IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.51 of 2010

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M/S Mahendra Prasad Singh & Bros Mahalla- Dalluchak, Khagaul, District-Patna through its working partner Rakesh Kumar, S/O Late Mahendra Prasad Singh R/O- Dalluchak, P.O. & P.S.- Khagaul, Distt.- Patna

... ... Appellant/s

Versus

1. Commissioner of Income Tax-II, Patna
2. Asstt. Commissioner of Income Tax, Circle-5, Patna

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr.Krishna Mohan Mishra, Advocate
For the Respondent/s : Mrs. Archana Sinha, Sr. Standing Counsel

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 04-12-2023

At the time of argument, learned counsel for the appellant had pointed out that the only question of law raised is with respect to the disallowance made based on Section 40A(3) of the Income Tax Act, 1961, which is re-framed as below:-

> *"Whether the provision under Section 40A(3) as it existed for the relevant Assessment Year being 2004-05 permitted disallowance of deduction of expenditure incurred beyond Rs.20,000/-, on the facts coming out, if the same has not been made by an Account Payee Cheque/Draft drawn at a Bank, especially since the words 'to a person in a day' was incorporated only from 01.04.2009?"*

2. The assessee, who is the appellant, is a government contractor and filed returns for the relevant Assessment Year

2004-05. As per the Assessment Order produced at Annexure-3 the perusal of the Books of Account showed payments exceeding Rs. 20,000/- in cash on various dates for materials purchased, the total of which came to Rs. 1,22,33,656/-. The Assessing Officer noticed Section 40A(3) which mandated that no expenditure shall be allowed as a deduction if a sum exceeding Rs. 20,000/- is paid otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft. Twenty per cent of such expenditure shall not be allowed as a deduction was the rigor of the provision. Rule 6DD was also noticed which permitted absolution from the prohibition as provided under Section 40A(3), none of which applied in the case of the assessee.

3. It was noticed that the Cash Book of the firm indicated amounts beyond Rs. 20,000/- having been paid for material purchases and the assessee was to explain why 20 per cent of it should not be disallowed. The assessee's contention was that the Books of Account itself shows that the amounts paid on a single day were for payment of material brought in different trucks clearly indicating that they were bifurcated payments. The Assessing Officer, however, found that none of the bills or vouchers were produced, which the assessee

admitted they did not have in their possession; for having not obtained such bills or vouchers. It was asserted that the payments were made to the individual truck drivers who brought the material. The assessee before us also pointed out that though the Cash Book showed payments on a single day, the Day Book clearly bifurcated the same based on the truck loads of material received, which indicates the payment having been made individually to the truck drivers; none of which single payment exceeded Rs. 20,000/-. The Assessing Officer refused to accept the contention of the assessee especially relying on the entries made in the Books of Account without producing any substantiating bills or vouchers.

4. The first Appellate Authority found that the assessee was disallowed an amount of Rs. 1,50,000/- on an estimate, out of the expenses claimed on account of non-furnishing of any supporting evidence with regard to the claim. The disallowance was found to be excessive and it was restricted to Rs. 1,00,000/. The Tribunal by its impugned order held that despite specific order by the Bench the authorized representative was not able to show any evidence that cash payments on a particular day, which was admitted to be exceeding Rs. 20,000/- were separate transactions.

5. Learned counsel for the assessee before us also relied on the Day Book and the bifurcation made therein. The assessee further pointed out that the disallowance of the payments made other than by an account payee cheque/draft ***"to a person in a day"*** was brought in by an amendment to Section 40A(3) of the Income Tax Act with effect from 01.04.2009. Hence, the same would not be applicable in so far as the relevant assessment year especially in the context of the Day Book having shown the bifurcated payments made. The learned counsel also relied on the decision of a Division Bench of this Court in ***M.A. No. 30 of 2012; Asstt. CIT v. Sunil Kumar dated 17.02.2016.***

6. Learned Senior Standing Counsel for the Income Tax Department, however, supported the assessment order as confirmed by the Appellate Authorities. It was pointed out that the only exception allowed from a disallowance under Section 40A(3) was under Rule 6DD of the Income Tax Rules, which is not applicable in the present case.

7. The appellant relied on ***CIT, Orissa v. Aloo Supply Co.; (1980) 121 ITR 680 (Ori-HC), CIT v. Triveniprasad Pannalal; (1997) 228 ITR 680 (MP-HC), CIT v. Ashok Iron & Steel Rolling Mills; (2010) 320 ITR 101 (All-HC)*** to further

challenge the disallowance of expenses made in the present case. In so far as the reliance to be placed on Books of Accounts are concerned, learned counsel placed reliance on ***Indore Malwa United Mills Limited v. State of Madhya Pradesh & Others; (1966) 60 ITR 41 (SC)***. The assessee also relied on ***D.R. Rathna Murthy v. Ramappa; (2011) 1 SCC 158, Manicka Poosali (Dead) by LRS. and others v. Anjalai Ammal and another; (2005) 10 SCC 38 and Sabitri Chatterjee v. Debi Das Roy; (2005) 10 SCC 402*** to urge that an erroneous finding of fact bordering on perversity would be a substantial question of law which can be considered by the High Court. Reliance was placed on ***CIT v. Rajinder Prasad Jain; (2015) 374 ITR 545 (P & H-HC)*** and ***Prasad Construction & Co. v. CIT & others; (2016) 388 ITR 597 (Pat-HC)*** to urge the non-sustainability of estimates of income in civil contract businesses.

8. ***Aloo Supply Co.*** (supra) considered the then existing provision under Section 40A(3) which had the statutory limit of Rs. 2500/-. Therein, the Tribunal had accepted the contention of the assessee that the entry made in the cash book at the end of the day, relating to all the payments made to a party during the day, would not run contrary to the explanation of the assessee that the payee had accepted the money in different

installments. We are unable to accept the aforesaid principle in the present case especially since the Assessing Officer had specifically found that in the present case though there was a contention raised of the assessee having paid the amounts to the truck drivers on the delivery of goods at different work sites; it is not supported by any bills or vouchers. ***Triveniprasad Pannalal*** (supra) and ***Ashok Iron & Steel Rolling Mills*** (supra) also are High Court decisions which accepted the Tribunal's finding on facts that though the payment of a day exceeded Rs.2,500/-, there was a break up of three or four transactions. We cannot but notice that the decisions at best are on facts and are only persuasive in nature being that of the different High Courts.

9. ***Indore Malwa United Mills Limited*** (supra) was a case in which estimate was made of sale beyond that shown in the books of accounts, relying on the Sale Contract Register and the Daily Yarn Production Register. The assessee contended that the Sale Contract Register recorded only the estimate of quality and quantity required by the buyer and the Daily Yarn Production Register indicated the actual production made; which alone was subjected to sale. The Hon'ble Supreme Court found favour with the above contention especially noting that

there are many imponderables entering into the process of spinning yarn and weaving cloth which reduce the weight of the yarn that finally enters into the making of the cloth. It was also found that there are other registers maintained by the assessee from which the actual sale of yarn could be discerned and that the Assessing Officer was not correct in having ignored such registers and merely relied on the Sale Contract Register which targeted only the requirement of the buyer and not the actual sale. The said decision has no application to the present case since there is no such imponderable, discernible from the transaction of supply of building materials at work sites in different trucks. The cash book indicated the amounts paid on a particular day which exceeded Rs.20,000/-. The assessee has not shown as to whether the supplies were sourced from different persons and has not produced any supporting bills or vouchers, which leads to only a reasonable inference that the amounts were paid to the supplier in lump sum for the materials delivered on a date.

10. We need not refer to the decisions relied on by the assessee to urge the trite principle that perversity on facts would definitely come within the ambit of a question of law. There is no such perversity coming out from the order of the Tribunal

which confirmed the order of the Assessing Officer and the First Appellate Authority. Insofar as the estimates on civil contract business, we are not convinced that the modification made by the First Appellate Authority on the premise that the disallowance made by the Assessing Officer was on an estimate is correct especially since the specific provision under which the disallowance was made, mandates such disallowance to the percentage indicated therein on there being no evidence to indicate payments exceeding Rs.20,000/- by account payee drawn cheques/drafts. However, the State having not filed any appeal from the estimate made, we do not think it proper to interfere in the modification made by the First Appellate Authority.

11. The decision in ***Sunil Kumar*** (supra) especially reckoned the amendment brought about to the provision with effect from 01.04.2009. It was noticed that the disallowance of an expenditure was possible prior to the amendment only if a single payment exceeded Rs. 20,000/-. Payments made to a single person on a single day would qualify for disallowance, if it exceeds Rs. 20,000/- only after the amendment made on 01.04.2009. We cannot doubt the above proposition as coming out from the amended provision as declared by another Division

Bench of this Court. However, it has to be noticed that the reliance placed by the assessee is on the Day Book of the assessee which is provided as Annexure-1/A. We look at the Day Book of the assessee as distinguished from the Cash Book, the details of which are reproduced in Annexure-1/A. Having perused Annexure-1/A it is seen that the assessee had contracts for carrying out construction work at different places, as evident from Annexure-1/A at six different sites. The contention of the assessee is that there were different truck loads delivered at the different work sites for which payments were made to the truck drivers at the work site. We see from the Cash Book, that at the right-hand corner of Annexure1/A, that the payments exceeded Rs. 20,000/- on a single day. We keep in mind the fact that payments made to a single person on a single day would be capable of disallowance only after the amendment on 01.04.2009; if it exceeds Rs. 20,000/-. However, in the present case, there is nothing to indicate that the payments were not made as is indicated in the Cash Book. It is true that in the Day Book, as pointed out by the assessee, the payments are bifurcated to the points at which the goods were delivered.

12. We look at one of the above transactions on 04.04.2003 wherein Rs. 16,400/- is indicated at Rajendra Nagar

Railway Station, Rs. 8200/- at Patna Junction Railway Station, Rs. 8200/- at Patna-Gaya Railway Line and Rs. 8200/- at Buxar Railway Station, totaling Rs. 41,000/-. As we understand it, the bifurcation made in the Day Book is only to indicate the expenditure at each work point, for ease of business and convenience of accounting; which does not necessarily indicate that the payments were also made to the truck drivers. The specific ground on which the disallowance was made by the Assessing Officer is with respect to no substantiating bills or vouchers having been produced. The supplies admittedly have been obtained from a third party and it was delivered at the work site in trucks. If the payments are made to the different truck drivers, definitely there would have been vouchers obtained evidencing the receipt of such payments by the truck drivers. The Books of Accounts does not show the payments having been made by the appellant separately and not together as indicated in the Cash Book. If the payments were made at different points, definitely the Cash Book also would have indicated such payments having been made at the different sites in the registers maintained by the contractor at such different sites. It is the consolidated Day Book and Cash Book of the assessee which is produced before the Assessing Officer which does not indicate such payments having not been made on a consolidated basis; which is the only inference available from the Cash Book of the assessee, which has been entered on a daily basis. We find that the Accounts Book cannot be relied on to challenge the disallowance made and the amendment made with effect from 01.04.2009 is not at all applicable in the above case.

13. We specifically notice that ***Sunil Kumar*** (supra) was a case in which the Assessing Officer had disallowed the aggregate payments made on a single day by several vouchers to a single person which aggregate amounts exceeded Rs. 20,000/-. It was specifically noticed by the Division Bench that in the present case not a single payment has been made through any voucher exceeding Rs. 20,000/- and hence it was not open to the Assessing Officer to have aggregated the said payments. Such aggregation of payments would have been possible after 01.04.2009 is the corollary to the declaration made in the decision. We bow to the proposition as laid down by the Division Bench and notice specifically that there are no vouchers produced to substantiate the claim of separate payments having been made on a single day at the work spots where the delivery of the goods supplied were made. We find

absolutely no reason to entertain the appeal and the question of law is decided against the assessee and in favour of the Revenue. The disallowance made by the Assessing Officer on the ground of no substantiating documents having been furnished to the Assessing Officer by way of bills/vouchers is found to be perfectly in order, on the facts available in the instant case, which is in accordance with the provision even as it existed prior to the amendment of 01.04.2009.

14. We dismiss the appeal.

15. Interlocutory Application(s), if any, shall stand closed.

(K. Vinod Chandran, CJ)

(Partha Sarthy, J)

P.K.P./-.

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