

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.211 of 2018

Commissioner Of Income Tax, Bhagalpur

... .. Appellant/s

Versus

Dhananjay Kumar Yadav B - 103, Jagmeno Shree Garden Apartment, Veh
Nagar, Rukanpura, Bailey Road, Patna - 800014 PAN AAPPY5158C.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mrs. Archana Sinha, Sr. SC. Income Tax Deptt. Ms. Shilpi Keshri, Advocate
For the Respondent/s	:	Mr. Krishna Mohan Mishra, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE RAJIV ROY

CAV JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 24-01-2024

The questions of law arising in the above appeal
are framed as follows:-

*1. Whether on the Assessing Officer
estimating profits of a business after rejecting the
books of accounts, there is any scope for further
additions to be made based on the entries in the
books of accounts?*

*2. Whether when such estimation of
profit is made, the Commissioner under Section
263 of the Income Tax Act, 1961, can revise the
assessment order finding prejudice on the revenue,
which is an essential ingredient in invoking Section
263, along with an erroneous finding by the
Assessing Officer?*



2. The learned Standing Counsel for the revenue argued that in the present case, the assessee was a works contractor, who in addition to the said income had income from other sources, in the subject assessment year, being 2012-13. The Assessing Officer looked at the books of accounts and directed the assessee to produce the bills and vouchers of the materials purchased. The assessee having failed to produce the same, the Assessing Officer rejected the books of accounts and estimated a net profit of 6% on the gross receipts of the assessee to which the other incomes were added.

3. The Commissioner under Section 263 of the Income Tax Act, 1961 (for brevity, 'the Act') found the assessment order to be erroneous on two counts. The payment of tax deducted at source claimed of Rs. 2,64,000/- having not being proved and the Assessing Officer having not reckoned the sundry creditors of the assessee especially when no bills and vouchers were produced. The order of the Commissioner under Section 263 of 'the Act' is asserted to be perfect, in all respects, by the Revenue, since the assessment order is both erroneous and prejudicial to the revenue. The learned Senior Standing Counsel also relies on the decision in **Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax; (2000) 243 ITR 0083.**



4. The learned counsel for the respondent, however, points out that when the books of accounts are rejected, there is no scope for seeking explanation to the various entries made in the books of accounts. The Assessing Officer having reckoned the gross profit at 6% on the total receipts, there cannot be any further additions made. The learned counsel would assert that **Malabar Industrial Co. Ltd.** (supra), relied by the revenue, is in his favour. The respondent also relies on **Prasad Construction & Co. vs. CIT & others; (2016) 388 ITR 579 (Pat-HC)** and **Asst. CIT vs. Salauddin; (2019) 414 ITR 335 (Pat-HC)**. Reliance is also placed on **CIT vs. Aggrawal Engg. Co (Jal.); (2008) 302 ITR 246.**

5. We will first consider the decisions placed on record and then look at the application of the dictum to the facts of the case. The first of the cases placed before us is **CIT vs. Aggrawal Engg. Co** (supra) of the Punjab and Haryana High Court. Therein, the assessee being a civil contractor filed the return based on which the assessment was made, which was cancelled under Section 263 of 'the Act'. A fresh assessment was made which was challenged in appeal before the Commissioner. The Commissioner deleted two additions made by the Assessing Officer, on account of cash introduced in the



books and payments made for purchases outside the books of accounts. The Commissioner found that the books of accounts having been rejected by the Assessing Officer, and a net profit of 10% being applied, there is no reason for the further additions. We are perfectly in agreement with said findings especially since it has to be presumed from the facts available in the judgment that the receipts of the assessee were confined to the civil contracts. When the gross receipts were taken and an assessment made estimating the book profit, the defects and defalcations in the books of accounts is reckoned to be taken into account. In this context, we only raise one reservation, as to whether in reckoning the total income for the purpose of computing the gross income, it is not discernible from the judgment, whether the cash introduced and the purchases made outside the books of accounts were included or not.

6. Prasad Construction & Co. (supra) is the case of a civil contractor arising from an assessment order; not an order under Section 263 of 'the Act' as is the case in the present appeal. Therein also, the assessment of the civil contractor was concluded; estimating net profit at 10%. The assessment order having been confirmed by the two appellate authorities, reached the High Court where the assessee claimed that the net profit



was only 6%.The Division Bench of this Court interfered with the assessment only on the ground that the material relied on by the Assessing Officer was irrelevant and relevant materials having not been relied upon; which dictum is not applicable to the above case.

7. In **Salauddin** (supra) a works contractor with the main source of income from the contract awarded by the Railways and the Public Works Department, disclosed a total receipt slightly above that of the previous year. The Assessing Officer rejected the books of accounts and determined the net profit at the rate of 8% as against the net profit declared of 5.10% by the assessee; only slightly above the 5% declared for the preceding year. The assessee challenged the order before the Commissioner, who made a further addition on the basis of profit not disclosed. The Tribunal found that once the books of assessee has been rejected and net profit estimated at 8% there was no reason for a further addition at the level of the first Appellate Authority, who has sustained the addition of net profit by the Assessing Officer.

8. **Malabar Industrial Co. Ltd.** (supra), relied on by both the parties held that to invoke Section 263 of 'the Act' two conditions must co-exist; that the order of the Assessing



Officer should be erroneous and it should also be prejudicial to the interest of the revenue. It was declared that the mere fact that the order of the Assessing Officer is erroneous would not necessarily lead to invocation of Section 263 of 'the Act'; since when two views are possible and the Assessing Officer has chosen one of them; giving the assessee relief to an extent, the mere fact that the revenue collected less tax would not enable invocation of Section 263 of 'the Act'. However, when the order is erroneous and the revenue loses tax, lawfully payable by a person, it will also be prejudicial to the interest of the revenue; which words, it was held, is of wide import and not confined to mere loss of tax.

9. As we noticed, of the four decisions discussed herein above, three are on assessment. In the present case, the Assessing Officer had estimated the gross profit at 6% of the total receipts and had completed the assessment after adding the income from other sources also. The sundry creditors, as is seen from the explanation offered by the assessee before the Commissioner for the subject assessment year, came to Rs. 3,44,84,318/-; out of which, the liability in the previous year was Rs. 1,92,98,140/-. Hence the sundry credit claimed by the assessee came to Rs. 1,51,86,178/-. Obviously, this was not



noticed by the Assessing Officer and presumably the same was not accounted in the total receipts, as undisclosed income. If the sundry credits are not explained properly, then disclosing that in the books of accounts would amount to a device employed to suppress the income received, as a credit taken by a third party, with whom the assessee had a transaction.

10. In the present case, the assessee was a works contractor as is disclosed from Annexure-2 order under Section 263 of 'the Act', who had executed contracts awarded by various State government departments. There is no question of the credit being attributed to any of the awarders; which even if existing, there was no difficulty in establishing the same.

11. We also have to notice that in the assessment order, the assessee has income from different sources; from a firm, house property and other sources. Hence, the income declared by the assessee is not solely from the contract work. When the assessment made is of income from one single source, if the total contract receipts are taken to estimate the gross profit, necessarily there cannot be any further additions made. In consonance with the reservation made by us, while dealing with **Prasad Construction & Co.** (supra), applied to the present case; if the gross receipts are taken, on which the net profit is



assessed, the entire receipts are not reflected, then definitely there is scope for addition, to the receipts. The sundry creditors, if not explained will have to be added to the contract receipts before the net profit is assessed or otherwise added in the income from other sources, bringing in that quantum, as unexplained income.

12. Hence, either way, whether the unexplained sundry credits are added to the contract receipts or as income from other sources definitely the tax payable by the assessee would be higher than that paid by a mere estimation of net profit; looking at the quantum returned, on which no explanation was sought. We also have to notice that in the present case the Commissioner under Section 263 of 'the Act' had also reckoned non-payment of tax deducted at source.

13. Essentially, the Commissioner has found the order to be erroneous for reason of non payment into the treasury, of the tax deducted at source having not been verified and also the sundry creditors having not been examined; the latter of which ground results in the finding that the estimation of profit on the contract receipts alone would be an erroneous exercise and it causes prejudice to the interest of the revenue. We find absolutely no reason to interfere with the order of the



Commissioner and set aside the order of the Tribunal answering the questions of law against the assessee and in favour of the Revenue, especially on the facts of this case. The order of the Tribunal setting aside the order under Section 263 of ‘the Act’ is annulled.

14. The appeal stands allowed directing the Assessing Officer to complete the assessment.

(K. Vinod Chandran, CJ)

Rajiv Roy, J: I agree

(Rajiv Roy, J)

Aditya Ranjan/-

AFR/NAFR	AFR
CAV DATE	16.01.2024.
Uploading Date	24.01.2024.
Transmission Date	

