
(2016) 04 PAT CK 0189

In the Patna High Court

Case No : Miscellaneous Appeal No. 276 of 2010.

Prasad Construction and Company through its partner Bharat Bhushan, Leela Mohan Niwas, Naisarai, Biharsharif, P.O. and P.S. Biharsharif in the District of Nalanda - Appellant @HASH Commissioner of Income Tax-II, Patna

Date of Decision : 28-04-2016

Acts Referred:

Income Tax Act, 1961 — Section 144, Section 254

Citation : (2017) 295 CurTR 540 : (2016) 388 ITR 579

Hon'ble Judges : Ramesh Kumar Datta and Sudhir Singh, JJ.

Bench : Division Bench

Advocate : Mr. Ajay Kumar Rastogi, Advocate, for the Appellant; Mr. Rishi Raj Sinha, Senior Standing Counsel and Mrs. Archana Prasad, Junior Standing Counsel, for the Respondents

Final Decision : Allowed

Judgement

Ramesh Kumar Datta, J. (Oral)— Heard learned counsel for the appellant assessee and learned Senior Standing Counsel for the Revenue.

2. The appeal has been filed against the order dated 17.11.2009 passed by the Income Tax Appellate Tribunal, Patna Bench, in I.T.A. No.9/PAT/2008, by which the appeal of the assessee has been dismissed and the order passed by the Commissioner of Income Tax (A)-II, Patna in I.T.A. No.18 of 2007-08 dated 09.10.2007 has been upheld.

3. The dispute before us falls in a very narrow compass. The assessee is a partnership firm and being a civil contractor it undertakes civil contracts of the State Government and has filed its return for several years past including the year 2002-03 onwards. The appeal in question relates to the assessment year 2004-05. In the assessment year in question, the books of accounts of the assessee were rejected and a best judgment assessment was made. The assessing officer made the estimate of income from the business of the assessee @ 10% of its gross contract receipts and arrived at the net profit after giving the

benefit of partner salary, interest and depreciation according to the table supplied by the petitioner on the gross receipt from civil contract of Rs.6,75,27,370/-. The assessed income works out to Rs.53,81,337/- being 7.9% of the receipt from the said civil contract. The appeal before the Commissioner of Income-tax (Appeal) on the order of the assessing officer was dismissed. The similar fate was met with by the further appeal before the Tribunal.

4. The assessee claimed that the income ought to have been 6% of the gross payment. The ground taken by the assessee that the estimated income of 10% of the contract value was very high, was sought to be bolstered by filing several orders of the Tribunal with respect to similarly situated Government contractors in which the rate of 6% had been applied. However, the Tribunal accepted the statement made by the Assessing Officer that the rate of profit in case of Government contract is 10 % and the appeal was dismissed on other counts but before us, the only question on which the appeal has been admitted is as follows:

"Whether on the facts and in the circumstances of the case the Tribunal was justified in affirming the estimate of net profit @ 10% as against 6% upheld by it in a large number of identical matters relating to Government contract."

5. Learned counsel for the appellant before us submits that the order of the Tribunal is perverse by relying upon the 10% rate taken by the assessing officer and without any application of mind to the question of profits of the Government contracts and merely on his say so accepted the proposition that in Government contracts in general net profit is 10%. It is submitted that it is well known that Government contracts are given out on the basis of public tender to the lowest bidders and thus the rate of profit in each of the contracts would vary and there cannot be any such proposition that there would be a 10% profit in a Government contract.

6. It is further submitted by learned counsel for the appellant that the Department itself is in possession of the assessment being made on different Government contracts and before laying down such a broad proposition in respect of Government contract, it was obliged to find out that such is the figure which is to be found in the assessment generally which are generally made with respect to the Government contract but there is nothing in support of the same, rather the assessee had produced before the authorities concerned, including the Tribunal, various judgments of the Tribunal in which 6% net profit rate with regard to small Government contracts has been accepted by the Tribunal. In the said circumstances, it is submitted that it was not open for the Tribunal to have accepted as unchallengeable proposition that in all Government contracts 10% net profit has to be taken.

7. It is further submitted that the assessment orders of the appellant were themselves in the possession of the assessing authority. If the assessing officer had carefully looked into the assessment order for the assessment year 2002-03, on a comparable receipt from civil contract works at Rs.5,78,17,423/- a final net

profit of 2.69% after all deductions including partner salary, interest and depreciation, was accepted by the Department under Section 143 (1) of the Income Tax Act. It is also pointed out that in the assessment year 2003-04 again on a comparable receipt of Rs.7,21,67,037, the income finally determined under Section 143 (3) of the Act was Rs.32,20,427/- which comes to a mere 4.46% of the gross receipt. However, in the present year, i.e., assessment year 2004-05 on a total receipt from civil contract Rs. 6,75,27,370/-, the income finally assessed after giving the benefit of depreciation, interest and partner salary comes to Rs.53,81,337/-, i.e., final figure 7.96% when the net profit of 10% has been taken.

8. Learned counsel for the appellant submits that although the same trend has continued for the subsequent assessment year also and in the assessment years 2005-06, 2006-07 and 2007-08 the final rate of net profit in assessment under Section 143 of the Income-tax Act comes to 3.4, 4.3 and 5.6 per cent.

9. It is, thus, submitted by learned counsel for the appellant that the order of the assessing officer, which has been upheld by the appellate authority and the Tribunal, cannot be considered to be best judgment assessment on the basis of the facts and materials in possession of the assessing officer and the same has to be treated as arbitrary on the part of the assessing officer and could not have been upheld by the appellate authority and the Tribunal.

10. In support of the above proposition, learned counsel for the appellant relies upon a decision of the Supreme Court in the case of State of Kerala v. C. Velukutty: (1966) 60 ITR 239 (SC) which decision has also been relied upon by learned counsel for the Revenue. The last paragraph at page 243 of the said judgment is quoted below:-

"What is the scope of section 12 (2)(b) of the Act? The expression "to the best of his judgment" in the said clause is presumably borrowed from section 23 (4) of the Income-tax Act. The said expression in the Income-tax Act was the subject of judicial scrutiny. The Privy Council in Commissioner of Income-tax v. Laxminarayan Badridas has considered those words. Therein it observed:

"He (the assessing authority) must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guesswork in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary."

The Privy Council, while recognising that an assessment made by an officer to the best of his judgment involved some guess-work, emphasised that he must

exercise his judgment after taking into consideration the relevant material. The view expressed by the Privy Council in the context of the Income-tax Act was followed when a similar question arose under the Sales Tax Act. A Division Bench of the Calcutta High Court in *Jagdish Prasad Pannalal v. Member, Board of Revenue, West Bengal*, confirmed the assessment made by the sales tax authorities, as in making the best judgment assessment the said authorities considered all the available materials and applied their mind and tried their best to come to a correct conclusion. So too, a Division Bench of the Patna High Court in *Doma Sahu Kishun Lal Sao v. State of Bihar* refused to interfere with the best judgment assessment of a Sales Tax Officer as he took every relevant material into consideration, namely, the situation of the shop, the rush of the customers and the stock in the shop and also the estimate made by the Assistant Commissioner in the previous quarters.

Under Section 12 (2)(b) of the Act, power is conferred on the assessing authority in the circumstances mentioned thereunder to assess the dealer to the best of his judgment. The limits of the power are implicit in the expression "best of his judgment". Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a judge, but on settled and invariable principles of justice. Though there is an element of guess-work in a "best judgment assessment?" it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case. Though sub-section (2) of section 12 of the Act provides for a summary method because of the default of the assessee, it does not enable the assessing authority to function capriciously without regard for the available material."

11. Learned counsel further relies upon a decision of the Punjab and Haryana High Court in the case of *Commissioner of Income-Tax v. Rajinder Prasad Jain*, (2015) 374 ITR 545, in paragraph No.8 of which it has been held as follows:-

"8. The Tribunal has applied a net profit rate of 6 percent as it was in consonance with the past history of the assessee. At the time of initial hearing, we had called upon counsel for the appellant-Revenue to apprise the court about the net profit rate applied to the assessee in years previous and subsequent to the assessment year in dispute. Counsel for the appellant fairly concedes, on instructions that in the preceding as well as the following year a net profit rate of 6.75 per cent and 5 per cent, respectively, was applied by the Assessing Officer and has also placed on record the order for the assessment year 2009-10 where a net profit rate of 5 percent has been applied to the assessee. We, therefore, find no error in the discretion exercised by the Tribunal in applying a net profit rate of 6 per cent."

12. Further learned counsel relies upon the decision of the Supreme Court in the case of *Union of India and another v. Paras Laminates Pvt. Ltd.*, (1990) 186 ITR 722. In the last but one paragraph of the said judgment it has been held as follows:-

"In our view, the Bench of two members acted within their power in stating the

points of law which required clarification and the President acted equally within the bounds of his power in constituting a larger Bench to hear and decide those points."

13. He also relies upon the decision of the Supreme Court in the case of Vijay Kumar Talwar v. Commissioner of Income-Tax, (2011) 330 ITR 1 (SC), paragraph No.21 of which is quoted below:-

"A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread (see Madan Lal v. Mst. Gopi (1980) SCC 255, Narendra Gopal Vidyarthi v. Rajat Vidyarthi (2009) 3 SCC 287, Commissioner of Customs (Preventive) v. Vijay Dashrath Patel (2007) 4 SCC 118, Metroark Ltd.v. Commissioner of Central Excise, Calcutta (2004) 12 SCC 505, West Bengal Electricity Regulatory Commission v. CESC Ltd. (2002) 8 SCC 715."

14. Learned counsel for the Revenue, on the other hand, submits that in matters like the present one the case of each assessee has to be taken on its own facts and another set of model cannot be applied to a different set of model as in the present case.

15. The submission is that the net profit of 6% in the case of two other civil contractors engaged in the State Government work need not have been applied to the case of the appellant.

16. The further submission of learned counsel for the Revenue is that there is a concurrent finding of facts by all the three authorities and if the authorities have applied their minds then the order ought not to be interfered with by this Court.

17. In support of the same, learned counsel for the Income-tax Department relies upon a decision of the Supreme Court as quoted above in the case of C. Velukutty (supra). Further he seeks to rely upon the decision of the Supreme Court in the case of Commissioner of Sales Tax, Madhya Pradesh v. H.M. Esufali H.M. Abdulali: (1973) 90 ITR 271 (SC), page 278 of which is quoted below:-

"The law relating to "best judgment" assessment is the same both in the case of income-tax assessment as well as in the case of sales tax assessment. The scope of "best judgment" assessment under the income-tax law came up for consideration before the Judicial Committee as early as 1937 in Commissioner of Income-tax v. Laxminarain Badridas. Therein Lord Russell of Killowen, speaking for the Judicial Committee, observed:

"The Officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. ?"(Already quoted above) In Raghubar Mandal Harihar Mandal v. State of Bihar, a case arising under the Bihar Sales Tax Act, 1944, the law relating to "best judgment" assessment

was examined at length by this court. Therein, S.K. Das J., speaking for the court, observed:

"No doubt it is true that when the returns and the books of account are rejected, the assessing officer must make an estimate, and to that extent he must make a guess; but the estimate must be related to some evidence or material and it must be something more than mere suspicion. To use the words of Lord Russell of Killowen again, 'he must make what he honestly believes to be a fair estimate of the proper figure of assessment' and for this purpose he must take into consideration such materials as the assessing officer has before him, including the assessee's circumstances, knowledge of previous returns and all other matters which the assessing officer thinks will assist him in arriving at a fair and proper estimate."

(Emphasis supplied).

Proceeding further, the learned Judge quoted with approval the observations of Din Mohammad J. in *Ganga Ram Balmokand v. Commissioner of Income-tax*:

"It cannot be denied that there must be some material before the Income-tax Officer on which to base his estimate, but no hard and fast rule can be laid down by the court to define what sort of material is required on which his estimate can be founded."

18. Further, he relies upon the decision of the Apex Court in the case of *Raghubar Mandal Harihar Mandal v. The State of Bihar*: (1957) 8 STC 770, which has also been cited with approval in the above case.

19. We have considered the submissions of learned counsels for the parties.

20. It is evident that the dispute, as it appears before us, is on the similar issue as to whether in best judgment assessment, it was open for the assessing officer to have taken figure of 10% merely on the basis of saying that in Government contracts general profit is 10% without any material in support of the same.

21. As held in the judgments quoted above, it is not necessary for the assessing officer to produce materials to show the basis on which he has come to the said conclusion but as repeatedly held by the courts, including the decisions cited above, that the assessing office must be rational and reasonable while assessing the dealer to the best of his judgment and there is an element of guess-work in a best judgment assessment.

22. It has also been held in the judgments relied upon by both the parties that the assessing officer must take into consideration the materials which are in his possession, including previous assessment years. It is true that upon the failure of the assessee to maintain the account in the manner which led to the situation the best judgment assessment cannot go wholly to the assessee's benefit but as a caution by the courts the fact that a best judgment assessment is being made cannot be a ground for fixing any unjustifiable figure of income or profit without

reference to the same in the preceding assessment years. In the immediately preceding assessment year the assessee's final net profit after giving benefit of partner salary, interest and depreciation came to 4.46%, that is, when the assessment was made under Section 143 (3) of the Act.

23. We may ignore the assessment figures for the subsequent assessment years as placed before us by the appellant although they would also go to show that regular assessment of the assessee has been made. This figure of 4.46% was definitely a relevant material to have been taken into consideration by the assessing officer and the appellate authorities up to the Tribunal while considering the figure of 10% simply introduced on his say so by the assessing officer.

24. Moreover, the Tribunal has given a complete go-by to several decisions of the Tribunal itself fixing the final net profit rate of 6% in the case of other similarly situated assessees who were also in civil contract works of the government. Taking the same into consideration, it can be said that no reasonable man would have put a figure of net profit at more than 8% of the estimated income received from the civil contract by the assessee. In the present matter even after the deduction on account of partner salary, interest and depreciation, it still has led to a final net profit rate of approximately 7.9% which is much above the net profit rate as it has been found after regular assessment made of the same assessee. The said figure is also not in accord with the other decision of the Tribunal in the case of similarly situated contractor.

25. Thus, on a consideration of the above circumstances, although there has been a concurrent finding of the authorities before us but the said finding is certainly not based upon any evidence and without taking into account relevant materials and thus it has to be held to be perverse.

26. In view of the aforesaid findings, the substantial question of law set out above is answered in the negative, in favour of the assessee and against the revenue.

27. The appeal is, accordingly, allowed and the matter is remanded to the Tribunal to re-decide the appeal in accordance with the observations and directions made in this judgment.