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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

ITA/112/2018

PRINCIPAL COMMISSIONER OF INCOME TAX, KOL-3, KOLKATA
VS
SIKARIA INFRAPROJECTS PVT. LTD.

BEFORE :

THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI

And

THE HON'BLE JUSTICE RAJARSHI BHARADWAJ

Date : 24th June, 2024.

Appearance:

Mr. Tilak Mitra, Adv.

... for the appellant.

1. Mr. Tilak Mitra, learned standing Counsel appears for the appellant.
2. This appeal was admitted by order dated 28.06.2018 on the following substantial question of law:

"whether the Commissioner (Appeals) or the Appellate Tribunal have any authority to make a rough-and-ready assessment as to the quantum of tax and what percentage of the net income would be demanded as tax when there are no statutory guidelines in such regard"?

3. Learned Counsel for the revenue/appellant submits that certain purchases disclosed by the assessee were found not variable and therefore the additions were lawfully made by the assessing officer. Therefore, there was no occasion for the CIT(A) to apply a net profit rate

based on the net profit disclosed by others in the same line of trade. He, therefore, submits that the appeal deserves to be allowed and the substantial question of law deserves to be answered in favour of the revenue.

4. Despite case having been called on, none appeared for the respondent/assessee.
5. We have carefully considered submissions of learned Counsel for the appellant.
6. We find that the respondent/assessee is a private limited company engaged in business of civil contract. During the assessment year 2009-10 the assessee executed two projects as 'sub contractor' on behalf of M/s. Hindustan Steel Works Ltd. and M/s. Engineering Projects of India Ltd. for construction of road under 'Prime Minister Gramin Sadak Yojana and construction of central jail at Vishalgarh, Tripura'. During the assessment year in question the assessee had made purchase of Rs.13,85,34,422/- from various parties which were claimed as deduction in its profit and loss account. The details of parties were furnished during the assessment proceedings. The assessing officer issued notice under Section 133(6) of the Income Tax Act, 1961 (hereinafter referred to such Act, 1961) to the parties for verification of the transaction with

the assessee. Assessing officer found certain mismatch in the figure of purchase disclosed by the assessee from the parties and the reply received from the parties in response to notices under Section 133(6) of the Act, 1961. It was also found that several parties had not responded to the notices under Section 133(6) of the Act, 1961. Under the circumstances, the assessing officer rejected the books of accounts and the disclosed profit and determined total income at Rs.10,14,99,264/- as against the disclosed total income of Rs.85,49,460/-. The assessing officer made addition in income of Rs.9,29,49,804/-, as under:

- i) On account of inflated/bogus purchase from eight parties but notices under Section 133(6) of the Act, 1961: Rs.1,56,90,244/-.
- ii) On account of not producing eight parties by the assessee during assessment proceedings under Section 133(6) of the Act, 1961: Rs.66,54,040/-.
- iii) On account of no reply submitted by six parties to notices under Section 133(6) of the Act, 1961: Rs.2,16,21,174/-.
- iv) On account of no reply received from eleven parties pursuant to notices under Section 133(6) of the Act, 1961: Rs.4,89,43,299/-.

iv) Penalty amount not disallowed by the assessee while computing its income: Rs.41,047/-.

Total Rs.9,29,49,804/-.

7. The CIT(A)-VI, Kolkata in appeal no. 264/CIT(A)-VI/Cir-6/11-12/Kol disposed of the appeal by a detailed order dated 9.11.2012 while determining the total income at Rs.1,79,98,687/- by appellant and net profit rate of 8% on the contract received of Rs.22,49,83,589/-. While affirming the best judgment assessment and after detailed discussion and reference to various judgments of Hon'ble Supreme Court, different High Courts and Tribunal in paragraphs 11 to 20 of its order, concluded in paragraph 21 and 22 as under:

"It is well-settled that in a best judgment assessment there is always a certain degree of guess work. No doubt the authorities concerned should try to make an honest and fair estimate of the income even in a best judgment assessment, and should not act totally arbitrarily, but there is necessarily some amount of guess work involved in a best judgment assessment and it is the assessee himself who is to blame as he did not submit proper accounts during assessment. The appellant has cited many case laws in which the gross profit has been estimated from 4% to 6% and there are number of cases in which the profit has been estimated from 8% to 12%. The proviso to sub-section 1 of Section 44AD provides that it is applicable only if the gross receipt are loss that

Rs. 40 lakhs. However, the Assessing Officer and appellate authorities can take the help of general principles of law laid down in Section 44AD and it does not mean that it has applied it ipso facto on the facts of the assessee. A help has been just taken from the provisions to determine the net profit ratio figure and applying the same in the case of a contractor's case and that too after being accepted by the appellant and as per ground of appeal no. 10. During the appellate proceedings the appellant after going through the assessment order and in the facts and circumstances has submitted as follows:-

"Without prejudice to above factual position and considering the supply of construction material mostly by unorganized sector and considering the net result of various construction companies, and considering the sub construction business, the CIT (A) may adjudicate the appeal by applying **net profit rate of 8% on contract receipts of Rs.22,49,83,589/-** which may reasonable under the given facts of the case."

22. Considering all, particularly considering the facts that the appellant failed to furnish necessary evidence, for purchase and other expenses before the Assessing Officer and also considering the facts that there are many defects in the books of accounts as pointed out by the Assessing Officer and purchases could not be verified but without material the appellant could not have executed Civil Contract Works and further considering the fact that the net profit of the appellant's contract business for the year was only 3.8%. I am of the view that estimating

the profit from the Civil Contract Business of the appellant @ 8% of the gross contract receipts would be fair and reasonable and the appellant has also accepted the same to be fair, reasonable and appropriate. In these facts and circumstances after rejecting the books of accounts due to defects the income of the appellant is assessed taking net profit @ 8% on contract receipts of Rs. 22,49,83,589/- amounting to Rs. 1,79,98,687/- subject to no depreciation allowance. The assessing Officer will take that all the allowances, deductions, exemption, if any has been availed by the appellant during the year and then the net profit chargeable to tax is Rs. 1,79,98,687/-. The net profit is to be assessed as income at Rs. 1,79,98,687/-. Ground No. 10 that without prejudice the ground of appeal the Assessing Officer ignored the fact presumptive basis of taxation i.e. profit of 8% of the total turnover is allowed by accepting net profit @ 8% as discussed (Supra). The other grounds of appeal are decided as discussed in the order."

8. Aggrieved with the order of the CIT, the revenue filed an appeal being ITA/296/Kol/2013 (assessment year 2009-10) [DCIT, Circle-6 Vs. M/s. Sikaria Infraprojects (P) Ltd.] The ITAT considered various aspects of the matter and concluded as under:

"From the aforesaid discussion we find the AO has disallowed the various expenses as these were not verified in response to the notice issue under section 133(6) of the Act. But the Id. CIT(A) has

treated the income of the assessee @ 8% of the gross receipt. So the Revenue is in appeal before us. Now the question before us arises for adjudication is as to whether the action of the Id. CIT(A) is correct for working the income @ 8% of the gross receipt. From the facts of the case, we find that the nature of the work of the assessee has not been doubted and so in the similar facts and circumstances various Hon'ble courts have held that a reasonable percentage of profit can be worked out. Some of the similar case laws are cited below.

1. In the case of M/s. Triveni Enterprise, Hyderabad Vs. the Income Tax Officer Wd 6 (1) ITA No. 352/Hyd/2011 & 353.Hyd/2011 it has been held that in the AY 2006-07 and 2008-09, the assessee was engaged in the business of Civil construction. Assessee fails to prove the expenses details AO estimated the income of the assessee at 12% of the gross receipt. On appeal, Learned CIT(A) directed the AO to estimate the income at 8% in the case of main contract receipts and at 6% on the sub contract receipt. Tribunal direct the Assessing Officer to estimate the income of the assessee at 8% on main contract receipts and at 5% of the sub contract receipts as above said.
2. In the case of Shri Om Prakash Tripathi Vs ACIT (Contractor) 2(1), Farrukhabad. ITA No. 330/Agr/2005 it has been held that, AY 2001-02, the assessee was engaged in the business of construction. Net profit rate shown by the assessee 5.32%. the being accepted by the AO

CIT(A), Agra. Rejected the books of account by applying provisions of section 145 and estimated the net profit of the gross receipts. Tribunal confirmed the order of the CIT(A) of issue with conclusion that the rate applied has been rightly based of net profit rate on different years.

3. In the case of Metropolitan Engg. Co. Opt. Society Ltd. vs. Ad No.s 2172 & 2172/Kol/2010 it has been held that in the AY 2010 the assessee is engaged in civil contract business with others basements. AO estimated net income from the work contract @ 10 the gross contract receipts. Assessee failed to furnish evidence for purchase and other expenses. Purchase & expense confirmed on an enquiry conducted by the AO u/s. 133(6). Ldt. confirmed the order of the Assessing Officer. Tribunal relied decision of Hon'ble Orissa High Court decision in the case of Nandaram Hunda Ram (1976) 103 ITR 433, wherein it is held the assessee failed to produce acceptable accounts revenue on the decision of Royal medial Hall vs. CIT (1962) 46 ITR 74 wherein it is held that "estimate of income on the basis of available and the past assessment record was held proper Tribunal directed the Assessing Officer to recomputed the income applying 6% of net profit on gross contract receipts.
4. In the case of Prawn Pandurang Patil, Islampur in ITA No. 850 it has been held that in the AY 2005-06, the assessee is engaged contract

business with others business segments. AO reject books of account invoking the provisions of Section 145 (estimated net income from the contract business @ 8%. As failed to produce the labour payment vouchers and purchase verify the expenses purchase and closing stock. Ld. CIT, estimated, the income from regular contract business at 8% contract receipts and 4% in so far sub-contracting is concerned, lordship of Tribunal, directed to estimate the income @ 6% from contract business sand so far as profit on sub-contract business road roller hiring is concerned uphold the estimation as adoptee Commissioner of Income Tax (Appeals) to meet the end of justice.

5. In the case of the ACIT Gandhidham Circle Vs. M/s. Construction Co. Gandhidham ITA No. 1140/RJT/2009 it has AO made addition for unexplained purchase, sub-contract expenses and under valuation of work-in-progress. The Ld. CIT (A) estimated the total income by applying net profit rate of 4% Both the assessee and revenue has challenged to the extent of order against them. The Tribunal inclined upon the order of the Ld. CIT (A) and accordingly confirmed."

In addition to the above we also find that the assessee has declared the profit in its own costs for the earlier years and subsequent years, showing very less amount of profit in terms of percentage and the same was accepted by the Revenue. Therefore in our considered view we find no reason to

interfere in the order of Ld. CIT(A) and this ground of Revenue's appeal is dismissed."

"To ensure that a best judgment assessment is conducted with fairness and impartiality, the following principles are to be satisfied:

- a) **Deficiency of Information:** The initiation of the assessment occurs when the assessee fails to furnish complete and accurate information. In such instances, the assessing officer is authorized to commence a best judgment assessment based on the extant information.
- b) **Due Diligence:** Prior to invoking a best judgment assessment, the assessing officer is obligated to undertake reasonable efforts to procure the necessary information. This entails issuing notices to the assessee, affording adequate response time and providing multiple opportunities for the assessee to rectify any discrepancies.
- c) **Prudence and Reasonableness:** The best judgment assessment must be executed with prudence and reasonableness. The assessing officer is required to exercise due caution, ensuring the assessment is grounded in factual evidence and logical reasoning. It must not be arbitrary or prejudiced.
- d) **Objective Standards:** The assessment must be predicated on objective standards rather than subjective opinions or biases. The assessing officer should reference applicable laws, regulations, precedents and established principles in the assessment process.
- e) **Comprehensive Documentation:** Proper documentation of the entire best judgment assessment process is imperative. This includes recording the justification for initiating the assessment, the efforts undertaken

to obtain information, the criteria employed for the assessment and the final determination made.

9. The Allahabad High Court in **Commissioner of Income-Tax v. Surjit Singh Mahesh Kumar** reported in **(1994) 210 ITR 83** held that:-

"It is well-known that in the case of best judgment where resort is taken to Section 144 of the Act, the Assessing Officer exercising his judgment cannot act arbitrarily or capriciously. The assessment must proceed on judicial considerations in the light of the relevant material that may be brought on record. In the instant case, the Income-tax Appellate Tribunal while sustaining the order passed by the Commissioner of Income-tax (Appeals) has taken into account comparable cases which were brought to its notice...In the situation with which the Income-tax Appellate Tribunal was confronted, it cannot be disputed that there can be no rigid tailor-made formula which can be applied to every case. Everything would depend on the facts and circumstances of each case. **The finding in a given case about the applicability of a particular rate of net profit on the sales disclosed or estimated is one of fact...**In every case of best judgment, the element of guess work cannot be eliminated. So long as the best judgment has nexus with the material on record

and the discretion in that behalf has not been exercised arbitrarily or capriciously, it is not open to scrutiny in these proceedings to give rise to a question of law or to a mixed question of law and fact."

10. It has not been disputed by the assessing officer that the assessee carried civil work and in view thereof he received a certain amount as consideration. The materials in execution of contract have not been disbelieved by the assessing officer. In this regard, the CIT(A) and ITAT have also recorded findings of fact. The ITAT has also noticed net profit rate of last seven years which ranged from 0.45% to 3.84%. The ITAT has also noticed net profit rate determined in matters of others in the same line of trade, to be about 4%. The assessee himself has agreed before the CIT(A) for net profit at the rate of 8% on the gross receipts under the contract. Learned Counsel for the appellant could not place any material before us on the basis of which determination of net profit at the rate of 8% in the line of trade of the respondent/assessee can be said to be perverse or insufficient under the facts and circumstances of the present case. The

findings recorded by the CIT(A) and the ITAT for applying the net profit rate of 8% on the gross receipts under the contract, cannot be said to suffer from any apparent illegality in the facts and circumstances of the present case.

11. For all the reasons aforestated, applying the principles of best judgment assessment and the net profit rate, we do not find any illegality in the impugned order of the ITAT. The substantial question of law is answered in favour of the assessee and against the revenue. The appeal filed by the revenue is hereby **dismissed**.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)