

(2014) 05 AHC CK 0109

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (Tax) No. 640 of 2013

Awasthi Traders

APPELLANT

Vs

Commissioner of Income Tax-I

RESPONDENT

Date of Decision : 27-05-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 139(1), 142(1), 143, 143(2), 143(3)

Motor Vehicles Act, 1988 — Section 2

Citation : (2014) 6 ADJ 580

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : N.R. Kumar and Vishwjeet, Advocate for the Appellant; Shambhoo Chopra, Advocate for the Respondent

Judgement

Sudhir Agarwal, J.—Heard Sri Vishwajeet, Advocate, for petitioner and Sri Shambhoo Chopra, Advocate, for respondents. This writ petition under Article 226 has arisen from the order dated 13.10.2011, passed by respondent No. 2, Assistant Commissioner, Income Tax, Agra for the Assessment Year 2009-10 u/s 143(3) of Income Tax Act, 1961 (hereinafter referred to as "Act, 1961") and the order dated 4.3.2013 passed by Commissioner of Income Tax-I, Agra, u/s 264 of Act, 1961 dismissing the petition of Assessee against the aforesaid order of Assessing Authority.

2. Petitioner, a registered partnership firm, is engaged in the business of executing civil works contracts in different Departments. For the Assessment year 2009-10, return was filed u/s 139(1) of Act, 1961 disclosing net taxable income as Rs. 4,99,500/-. Petitioner claimed depreciation of Rs. 25,67,785/- as per the depreciation chart and submitted accounts, i.e. trading, profit and loss accounts, balance sheet, deprecation chart etc.

3. As a condition of receiving contract and for execution thereof, petitioner used to take Fixed Deposit Receipts (hereinafter referred to as "F.D.R.") furnished with

the Department as Security and therefore petitioner claimed that the interest earned on such fixed deposits cannot be treated "income from other sources" and instead the said income was his "business income".

4. Petitioner's return was selected for scrutiny as a consequence whereof respondent No. 2 issued notice u/s 143(2) and 142(1) of Act, 1961. Respondent No. 2 took the view that expenses incurred by Firm are not properly vouched, the disclosed turn over was not to be accepted and hence it calculated profit by following a flat rate of 8 per cent on the gross receipt of Rs. 12,68,14,480/- with the condition that no penal action shall be taken against petitioner and consequently passed order on 13.10.2011. It determined income from business of civil contracts at Rs. 1,01,45,158/-. After deduction of salary etc, it assessed final income of Firm as Rs. 89,04,219/-. Respondent No. 2 also treated interest accrued on F.D.R. of Rs. 10,53,681/- as "income from other sources" and taxed accordingly. Petitioner, thereafter, preferred a Revision petition u/s 264 of Act, 1961 before Commissioner which has been rejected by order dated 4.3.2013.

5. There are two questions. First whether the depreciation claimed by petitioner has rightly been disallowed or not. In this regard, the Revenue has referred to Sections 44AD, 44AE and 44AF of Act, 1961. The aforesaid provisions, as they stood in the relevant Assessment Year read as under:

"44AD. Special provision for computing profits and gains of business of civil construction, etc.--(1) Notwithstanding anything to the contrary contained in Sections 28 to 43C, in the case of an assessee engaged in the business of civil construction or supply of labour for civil construction, a sum equal to eight per cent of the gross receipts paid or payable to the assessee in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum as declared by the assessee in his return of income, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession":

Provided that nothing contained in this sub-section shall apply in case the aforesaid gross receipts paid or payable exceed an amount of forty lakh rupees.

(2) Any deduction allowable under the provisions of Sections 30 to 38 shall, for the purposes of sub-section (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed:

Provided that where the assessee is a firm, the salary and interest paid to its partners shall be deducted from the income computed under sub-section (1) subject to the conditions and limits specified in clause (b) of Section 40.

(3) The written down value of any asset used for the purpose of the business referred to in sub-section (1) shall be deemed to have been calculated as if the assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

(4) The provisions of Sections 44AA and 44AB shall not apply in so far as they

relate to the business referred to in sub-section (1) and in computing the monetary limits under those sections, the gross receipts or, as the case may be, the income from the said business shall be excluded.

(5) Nothing contained in the foregoing provisions of this section shall apply, where the assessee claims and produces evidence to prove that the profits and gains from the aforesaid business during the previous year relevant to the assessment year commencing on the 1st day of April, 1997 or any earlier assessment year, are lower than the profits and gains specified in sub-section (1), and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee and determine the sum payable by the assessee on the basis of assessment made under sub-section (3) of Section 143.

(6) Notwithstanding anything contained in the foregoing provisions of this section, an assessee may claim lower profits and gains than the profits and gains specified in sub-section (1), if he keeps and maintains such books of account and other documents as required under sub-section (2) of Section 44AA and gets his accounts audited and furnishes a report of such audit as required u/s 44AB.

Explanation.--For the purposes of this section, the expression "civil construction" includes-

(a) the construction or repair of any building, bridge, dam or other structure or of any canal or road;

(b) the execution of any works contract."

"44AE. Special provision for computing profits and gains of business of plying, hiring or leasing goods carriages.--(1) Notwithstanding anything to the contrary contained in Sections 28 to 43C, in the case of an assessee, who owns not more than ten goods carriages at any time during the previous year and who is engaged in the business of plying, hiring or leasing such goods carriages, the income of such business chargeable to tax under the head "Profits and gains of business or profession" shall be deemed to be the aggregate of the profits and gains, from all the goods carriages owned by him in the previous year, computed in accordance with the provisions of sub-section (2).

(2) For the purposes of sub-section (1), the profits and gains from each goods carriage,--

(i) being a heavy goods vehicle, shall be an amount equal to three thousand five hundred rupees for every month or part of a month during which the heavy goods vehicle is owned by the assessee in the previous year or, as the case may be, an amount higher than the aforesaid amount as declared by him in his return of income;

(ii) other than a heavy goods vehicle, shall be an amount equal to three thousand one hundred and fifty rupees for every month or part of a month during which the goods carriage is owned by the assessee in the previous year

or, as the case may be, an amount higher than the aforesaid amount as declared by him in his return of income.

(3) Any deduction allowable under the provisions of Sections 30 to 38 shall, for the purposes of sub-section (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed:

Provided that where the assessee is a firm, the salary and interest paid to its partners shall be deducted from the income computed under sub-section (1) subject to the conditions and limits specified in clause (b) of Section 40.

(4) The written down value of any asset used for the purpose of the business referred to in sub-section (1) shall be deemed to have been calculated as if the assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

(5) The provisions of Sections 44AA and 44AB shall not apply in so far as they relate to the business referred to in sub-section (1) and in computing the monetary limits under those sections, the gross receipts or, as the case may be, the income from the said business shall be excluded.

(6) Nothing contained in the foregoing provisions of this section shall apply, where the assessee claims and produces evidence to prove that the profits and gains from the aforesaid business during the previous year relevant to the assessment year commencing on the 1st day of April, 1997 or any earlier assessment year, are lower than the profits and gains specified in sub-sections (1) and (2), and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee and determine the sum payable by the assessee on the basis of assessment made under sub-section (3) of Section 143.

(7) Notwithstanding anything contained in the foregoing provisions of this section, an assessee may claim lower profits and gains than the profits and gains specified in sub-sections (1) and (2), if he keeps and maintains such books of account and other documents as required under sub-section (2) of Section 44AA and gets his accounts audited and furnishes a report of such audit as required u/s 44AB.

Explanation.--For the purposes of this section,--

(a) the expressions "goods carriage" and "heavy goods vehicle" shall have the meanings respectively assigned to them in Section 2 of the Motor Vehicles Act, 1988 (59 of 1988);

(b) an assessee, who is in possession of a goods carriage, whether taken on hire purchase or on instalments and for which the whole or part of the amount payable is still due, shall be deemed to be the owner of such goods carriage."

"44AF. Special provisions for computing profits and gains of retail business.--(1) Notwithstanding anything to the contrary contained in Sections 28 to 43C, in the

case of an assessee engaged in retail trade in any goods or merchandise, a sum equal to five per cent of the total turnover in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum as declared by the assessee in his return of income shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession":

Provided that nothing contained in this sub-section shall apply in respect of an assessee whose total turnover exceeds an amount of forty lakh rupees in the previous year.

(2) Any deduction allowable under the provisions of Sections 30 to 38 shall, for the purposes of sub-section (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed:

Provided that where the assessee is a firm, the salary and interest paid to its partners shall be deducted from the income computed under sub-section (1) subject to the conditions and limits specified in clause (b) of Section 40.

(3) The written down value of any asset used for the purpose of the business referred to in sub-section (1) shall be deemed to have been calculated as if the assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

(4) The provisions of Sections 44AA and 44AB shall not apply in so far as they relate to the business referred to in sub-section (1) and in computing the monetary limits under those sections, the total turnover or, as the case may be, the income from the said business shall be excluded.

(5) Notwithstanding anything contained in the foregoing provisions of this section, an assessee may claim lower profits and gains than the profits and gains specified in sub-section (1), if he keeps and maintains such books of account and other documents as required under sub-section (2) of Section 44AA and gets his accounts audited and furnishes a report of such audit as required u/s 44AB.

(6) Nothing contained in this section shall apply to any assessment year beginning on or after the 1st day of April, 2011."

6. Counsel for petitioner, though relied on a Division Bench judgment of this Court in Commissioner of Income Tax Vs. Bishambhar Dayal and Co., but the aforesaid decision relates to Assessment year 1987-88 while the aforesaid provisions were inserted in 1994 and onwards. Moreover, in para 2 of the aforesaid judgment itself, the Court has said that there is no provision under the Income Tax Act brought to the notice of the Court which makes the claim of depreciation inadmissible where the income is computed by applying flat rate. Subsequently, the provisions have been inserted in the Act. I find no error in the view taken by the respondents.

7. Now coming to the question in respect to the interest on F.D.R. which has

been treated to be other income and not business income, it is not disputed that petitioner has not invested the income but in order to run his business and obtaining contracts, he had to receive short term fixed deposit so as to provide security to the Department against civil works contract allotted to him. Learned counsel for petitioner drew my attention to the judgment of Karnataka High Court in Commissioner of Income Tax and Another Vs. Chinna Nachimuthu Constructions, where the Court relying on an Apex Court's decision in Commissioner of Income Tax, Orissa Vs. Govinda Choudhury and Sons, Gosaninuagaon, Orissa, has said as under:

"1. This appeal is by the Revenue challenging the order passed by the income tax Appellate Tribunal, Bangalore dated March 28, 2002, whereunder, the Tribunal has confirmed the order passed by the Assessing Officer.

2. The question of law raised by the Revenue in this appeal is whether the interest accrued on the deposit made by the assessee to avail of the bank guarantee has to be treated as income from the business or from other sources.

3. Heard learned Counsel for both the parties. It is not in dispute that the assessee being a contractor in order to secure a contract work was required to offer a bank guarantee to the KPTCL. It is not in dispute that in order to avail of the bank guarantee, certain amounts, were invested in fixed deposits, which had accrued interest. The assessee has shown the interest accrued on the fixed deposits as business interest. But the Assessing Officer treated the interest, considering the same as income from other sources and called upon the assessee to show-cause, which order has been further confirmed by the income tax Appellate Tribunal. This appeal is filed against the concurrent findings of the Courts below.

4. Having heard counsel for both sides, we have noticed that the investment of amount in fixed deposits by the assessee was only to secure a bank guarantee to be offered to M/s. KPTCL in order to acquire a contract work. Therefore, it cannot be treated as an income from other sources and interest accrued on such fixed deposits has to be treated as business income only. Our view is also supported by the judgment of the Supreme Court in the case of Commissioner of Income Tax, Orissa Vs. Govinda Choudhury and Sons, Gosaninuagaon, Orissa,

5. In the result the appeal is dismissed. The question of law is answered against the Revenue."

8. The above dictum is clearly applicable in the case in hand also. The F.D.R. have not been received by Assessee for the purpose of investing money or otherwise, but it is a part and parcel of his regular business activities in which he has to furnish security to the Department to obtain civil contracts and if an interest has been earned thereon, in my view, it will qualify to be an "income on business" and not as "income from other sources".

9. It is also brought to the notice of this Court that in similar circumstances,

where the department has treated income on F.D.R. as business income in respect to another construction company, i.e. M/s. Gupta Construction Company, Income Tax Appeal No. 250 of 2013 (Commissioner of Income Tax v. M/s. Gupta Construction Company) preferred by Department has been dismissed by this Court on 19.3.2013 observing as under:

"...On interest on FDRs, the CIT(A) noted that the addition was made by the Assessing Officer without giving any opportunity of hearing to the assessee. The FDRs were purchased for security purpose for obtaining the contracts which is connected, with the business activities of the assessee.

We do not find any question of law arising from the order for consideration in the appeal.

The income tax appeal is dismissed."

10. Learned counsel for the respondents could not dispute the above facts. In the above matter also, the F.D.R. were purchased for security purposes for obtaining the contracts and the Court observed that it is in connection with the business activities of Assessee, which was the view taken by Commissioner also so as to hold that income earned on such F.D.R. is to be treated as "business income" and not as "income from other sources". On this aspect, I, therefore, find that the view taken by Revenue is unsustainable and the Assessee deserves this issue to be returned in his favour. In view thereof, the writ petition is allowed partly. Impugned orders dated 13.10.2011 and 4.3.2013, insofar as income earned on F.D.R. has been treated "income from other sources", is hereby set aside. Assessing Authority is directed to pass consequential order in the light of observations made above.