

ITAT/135/2021
IA No.GA/2/2021

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX-9, KOLKATA
Vs
M/S. JAY BHARAT CONSTRUCTION

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 22nd August, 2022.

Appearance:
Mr. Smarajit Roychowdhury, Adv.
...for the appellant.

The Court:- This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is directed against the order dated 24th August, 2018 passed by the Income Tax Appellate Tribunal, “B” Bench, Kolkata (the Tribunal) in ITA No.1009/Kol/2015 for the assessment year 2010-11.

The revenue has raised the following substantial questions of law for consideration :-

- i) *Whether on the facts and in the circumstances of the case an order of the Learned Income Tax Appellate Tribunal “B” Bench, Kolkata is*

perverse in allowing the assessee's expenditure to the tune of Rs.7,68,60,417/-?

- ii) Whether on the facts and circumstances of the case the order of the Income Tax Appellate Tribunal is perverse as the profit was estimated @ 12% on entire turnover. Whereas, the Assessing Officer did not reject the books of accounts?*
- iii) Whether on the facts and circumstances of the case the order of the Learned Income Tax Appellate Tribunal is perverse as there is no direct nexus between the conclusion of the fact and primary fact upon which that conclusion is based?*

We have heard Mr. Smarajit Roychowdhury, learned standing counsel for the appellant/revenue. Though the respondent had been served and an affidavit of service had been filed, none appeared for the respondent on the earlier occasion. Therefore, by order dated 28th July, 2022 directions were issued to the revenue to send fresh notice to the assessee. This direction has been complied with and affidavit of service has been filed and none appears for the respondent/assessee.

The short question involved in the instant case is whether the Commissioner of Income Tax (Appeals)-9, Kolkata was justified in revising the addition made by the Assessing Officer in his order dated 28th March, 2013 under Section 143(3) of the Act on the ground that the claim of transport charges raised by the assessee was not genuine. The CITA in his order dated 12th March, 2015 has elaborately set out the grounds raised by the assessee before him and was of the view that when the books of accounts are not found reliable and all

the expenses were found to be non-genuine, then disallowance under Section 40(a)(ia) is not called for. The CITA further records that the assessee had claimed that they had carried out the transport business by hiring trucks and not through their own trucks. Therefore, the CITA came to the conclusion that it would be reasonable in the interest of natural justice that the profit is estimated at 12% as against the addition made by the Assessing Officer of the entire turnover and, accordingly, a direction was issued to the Assessing Officer to make an addition of Rs.13,60,158/- and the balance addition was directed to be deleted.

Aggrieved by such order, the revenue preferred appeal before the learned Tribunal. The learned Tribunal has extracted the findings recorded by the CITA and opined that the CITA has estimated the assessee's profit at 12% under the peculiar circumstances and by exercising his co-terminus powers as that of the Assessing Officer and also further held that the CITA has correctly appreciated the entire facts and, thereafter, held that Section 40(a)(ia) of the Act pre-supposes genuine business expenditure which cannot go side by side to an instance involving in the rejection of books.

In our considered view, the CITA as well as the Tribunal did not even venture into the factual matrix which has been brought out by the Assessing Officer in his order dated 28th March, 2013. The assessee had debited Rs.7,84,28,827/- as transporting charges against transporting works income of Rs.8,75,71,214/- which is 89.56% of the total transporting receipt. The Assessing Officer noted that the assessee initially consisted of three partners and in July, 2009, the partnership was reconstituted with five partners and the

Partnership Deed mentions civil engineering construction work and there is not mention of any transport business. Further, the Assessing Officer on going through the earlier records, on facts, found that the assessee had no expertise in transport business and they were not running any transport business during the earlier assessment years and it is only in the financial year 2009-10, the assessee had shown transportation charges of Rs.8,75,71,214/-.

Considering this factual situation, the Assessing Officer issued notice dated 23rd July, 2020 under Section 142(1) of the Act directing the assessee to produce the books of accounts, bills and vouchers. Thereafter, the case was discussed with the assessee on ten occasions, which was followed by fresh notices dated 4th February, 2013 and 19th February, 2013 calling upon the assessee to submit details as per the earlier notices. However, the assessee had filed some details and documents but did not file all the documents nor produce the books of accounts, bills and vouchers as called for by the Assessing Officer. The assessee was issued another notice dated 4th February, 2013 to submit the details of transport charges in a tabular format which was followed by another notice dated 19th February, 2013. After repeated notices, on 25th February, 2013 the authorised representative of the assessee appeared and submitted a list of 145 transporters mentioning the payments made against each of them. The names of the said transporters have been mentioned in paragraph 2.5 of assessment order. After noting the details given by the assessee, the Assessing Officer has pointed out that the assessee has failed to produce the books of accounts, bills and vouchers nor the PAN numbers of the 145 transporters were

produced with supporting evidence to prove the identity, genuineness of the transaction and creditworthiness of the said transporters.

Subsequently, the assessee failed to appear before the Assessing Officer. Thus, taking into consideration the factual position, the Assessing Officer has recorded the following finding and disallowed the claim made by the assessee towards transport charges. The relevant paragraph is quoted hereinbelow:

“2.9 It is seen from the Profit & Loss Account of the assessee has debited a sum of Rs.7,82,12,027/- as transporting charges against transporting works income of Rs.8,75,71,214/-. As discussed in the Para No.2.1(c) that the assessee has not expertise in the transport work. It is also noticed that the assessee had not transport business in the preceding years. The newly made partnership deed also not mentioned this transporting business except the civil engineering business. The assessee also failed to prove the identity, genuineness of the payments and the creditworthiness of the transporters in spite of given several opportunities. The assessee also failed to submit the details of work done during the financial year 2009-10. Therefore, the said expenditure is not genuine expenditure whether it is incurred or not. Since the assessee failed to provide the details of work done during the financial year 2009-10. There is every possibility of that it is just an accommodation entry to nullify the transport income of Rs.8,75,71,214/-. Because the assessee failed to produce any single detail which can prove that the assessee is expertise in this business. It is beyond doubt that the assessee had not done any work of transport. The firm has no infrastructure to provide transport service. So the claim of transport charges also no genuine. Under the circumstances, the expenditure of Rs.7,82,12,027/- not allowable and added to the total income of

assessee. Penalty Proceeding u/s 271(1)(c) is initiated separately for furnishing inaccurate particulars.

However, the transport charges also attract the provisions of section 40(a)(ia) of the Income Tax Act, 1961. The assessee was liable to deduct tax at source on the paid or credited payment to the transporters exceeding Rs.20,000/- for single transaction and Rs.50,000/- for aggregate payment. It is clearly seen that the assessee credited payment exceeding 20,000/- or 50,000/- where the assessee was liable to deduct tax at source but failed to deduct tax at source. Therefore, as discussed above, the transporting charges of Rs.7,82,12,027/- is disallowed u/s 40(a)(ia) of the Income tax Act, 1961 also and added back to the total income of the assessee.

(Addition of Rs.7,82,12,027/-)"

From the order passed by the CITA as well as the Tribunal, we find that the factual finding recorded by the Assessing Officer was not dislodged. The Tribunal was of the view that the CITA has exercised his powers which are co-terminus to that of the powers of the Assessing Officer. However, on going through the order passed by the CITA, we find that there is no such exercise done by the CITA and all that is observed is that it would be reasonable and in the interest of principles of natural justice to estimate the profit at 12%. In the absence of any reasons given by the CITA, we are of the view that the order suffers from perversity which has been perpetuated by the order passed by the Tribunal.

Thus, for the above reasons, we are of the clear view that the order impugned calls for interference. In the result, the appeal filed by the revenue is

allowed and the orders passed by the Tribunal as well as the CITA are set aside and the assessment order dated 28th March, 2013 stands revived.

Accordingly, the substantial questions of law are answered in favour of the revenue.

The stay application being IA No.GA/2/2021 stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)