

**IN THE INCOME TAX APPELLATE TRIBUNAL  
JABALPUR BENCH, JABALPUR**

**BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND SHRI SANJAY ARORA, ACCOUNTANT MEMBER**

ITA No.126/JAB/2018  
Assessment Year:2010-11

M/s. Anuj Kumar Agarwal, College Road, BetulGanj, Betul (MP) 460001 PAN: AAOFA3419K	vs.	Income Tax Officer, AaykarBhawan, Civil Lines, Betul (M.P.)
(Appellant)		(Respondent)

Appellant by	Shri Hemant S. Modh, Advocate
Respondent by	Shri I.B. Khandel, Sr. DR
Date of hearing	10/12/2019
Date of pronouncement	24/12/2019

**ORDER**

Per Sanjay Arora, AM

This is an Appeal by the Assessee, directed against the Order by the Id. Commissioner of Income Tax (Appeals)-1, Bhopal ('CIT(A)' for short) dated 21.03.2018, partly allowing the assessee's appeal contesting its' assessment under section 143 read with s. 263 of the Income Tax Act, 1961 ('the Act' hereinafter) dated 15/7/2015 for Assessment Year (A.Y.) 2010-11.

2. The brief facts of the case are that the assessee-firm, a civil contractor, filed its' return of income for the relevant year on 15.10.2010, disclosing an income of Rs.8,76,920/-. The assessee not producing its' books of account, which formed the basis of its' return, in the assessment proceedings before him, the Assessing Officer (AO) invoked section 145(3) of the Act, and noting the assessee to be a habitual defaulter and not cooperative in the assessment proceedings, estimated the 'net' profit of its' contract business at 5% of the turnover of Rs.365.44 lacs, i.e., at

Rs.18,27,177, and allowing deduction toward interest and salary to the partners thereafter, at Rs.2,49,557/- and Rs.1,30,000/- respectively, i.e., as claimed through the profit and loss account (PB pgs. 12,25), assessed its' income for the year at Rs.1,4,47,620 vide order u/s. 143(3) dated 25.3.2013 (copy on record). The same was subject to revision by the Commissioner of Income Tax-1, Bhopal ('CIT' for short) vide order u/s.263 dated 31.3.2015 (copy on record). The AO, it was observed therein, had:

- (a) not brought to tax other income of Rs.1,77,273/-, being Jeep rent (Rs.59,299) and bank interest (Rs.1,17,974/-);
- (b) allowed the assessee interest and remuneration to partners at Rs.3,79,557/-, as debited to the profit and loss account, even as net profit of the business had been estimated by him, implying deduction of all expenses, so that there was no scope for separate deduction *qua* any expenditure;
- (c) not bringing the profit on receipt of Rs.2,50,000, i.e., at the rate of 5% or Rs.12,500/-, to tax, i.e., as part of the contract income,

resulting in an under-assessment by Rs.5,69,330/-. He, accordingly, directed a *de novo* assessment after considering the said issues, in accordance with law, and after affording a reasonable opportunity of hearing to the assessee. In the set aside proceedings, the AO:

- (a) estimated the contract business income at 8% of the turnover, adopting a figure by increasing the book sales by Rs.2.50 lacs, i.e., at Rs.367.94 lacs, as found by him after verification;
  - (b) brought to tax the other income of Rs.1,77,273/-; and
  - (c) did not allow any deduction for interest and remuneration to the partners,
- assessing, thus, the assessee's total income for the year at Rs.31,20,757/-.

2.2 In appeal, the Id. CIT(A) was of the view that the Id. CIT had given a specific direction to the AO, who therefore could not have travelled outside the mandate of the section 263 order, which had become final on account of it having not been appealed against by the assessee before the Tribunal. The AO, however, had gone wrong in increasing the net profit rate to 8%, *qua* which there was no direction. In any case, the same was *sans* any basis or material on

record. He, accordingly, directed the AO to restrict the addition to Rs.5,69,330, i.e., as stated by the Id. CIT. Aggrieved, the assessee is in further appeal.

3.1 The Id. counsel for the assessee, ShriHemantModh, would submit that the assessee's income could not have been enhanced in assessment without being show caused in its respect by the AO. The interest and remuneration to the partners is only a distribution of profit, so that the same ought to have been allowed after estimating the contract business income, toward which he would advert to the assessee's past history (PB page 7), as under, which had not been considered:(Amount in Rs. lacs)

<u>A.Y.</u>	<u>GR</u>	<u>NP</u>	<u>NP(%)</u>
2008-09	181.69	2.71	1.49
2009-10	221.14	2.94	1.33
2010-11	365.44	8.77	2.40

GR =>Gross receipt of the contract business

NP=> Net profit of the contract business

No adjustment was accordingly called for. Further, the receipt of Rs.2,50,000/- is a refund of a security deposit from M.P. LaghuUdyogNigam (PB pgs. 8,14). A perusal of the statement of the assessee in its' records would show that no tax was deducted at source on Rs.2.50 lacs, paid by way of S.A. recovery in two sums of Rs.1.25 lac each, i.e., *qua* two separate bills. The same, therefore, did not represent a trading receipt. No adjustment in its respect is called for.

3.2 The Id. Senior Department Representative(Sr. DR), on the other hand, adverting to para 10 of the impugned order, submit that the directions issued by the Id. CIT u/s. 263 had assumed finality in view non-challenge thereto, so that the assessee's income had to be increased by Rs.5,69,330/-, to which amount the addition having been already restricted in first appeal, no further relief is called for.

4. We have heard the parties, and perused the material on record.

4.1 The first thing that therefore needs to be clarified is *qua* the scope of the assessment in the set aside proceedings. This is in view of the Revenue's claim of the same having been determined per the section 263 order, i.e., to enhancing the income as originally assessed by Rs.5,69,330, even as held by the Id. CIT(A). We, however, do not think so; the revision clearly requiring a fresh consideration of the stated issues as per law after hearing the assessee. The use of the words '*do novo*' by the Id. CIT may not be very apt, but without doubt there is no foreclosure, as being suggested by the Revenue. Like-wise, the assessee having not appealed either against its' original assessment or indeed the s. 263 order, there is no scope for it to argue as to the wrong invocation of s. 145(3) in the instant proceedings. We shall accordingly take up each of three issues raised by the Id. CIT per his order, and which the AO was required to reconsider in assessment (refer paras 2.1, 2.2).

4.2 The first is the quantum of the turnover which stands increased by Rs.2.50 lacs. We find no basis therefor. As clarified by the assessee with reference to the record of its' bill-wise details in the books of the payer, the same is a reimbursement by the customer-payer; the words 'S.A.' denoting 'Security Advance', which is both accepted and repaid, recording it under columns 'S.A. paid' and 'S.A. recovery', i.e., on being paid and released respectively, in the bill-wise statement (PB pg. 14). Two amounts of Rs. 1.25 lac each are reflected as 'S.A. recovery' in the said statement, and tax deducted at source only on the balance amount/s. Further, the bill amount/s having been since paid, duly recorded in the assessee's accounts, not accounting a part thereof by the assessee, as inferred by the Revenue, would lead to a difference in its' accounts (with that of the payer) to that extent, i.e., Rs. 2.50 lacs, while none has been noticed or found. The said amount is thus not a trading receipt, but the receipt back of the security advance, paid earlier. The turnover would,

accordingly, stand undisturbed at the amount reflected in the books, i.e., Rs.365.44 lacs.

4.3 The second issue is with regard to the allowance of interest and remuneration to the partners upon estimating the net profit of the contract business at 5% of the turnover. This is as once the net profit has been estimated, there is presumably no question of any separate allowance of any expenditure debited to the profit and loss account. Toward this, the matter, in our view, is purely factual, the answer to which depends upon whether the AO, while estimating the said profit (of the business), is estimating the same before or after the said expenditure which, though deductible in computing a firm's income, represents, in essence, the manner of working the share of the individual partners in the firm's – a separate person/entity (under the Act) from the partners constituting it for the time being, profit. The purport of the estimation exercise is to determine the real income of an assessee whose regular books of account are found not reliable. It is this income which, subject of course to the overriding statutory provisions, is to be included in computing an assessee's total income. In other words, it is fully competent for the AO to estimate the assessee's business income either before or after allowing the said expenditure, in which latter case the estimate would be arrived at by factoring the amount of the said expenditure and, thus, lower than the former to the said extent. The motivation for a separate allowance thereof and, therefore, the estimation of profit prior thereto, could possibly be on account of the legal position that the said expenditure, to the extent allowed in the firm's assessment, is assessable in the hands of the individual partners. Where, therefore, not separately deducted, no amount would stand to be assessed in their hands even as, being otherwise eligible for deduction, would stand to be reckoned while estimating the firm's income u/s. 28.

The AO had, in the instant case, estimated the 'net' profit at 5% (of the turnover), and allowed the said deductions thereafter. The original assessment order clearly reflects the AO to be fully conscious of the same while making the

estimate, and of having applied his mind in allowing the deduction on account of interest and remuneration to the partners, i.e., as claimed, being otherwise admissible. A lower estimate by him would not by itself make his order erroneous, particularly considering that the Id. CIT had not found his order erroneous on account of a lower estimate *per se*, but due to his having allowed, after estimation, deduction on account of interest and remuneration to the partners. Why, he himself directs for applying a net profit rate of 5% on the 'escaped' turnover (of Rs. 2.50 lacs), so that he found the same as reasonable. The AO, accordingly, had no jurisdiction to revisit his said estimate in the set aside proceedings. This also answers the assessee's additional ground, challenging the revision in estimate, in its'favour, even as the Id. CIT(A) has also held like-wise, so that there is no warrant for the said Ground; the Revenue being not in appeal.

We, therefore, find no basis for either a review of the said estimate, revised to 8%,or for regarding it as having been made after the allowance of interest and salary to the partners, so as to preclude their allowance, as argued by the Revenue. No adjustment in respect thereof is accordingly called for.

4.4 The third and last adjustment is towards the income of Rs.1,77,273/-, not separately assessed. These incomes are independent of the assessee's contract business. We are unable to see as to how these incomes, the source whereof is a Jeep (vehicle) and surplus (for the time being) money (placed under bank deposit), would not stand to be assessed separately as 'income from other sources'. Further, the amount credited to the profit and loss account in their respect represents the net income, which would therefore not require any separate adjustment –the depreciation schedule not bearing 'Jeep' for adjustment of depreciation, a statutory allowance, exigible thereon. In fact, no contention either as regards the same being not separate or independent incomes, or the set off of any expenditure/allowance against the credits in their respect,has been raised by the assessee at any stage, including before us.

5. The only adjustment, therefore, that obtains consequent to the set aside by the Id. CIT is the assessment of Rs.1,77,273/- as income from other sources u/s. 56, i.e., as assessed. The assessee's business income shall continue to be at Rs.14,47,620/-, i.e., as original assessed. We are conscious that the allowance of deduction for remuneration to partners, allowed at Rs. 1,30,000, is to be w.r.t. 'book profit' (*Explanation 4* to s. 40(b)(v)), so that the enhancement in income upon estimation would have no bearing on the quantum of the said deduction. The same, however, has been considered w.r.t. the assessee's book profit, and found allowable at the claimed amount of Rs. 1,30,000. We decide accordingly.

6. In the result, the assessee's appeal is partly allowed.

*Order pronounced in the open court on December 24, 2019*

Sd/-  
(Bhavnes Saini )  
Judicial Member

Sd/-  
(Sanjay Arora)  
Accountant Member

Dated: 24 /12/2019  
Aks

Copy of the order forwarded to:

1. The Appellant:M/s.Anuj Kumar Agarwal,College Road, BetulGanj, Betul (MP) 460001
2. The Respondent:Income Tax Officer,AaykarBhawan, Civil Lines,Betul (M.P.)
3. The CIT-1, Bhopal
4. The CIT(A)-1, Bhopal
5. Sr. DR, I.T.A.T.