
(2008) 07 RAJ CK 0066
In the Rajasthan High Court

Shri Ram Jhanwar Lal

APPELLANT

Vs

ITO and Others

RESPONDENT

Date of Decision : 03-07-2008

Acts Referred:

Income Tax Act, 1961 — Section 145, 263, 44AD

Citation : (2009) 177 TAXMAN 135

Hon'ble Judges : N.P. Gupta, J; Kishan Swaroop Chaudhari, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This appeal has been filed by the assessee against the judgment of the learned Tribunal dated 29-8-2005 passed in Appeal No. 140 of 2005. reported as Shriram Jhanwarlal v. ITO (2005) 98 TTJ (Jd) 639-Ed.

2. The appeal was admitted vide order dated 23-1-2006, by framing three substantial questions of law, which read as under:

(i) Whether in the facts and circumstances of the case, where the assessing officer has adopted net profit rate in making assessment of the income on the basis of best judgment assessment, any further adjustment of the profits arrived at by applying net profit rate by way of allowance of depreciation of the assets used in business is permissible?

(ii) Whether the Commissioner could validly assume jurisdiction u/s 263 by holding an opinion that order passed by the assessing officer allowing the claim of depreciation was erroneous and prejudicial to the interest of revenue?

(iii) Whether the Tribunal was justified in adopting the principle underlying Section 44AD of the Income Tax Act in sustaining the order passed by the Commissioner, when Section 44AD was not admittedly applicable in the case ?

3. At the outset it may be observed that both the learned Counsel are ad idem, to the effect, that question No. 2 does not arise in this appeal. Consequently,

question No. 2 need not to be answered.

4. So far as the question Nos. 1 and 3 are concerned, the necessary facts are, that the assessing officer rejected the books of accounts and made a best judgment assessment, determining the GP, and then from out of that, allowed various admissible deductions, including depreciation. That order was upheld in appeal by the learned Commissioner (Appeals). Then the matter was carried by the assessee in further appeal before the learned Tribunal, and the learned Tribunal has decided the appeal by the impugned order. The findings recorded by the Tribunal are contained in para 5 of the judgment, which we may gainfully reproduce being as under:

We have heard the rival submissions and perused the relevant material on record. It is obvious that the assessee had not maintained books of accounts in a manner which could assist the computation of correct income. It has also been conceded by the assessee before the assessing officer with regard to non-maintenance/irregular maintenance of vouchers in support of expenses. In these circumstances, we are of the considered opinion that the application of provisions of Section 145(3) by the assessing officer was justified. After rejecting the book results, the assessing officer does not get unfettered powers to make assessment at any income. He is supposed to be guided either by the previous results of the assessee or some comparable cases. In the instant case, the assessing officer has allowed deduction of direct expenses at 75 per cent of the gross receipts without any cogent material. His ad hoc estimate of expenses divorced from the relevant facts cannot be upheld. We have also gone through the detail of income furnished by the assessee, which shows net profit at 8.05 per cent. In this calculation, the assessee had determined net profit at Rs. 3,40,350 before depreciation, interest and remuneration to partners. If the amount of depreciation of Rs. 49,324 is reduced this net profit comes at Rs. 2,91,116. Its ratio of gross receipts comes at 6.88 per cent. It is the manner in which the assessee had shown working of net profits in the earlier three years as well. It is no doubt true that the assessee had gross receipts of Rs. 42,27,946 in this year and the case did not strictly fall within the parameters laid down u/s 44AD. However, in order to determine the correct net profit rate, we are regularly seeking guidance from this Section and applying 8 per cent net profit rate. This net profit rate is further subject to interest and remuneration to partners as provided in proviso to Section 44AD(2). In our considered opinion, it would be fair and reasonable if the total income of the assessee is computed in this manner. By translating it into the actual calculation, the amount of net profit after depreciation but before remuneration and interest to partners comes at Rs. 3,38,236. The amount of salary and interest to partners has been shown at Rs. 2,52,249. If this amount is deducted, the taxable income comes at Rs. 85,987. We hold this amount to be taxable income liable for taxation.

5. From a reading of this para itself, it is clear, that the learned Tribunal has itself found, that the case did not strictly fall within the parameters laid down u/s

44AD, however, since the Tribunal found, that it is regularly seeking guidelines from this section, for applying net profit rate, the net profit rate was applied, and directed to be calculated after depreciation, but before remuneration and interest to the partners.

6. The grievance of the appellant is, that when the best judgment assessment of net profit is made, thereafter, depreciation is required to be allowed to be deducted therefrom, and for that purpose, reliance is placed on judgments of this Court, in Commissioner of Income Tax Vs. Jain Construction Co. and Others, and IT Ref. No. 55 of 1998, Bharat Construction Co. v. CIT, decided on 13-9-2001

7. On the other hand, learned Counsel for the revenue submitted, that the findings recorded, are pure findings of fact, and do not require any interference.

8. In our view, so far as the question No. 1 is concerned, it is clear from the judgments of this court in Jain Constructions (supra) and Bharat Construction's cases (supra), that where the assessing officer has adopted net profit rate in making assessment on best judgment assessment basis, even in that case allowance of depreciation is required to be made. The question No. 1 is accordingly, answered in favour of the assessee, and against the revenue.

9. Coming to question No. 3, a bare reading of the provisions of Section 44AD does show, that according to proviso to Sub-section (1), nothing in Sub-section (1) applies in cases where gross receipts exceed more than Rs. 40 lakhs. It is not in dispute, that in the present case, the said amount exceeds Rs. 40 lakhs, obviously therefore, Section 44AD, as such, is not applicable. So far as the permissibility of adopting principle underlying therein is concerned, no legal authority has been shown to support the proposition that in this manner the principle underlying therein can be adopted. May be, that the learned Tribunal claims to be adopting this practice, but then, in our view, in taxing statutes, such adopting the principle underlying other sections cannot be said to be permissible, and sooner the practice is stopped, the better. Thus, question No. 3 is answered in favour of the revenue, and against the assessee, and it is held, that the Tribunal was not justified in adopting the principle underlying Section 44AD, when it was not applicable, as such. Rather all the Tribunals are directed to stop this practice forthwith, if they are still continuing.

10. Since the impugned judgment of the learned Tribunal proceeds on the basis of adopting the principle underlying Section 44AD, and also declines allowances of depreciation, contrary to law, we are constrained to set aside the order of the Tribunal.

11. Accordingly, the appeal is allowed. The impugned order of the Tribunal is set aside, and the matter is sent back to the learned Tribunal, for deciding the matter afresh, keeping in view the above observations and directions. A copy of this order be sent to all the Tribunals for necessary action.