

IN THE HIGH COURT OF ORISSA AT CUTTACK**ITA No.30 of 2010*****M/s. Hari Electrical Works,
Bhubaneswar******Appellant***
....
Mr.A.K. Roy, Advocate***-versus-******Commissioner of Income Tax,
Bhubaneswar******Respondents***
....
Mr. T.K. Satpathy, Standing Counsel for Income Tax**CORAM:
THE CHIEF JUSTICE
JUSTICE R.K.PATTANAIK****ORDER
08.02.2022****Order No.**

08.

Dr. S. Muralidhar, CJ.

1. The present appeal arises from an order dated 11th February, 2010 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (ITAT) in ITA No.259/CTK/2009 for the Assessment Year (AY) 2005-06.

2. While admitting this appeal on 8th March, 2013, the following substantial questions of law are framed for consideration.

(i) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that separate addition on account introduction of un-explained partner's opening capital in the assessee's books of accounts can be made once the net profit rate is applied on contract receipts of the appellant for estimating its income from contract work when the provisions of section 68 is directly hit in the instant case?

(ii) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in not giving any direction to the Income Tax Department to adjust the TDS or refund back the same even though the said amount was deposited during the assessment year 2005-06?

(iii) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law to disallow the partner's salary although the same is permissible u/s.44AD of the Income Tax Act, 1961?

3. The relevant facts are that the Appellant assessee is a partnership firm carrying on a business of execution of works contract. The Assessing Officer (AO) took up the returns filed by the AY in question found that Bharati Cellular Ltd. (BCL) while paying an advance to the Assessee issued three TDS certificates under Section 194 J of the Income Tax Act, 1961 (IT Act) for a total sum of Rs.5,45,700/-. Contenting that this was wrongly deducted, a direction was sought by the Assessee to permit adjustment of the wrongly deducted TDS amount of Rs.55,400/-. The other issues concerned the acceptance of the profit shown in the profit and loss account instead of resorting to estimation @ 8% and not permitting deduction of salary paid to the partners.

4. The ITAT concurred with the order of the Commissioner of Income Tax (Appeals) [(CIT) (A)] and that is how the assessee before this Court.

Question (i)

5. The contention of learned counsel for the Appellant assessee is that once the profit has been estimated at 8% then the

question of a separate addition on account of introduction of unexplained opening capital in the Assessee's hands did not arise. Reliance has placed on the decision of the Punjab & Haryana High Court in ***Commissioner of Income Tax v. Aggarwal Engg. Co. (2008) 302 ITR 246 (P & H)***.

6. The impugned order of the ITAT discusses the findings of the CIT(A) regarding estimation of the net profit at 8%. The ITAT has, in fact, upheld the order of the CIT(A). If that is indeed the position, the question of adding the further sum as unexplained credit was not sustainable particularly in view of the decision of the Punjab & Haryana High Court in ***Commissioner of Income Tax v. Aggarwal Engg. Co. (supra)***. A perusal of the said decision reveals that the Punjab & Haryana High Court decided to follow the decision of the Allahabad High Court in ***CIT v. Banwari Lal Banshidhar (1998) 229 ITR 229*** where it was held as under:

“When the gross profit rate is applied, that would take care of everything and there was no need for the Assessing Officer to make scrutiny of the amount incurred on the purchases by the assessee.”

7. Learned counsel for the Department did not contest the position that neither of the above decisions were taken up in the appeal by the Department before the Supreme Court of India. Consequently, this Court answers the question No.(i) in the negative, i.e. in favour of the Appellant assessee against the Department by holding that the ITAT erred in holding that a separate addition on account of introduction of unexplained

partner's opening capital in the assessee's books of accounts could be made particularly since the net profit was uniformly applied at 8% as an estimation.

Question No.(ii)

8. The ITAT upheld the findings of the CIT(A) that there ought not to have been any deduction of TDS by BCL while paying advance to the Appellant assessee. The total tax deducted from the advance work out to Rs.55,400/-. The CIT (A) directed the AO "to withdraw the credit given for TDS". The ITAT while agreeing with the finding of the CIT (A) ought to have been to permit the Assessee to adjust the amount so paid or ordered it to be refunded to the Assessee. There is no explanation why this was not done. Learned counsel for the Department also could not support the above failure of the CIT(A) as well as the ITAT to issue such a direction.

9. In the circumstances, question (ii) is also answered in the negative i.e. in favour of the Appellant assessee and against the Department by holding that the ITAT and the CIT(A) were not tried in failing to give a direction to adjust the TDS amount or refunded although the said amount to be deposited in AY 2005-06.

Question No.(iii)

10. The proviso to Section 44AD (2), as it read at the relevant time, did permit the salary and interest paid to the partners of a firm to be deducted from income of the firm subject to the condition specified under Section 40(d) of the Act being

fulfilled. This appears to have been lost sight of by the ITAT. Accordingly, question (iii) is also answered in the negative i.e., in favour of the Appellant assessee and against the Department by holding that the ITAT erred in law in not allowing deduction the salaries paid to the partners from the income of the firm.

11. The appeal is accordingly allowed in the above terms.

12. An urgent certified copy of this order be issued as per rules.



KC Bisoi