(2013) 05 GUJ CK 0048

In the Gujarat High Court

Case No : Tax Appeal No. 1477 of 2011

Deep Construction Co. APPELLANT

Vs

Deputy Commissioner of Income Tax RESPONDENT

Date of Decision : 06-05-2013

Acts Referred:
Income Tax Act, 1961 — Section 44AD

Citation : (2013) 215 TAXMAN 700

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Tushar P. Hemani and Ms. Vaibhavi K. Parikh,s No. 1, for the Appellant; Pranav G. Desai, Advocate for the Opponent(s) No. 1, for the Respondent

Judgement

Akil Kureshi, J.—This appeal is filed by the assessee calling in question validity of an order of the Income Tax Appellate Tribunal (''the Tribunal'' for short) dated 21.08.2009. The issue arises in following background. For the assessment year 2005-06, the assessee had filed its return of income declaring a total income of Rs. 5,53,821/-. On such return, the Assessing Officer passed a scrutiny assessment. After rejecting the book results, the Assessing Officer made addition of Rs. 26,01,754/- at an estimated disallowance of 25% of the expenditure. The issue was carried in appeal by the assessee. CIT(A) gave partial relief to him and reduced the disallowance to Rs. 4,14,387/- by taking an estimate of the assessee''s net profit at 7% and arriving at net profit at Rs. 15,12,735/- and thereafter, grant a benefit of salary to partners and interest to partners.

2. The revenue carried the matter in appeal before the Tribunal. In response to the revenue''s appeal, assessee also filed the cross-appeal. In such proceedings, the Tribunal passed an order on 13.02.2009 and held as under:

5. We have heard the rival submissions. Looking to the facts and circumstances of the case, we find that the CIT(A) has estimated the profit. The Assessing Officer found that the books of accounts are defective and the CIT(A) agreed

with the findings of the Assessing Officer. But 25% of the expenses cannot be disallowed and this line of business profit 17.12% is unachievable, therefore, the CIT(A) has restricted the net profit before salary and interest to partners is estimated @7% as against 5.08% shown by the assessee. We find that the CIT(A) has not taken into consideration any basis for the same. We find that the similar issue had been come up for the Hon''ble Rajasthan High Court in the case of Commissioner of Income Tax Vs. Jain Construction Co. and Others, , wherein it has been held that while books of accounts are rejected if the turnover is above Rs. 40 lakhs, the Assessing Officer can take the help of section 44AD for passing assessment order for estimating the net profit. We find that in the present case, the CIT(A) has estimated 7% without any basis. Therefore, we modify the order of the CIT(A) and we estimate 8% as net profit. The Assessing Officer is directed to take net profit before allowing depreciation, salary and interest to the partners as fair and reasonable. Therefore, total turnover is Rs. 21,610,506/- 8% comes to Rs. 17,28,840/-. The assessee has shown profit before depreciation, salary and interest to the partners at Rs. 10,98,348/-. Therefore, this disallowance of Rs. 17,28,840/- is confirmed against disallowance of Rs. 26,01,574/- made by the Assessing Officer.

3. From the reproduced portion of the order of the Tribunal, it can be seen that the Tribunal adopted the profit rate of 8% before depreciation; salary and interest to the partners. For such purpose, the Tribunal placed reliance on a decision of Rajasthan High Court in case of Commissioner of Income Tax Vs. Jain Construction Co. and Others, .

4. The assessee thereupon, moved an application for rectification before the Tribunal and contended that before depreciation; salary and interest to the partners, the assessee had already reflected net profit rate of 8.13% as against, that provided by the Tribunal @ 8%. The Tribunal, therefore, may suitably correct the order. On such application, Tribunal passed the impugned order and provided as under:

5. Having heard both the parties, we are of the view that the Tribunal has modified the order of CIT(A) and Tribunal has confirmed the addition of Rs. 5 lakhs and he has also not allowed the depreciation. Therefore, we modify our order and we direct the Assessing Officer to take the net profit at 8% before allowing salary and interest to the partners as fair and reasonable. We therefore confirm the disallowance Rs. 10,98,348/- as against disallowance of Rs. 26,01,574/- made by the assessing officer. We accordingly modify the order and allow miscellaneous petition as indicated above.

Order pronounced in the open court at the time of hearing itself i.e. on 21.8.2009.

5. For the purpose of this tax appeal, we frame the following substantial question of law:

Whether the Income Tax Appellate Tribunal was right in law and in facts in exercising power of rectification?

6. From the orders on record, we gather that in the original order, the Tribunal estimated the profit at the rate of 8% before depreciation, salary and interest to the partners. This was on the basis of decision of Rajasthan High Court in case of CIT vs. Jain Construction co. and ors. (supra). In such decision, the precise question was, whether while applying the profit rate of 8% u/s 44AD of the Act, can depreciation still be claimed thereafter? It was, in this background, the High Court had answered the question in favour of assessee. When the Tribunal, therefore, applied such a decision and specifically provided for working-out depreciation after computing profit at the rate of 8% in our opinion, there was no ambiguity or uncertainty. Simply because the assessee himself had declared profit at 8.13% on such parameters, would not permit the Tribunal to change such a directive in exercise of rectification powers. Power of rectification can be exercised for correcting an error apparent on the face of the record and not for reviewing and order. In the present case, decision of the Tribunal to allow depreciation on 8% profit was a conscious decision. Whether such a view was correct or not is not our inquiry in this case. What we do hold is, that such a view could not have been changed in exercise of power of rectification. On this short ground, we are prepared to reverse the Tribunal''s order under challenge. The counsel for the appellant clarified that the assessee would not argue that the estimate adopted by the CIT(A) also should be reduced further. In other words, he would be satisfied with the revenue''s appeal before the Tribunal being dismissed without any further benefit to him. In the result, appeal is allowed. Order of the Tribunal dated 21.08.2009 is set aside. Question is answered in favour of the assessee accordingly. It is clarified that resultant effect of this order would be that the revenue''s appeal before the Tribunal against the order of the CIT(A) would stand dismissed without any further benefit to the assessee. For all purposes, the order of CIT(A) would prevail. Tax appeal is disposed of accordingly.

