

(2002) 04 RAJ CK 0014

In the Rajasthan High Court

Case No : IT Appeal No's. 1 and 3 of 2002 18 April 2002 A.Y. 1994-95 and 1996-97

Commissioner of Income Tax

APPELLANT

Vs

Bhawan Va Path Nirman (Bohra) and Co.

RESPONDENT

Date of Decision : 18-04-2002

Acts Referred:

Income Tax Act, 1961 — Section 145, 256

Citation : (2002) 175 CTR 160

Hon'ble Judges : Rajesh Balia, J;D.N. Joshi, J

Bench : Full Bench

Advocate : H.S Rathore, for the Revenue and Anjay Kothari, for the Assessee, for the Appellant;

Judgement

Rajesh Balia, J.

Heard learned counsel for the parties.

These two appeals filed by the revenue relate to assessment years 1994-95 and 1996-97.

The core question raised before us, as is apparent from the question framed at the time of admission, whether the Tribunal was justified in law allowing interest paid to third parties.

Reference to COMMISSIONER OF INCOME TAX Vs. JAIN CONSTRUCTION CO. and Others, is primarily for the purpose of showing that whether on reaching this conclusion, reliance can be placed on that judgment laying down any such rate.

2. Having perused the judgment under appeal and other material, which has been referred to by both the learned counsel, we are of the opinion that in the facts and circumstances of the case, the decision of M/s. Jain Construction Company referred to above which was rendered in application u/s 256 really does not call for any consideration in this case as the finding has been reached

on appreciation of facts concerning the assessment in question.

3. The background of the question is that the assessing officer finding that the net profit rate disclosed in the books of account of the assessee for the previous years relevant to assessment years in question respectively were not showing the true and correct picture of the trading results and, therefore, by rejecting the books of accounts, the assessing officer resorted to section 145(2) and computed the income chargeable to tax for the respective assessment years by estimating net profit rate at 11 per cent without subject to any appropriation.

For considering that books of account by the assessee do not disclose correct picture of profit and gain from business the assessing officer has referred to the net profit rate showing the trading result as per books of account was lower than previous years. Such net profit rate taken into account was without taking into account the allowable depreciation and interest paid to third parties, and the same were still to be appropriated from the net profit so disclosed by the assessee.

Likewise for the assessment year 1996-97 net profit rate disclosed by the assessee in his books of account was arrived at without taking into account depreciation and interest payable to the third parties.

However, while increasing the net profit rate as disclosed by the assessee to 11 per cent the assessing officer did not leave room for any further appropriation on account of depreciation or interest payable to third parties, or for that matter any other claim to appropriation from such net profit rate was not considered.

4. The Tribunal by tracing the history of assessee in the matter of determining its taxable income by estimating it on the basis of net profit rate for earlier years has found: firstly, as a fact that assessee has declared net profit rate in the three assessment years preceding assessment year 1989-90. The Tribunal was considering appeals arising from proceedings relating to assessment year 1989-90 and subsequent years upto 1996-97 and average rate of net profit applied was taken to be 11 per cent.

This NP rate has been taken to replace the basic NP rate as declared by the assessee under the subsequent years also.

Thus, finding 11 per cent net profit rate as basic rate for computing income for the purpose of levying tax, the Tribunal has found that basic net profit rate fixed by the Income Tax Officer at 11 per cent for each of the 2 years in question also does not call for any change so far as percentage is concerned.

However, the Tribunal has further found by noticing the past record of the assessee both in the matter of declaration of income by him and assessment made on the estimated basis by the assessing officer as finally affirmed or modified by the appellate authorities that in determining the income of assessee on estimated basis, past record and history of assessment is always relevant factor. That history we find upto the finding recorded by the Commissioner

(Appeals) as noticed by the Tribunal in para 16 of its order under appeal which reads as under :

"16. The factual position regarding the N.P. rate applied by assessing officer and confirmed/sustained by learned Commissioner (Appeals) for the assessment years can be better appreciated from the figures given in the following comparative chart :

Note : (1) The figures for assessment years 1990-91, 1991-92 & 1993-94 are also shown in the chart to facilitate better comparison.

(2) Tribunal has upheld the N.P. rates of 10 per cent and 10.49 per cent for assessment year 1990-91 & 1991-92, respectively.

From the aforesaid chart, it is apparent that in the case of assessee at least since 1989-90 the assessing officer has taken trading result of assessee on the basis of net profit rate before appropriation towards depreciation and interest to third parties, though in the case of assessment years 1994-95 and 1995-96 some other expenses have also been claimed."

The Tribunal also referred to net profit rate as per assessee's methodology disclosed in assessment year 1986-87 to 10.7 per cent, 1987-88 at 10.4 per cent and 1988-89 at 11.6 per cent to sustain basic NP rate at 11 per cent.

5. The assessing officer while altering the net profit rate as disclosed in the books of account of the assessee has estimated the net profit rate successively for 6 assessment years 1989-90 to 1994-95 subject to appropriation towards depreciation and interest to third parties. While affirming or modifying the net profit rate determined by the assessing officer the first appellate authority has also determined net profit rate subject to appropriation towards depreciation and interest to third parties and sales-tax.

Thus, it was apparent from the aforesaid background of the determination of assessee's income on estimated basis that throughout net profit rate disclosed by the assessee, has been computed and taken into account by the assessing officer to determine trading results prior to allowance of depreciation and payment of interest to the third parties and has himself determined the net profit rate to be applied subject to similar appropriation.

All through past years history of the assessee in connection with Income Tax assessment is consistent with finding net profit rate disclosed by him in his books of accounts and net profit rate applied by the assessing officer for estimating his income from business and profession for the relevant years as affirmed by the Commissioner (Appeals) had been without the element of appropriation towards depreciation and interest to third parties which are otherwise allowable expenditure under the provisions of the Income Tax Act to be taken into account for determining the taxable income and were required to be so appropriated against trading result obtained by applying estimated net profit rate.

It is on the aforesaid premise that the net profit rate to be applied to the assessee was devised by the assessing officer as well as by the Tribunal.

However, in devising net profit rate and estimating income of the assessee in relation to assessment years in question on the basis of past record of practice the Income Tax Officer has, for the first time deviated from method of final estimate by not considering the element of later appropriation towards depreciation and its interest as has been consistently followed in the case of assessee in past years by the revenue itself.

The Tribunal while accepting the basic NP rate on the basis of history of case, has found no reason to deviate from the past history of estimating the income of the assessee.

We are of the opinion that there is a reasonable nexus in the reasoning of the Tribunal by linking the process of estimating income with the past practice followed in the assessee's case by the revenue itself consistently for five years prior to the relevant years in question.

6. In this case the very foundation of fixing net profit rate has been the average net profit rate as has been applied by the revenue in past consistently since assessment year 1989-90 and which has been followed in determining taxable income of the assessee year after year. Such net profit rate was determined without considering any appropriation towards depreciation and interest on borrowings. Once the basic premises was founded on past history which was apparently denoting towards fixing of net profit rate by the assessing authority vis-a-vis net profit rate declared by the assessee by excluding the element of depreciation and interest on borrowings whether in computing net profit rate disclosed by the assessee or net profit rate applied by the assessing officer, the consequence automatically follows that in the net profit rate so fixed the element of depreciation on the fixed asset and interest on borrowings has not been taken into consideration in determining the NP rate. Consequently, the trading result obtained by applying such net profit rate needed further appropriation towards allowable depreciation and interest on borrowings. There is no doubt about the fact that both expenses, on account of depreciation and interest on borrowings are allowable expenses and without taking into account such expenses net taxable income cannot be determined. In fact there is no dispute about appropriation towards depreciation, notwithstanding the assessing authority has applied net profit rate excluding appropriation towards any allowable expenditure.

We are in agreement with the Tribunal for modifying the order passed by the assessing authority by making net profit rate subject to adjustment towards depreciation and interest on borrowings.

This conclusion, in our opinion, was a pure finding of fact and would not give rise to question of law much less substantial question of law unless the finding is shown to be perverse or without any rationale. That being not so, we do not find any merit in these appeals and the same are hereby dismissed with no order as

to costs.

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