

OD - 11

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [INCOME TAX]
ORIGINAL SIDE

PRESENT :

THE HON'BLE CHIEF JUSTICE T.S SIVAGNANAM

And

THE HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)

ITAT/141/2025

IA NO: GA/1/2025, GA/2/2025

M/S SKYSCRAPER PROJECTS PVT LTD.

VS

ADDITIONAL COMMISSIONER OF INCOME TAX,
CIRCLE-10(2), KOLKATA

For Appellant : Mr. Anil Kumar Dugar, Advocate
Mr. Rajarshi Chatterjee, Advocate
Mrs. Suman Sahan, Advocate

For Respondent : Mr. Prithu Dudhoria, Advocate

Heard on : 28.7. 2025

Judgment on : 28.7. 2025

T.S. SIVAGNANAM, CJ:

This appeal has been filed by the appellant/assessee under Section 260A of the Income Tax Act (the Act) challenging the order dated 23.9.2024 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (Tribunal) in ITA/2542/Kol/2019 for the assessment year 2012-13.

Though the Department has been served, since no standing counsel has been nominated by the Department, we have directed Mr. Prithu Dudhoria, learned standing counsel, to appear for the respondent/department and his appearance shall be regularised and his fee bills shall be honoured.

There is a delay of 167 days in filing the appeal. The explanation offered by the appellant/assessee is acceptable apart from the fact that the delay is not inordinate. Hence, the delay in filing the appeal is condoned. The condone delay application, GA 1 of 2025, is allowed.

The issue involved in the instant case is whether the learned Tribunal was justified in setting aside the order passed by the Appellate authority namely, Commissioner of Income Tax (Appeal - 4), Kolkata [CIT(A)] and remanding the matter to the Assessing Officer to consider whether addition is required to be made under Section 43B of the Act. The assessee has raised the following substantial questions of law for consideration :-

“ i) Whether the Learned Tribunal erred in law in failing to take into consideration that the Assessing Officer had made estimation of the net profit by not relying upon the books of accounts and thus addition made under Section 43B of the Income Tax Act, 1961 on the basis of the said books of accounts is illegal and perverse.?

ii) Whether the Learned Tribunal erred in law in failing to take into consideration that when the income of an appellant/assessee was computed gross profit ratio and no deduction was allowed in regard to the expenses claimed by the appellant/assessee there is no need to look into the provision under Section 43B of the Income Tax Act, 1961?

iii) Whether the Learned Tribunal erred in law in failing to take into consideration by adding back Section 43B of the Income Tax Act, 1961 on the basis that VAT/Service Tax liability stands in the books of accounts though the Assessing Officer had considered the profit at eight percent of the gross receipts without allowing any deduction thereby giving rise to the presumption that all the expenses have been taken into consideration by the assessing authority and thus the VAT and Service Tax cannot be considered as further expenses and added back separately for computation of income?

iv) Whether the Learned Tribunal failed to consider that tax and duties were never charged as an expense in the profit and loss account and therefore could not reduced the profit estimated by the assessing authority and therefore the question of disallowing of expense that was never claimed at the first place is illegal, arbitrary and dehors the law?"

We have heard Mr. Anil Kumar Dugar, learned counsel appearing for the appellant and Mr. Prithu Dudhoria, learned standing counsel appearing for the respondent/department.

The assessee filed its return of income for the assessment year under consideration A.Y. 2012-13, disclosing a total income of Rs.3,66,69,260/-. The case was selected for scrutiny and notice under section 143(2) was issued. Subsequently, a questionnaire along with notice under section 142(1) was issued. The assessee appeared before the Assessing Officer and furnished the details. The first issue which was considered by the Assessing Officer is with regard to the profit from civil construction business. In accordance with the stand taken by the assessee, the Assessing Officer rejected the books of accounts and estimated the net profit of the assessee at 8% as was

done in the earlier assessment years. However, in the computation of the tax liability, the Assessing Officer added liability under section 43B and passed the order dated 29.3.2015 under section 143(3) of the Act.

Aggrieved by the same, the assessee preferred appeal before the CIT(A) contending that the addition made under section 43B of the Act is incorrect and not sustainable in law. It was submitted that the Assessing Officer in the assessment order need not discuss why he was invoking section 43B separately when income was estimated by the Assessing Officer and the assessee agreed to pay tax on the taxable income determined at 8% of the turnover and therefore, computation of the taxable income in normal course applying various provisions is in no way applicable. The CIT(A) considered the submissions of the assessee and held that once the Assessing Officer computed the net income under business profession, it is presumed that all the provisions of sections 29 to 43D have been considered and no further addition on account of section 43D is required. Therefore, the additions made by the Assessing Officer under section 43B are not required to be considered. In this regard, the Appellate authority took note of the decisions of the Division Bench of this Court in the case of Commissioner of Income Tax, Kolkata - XVII vs. Shri Arjun Bhowmick, ITAT 134 of 2014 dated 29.8.2024 and allowed the assessee's appeal. The revenue preferred appeal before the learned Tribunal. Learned Tribunal took note of the submissions made by the assessee and held that the matter has to be restored back to the file of the Assessing Officer, who has to verify the claim of the assessee in respect of the

VAT/Service tax liability paid during the year which has already suffered tax on account of addition made under section 43B of the Act in the preceding year.

Aggrieved by such order of remand passed by the learned Tribunal, the assessee has preferred the present appeal.

The legal issue involved in this appeal has been decided by this Court as well as the Hon'ble Division Bench of the other High Courts. In *Shri Arjun Bhowmick (supra)* the Hon'ble Division Bench held that when the profits are estimated, it means that the Assessing Officer has not relied on the books of accounts and if this fact is accepted then the estimation made by the Assessing Officer of net profit will take care of every addition related to business income or business receipts and no further disallowance can be made.

Similar issue arose for consideration in the case of *Commissioner of Income Tax vs. Noble & Hewitt (I) (P.) Ltd.*, [2008] 166 taxmann.com 48 (Del.) wherein it was held that when the assessee has not even claimed any deduction on the ground of service tax and has not debited the amount to its profits and loss account, the question of applying further deduction under section 43B was impermissible.

In *Commissioner of Income Tax vs. Banwari Lal Banshidhar*, [1998] 229 ITR 229 (All.), identical issue was considered and it was held that when the income of the assessee was computed applying the gross profit rate and when no deduction was allowed in regard to purchases of the assessee, there was no need to look into the provisions of section 40A(3) and Rule 6DD(J) and no disallowance could have been made.

In *Indwell Constructions vs. Commissioner of Income Tax*, [1998] 232 ITR 776 (Andhra Pradesh) it was held that where the books of accounts of the assessee were rejected and its income was estimated by applying proviso to section 145, no separate addition on account of interest and salary paid to the partners could be made to such estimated income.

In *Commissioner of Income Tax, Trichy vs. Amman Steel & Allied Industries*, [2017] 79 taxmann.com 331 (Madras) it was held that when income has been arrived at and had an estimate of turnover and computed applying the gross profit, no expenditure shall be allowed, since the gross profit applied would take care of the amount incurred by purchases etc. The Court noted the earlier decision in *CIT vs. Mohammad Dhurabudeen*, Tax Appeal No. 885 of 2007, dated 11.7.2007 (Madras High Court) wherein it was held as follows :-

"The question for consideration is when no deduction was sought and allowed under S. 40A (3), was there any need to go into S. 40A (3) and Rule 6DD (j). We see force in the view taken by the Tribunal that when the income of the assessee was computed applying the GP rate and when no deduction was allowed in regard to purchases of the assessee, there was no need to look into the provisions of Section 40A (3) and Rule 6DD (j). No disallowance could have been made in view of the provisions of S. 40A (3) read with Rule 6DD (j) as no deduction was allowed to and claimed by the assessee in respect of purchases. When the GP rate is applied, that would take care of everything and there was no need for the A.O. to make scrutiny of the amount incurred on the purchases by the assessee."

In *Grand Motors vs. Income Tax Officer*, [2024] 169 taxmann.com 241 (Chattisgarh), the Court took note of the decision in *Noble & Hewitt (I) (P.) Ltd. (supra)*,

it was held that since the assessee did not debit the amount to the profit and loss account as an expenditure nor did the assessee claim any deduction in respect of the amount and considering that the assessee is following mercantile system of accounting, the question of disallowance of deduction not claimed does not arise.

In the light of the above legal position and also the undisputed fact being that the gross profit was estimated after rejecting the books of accounts, the order passed by the learned Tribunal restoring the matter to the Assessing Officer is unnecessary and not called for.

For the above reasons, the appeal filed by the assessee is allowed.

The substantial questions of law are answered in favour of the assessee and the order passed by the CIT(A) dated 19th August, 2019 stands restored.

The application being IA No.GA/2/2025 stands closed.

(T.S SIVAGNANAM, CJ.)

I agree.

(CHAITALI CHATTERJEE (DAS), J.)

