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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: December 09, 2014

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COMMISSIONER OF INCOME TAX-XII Appellant

Through Mr.Kamal Sawhney, Sr.
Standing Counsel with
Mr.Sanjay Kumar, Advocate

versus

SUBODH GUPTA Respondent

Through Mr.Ved Jain, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J (ORAL)

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act' in short) relates to assessment year 2009-10.

2. The assessee had filed return for the said year on 28.09.2009 declaring income of Rs.35,21,970/-.

3. In the scrutiny assessment, the Assessing Officer relying upon Section 40A(3) disallowed expenditure of Rs.10,61,49,773/-. He rejected reliance on Clause g to Rule 6DD of Income Tax Rules, 1962 ('Rules' for short) to the effect that payments were made to villagers who were operating tractors, trolleys, bullock carts and had supplied materials like bitumen, grit etc. It was the contention of the assessee

that the development work undertaken was in rural or sub rural area and the villagers to whom payments were made did not have benefit of banking facility. The Assessing Officer in addition made adhoc disallowance of 20% on depreciation, car running and maintenance expenditure, telephone expenses, staff welfare expenses etc. The Assessing Officer observed that the assessee had not produced the books of accounts on the plea that books had been stolen. Copy of an FIR in support was filed.

4. The Commissioner of Income Tax (Appeals) noticed that the disallowance of Rs.10.61 crores had resulted in an abnormal conclusion, as the net profit rate had jumped to 59.60% on the total turnover of Rs.18.43 crores. This was illogical and could not be accepted. Relying upon Rule 6DD(g) of the Rules and after making reference to several decisions, he observed that the assessee should partly succeed. He observed that the assessee had filed copy of the ledger accounts before the Assessing Officer which was also filed before him but supporting details/vouchers and details of payments had not been filed. Further, the assessee had claimed that the books of accounts had been stolen and an FIR in respect of the said theft had been recorded. In the absence of full details and confirmations from the parties concerned, the book results and income declared could not be verified. The only figure verifiable was the total turnover of the

contractual work undertaken by the assessee as the said work was undertaken for the Greater Noida Authority who had deducted tax at source on the payments made. He felt that the only option available was to reasonably estimate the assessee's income after rejecting the books of accounts and the profits as declared. Recording absence of material to show the net profit rate, which could be applied, the Commissioner of Income Tax (Appeals) applied net profit rate of 8% on total turnover referring to the net profit rate mentioned in Section 44AD of the Act. He observed that Section 44AD was not applicable as the turnover of the assessee was more than Rs.40 lacs but the presumptive net profit rate of 8% as stipulated could be taken for estimation. It would be reasonable to estimate the income by applying 8% net profit rate on turnover of Rs.18,43,03,935/-. He accordingly computed income of the respondent assessee at Rs.1,46,74,314/-, thus making an addition of Rs.1,13,22,344/- to the declared income of Rs.34,21,970/-.

5. Aggrieved, the Revenue preferred an appeal before the Tribunal, primarily raising the ground that Section 44AD was not applicable as the assessee's turnover was in excess of Rs.40 lacs and the Assessing Officer was justified in making addition of Rs.10,61,49,773/- in view of contravention of Section 40A(3) of the Act. It was also stated that 20% disallowance of expenses on account of car running and

maintenance, telephone expenses, business promotion, depreciation on car etc. should be also restored. The Tribunal did not agree and has held that the assessee was in business of civil construction and disallowing expenditure of Rs.10.98 crores would give an abnormal profit rate of 59.60% on the total turnover of Rs.18.43 crores. This would be illusory and illogical. They agreed that Section 44AD would not be applicable but there was no other material or basis to reasonably estimate income of the assessee. In these circumstances, the Commissioner of Income Tax (Appeals) had adopted a reasonable net profit rate of 8% to estimate the income. They did not find any infirmity in estimating income on the said basis. It was observed that the Commissioner of Income Tax (Appeals) had rightly accepted the explanation of the assessee that this case was covered under the exceptional circumstances stipulated in Clause (g) to Rule 6DD of the Rules. Further, the assessee had asserted that the payments in cash at a particular point of time (i.e. each day) did not exceed Rs.20,000/-. This submission was made before the Commissioner of Income Tax (Appeals), but the first appellate authority had not elucidated and verified facts as details could not be ascertained in the absence of books. The total turnover or quantum of work done by the assessee was undisputed as the assessee had only worked for the Greater Noida Authority.

6. Learned counsel for the Revenue submits that Section 44AD has no application as the turnover of the respondent assessee was Rs.18.43 crores and the said section prescribes a thumb rule or presumptive net profit rate if the turnover of an assessee is less than Rs.40 lacs. This is correct and has been noticed by the Commissioner of Income Tax (Appeals) and the Tribunal. The difficulty in the present case is that the Assessing Officer did not conduct any inquiry and ascertain the net profit rate of other comparable contractors. On the other hand, he disallowed expenditure of Rs.10.61 crores resulting in abnormal gross profit rate of 59.60%, which should not be accepted. The effect thereof was that 70% of the expenditure on account of purchases worth Rs.10.61 crores out of total purchases of Rs.14 crores was disallowed. The appellate authorities have taken a holistic and broader view and held that as the books of accounts had not been produced and were not regularly maintained, the book results should be rejected. We agree with the counsel for the Revenue that the assertion that the books of accounts were stolen had a hidden motive and the assertion is rather unbelievable. The respondent assessee therefore must suffer adverse consequences. The only question is whether the addition of Rs.1,13,22,334/- to declared income of Rs.34,21,970/- is adequate or a higher addition would be justified. As far as total turnover is concerned, the appellate authorities are right in holding that the figure

of Rs.18.43 crores cannot be disputed as the assessee was only doing development work for the Greater Noida Authority. The total turnover is also supported by the tax at source certificate. The quantum of turnover was not adversely commented upon by the Assessing Officer. In view of the aforesaid position, we wanted the counsel for the Revenue to ascertain the gross profit or net profit rates declared and accepted by the Assessing Officer in case of other contractors engaged in similar work. We wanted ascertainment of this aspect as the counsel for the Revenue had submitted that net profit @ 8% was inadequate and low and a higher profit rate should be attributed. By order dated 19.08.2014, counsel for revenue was required to ascertain the said aspect. It is stated at Bar that the Assessing Officer has not given any comments in this regard. Noticeably, counsel for the assessee had earlier produced before us a copy of the assessment order relating to assessment year 2010-11, wherein the Assessing Officer himself had applied net profit rate of 8% on contractual receipt of Rs.6.66 crores and net profit rate of 3% on supply receipts of Rs.7.21 crores. As per the said order, the total receipts were to the tune of about Rs.14 crores. In the present assessment year the total turnover of the assessee was about Rs.18 crores. In these circumstances we are not inclined to accept the prayer of the counsel for the Revenue that an order of remand may be passed. The Assessing Officer in the subsequent years

has accepted the figure of 8% net profit, which is the figure which has been adopted by the appellate authorities in the present case. Reliance placed by counsel for the Revenue on *CIT vs. Sobti Construction (India) Ltd. [2008] 307 ITR 374* is misplaced. In the said case, Section 44AD had been applied though the turnover of the assessee was admittedly above Rs.40 lacs. In the case in hand, the appellate authorities have not applied Section 44AD as such. Difficulty arose as they had to estimate reasonable rate of net profit. In the absence of any data and details, they applied the net profit rate as mentioned in Section 44AD. As recorded above, we had asked counsel for the Revenue to ascertain whether similar contractors have declared a higher profit rate. Counsel for the Revenue has not been able to point out or state that the other contractors have a higher profit rate, than the net profit rate of 8% as held by the appellate authorities. The said rate was also applied in the assessment year 2010-11.

7. In view of the aforesaid factual position, we do not see any reason to interfere with the impugned order and the appeal is dismissed.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

DECEMBER 09, 2014/km