Pragati Engineering Corporation Vs Income Tax Officer

Court: Allahabad High Court (Lucknow Bench)

Date of Decision: April 5, 2013

Citation: (2014) 3 ALJ 236

Hon'ble Judges: Saeed-Uz-Zaman Siddiqi, J; Rajiv Sharma, J

Bench: Division Bench

Final Decision: Allowed

Judgement

1. Heard Sri. Pradeep Agarwal, learned Counsel for the appellant and Sri. Prashant Kumar, learned Counsel for the respondents. This instant

income tax appeal u/s 260A of the income tax Act has been filed by Pragati Engineering Corporation-appellant against the judgment and order

dated 25.5.2012 passed by the Income Tax Appellate Tribunal, Lucknow Bench ''B'', Lucknow [hereinafter referred to as the ""Tribunal""] in I.T.A.

No. 304/LKW/2011 for the Assessment Year 2005-2006, whereby the Tribunal has dismissed the appeal.

2. Shorn off unnecessary details the facts of the case are as under:

Pragati Engineering Corporation-appellant is a partnership firm and is engaged in the business of civil contractors in district Raibareli. During the

Assessment Year 2005-2006, the appellant had received gross payment from various Government department to the tune of Rs. 1,33,76,545/-,

which was audited by the Chartered Accountants on the basis of books of accounts. Thereafter, on 30.10.2005, appellant had filed its return of

income for the Assessment Year 2005-2006, showing income of Rs. 4,43,630/-.

3. In compliance to a notice issued u/s 143(2), various details asked from time to time, were furnished by the appellant. Since the case was

selected for scrutiny, the appellant/assessee was asked to produce the books of account but it failed to produce the cash book etc. and only ledger

copies of purchase, labour charges, salary payable etc. were produced on 9.7.2007. Thereafter, appellant/assessee was repeatedly asked to

produce the vouchers etc. in support of its claim of incurring respective expenses but the same were not made available before the Assessing

Authority.

4. According to the appellants, the husband of one partner, namely, Smt. Vaishali Singh, erstwhile Member of Legislative Assembly, who was

challaned under Sections 147, 148, 149, 323, 506, 364, 3841 I.P.C. in Case Crime No. 136 of 2003 at Police Station Kotwali, Raebareli, was

absconding and as such, a proceedings u/s 82/83 Cr.P.C. were initiated against him. In the said proceeding, the police has taken away all the

books of accounts including other household items pertaining to the Financial Year 2004-2005 (Assessment Year 2005-2006). Subsequently,

vide order dated 24.1.2006 passed by the Special Judge, Lucknow in Criminal Misc. Case No. 22 of 2006, the books of accounts, which were

impounded by the police, were returned but by that time, all the entries made therein had practically washed away and no part of the books of

accounts was in a position to be produced before the Assessing Authority concerned on the grounds that books of accounts were kept in an open

area in a jute bag. In these backgrounds, the appellant had filed a written submission dated 20.11.2007 before the Assessing Authority, stating

therein that in the absence of the books of accounts, the assessee is agreeable for estimation of income and agreed for a net profit of 8% of the

gross receipts.

5. On receipt of the said written submission dated 20.11.2007, the Assessing Authority observed that the turnover of the assessee was beyond the

prescribed limit of Rs. 40,00,000/-, whereby he has to maintain book and, therefore, adoption of flat rate of 8% u/s 44AD of the Act is not

permissible in law. Accordingly, the Assessing Authority, vide order dated 6.12.2007, while making additions in the expenditure account ranging

from 10% to 20% and making total addition to the tune of Rs. 12,55,520/- deter-mined the total income at Rs. 16,99,150/- against the returned

income of Rs. 4,43,630/- for the Assessment Year 2005-2006.

6. Feeling aggrieved by the Assessment Order dated 6.12.2007, assessee/appellant preferred an appeal before the Commissioner of Income Tax

(Appeal)-II, Lucknow, who, vide order dated 1.2.2011, dismissed the appeal and confirmed the addition of Rs. 12,55,520/- made by the

Assessing Authority.

7. Not being satisfied with the above orders dated 6.12.2007 and 1.2.2011, the asses-see/appellant preferred second appeal, bearing No. ITA

No. 304/LKO/2011, before the Tribunal. Vide order dated 24.11.2001, Judicial Member of the Tribunal allowed the appeal partly, whereas

Accountant Member of the Tribunal dismissed the appeal. Accordingly, the following point of difference was referred to the third Member of the

Tribunal u/s 255(4) of the Act by the Tribunal:

Whether the Tribunal being the last fact finding body can estimate the net profit from the business of the assessee in the absence of books of

account instead of confirming the disallowances sustained by the ld. CIT(A) under various heads?

8. On reference, the Third Member of the Tribunal decided the above issue and concurred his opinion with the Accountant Member vide order

dated 14.5.2012 and as such, a separate order was passed by the Bench on 25.5.2012, dismissing the appeal.

9. Hence the instant appeal.

10. Sri. Pradeep Agarwal, learned Counsel for the assessee/appellant submits that Section 44AD was brought on the statute book only with an

intention that in case of a civil contractor, who does not maintain books of accounts, then, he shall be assessed by applying a net rate of 8%. In the

present case, though the books of accounts are maintained, the tax audit report was submitted but the Assessing Authority erred in not applying net

rate of 8% u/s 44AD of the Act as offered by the appellant.

11. Sri. Agarwal further submits that while adjudicating the appeal, learned Commissioner of Income Tax (Appeal), has stated that appellant

agreed to be assessed at the rate of 8% of net profit as against the net profit of 3.31% and had also requested to allow salary to the partners,

interest on partners capital u/s 40(b) and to allow depreciation on fixed assets but learned Commissioner did not appreciate the facts and the

submissions made by the appellant and dismissed the appeal vide order dated 1.2.2011. He submits that the Accountant Member and the Third

Member had dismissed the appeal of the appellant on placing reliance upon a case reported in Comissioner of Income Tax Vs. Eastern Medikit

Ltd., . He submits that Eastern Medi Kit Ltd. (supra) is not applicable in the instant case as two decisions of Allahabad High Court were not

considered and the facts of the present case are entirely different. Thus, the findings arrived by the Tribunal in the impugned order are highly

perverse and illegal and against the facts of the case.

12. Elaborating his submission, Sri. Agarwal submits that under identical situation i.e. in I.T.A. No. 289/LUC/2009: M/s. Universal Construction,

B-2, Balaji Houses, Birbal Sahani Marg, Lucknow v. I.T.O., Raebareli, for the Assessment Year 2005-2006, decided on 15.6.2010, the Tribunal

had applied a net profit rate at the rate of 5.25% as against the net profit at the rate of 8% on the gross receipts of Rs. 3,06,71,363/- applied by

the Assessing Authority. The appellant had placed a copy of the said judgment before the Tribunal but the same has neither been considered nor it

disagreed with the aforesaid decision. Thus, the impugned order is liable to be set aside.

13. Per contra, Sri. Prashant Kumar, learned Counsel for the respondents submits that the tribunal after hearing the parties and going through the

material on record has rightly dismissed the appeal of the assessee. While dismissing the appeal, the Tribunal has recorded findings of facts and

laws relating to the present facts and circumstances of the case in detail. Thus, the appeal is liable to be dismissed.

14. We have heard learned Counsel for the parties and perused the records.

15. Section 44AD of the Act was inserted by Finance Act, 1994 w.e.f. 1.4.1994. Subsection (1) of Section 44AD clearly provides that where an

assessee is engaged in the business of civil construction or supply of labour for civil construction, income shall be estimated at 8% of the gross

receipts paid or payable to the assessee in the previous year on account of such business or a sum higher than the aforesaid sum as may be

declared by the assessee in his return of income notwithstanding anything to the contrary contained in Sections 28 to 43C of the Act. This income

is to be deemed to be the profits and gains of said business chargeable to tax under the head ""profits and gains"" of business. However, the said

provisions are applicable where the gross receipts paid or payable does not exceed Rs. 40 lacs.

16. In the case of Additional Commissioner of Income Tax Vs. Jay Engineering Works Ltd., , Hon''ble Delhi High Court has held that when the

books of accounts have been destroyed in fire, then, the learned Tribunal should mainly rely upon the audit report because the said evidence is

admissible under the Evidence Act, 1872.

17. In the instant case, the stand of the assessee before Commissioner of income tax (Appeal) and the ITAT was that though he had prepared the

books of accounts but books of accounts and vouchers were impounded by the police in the proceedings u/s 82/83 Cr.P.C., which were initiated

against the husband of one of the partner and when the same was released by the Court''s order, the entries made on the books of accounts erased

on account of being placed/kept in a jute bag in an open area and, as such, the assessee agreed to assess 8% net rate, in the absence of books of

accounts. The Assessing Authority rejected the plea of the assessee on the grounds that the assessee failed to submit the books of accounts. It is

not in dispute that accounts of the assessee was audited by the Chartered Accountant on the basis of books of accounts and on that basis, return

of income was filed by the assessee, showing income as Rs. 4,43,630.00. It is also not in dispute that the assessment u/s 143(3) of the Act was

completed and the books was not rejected u/s 144 of the Act. Therefore, the auditors report can be relied upon by the Revenue authorities in the

absence of the books of accounts in view of Additional Commissioner of Income Tax Vs. Jay Engineering Works Ltd., .

18. In M/s. Radhasoami Satsang Saomi Bagh, Agra Vs. Commissioner of Income Tax, ; Sardar Kehar Singh Vs. Commissioner of Income Tax

and Others, and Lachhiram Puranmal Vs. Commissioner of Income Tax , it has been held that when a fundamental aspect permitting through the

different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging

the order, it would not be at all appropriate to allow the position to be altered in a subsequent year i.e. year under consideration. In the instant case

also up to the assessment year under consideration, the account books for earlier assessment years were accepted and the appellant''s firm was

assessed accordingly but in the assessment year under consideration, certain expenditures were disallowed without any basis in an arbitrary

manner. The Tribunal has also fell into a serious error in not taking into consideration its earlier view expressed in I.T.A. No. 289/LUC/2009. M/s.

Universal Construction, B-2, Balaji Houses, Birbal Sahani Marg, Lucknow v. I.T.O., Raebareli, for the Assessment Year 2005-2006, decided on

15.6.2010, which was relied upon by the appellant, wherein the Tribunal had applied a net profit rate at the rate of 5.25% as against the net profit

at the rate of 8% on the gross receipts of Rs. 3,06,71,363/- applied by the Assessing Authority. Not following earlier decision on the same issue is

against all settled judicial discipline. When the judgment was brought to the notice of the Tribunal, it was the onerous duty of the Tribunal either to

follow it in its letter and spirit or to record reasons for disagreement.

19. For the reasons aforesaid, we are of the view that in the absence of books of accounts, the Assessing Authority ought to have considered the

other documents i.e. auditor''s report.

20. Accordingly, we set aside the impugned judgment and order dated 25.5.2012 passed by the Tribunal and remit the matter back to the Tribunal

to decide it afresh, in accordance with law. The appeal is allowed.