocate</i>	<i>3,483/-</i>	<i>IOB a/c No. 3713</i>
<i>05.12.12</i>	<i>Cheque issued for expenditure against contract receipts</i>	<i>95,200/-</i>	<i>IOB a/c No. 3713</i>
<i>31.03.13</i>	<i>Car depreciation</i>	<i>27,750/-</i>	
<i>31.03.13</i>	<i>Cheque issued for expenditure against contract receipts</i>	<i>21,13,062/-</i>	<i>IOB a/c No. 1331</i>
<i>31.03.13</i>	<i>Expenses payable paid in next year against contractual receipts</i>	<i>18,928/-</i>	

	Total	22,58,423/-	
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From the above chart it is seen that the assessee has not incurred any major expense towards the work done for getting contractual receipts in question.

Major expenses is stated to be incurred on 31.03.2013 only.

The assessee has neither stated the cheque number through which this payment has been made nor has stated the name of the person to whom above mentioned payment was made by him. Further, on perusal of bank statements of Indian Overseas Bank (a/c No. 1331 & a/c No. 3713) it has been found that there is no such transactions on the above mentioned dates as well as after that date. Further the assessee has not deducted any taxes at source on the sub-contract so claimed to have been given.”

(emphasis supplied)

6. The Assessing Officer observed that there was no dispute that Rs.25,66,390/- was received by the appellant-assessee from M/s. Y.D. Builders and Hotels Pvt. Ltd. but the question was whether the assessee had done any contractual work covered under Section 44 AD of the Act, or the deduction of 88% claimed by relying on Section 44AD of the Act, was sham and bogus. The Assessing Officer, referring to factual background, held that the payment of Rs.25,66,390/- as income from a sub-contract was a camouflage as the appellant-assessee had not done actual work and was not engaged in eligible business assessable under Section 44AD of the Act.

Recording these findings, the Assessing Officer made an addition of Rs.25,66,390/-, thus treating the payment as income from other sources.

7. The aforesaid order was upheld on 15.09.2017 by the Commissioner of Income Tax (Appeals), noting that there was no doubt about receipt of money of Rs.25,66,390/- from M/s. Y.D. Builders and Hotels Pvt. Ltd., but the purpose of receipt was obviously given the colour of contractual receipt to take benefit of presumptive taxation under Section 44AD of the Act. It was a case where the appellant/assessee had created paper work to show that the transaction was a genuine one, whereas it was not so.

8. The Income Tax Appellate Tribunal has affirmed the finding of the income tax authorities. The transaction, as per the findings, was a sham and colourable device. Transaction was not between unrelated parties. It was not an arm's length transaction. The payment of Rs.25,66,390/- and claim under Section 44AD of the Act was an attempt to reduce the profits of M/s. Y.D. Builders and Hotels Pvt. Ltd. and take benefit of 88% of the payment made to the appellant as deemed expense under the aforesaid provision.

9. During the course of hearing, learned counsel for the assessee has submitted that the Assessing Officer had invoked Sections 2 (22) (e) of the Act relating to deemed dividend. It is submitted that this is a case of double addition, as the appellant-assessee has been taxed by addition of Rs.25,66,390/-, though Rs.3,07,967/- stands taxed under Section 44AD of the Act. The addition could have been restricted to difference between Rs.25,66,390/- and Rs.3,07,967/-. Learned

Standing Counsel for the Revenue would obtain instruction on this aspect.

Relist on 7.9.2018.”

Learned counsel for the respondent – revenue states that the Revenue agrees and accepts that addition of Rs.25,66,390/- would be inclusive of Rs.3,07,967/- declared by the appellant – assessee as income taxable under Section 44AD of the Income Tax Act, 1961. The addition would be the difference between Rs.25,66,390/- less Rs.3,07,967/-.

Recording the said concession with which the respondent would be bound, the appeal is disposed of. No costs.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

SEPTEMBER 07, 2018

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