
(2016) 04 AHC CK 0217
In the Allahabad High Court
Case No : Income Tax Reference No. 1 of 2010

M/s Shiva Constructions Co.

APPELLANT

Vs

CIT Allahabad

RESPONDENT

Date of Decision : 01-04-2016

Acts Referred:

Citation : (2016) 6 ADJ 35 : (2016) 93 UPTC 299

Hon'ble Judges : Dilip Gupta and Surya Prakash Kesarwani, JJ.

Bench : Division Bench

Advocate : Shakeel Ahmad, Advocate, for the Appellant; D. Awasthi and Gaurav Mahajan, Advocates, for the Respondent

Final Decision : Allowed

Judgement

1. The Income Tax Appellate Tribunal, Allahabad Bench, Allahabad (The Tribunal) by order dated 29 October 1999 relating to the assessment year 1991-92, has referred the following questions for opinion of this Court:

"1. Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was justified in holding that the issue of sub-contract of IRCON was never raised before the Commissioner of Income Tax (Appeals), whereas this issue was not before the Appellate Authority?

2. Whether on the facts and in the circumstances of the case the Tribunal was justified in confirming the Commissioner of Income Tax (Appeal) Order, holding that the issue of main contract and sub contract was raised for the first time before the Tribunal, whereas it came up only out of the Appellate Order, on which the finding was given, without considering the fact that the addition in the assessment order was on different issue?"

2. Learned counsel for the assessee submits that during the Assessment Year 1991-92, the total receipts from contract was Rs.94,06,135/- out of which receipts of Rs.7,82,750/- were from main contract and receipts of Rs.86,23,385/- were from sub contract.

3. It is not in dispute that the above two kinds of receipts were verified in earlier assessment years 1985-86 and 1986-87 and the Assessing Authority applied separate rates of net profit of 8.5% in respect of receipts from main contract and 6% in respect of receipts from sub contract, which was further reduced to 5.5% by the Commissioner of Income Tax (Appeals) 2 by order dated 6 February 1990. However, the Tribunal did not consider this aspect and applied a flat rate of 8% to determine the net profit for the assessment year in question as was done by C.I.T. (Appeals). The department was not aggrieved with the order of the C.I.T. (Appeals) but the assessee being aggrieved with the application of flat net profit rate of 8% on the entire receipts of contract, filed an appeal being Appeal No.1274 (Alld.)/1995 before the Tribunal, which was dismissed by the aforesaid order dated 26 April 1996.

4. Learned counsel for the assessee submits that once the net profit at flat rate was applied by the C.I.T. (Appeals), the assessee was right in raising an objection that different rates of net profit on two different classes of receipts should be applied as was done by the assessing officer in the earlier assessment years. He, therefore, submits that there was no fresh issue before the Tribunal and in any case when the assessee raised the issue of different rates of net profit on two kinds of receipts based on the method adopted by the assessing officer in the earlier assessment years, it was obligatory on the part of the Tribunal to decide this factual aspect of the matter, being the last fact finding authority to determine the net profit.

5. Shri Gaurav Mahajan, learned counsel for the department submits that since the additions were made under different heads by the Assessing Officer and C.I.T. (Appeals) has applied flat rate of 8% net profit on receipts of contract and the assessee has not raised this issue regarding bifurcating the receipts under two heads, namely, main contract and sub contract, it was not open to the assessee to raise this issue before the Tribunal. The Tribunal, therefore, it is submitted did not commit any error of law in upholding the order of C.I.T. (Appeals).

6. We have carefully considered the submissions made by the learned counsel for the parties.

7. The assessee is a contractor engaged in business of civil contract. The total receipts of the assessee during the assessment year 1991-92 were Rs.94,06,135/- out of which receipts of Rs.7,82,750/- were from the main contract and receipts of Rs.86,23,385/- were from the sub contract. The C.I.T. (Appeals) as well as Tribunal have found the aforesaid receipts to be verifiable. It is also undisputed that for the assessment years 1985-86 and 1986-87 the Assessing Authority itself applied net profit @ 8.5% in respect of receipts of main contract and 6% in respect of sub contract. The net profit rate on receipts of sub contract was reduced by the C.I.T. (Appeals) to 5.5% by order dated 6 February 1990, a copy of which was also filed before the Tribunal, as evident from the facts mentioned in paragraphs 3, 4 and 5 of order of the Tribunal dated 26 April

1996. The department was not aggrieved with the application of flat rate so as to determine the net profit. The assessee was aggrieved with the order of C.I.T. (Appeals) for the reason that once the C.I.T. (Appeals) applied net profit rate to determine the net profit from receipts of contract, then it was necessary to examine the two kinds of receipts, namely, receipts from main contract and receipts from sub contract for which different rates of net profit were applied by the Assessing Authority in the earlier assessment years. Thus, there was no fresh issue before the Tribunal. Rather the issue was with regard to the application of rate of net profit on the two kinds of receipts. The Tribunal has, therefore, committed a manifest error of law in upholding the application of net profit @ 8% on the entire contract receipts ignoring the receipts under the two heads, namely, the main contract and the sub contract.

8. It is not the case of the department before this Court nor was it the case before the Tribunal that a businessman can earn the same rate of net profit from the main contract and the sub contract. Once this fact is not disputed as the department applied net profit rate of 5.5% and 8.5% in the earlier assessment years in respect of the sub contract and main contract, the Tribunal should have considered this aspect of the matter and should have applied different net profit rates on the aforesaid two kinds of receipts.

9. In view of the above discussions, we are of the opinion that Tribunal committed a manifest error of law in upholding the order of Commissioner of Income Tax (Appeals). Accordingly, both the questions, as referred by the Tribunal, are answered in the negative and in favour of the assessee and against the revenue.

10. The reference is, accordingly, allowed. The Tribunal shall pass the consequential order.