

आयकर अपीलीय अधिकरण, पटना न्यायपीठ, पटना

IN THE INCOME TAX APPELLATE TRIBUNAL PATNA BENCH, PATNA
श्री चन्द्र मोहन गर्ग, न्यायिक सदस्य एवं श्री एल.पी.साहु, लेखा सदस्य के समक्ष।
BEFORE SHRI CHANDRA MOHAN GARG, JM & SHRI L.P. SAHU, AM
आयकर अपील सं./ITA No.02/PAT/2011

(निर्धारण वर्ष / Assessment Year :2007-2008)

Salauddin, Chhatradhari Bazar, Chapra, Saran	Vs.	DCIT, Circle-2, Muzaffarpur
स्थायी लेखा सं./PAN No. : AASFS 5008 E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by	:	Shri Sanjeev Kumar Anwar, Adv.
राजस्व की ओर से /Revenue by	:	Shri Supriya Biswas, JCIT-DR

सुनवाई की तारीख / Date of Hearing	:	16/09/2019
घोषणा की तारीख/ Date of Pronouncement	:	18/09/2019

आदेश / ORDER

Per Bench:

This appeal is filed by the assessee against the order passed by learned CIT(A)-I, Patna, dated 29.09.2010 for the assessment year 2007-2008.

2. Earlier this appeal was disposed off by the Tribunal vide order dated 10.08.2011, however, on miscellaneous application filed by the assessee, the same was restored to its original number vide order dated 26.06.2019 to decide ground No.8 to 10 with regard to allowability of depreciation out of estimated income.

3. Now, the appeal was listed today i.e. on 16.09.2019 and the same was heard and disposed off on the only issue as raised in ground Nos. 8 to 10.

4. Brief facts to the above grounds are that the Assessing Officer on perusal of the Audited Accounts filed by the assessee, found that the assessee has shown net profit of Rs 97.06.867/- before salary and interest to partners which comes to 5.07% of the gross contract receipt of Rs 18,91,39,663/-. The net profit shown by the assessee is very low. It was also noted by the Assessing Officer that the section 44AD of IT Act, 1961 has determined the net profit from civil contract work at 8% of the gross receipt as reasonable. Although section 44AD applies to the cases where gross receipt is up to Rs.40 lakh, it can be a sound basis for estimation of net profit in the case of present assessee. In the cases of contract receipt above Rs.40 lakh, the benefits of economies of high scale accrues to the contractor and net profit should not be less than 8% of gross contract receipt. Therefore, the Assessing Officer determined at 8% of gross contract receipt after considering all expenses including depreciation.

5. In first appeal, the CIT(A) relying on the decision of Hon'ble Punjab and Haryana High Court in the case of CIT Vs. Surinder Pal Nayar, 327 ITR 236 observed that the assessee was not entitled to depreciation since the same had been assumed to have been allowed

while determining the income by applying net profit on the gross receipts.

6. Ld. AR before us submitted that in view of the binding nature of CBDT Circular, the both the authorities below ought to have allowed the depreciation from the estimated net profit. Ld. AR further relied on the decisions of Hon'ble Rajasthan High Court in the case of Shri Ram Jhanwar Lal Vs. ITO, 321 ITR 400 (Raj) and the decision of Hon'ble Patna High Court in the case of M/s Shyam Bihari Vs. CIT, Miscellaneous Appeal No.808 of 2011, dated 07.05.2012. Therefore, ld. AR submitted that the assessee is entitled depreciation from the estimated net profit.

7. On the other hand, ld.DR relied on the order of the CIT(A).

8. After considering the rival submissions of both the parties and perusing the entire material available on record, we find in the instant case the Assessing Officer estimated net profit @8% after considering all expenses including depreciation. The CIT(A) confirmed the net profit @8% done by the Assessing Officer and also observed that the assessee is not entitled to depreciation on the estimated net profit. Thereafter the Tribunal relying on the order of Hon'ble jurisdictional High Court in the case of Shyam Bihari (supra) reduced the net profit to 6% as against 8% estimated by the authorities below. However, in the order of the Tribunal there is no discussion about the depreciation for

which on further (miscellaneous) application of assessee, the appeal is restored to decide the same. We find that the Board considered that where it is proposed to estimate the profit and the prescribed particulars have been furnished by the assessee, the depreciation allowance should be separately worked out. In all such cases, the gross profit should be estimated and the deductions and allowances including the depreciation allowance should be separately deducted from the gross profit. If it is considered that the net profit should be estimated, it should be estimated subject to the allowance for depreciation and the depreciation allowance should be deducted therefrom. This issue has also been decided by the Hon'ble Rajasthan High Court in the case of Shri Ram Jhanwar Lal (supra) relying on its earlier decisions in the case of Jain Construction Co. [2000] 245 ITR 527 and Bharat Construction Co. [2002] 125 Taxmann 366 (Raj) has held 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. Further the Hon'ble Patna High Court in the case of Shyam Bihari (supra) has observed as under :-

"10. We have been taken through the provisions of circular of the Board dated 31.8.1965. According to that circular which is binding on the department and its authorities, where it is proposed to estimate the profit and the prescribed particulars have been furnished by the assessee, the depreciation allowance should be separately worked out. In all such cases, as per the circular, the gross profit should be estimated

and the deductions and allowance including the depreciation allowance should be separately deducted from the gross profit. If the net profit is required to be estimated, it should be estimated subject to the allowance for depreciation and the depreciation allowance should be deducted therefrom."

9. From the above judgments of the Hon'ble Rajasthan and Patna High Court as well as the CBDT Circular, it is clear that where the Assessing Officer has adopted net profit rate in making the assessment on best judgment assessment basis, even in that case allowance of depreciation is required to be made. Therefore, we direct the Assessing Officer to re-compute the total income applying the net profit @6% as has been directed earlier by the Tribunal and allow the depreciation accordingly as per our above observations, subject to returned income declared by the assessee. Ground Nos.8 to 10 are allowed in terms as indicated above.

10. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 18/09/2019.

Sd/-
(C.M.GARG)

Sd/-
(L.P.SAHU)

न्यायिक सदस्य / JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

पटना / Patna; दिनांक Dated 18/09/2019

Prakash Kumar Mishra, Sr.P.S.(on tour)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant- .
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पटना / DR,
ITAT, Patna
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

(Private Secretary)

आयकर अपीलीय

अधिकरण, पटना /

ITAT, Patna

सत्यापित प्रति //True Copy//