IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.56 of 2011

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Trishul Constructions a partnership firm having its office at Chhatradhari Bazar, P.O.- Chapra, P.S. Bhagwan Bazar, District- Saran through its partner Jitendra Kumar Singh, Son of Nand Lal Singh, resident of Chhatradhari Bazar, P.O. Chapra, P.S. Bhagwan Bazar, District- Saran.

... ... Appellant/s

Versus

1. Commissioner of Income Tax, Muzaffarpur having its office at Bela Kothi, Muzaffarpur.
2. Dy. Commissioner of Income Tax, Circle-2, having its office at Bela Kothi, Muzaffarpur.

... ... Respondent/s

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Appearance :

For the Appellant/s : Mr. D.V.Pathy, Advocate

For the Respondent/s : Mr. Harshwardhan Prasad, Advocate

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

Date : 08-08-2023

The relevant assessment year is 2003-04, and the issue raised is with respect to the adoption of net profit at the rate of 8%, deviating from the adoption of net profit in the earlier years at a rate of 6%, and the depreciation allowable to the assessee insofar as the assets used in the business of the assessee

2. The assessee is a contractor engaged in executing civil contract works for the Railways. A return was filed for the relevant assessment year on 31.10.2006, declaring total income at Rs. 59,98,090/-. On scrutiny, the Assessing Officer observed that the books of accounts maintained by the assessee was not correct and complete and he applied the net profit rate of 8% on

the contract receipts.

3. An appeal carried to the Commissioner of Income Tax Appeals stood rejected. Before the Tribunal, the assessee took up the following grounds. One, that the order of the authorities below are bad in law and fact, next, the estimate of net profit at 8%; especially when for the earlier assessment year of 2003-04, the estimation of net profit at 6% was found to be reasonable by the very same Tribunal was unjustified. It was also contended that when the books of accounts are rejected and an estimation is made of profit, it would be reasonable and just to follow the estimation adopted in the earlier years. It is also contended that the application of Section 44AD cannot be considered relevant for the assessment year, when the turnover of the assessee exceeded Rs. 40 lakhs for the relevant year.

4. The questions of law arising from the order of the Tribunal which confirmed the order of the Appellate Authority are the following:-

> *(i) Whether the order of the Tribunal in adopting the estimate of profits at the rate of 8 percent on the basis of an order in an altogether different case, overlooking the estimate of profit @ 6 percent in assessment year 2003-04 by the Tribunal itself in the assessee's case, runs counter to the rule of consistency?*
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> *(ii) Whether in view of the rule of consistency, in the absence of any material*

change in the nature of business activity, the Tribunal ought to have followed the estimate of profits made in the assessment year 2003-04 in the case of the appellant itself?

(iii) Whether the order of the Tribunal refusing consideration of depreciation, runs contrary to the mandate of law?

5. The question raised as (i) and (ii) are answered together. Any estimation is based on the best judgment of the Assessing Officer and if it is reasonable, there is no reason for the Appellate Authorities or even this Court to substitute the same for yet another reasonable view. There is also no rule of consistency applicable in estimations, as the factors regulating profits fluctuate from year to year and every assessment year brings forth a different cause of action.

6. The assessee was a railway contractor carrying on works for very many years. It cannot be assumed that the net profit of the assessee would have been the same for all the years. The mere fact that in the assessment year, twice prior to the relevant assessment year, the Assessing Officer had adopted an income of 6% would not restrict the estimation of net profit to that, for all time to come.

7. The Assessing Officers, rightly reckoned the profit margin of similar businesses in the relevant assessment

year to estimate the net profit at 8%.

8. We find no question of law as framed at (i) and (ii) arising from the above order and refuse to answer the questions framed by the assessee, which is on facts and not of law. There is no perversity discernible in the estimation made by the Assessing Officer and it cannot be termed unreasonable.

9. On the question of depreciation, the learned counsel for the assessee relied on ***Shyam Bihari v. Commissioner of Income-Tax and Anr.; [2012] 345 ITR 283 (Patna).*** We extract paragraph number 10 and 11 of the said decision.

> *10. We have been taken through the provisions of circular of the Board dated August 31, 1965. According to that circular which is binding on the department and its authorities, where it is proposed to estimate the profit and the prescribed particulars have been furnished by the assessee, the depreciation allowance should be separately worked out. In all such cases, as per the circular, the gross profit should be estimated and the deductions and allowance including the depreciation allowance should be separately deducted from the gross profit. If the net profit is required to be estimated, it should be estimated subject to the allowance for depreciation and the depreciation allowance should be deducted therefrom.*
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> *11. Since it is the case of the appellant that the authorities should not apply the principles emanating section 44AD*

> *of the Act but should be guided by the binding circular of the Board, we find it necessary not only to set aside the order of the Tribunal but also the orders of the Assessing Officer and the learned Commissioner of Income-tax (Appeals) as those orders also suffer from error of law on both the points. Accordingly, this appeal is allowed and the order under appeal passed by the Tribunal, the appellate order of the leamed Commissioner of Income-tax (Appeals), Patna, and also the order of the Assessing Officer are set aside and the matter is remitted back to the Assessing Officer for passing a fresh order of assessment in accordance with law keeping in view the questions of law as answered by this court.*

10. The second question raised is no longer *res integra.* It is covered by the another Division Bench of this Court in ***Shyam Bihari*** (supra). The question is answered in favour of the assessee and against the revenue. The Assessing Officer shall give effect to this order of this court.

11. The appeal stands partly allowed.

(K. Vinod Chandran, CJ)

(Partha Sarthy, J)

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