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Shivani Builders vs The Income-Tax Officer on 27 October, 2005

Equivalent citations: [2007]108ITD520(AHD), (2007)110TTJ(AHD)719

ORDER

Sanjay Arora, Accountant Member

1. This is an appeal by the Assessee directed against the order of the Commissioner of Income Tax (Appeals)-VII, Ahmedabad ("CIT(A)" for short) dated 9-5-2000, and the assessment year under reference is (A.Y.) 1995-96.

2. The only issue under appeal relates to the confirmation of the assessment as made by the Assessing Officer (A.O.) (vide his order Under Section 143(3) of the Income-tax Act, 1961 ("Act" hereinafter) dated 30-3-1998), by placing reliance on the assessee's books of account and the final accounts (being Profit & Loss and Balance Sheet) produced therefrom, in preference to the assessee's claim of being assessed under the presumptive regime of Section 44AD of the Act.

3. The facts of the case in brief are that there was a survey Under Section 133A of the Act at the assessee's premises on 7-3-1995. Under the statement recorded Under Section 131(1) of the Act, it was conceded by Shri Hiteshbhai P. Patel, one of the partners of the assessee-firm, that it had collected on-money amounting to Rs. 9,04,380 outside its regular books of account, and which would be declared/shown as its income for the year in its books and the tax return for the year. However, while the assessee did include the said amount as a part of its gross receipts (which even after the inclusion of the said amount fell below Rs. 40,00,000, i.e., the threshold limit for the non-application of Section 44AD) it returned its income on the basis of applying the presumptive rate of 8 per cent (on the enhanced turnover of Rs. 38,29,380), i.e., at Rs. 3,06,350 (before deduction in respect of remuneration and interest to partners), as against its net profit of Rs. 4,54,195 as per its books (Profit & Loss account), i.e., after providing for Rs. 5,19,310 in respect of interest and salary to partners. The A.O. found this as unacceptable, and proceeded to frame the assessment on the basis of the assessee's books, further adding a sum of Rs. 60,000 out of the labour expenses of Rs. 5,76,470, being unverifiable, i.e., at an income of Rs. 5,14,195. Aggrieved, the assessee preferred an appeal before the learned CIT(A).

4. Before the learned CIT(A) it was submitted on behalf of the assessee that its case being squarely covered by the provisions of Section 44AD of the Act, which starts with non-obstante\, its return of income as filed (at Rs. 53,902, on 30-10-1998) i.e., Under Section 44AD, would have to be accepted as such, option of being assessed Under Section 44AD lying with the assessee. It was further stated that the partner having made the statement regarding disclosure of the on-money as income under ignorance of law, i.e., unaware of the provisions of Section 44AD, the same cannot be held against it; the assessee having, and only correctly so, included the undisclosed receipt (Rs. 9,04,380) in its turnover, which, thus, stands confirmed/disclosed, so that the A.O. was bound to accept the assessee's return as such, as the provision(s) of law would necessarily prevail. As regards the addition of Rs. 60,000, it was stated, in the alternative, that the labour contractors being the same,

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there had been an omission in recording their address(es) or insisting on their signatures; the payments being genuine, so that there was no reason for drawing any adverse inference, and that, it was ready to produce the labour contractors for verification before the A.O. The same, however, did not find favour with the CIT(A), who held that the assessee having maintained its books of account, and disclosing therein its real income higher than that assessable Under Section 44AD, the former would prevail, as the provision o Section 44AD is only for a person who did not, or chose not to, maintain regular books of account. In the matter of addition on account of labour payments, he, observing the discrepancy as noted by the A.O., as also the fact that the TDS stood deducted on labour payments only at Rs. 4,43,176 (as against the total payment of Rs. 5,76,470), upheld the estimated disallowance of Rs. 60,000 as made by the A.O. Aggrieved, the assessee is in appeal before us.

5. Before us the learned A.R. raised similar contentions as before the lower authorities, arguing that, irrespective of the book results, Section 44AD would prevail, and it allowing the assessee to avail a standard deduction of 92 per cent (by implication; the assessable income being 8 per cent of the turnover), and rather, in the facts of the case, the higher income resulted only on account of the disclosure made on survey. It was further contended that the interpretation as being sought to be placed by the lower authorities would tantamount to penalizing a person who maintains the books of account, as against one who does not, and in the instant case would operate to defeat the provision of law; the assessee being obliged to maintain the books for several other reasons as well viz., Sales-tax, Professional-tax, etc. The learned D.R., on the other hand, relied upon the orders of the authorities below, contending that the assessee ought to have, rather, disclosed the entire amount of on-money as its income, in terms of its statement on oath.

6. We have heard the rival submissions and perused the material on record. It would be useful and pertinent to recount the facts of the present case. The assessee, a partnership firm, entered into a construction agreement with two Associations (registered as non-trading corporations) viz. Chanchalba Association and Jayant Association, on 21-3-1992, for developing of lands admeasuring 2010 sq. yds. and 1005 sq. yds. belonging to the two Associations respectively, by undertaking construction of residential flats thereon, the specifications for which stood listed in the Agreement itself. The price for the said construction stood agreed (even as not specified in the Agreement) and was not subject to any alteration. In addition, the assessee was entitled to recover cost in respect of any extra work in the flat(s), as well as the price of the cabin, the under and overhead water tanks. All other responsibilities and obligations under law, including that in respect of getting the building plan(s) prepared and approved, as well as of administration of the said Scheme, was of the respective Associations. In the statement recorded on oath Under Section 131(1) of the Act during survey, it was submitted by Shri Hitesh Pravinbhai Patel, a partner with 20 per cent share, that he was the person handling financial matters in relation to the firm's business, as well as its principal activity. Further, in response to question No. 11, he admitted having received on-money of Rs. 9,04,380 during the previous year 1994-95 in respect of 38 flats constructed/being constructed in Block A, B & C for the Chanchalba Association from the concerned members, i.e., the purchasers of the said flats, and that the said amount would be shown as clear income in its books for the accounting period 1994-95 (answer to question No. 16).

7. The assessee having admitted receiving of on-money in respect of the flats directly from the purchasers thereof, and also across the board from all of them (as against selectively, so that there could be an inference of being in consideration of some extra work agreed to be performed), in its own right (and not on behalf of the Associations) is reason enough to suspect the construction Agreement as being the sole relationship between the assessee, the two Associations, and their members. The assessee's turnover excluding the said receipt for the year stands at Rs. 29,25,000, and which stands increased to Rs. 38,29,380 after inclusion thereto of the premium received directly from the members. That being the case, we do no think that sole reliance on the assessee's books, as also its statement, can be made for the purpose of determination of its turnover for the relevant year, and which is material to decide the applicability or otherwise of Section 44AD of the Act. It is apparent that the assessee, save for the survey, and the disclosure made thereat, would have declared only a turnover of Rs. 29.25 lakhs, while by its own admission its turnover for the year works to Rs. 38.29 lakhs. As such, we do not consider it to be a case that fully fits into the scheme of Section 44AD, for which, undoubtedly, faithful recording of the turnover (and other relevant financial parameters) is essential. Whenever the law provides any concession(s) from its rigors, the observance and satisfaction of the qualifying criteria are presumed as, as also contended by the assessee, correctly met, i.e., without any doubt, as the law contemplates a true disclosure, and in any case are subject to scrutiny/verification. As afore-stated, in the present case, the same cannot be said for sure, and as such, in our considered opinion, the assessee having failed to record its turnover correctly in its books, it cannot be said to be a case to which Section 44AD of the Act is strictly applicable.

8.1 However, shall decide this appeal by considering the Assessee's case on merits, i.e., as pleaded it before us. Section 44AD(1) reads as:

> Notwithstanding anything to the contrary contained in Sections 28 to 43C, in the case of an assessee engaged in the business of civil construction or supply of labour for civil construction, a sum equal to eight per cent of the gross receipts paid or payable to the assessee in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum as declared by the assessee in his return of income, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession:
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> Provided that nothing contained in this Sub-section shall apply in case the aforesaid gross receipts paid or payable exceed an amount of forty lakh rupees.
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> 8.2 Clearly, the section bestows the option to the assessee to avail of an alternate mechanism, i.e., to be assessed at a presumptive income of 8 per cent of its turnover, provided the same does not exceed Rs. 40 lakh. The presumptive income so arrived at, or any higher income as declared by the assessee, is to be deemed as its income chargeable under the provisions of Chapter IV-D of the Act, of course, subject to the allowance of salary and interest to partners, where the assessee happens to be a partnership-firm (Sub-section 2). Sub-section (4) draws an exclusion in respect of its relevant turnover, i.e., that arising from the business of civil construction or supply of

labour therefor, for the purpose of the requirement of maintenance and audit of accounts by the assessee under the Act. Sub-section (6) carves an exception, so that an assessee, desirous of disclosing a lower income that that assessable under the aforesaid scheme, would need to maintain accounts, as well as get the same audited, notwithstanding the fact that its turnover does not exceed the threshold limit of Rs. 40 lakh.

9.1 It is, thus, clear that the law envisages all the three situations, laying down appropriate procedure for all of them, i.e., the assessee disclosing a higher, lower, or an amount equal to the presumptive income (reckoned at the rate of 8 per cent of the turnover). In the present case, the assessee contends to have declared its income at the presumptive rate, being covered by the provisions of Section 44AD, of which, clearly, there is no doubt, being engaged in the (civil) construction of residential flats, namely, Chanchalba Apartments. The provision of Section 44AA, i.e., with regard to mandatory maintenance of books of account, would apply to an assessee engaged in such business, only, if the assessee chooses to be taxed at lower than the presumptive rate of 8 per cent. This is, to our mind, clearly in the nature of a, and the only, concession accorded by the statute to the relevant class of assessees, to which assertion of the assessee there can be no doubt, it being statutorily recognized/enacted. However, the moot point remains if the reverse is also true, i.e., where the assessee, despite the said concession, chooses to maintain the books of account, preferring to rely thereon for various other purposes, both apart from, and under the Act (e.g. interest on partner's capital, which would come to be worked out at a sum inclusive of their share in the net profit as disclosed per the said books), can it ignore the book results and claim to be entitled to a lower presumptive rate of income than that revealed by such books. To our mind, clearly not. The law does not accord a privileged status to the assessees engaged in this line of business, but only, considering the vagaries that attend thereto, drawn a higher bar for the purpose of maintenance of books, i.e., than that normally obtains Under Section 44AA. As such, it cannot be anybody's case that though he admittedly earns more, he would still be liable to be assessed to income-tax at a lower income by virtue of the said concession. The said section (Section. 44AD), would not, to our mind, operate to curtail the scope of income as defined Under Section 2(24) r.w.s. 5 of the Act, so that where the assessee admittedly earns a higher income, the character of which as income [as defined Under Section 2(24)] is undoubted, it would be liable to tax on that basis, which in all cases has to be only on the basis of real income, even as held by the learned CIT(A). The assessee's plea of the said interpretation as amounting to be penalizing it for the maintenance of its books, is, in our view, wholly misconceived; the act of paying tax on the basis of income earned cannot, by any stretch of imagination, be considered as amounting to being penalized; the law, as also stated earlier, not creating a privileged class out of such assessees (so as to violate Article 14 of the Constitution of India), but thereby only providing a window of concession for a limited purpose.

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9.2 The assessee, by maintaining its accounts, also derives benefit of 'capital' that becomes available to it for employment in its business or otherwise, besides, as admitted, complying with the other laws incident on its business, and which, provide for the maintenance, or otherwise require information derived from, the books of account. The said 'capital' can only be explained w.r.t. the assessee's books, and not otherwise, so that it cannot be that while it proves the source (of capital) w.r.t. its accounts, but claim, all the same, for their being ignored, for the purpose of assessing its liability to tax. The concession, cannot, in our view, be interpreted to imply a standard deduction at 92 per cent of the turnover, as advocated by the learned A.R., even as the same may, under the facts of a given case, as where the assessee does not maintain books of account, and provides clear evidence of its gross receipt, turnover (as not exceeding Rs. 40 lakhs), well amount to that. In fact, the assessee, in such a case, is at liberty to declare any amount equal to or higher than 8 per cent as it deems fit and proper [Sub-section (1)]. And which only further goes to show that the assessee cannot, except at the cost of tax, take advantage of, as sought to be done, higher capital/income generated. For, why would an assessee, its receipt being same/fixed, choose to be assessed at a higher income, and consequently, bear a higher tax liability, i.e., if no other advantage/benefit accrues to it? The said concession, or its equivalent of standard deduction at 92 per cent., cannot be taken or assumed as a matter of prescription/right, the matter being subject to factual considerations, and the limited right granted cannot transgress the basic or the fundamental scheme of the Act.

10. That apart, we also consider that the assessee's claim does not stand the test of Section 44AD itself. This is so as Section 44AD(1) itself provides for a case where the assessee chooses to declare a higher income, which would, in that case, be deemed as the income chargeable to tax under the head 'Profits and gains of business or profession' in preference to the presumptive income equal to 8 per cent (of the gross receipt). The return of income is not a single document consisting of just the relevant prescribed form, but, rather, is a comprehensive document, including within its ambit several other documents, i.e., as are deemed necessary by law to substantiate and prove the various figures that go into the computation of income as well as relating to the calculation and discharge of the tax (and interest) liability. Section 139(9) enlists all such accompanying documents, in the absence of which the return is deemed defective, and further, on the defect not being removed within the prescribed time, empowers the A.O. to treat the return as non-est. Now, therefore, it cannot be that the statements that mandatorily form a part and parcel of the return of income as required to be furnished, reveal a higher income, while the assessee states a lower figure in the relevant form, making the return itself as internally inconsistent. The returned income, has therefore, necessarily to be in accordance and in conformation with the underlying documents which form an integral part thereof, so that the assessee cannot arbitrarily claim to be assessed at a lower figure by virtue of a concessionary measure provided under the Act to alleviate a particular hardship, i.e., of the maintenance of accounts and, therefore, also their audit. And which hardship it itself bears, or chooses to bear, considering the several other factors that impinge on the said requirement, and thus, in effect, choose not to avail benefit of.

11. However, at the same time, we also consider that the law [Section 44AD(1)] itself providing for the deeming of the higher income (as returned) as the assessee's income chargeable to tax, there cannot be any further disallowance on the ground that the relevant expenditure has not been, or

could not be, subject to a proper verification. Once the assessee's income, in terms of the underlying documents, stand worked out at a sum higher than the presumptive income, the same has to be accepted as such, excepting for prima facie adjustments in respect of clear inadmissibles, e.g. (say) personal expenses, income-tax, etc. For otherwise, it would amount to transgressing the clear provision of law (which 'deems' such higher sum as its income), and penalizing the assessee for having chosen to be assessed at a higher sum, in terms of the section itself, and which vests the option in him.

12. The learned A.R. has also adduced certain decisions in his favour, each of which is taken up as under:

> 12.1 The first case (Annexure E of the Paper Book) i.e., Balaji Construction v. ACIT (2000) 66 TTJ (Pune) 718 is a case of a search, where the assessee declared its income at the presumptive rate Under Section 44AD of the Act. The ITAT held that in view of that Section 158BB itself provides for computation of income in accordance with the provisions of Chapter IVD (of the Act), of which Section 44AD as a part, the same shall have to be respected or accorded precedence. As such, the assessee cannot be called upon to explain its entries of expenditure with reference to its books of account. We find that, in the facts of the case, the said order, rather than assisting the assessee's case supports the view taken by this Bench (refer para 11).
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> 12.2 The second case (Annexure F of Paper Book) i.e., Sitaram Parita v. ACIT (1994) 49 TTJ (Indore) 295 the view, taken was that the assessment under the Act shall have to be in terms of Section 44AC (prescribing the presumptive rate in respect of profits from business of trading in certain goods), even if the assessee's books disclosed a higher income. And which, we find for the same reason to be, rather, supportive of the view advanced in this order (Refer para 11).
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> 12.3 The last case cited (Annexure G of the Paper Book) is that of Oil India Limited v. CIT (1995) 212 ITR 225, where with reference to the discharge of the tax liability of a non-resident by the assessee-company with reference to the contract between the two, it was held to be a correctly assessed as a perquisite (arising out of the exercise of business of oil exploration), and further to be quantified at the presumptive rate of 10 per cent of the turnover, i.e., as prescribed Under Section 44BB of the Act, in the hands of the non-resident firm. It is difficult to see as to how this case is of any assistance to the assessee.
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> 13. In view of the foregoing, we uphold the order of the learned CIT(A), except for the disallowance of Rs. 60,000 in respect of labour payment, which claim of the assessee would merit acceptance. We order accordingly. The said issue would cover ground No. 1 through 5 of the present appeal.
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> 14. Ground No. 6 relates to the non-grant of depreciation at Rs. 48,500, i.e., as claimed by the assessee in the alternative. Even as the same does not arise out of the

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order of the learned CIT(A), being omitted to be adjudicated upon by him (raised before him as ground No. 4), we, under the circumstances, only consider it fit to restore this matter for adjudication to the file of the A.O., as remitting the same to the desk of the learned CIT(A) would now, i.e., in view of our decision aforesaid rendered in the context of the main appeal, serve no useful purpose. As the law envisage the deduction of all the expenses/allowance (from Section 30 to 38) in the assessment of the assessee's income, the same can only be at the correct amount(s), i.e., in terms of the said provisions. As such, the assessee's claim for depreciation would merit acceptance in principle, i.e., if otherwise exigible, with the rider that its income as finally assessed should not fall below the presumptive amount of 8 per cent (of the relevant turnover). The assessee shall have opportunity to advance its case before the A.O. We direct accordingly.

15. Ground No. 7 being general in nature, does not warrant any specific adjudication.

16. In the result, the appeal is partly allowed.