(2016) 02 P&H CK 0005

In the Punjab And Haryana At Chandigarh

Case No : ITA No. 399 of 2015

M/s S.P. Construction APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 04-02-2016

Acts Referred:
Income Tax Act, 1961 — Section 132, Section 260A

Citation : (2017) 390 ITR 314

Hon'ble Judges : Mr. Ajay Kumar Mittal and Mrs. Raj Rahul Garg, JJ.

Bench : Division Bench

Advocate : Mr. Sandeep Goyal, Advocate, for the Appellant-Assessee

Final Decision : Dismissed

Judgement

Ajay Kumar Mittal, J. - This appeal has been preferred by the appellant-assessee under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 31.3.2015, Annexure A.7 passed by the Income Tax Appellate Tribunal, Chandigarh Bench ''B'', Chandigarh (in short, "the Tribunal") in ITA No.244/Chd/2015 for the assessment year 2007-08, claiming following substantial questions of law:-

"i) Whether on the facts and in the circumstances of the case, the order passed by the learned Tribunal is violative of principles of natural justice in as much as the same has been passed without dealing with all the contentions raised by the appellant during the course of hearing as well as written submissions in the paper book?

ii) Whether on the facts and in the circumstances of the case, the learned Tribunal was justified in upholding the application of net profit rate on an estimated basis without there being any specific rejection of books of account by the AO?

iii) If the answer to question No.(ii) is in affirmative, whether on the facts and in the circumstances of the case, the learned AO had sufficient reasons not to rely upon the books and documents produced by the appellant and applying an estimated net profit rate?

iv) Whether in the facts and circumstances of the case, the learned ITAT is justified in applying a net profit rate of 9% on the total gross receipts without giving any reasons or relying upon any comparable case especially when in the case of appellant itself, the net profit rate of 2.48% had been accepted by the department for the assessment year 2005-06?

v) Whether the finding of learned ITAT is perverse in so far as it has observed that the rate of 9% gross profit is applicable because the appellant is engaged in construction of residential buildings whereas the appellant is primarily involved in construction of industrial buildings?"

2. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. On 24.7.2009, a search operation had been carried out under section 132 of the Act at the premises of one Anil Talwar group of persons. Some of the information which was obtained from his premises related to the appellant firm and accordingly notices were issued under section 148 of the Act to the appellant for the assessment years 2005-06, 2007-08 and 2008-09. In response thereto, the appellant filed its returns for the concerned assessment years. Necessary documents, books of account, records and vouchers were produced. While framing assessment for the assessment year 2005-06, vide order dated 28.12.2010, Annexure A.1, the books were not rejected and certain disallowances were made in addition to an amount of Rs. 47,80,000/- which had been treated as business receipt and in lieu of imprest account received from Anil Talwar. A net profit rate of 8% was applied on the same. On this account, an addition of Rs. 3,82,400/- had been made in the income besides other petty additions totalling Rs. 1,64,581/-. Aggrieved by the order, the assessee filed appeal before the first appellate authority. Vide order dated 3.12.2012, Annexure A.2, the first appellate authority deleted the addition with regard to receipt from Anil Talwar holding that the said amount was on account of imprest amount and therefore could not be treated as business receipt. The appeal was partly allowed. Similarly for the assessment year 2007-08, the Assessing officer carried out proceedings under section 147 of the Act in which certain enquiries were made. The appellant submitted written submissions and produced necessary documents. Certain defects were noticed by the Assessing Officer which were not removed by the appellant. The Assessing Officer vide order dated 8.3.2013, Annexure A.3 without rejecting the books of account applied net profit rate of 10% on the gross receipts working out the receipts at Rs. 5,42,83,935/-. The income was worked out at Rs. 54,28,393/-. After giving deduction of interest paid to partners at Rs. 6,28,455/-, the income was calculated at Rs. 47,99,938/-. Aggrieved by the order, the assessee filed appeal Annexure A.4 on 15.4.2013 before the Commissioner of Income Tax (Appeals) [CIT(A)].

Vide order dated 10.12.2014, Annexure A.5, the CIT(A) partly allowed the appeal holding that receipts from Anil Talwar could not be added in the gross receipts and similarly entries with regard to bounced cheques/total mistakes could also not be considered for the purpose of examining gross receipts from business. The net profit rate of 10% was however upheld. The appellant filed appeal, Annexure A.6 before the Tribunal pleading that the CIT(A) erred in confirming the application of net profit rate of 10% on the turnover even though books of account had not been rejected by the Assessing Officer. Vide order dated 31.3.2015, Annexure A.7, the Tribunal partly allowed the appeal observing that net profit rate of 9% appeared to be reasonable though in the normal course the net profit rate of 8% would have been estimated. Hence the instant appeal by the assessee.

3. We have heard learned counsel for the appellant.

4. Learned counsel for the appellant-assessee submitted that the Tribunal erred in applying the gross profit rate of 9% without thoroughly examining the matter. It was incumbent upon the authorities to have rejected the books of account first while adopting a certain rate of gross profit keeping in view the comparative cases.

5. A perusal of the impugned order passed by the Tribunal shows that after considering the overall facts and circumstances of the case, the Tribunal had estimated the rate of profit at 9%. It is true that the discretion to determine a net profit rate must necessarily be exercised on the basis of relevant factors. In the present case, it has been categorically recorded by the Tribunal that the assessee did not produce any supporting vouchers for expenses exceeding Rs. 25,000/-. It did not file copies of the bank accounts of the partners and thus the Assessing Officer could not have verified the various payments received by the appellant from bankers or payments taken directly from the customers by the partners. The assessee did not file the details of purchases in the format given by the Assessing Officer. Regarding sundry debtors, no confirmation was filed and even in the balance sheet, the names of the sundry debtors to the extent of Rs. 1,66,00,000/- were not shown. No details of opening and closing stock were filed. In view of these facts, the Assessing officer could not verify various details and in this way he could not rely upon the book version of the assessee. The assessee even did not file return unless the same was detected during the search. Keeping all the factors in view, the Assessing Officer adopted net rate of 10% on the gross receipts on estimate basis which was reduced by the Tribunal to 9% to meet the ends of justice. The relevant findings recorded by the Tribunal in paras 11 to 16 read thus:-

"11. We have considered the rival submissions carefully. Before us the issue of rejection of books was not seriously pressed but it is clear from the material available on record that assessee is a firm and was having two permanent account numbers. It was admitted before us that there was a firm with the same name but the partners were different and the firm was again started with the same name with different partners. Since this issue is not before us we are not going into the details. Further, it is also admitted fact that assessee did not file any return despite having taxable income. This fact becomes clear because assessee has itself filed the return declaring income of Rs. 3,19,865/- in response to notice under section 148. We have already discussed the affairs of the assessee and failure to file many details while discussing the facts of the case at the outset of this order. To summarize the details again, the assessee did not produce any supporting vouchers for expenses exceeding Rs. 25,000/-. The assessee did not file copies of the bank account of the partners and, therefore, the Assessing Officer could not have verified the various payments received by the firm from bankers or payment taken directly from the customer by the partners. The assessee has shown wages payable of Rs. 9,38,500/- which were paid on 5.7.2007 and normally labour will not work for period of three months without receiving their payments. The assessee also did not file the details of purchases in the format given by the Assessing Officer. The assessee was having sundry creditors of Rs. 75,69,505/- and did not file any confirmation even in cases where sundry creditors exceed Rs. 1 lakh. Even regarding sundry debtors no confirmation was filed and as noted by the Assessing Officer even in the balance sheet the names of the sundry debtors to the extent of Rs. 1,66,00,000/- were not shown. No details of opening and closing stock were filed. The Assessing Officer has discussed and summarized this issue at page 5 in the following para:-

"From the above discussion, it is clear that purchases made by the assessee are not subject to any verification. Sundry creditors and debtors are also not subject to any verification. Wages, salaries, general expense and other expenses mentioned in para 15 of my letter dated 21.1.2013 are also not subject to any verification. In view of the above facts, the book version shown by the assessee cannot be relied upon. I therefore, apply net profit rate of 10% on the gross receipts of Rs. 5,42,83,935/- which will mean that assessee''s income would work out at Rs. 54,28,393/-. From this interest paid to partners at Rs. 6,28,455/- is to be deducted and the balance would be income of the assessee at Rs. 47,99,938/- ."

12. The above clearly shows that since Assessing Officer could not verify various details i.e. why he has estimated the profits. This clearly shows that books have been rejected.

13. Now the question is once books of account are rejected, what rate of profit should be applied. We agree with the contention of learned counsel that profit should be estimated on the basis of various facts a particular case. Even the Hon''ble Punjab and Haryana High Court in the case cited by learned counsel in the case of Telelinks v. CIT (supra) has observed that while discussing the nature of power to be exercised for determining the net profit, it was observed as under:-

"The first question relates to the nature of the power exercised while determining a net profit rate. The question must necessarily be answered by holding that where books of account rejected or not produced, the Assessing Officer would be well within the limits of his jurisdiction to access income by applying a fictional net profit rate. The power so conferred is quasi judicial and, therefore, not unbridled as it must be guided by reason and though it may involve a degree of guesswork, must be based upon a rational analysis of facts. The first question of law is answered accordingly".

14. While discussing the second question, factors required to be taken into consideration for determination of the net profit rates, it was observed as under:-

"The second question of law namely factors required to be taken into consideration while applying a net profit rate has come up for consideration, as on the same set of facts the Assessing Officer, the Commissioner of Income Tax and Income Tax appellate Tribunal have applied different rates of net profit, the discretion to determine on adequate net profit rate undoubtedly vests with authorities under the Act by the discretion so vested is neither unbridled nor unguided as it must be guided by reason i.e. should be preceded by reasons which, in turn, should be preceded by a perceptible process of reasoning based upon due consideration of all relevant facts. However, authorities under the Act appear to construe their jurisdiction as a discretion to apply a thump rule dependent almost entirely on the whims of a particular officer.

The discretion to determine a net profit rate must necessarily be exercised on the basis of relevant factors which we shall enumerate but before doing so, would clarify that these factors are neither exhaustive nor a final word on relevant factors that may be considered while determining the net profit rate. A few significant factors are the past tax history of the assessee, if available, assessment order that may have been passed and accepted by the department, the nature of the assessee''s business, an appraisal of the value of the contract, prevailing economic conditions vis-a-vis the assessee''s business, the price of raw material, labour etc. the rice in price index as notified by the Central Government from time to time if applicable and if the Assessing Officer proceeds to rely upon assessments of other assessees engaged in similar business to do so only after determining points of similarity etc."

15. Therefore, once details are not filed, the profit has to be estimated and such estimation would have to be done considering the facts of the particular case in a judicious manner. In the case of CIT v. Prabhat Kumar (supra) where addition was made on account of wages, which was not found to be verifiable, ultimately the court applied profit rate of 12% and it was observed as under:-

"The Tribunal has proceeded on the basis that there may be unverifiable wages which may call for addition to income but not to the extent assessed by the Commissioner of Income Tax (Appeals). Applying net profit rate on the basis of best judgment assessment in a given situation will be a question of fact unless such an assessment is shown to be arbitrary or perverse. In the present case, it cannot be said that any substantial question of law arises. Assessment of 12 per cent of net profit rate of contract receipt is not shown to be arbitrary or perverse.

Thus, wherein in a case wages were found not verifiable, 12% profit reached was held to be reasonable.

16. Now in the case before us we have already noted that assessee did not file even the return unless the same was detected during search made in the case of M/s Talwar Group. Anyway the most relevant factor in the case before us was that assessee is engaged in the business of construction of house for private parties. It is a common knowledge that rate of profit in construction of a private houses is much higher than in comparison to the mass construction contracts for government or other government authorities. This is so because the construction of a private house involves superior quality of work, fancy items for which generally the contractor charges higher rate of margin. Further, it is to be noted that assessee had huge amount of sundry creditors amounting to Rs. 75,69,505/- for which no confirmation has been filed. Even the names of the sundry debtors are not disclosed in the balance sheet. Normally, the Chandigarh Bench of the Tribunal has estimated the rate of profit in the case of construction firms at 8%. But considering the above facts, we are of the opinion that estimate of profit at the rate of 9% would meet the ends of justice in this case and therefore, we set aside the order of learned CIT(A) and estimate the net profit at 9%."

6. The estimation of gross profit rate at 9% could not be held to be arbitrary or unreasonable warranting interference by this Court in the facts and circumstances of the case. The view adopted by the Tribunal is a plausible view and we find no error therein. The judgments cited by the learned counsel for the appellant assessee in ITA No.269 of 2014, decided on 20.11.2014 (Telelinks v. Commissioner of Income Tax, Bathinda), ITA No.428 of 2014 (Jangir Singh Mahli v. Commissioner Central Tax, Patiala, decided on 6.5.2015, Aggarwal Engineering Co. v. Assistant Commissioner of Income Tax, (2011) 336 ITR 332 (P&H) and M/s Deluxe Roadlines Pvt. Limited v. the Deputy Commissioner of Income Tax, ITA No. 213 of 2014 decided on 14.10.2014 (Bangalore) being based on individual fact situation involved therein do not come to the rescue of the appellant. Consequently, no substantial question of law arises. The appeal stands dismissed.

