



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK 'SMC' BENCH, CUTTACK**

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.218/CTK/2020
Assessment Year : 2010-2011

| | | |
|--|-----|----------------------------|
| Deokaran Das Rambilash, Old Station Road, Rourkela. | Vs. | ITO, Ward -4, Rourkela. |
| PAN/GIR No.AADFD 9708 K | | |
| (Appellant) | .. | (Respondent) |

Assessee by : Shri S.K.Agarwalla, AR
Revenue by : Shri S.C.Mohanty, DR

Date of Hearing : 28/05/ 2021
Date of Pronouncement : 14/06/2021

ORDER

This is an appeal filed by the assessee against the order of the CIT(A), Sambalpur dated 20.9.2019 for the assessment year 2010-2011.

2. Grounds raised by the assessee are as under:

"1. That the Id CIT(A) is factually and legally not correct in directing the AO to estimate the profit at 3% in the place of 4% estimated by the AO in view of the fact that, the appellant maintains the proper books of account which were audited by chartered accountant and also the appellant produced the books of account during the course of assessment proceedings which was admitted by the AO in his assessment order. Therefore, the returned income is to be accepted.

2. That the authorities below erred in facts in not allowing the interest on partner's capital, remuneration to partners and depreciation which are to be allowed as per the provisions of the Act."

3. The appeal is time barred by 359 days. The assessee has filed condonation petition supported by an affidavit sworn by Sri Suresh Chandra Agarwal, Managing Partner of M/s. Deokaran Das Rambilash, wherein, it is stated that he received order of the Id CIT(A) on 20.9.2019 and the appeal has to be filed before the Tribunal on or before 20.11.2019. As he was suffering from diabetic, hypertension alongwith some other diseases, Doctor had advised to stay at home. In the meantime, COVID-19 came and Govt had declared lock down/shut down, therefore, he could not contact the counsel to file appeal within the stipulated period causing delay of 359 days. Ld D,.R. opposed to condonation of delay.

4. After considering the condonation petition and hearing the rival submissions, I am satisfied that the assessee was prevented by sufficient cause in filing the appeal before the Tribunal within the stipulated period, causing 359 days. Therefore, respectfully following the judgment of Hon'ble Supreme Court in the case of Collector, Land Acquisition vs Mst. Katiji (1987) 167 ITR 471, wherein, it has been held that there can be no presumption of deliberateness or negligence or *mala fides* in case of delay, because litigants run a serious risk without any benefit by the delay, I condone the delay and admit the appeal for hearing.

5. Ld A.R. of the assessee did not press Ground No.1 of appeal. Therefore, this ground is dismissed as not pressed.

6. Briefly stated facts of the case are that the assessee firm was engaged in the business of trading in agency goods and for the year under consideration filed return of income on 4.10.2020 disclosing total income of Rs.1,30,805/-. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short the 'Act') was issued and complied with. The Assessing Officer issued notice u/s.142(1) of the Act, which was not complied with the assessee properly. The AO found from Co. No.9(b) of Form No.3CD of the audit report that the assessee has not maintained any stock register but closing stock was valued at Rs.9,53,794/-. Hence, the AO completed the assessment under section 144 of the Act on 21.3.2013 on a total assessed income of Rs.9,71,380/-, after rejecting books of account u/s.145(3) of the Act and computed the net profit @ 4% on total turnover of Rs.9,71,381/- and disallowed Rs.1,20,000/- on account of remuneration to partners. Aggrieved, the assessee filed appeal before the Ld. CIT(A), who partly allowed the appeal of the assessee restricting the net profit to 3% and confirming the disallowance of salary paid to partners.

7. Ld A.R. of the assessee submitted that the assessment was completed u/s.144 of the Act by rejecting the books of account and estimated the net profit @ 4% of the gross turnover. Ld A.R. submitted that he should have allowed the salary paid to partners as per law. Ld A.R. also referred to the decision ITAT Cuttack in the case of Ms/. Engineering Design & Construction Co vs ITO in ITA Nos.113 & 114/CTK/2013 for the

assessment years 2005-06 and 2006-07 order dated 21.5.2015 and also in the case of M/s. Jai Hanuman Enterprises vs ITO in ITA No.233/CTK/2017 for the assessment year 2012-13 order dated 12.3.2019, wherein, on similar facts salary paid to partners has been allowed. Ld A.R. of the assessee contended that the Coordinate Bench of the Tribunal had allowed deduction for salary and interest paid to partners from the income estimated after rejecting the book results of the assessee and, therefore, following the same, salary and interest paid to the partners should be allowed as deduction to the assessee.

8. Replying to above, Id DR supported the order of the Id CIT(A) and submitted that as per the provisions of section 184(5) of the I.T.Act, 1961, the salary paid to the partners is not allowable. Hence, the order of the Id CIT(A) should not be disturbed.

9. I have heard the rival submissions and perused the record of the case as well as the orders of the Tribunal, placed in the paper book filed by the assessee.

10. Section 184(5) provides that where in respect of any assessment year, there is on the part of a firm any such failure as mentioned in section 144 of the Act, deduction by way of any payment of interest, salary, bonus, commission or remuneration etc. to any partner of such firm shall not be allowed in computing the income chargeable under the head "Profits and gains of business or profession". Section 144 of the Act provides that if any

person fails to make the return required under sub-section (1) of Section 139 and has not made a return or a revised return under sub-section(4) or sub-section (5) of that section, or fails to comply with all the terms of a notice issued under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section and having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143, the Assessing Officer after taking into account all relevant material shall make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment.

11. In the instant appeal it was not a case of the AO where the assessee had not filed its return of income. It was also not a case where the assessee failed to comply with the notice u/s. 142(1) and also it was not a case where the assessee failed to comply with all the terms of a notice issued under section 143(2) of the Act by the AO. The AO made the assessment by estimating the income of the assessee by rejecting the books of account by invoking the provisions of section 145(3) of the Act as he was not satisfied about the correctness of the book results of the assessee.

12. I find that under similar facts, the Tribunal in ITA No.233/CTK/.2017 (supra), has dealt the issue in detail and directed the AO to allow the interest and salary paid to partners, by observing as under:

"11. On careful consideration of the above rival submissions of both the sides, first of all, I find it profitable to reproduce the relevant provisions of Section 184(5) of the Act, which reads as under :-

"[Assessment as a firm.

184 (1)xxxxxxxxxx

(2) xxxxxxxxxxxx

(3) xxxxxxxxxxxx

(4) xxxxxxxxxxxx ,,

(5) Notwithstanding anything contained in any other provision of this Act, where, in respect of any assessment year, there is on the part of a firm any such failure as is mentioned in section 144, the firm shall be so assessed that no deduction by way of any payment of interest, salary, bonus, commission or remuneration, by whatever name called, made by such firm to any partner of such firm shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession" and such interest, salary, bonus, commission or remuneration shall not be chargeable to income-tax under clause (v) of section 28."

In view of the above provisions, I observe that where in respect of any assessment year, there is on the part of a firm any such failure as is mentioned in section 144, the firm shall be so assessed that no deduction by way of any payment of interest, salary, bonus, commission or remuneration, by whatever name called, made by such firm to any partner of such firm shall be allowed in computing the income chargeable under the head "profits and gains of business or profession". Thus, the provision of Section 184(5) of the Act empowers the AO in denying deduction of interest and salary to the partners, where he has invoked the provision of Section 144 of the Act.

12. I also find profitable in taking cognizance of relevant provision of Section 144 of the Act, which reads as under :-

144. Best judgment assessment

(1)] If any person-

(a) fails to make the return required 2 under sub- section (1) of section 139] and has not made a return or a revised return under subsection (4) or sub- section (5) of that section,] or

(b) fails to comply with all the terms of a notice issued under subsection (1) of section 142 or fails to comply with a direction issued under sub- section (2A) of that section], or

(c) having made a return, fails to comply with all the terms of a notice issued under sub- section (2) of section 143,

the[Assessing] Officer, after taking into account all relevant material which the Assessing] Officer has gathered, shall, after giving the assessee an opportunity of being heard, make the assessment] of the total income or loss to the best of his judgment and determine the sum payable by the assessee] on the basis of such assessment: **Provided** that such opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment:

Provided further that it shall not be necessary to give such opportunity in a case where a notice under sub- section (1) of section 142 has been issued prior to the making of an assessment under this section.]

(2) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988 , or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year.]”

From the relevant para 4.1 of the assessment order, wherein the AO has rejected the book results of the assessee u/s.145(3) of the Act, I observe that the AO has mentioned about non-compliance of two notices. First notice dated 03.11.2014 issued u/s.142(1) of the Act placing the date of hearing on 11.11.2014, in the last column of remarks, there is no mention of non-compliance by the assessee. Therefore, regarding this notice, I am not satisfied with the allegation leveled by the authorities below that there was any non-compliance of notice dated 03.11.2014 on the part of the assessee. Secondly, the AO himself in the second part of para 4.1 stated that show cause letter dated 23.01.2015 was issued with the notice u/s.142(1) of the Act intimating the assessee that in case of nonproduction of books of accounts as called for in the notice, the assessment shall be completed u/s.144 of the Act invoking provisions of Section 145(3) of the Act. The AO further stated that the assessee on the fixed date of hearing i.e. on 23.01.2015 only produced bank statement and list of

sundry debtors and there was no reply of questionnaire nor the documents as called for in the notice produced, however, there is no allegation that the assessee did not produce the books of accounts. Therefore, I can safely presume that the allegation of non-production of books of accounts has no legs to stand against the assessee. In the totality of facts and circumstances of the case, I clearly observe that there was a part compliance of the assessee and part non-compliance of the assessee regarding notices issued by the AO but it is not the case of complete non-compliance.

13. In the order of "A" bench of the Lucknow Tribunal in the case of Surendra Prasad Misra (supra), it was held that mere non-cooperation of the assessee making it difficult to determine the correct income may justify an assessment u/s.144 of the Act but that by itself is not sufficient to assess the firm as an AOP u/s.184(5) of the Act.

14. In view of the above discussion and keeping in mind the relevant provisions of Sections 144, 145(3) and 184(5) of the Act, I am of the considered view that the disallowance u/s.184(5) of the Act cannot be treated in every case of assessment u/s.144 of the Act but this provision can be invoked as a result of the lapses as mentioned by the legislature u/s.144 of the Act. Meaning thereby, the disallowance u/s.184(5) of the Act does not have a cause and effective relevancy with the assessment framed u/s.144 of the Act and this provision can be invoked only as a result of assessee's committing any failure as mentioned u/s.144 of the Act. Considering the totality of circumstances of the present case and the allegation leveled by the AO in the assessment order against the assessee, I am of the considered view that the AO has merely erred in taking provisions of Section 184(5) of the Act without any justified and reasonable basis and without bringing any specific allegation of noncompliance against the assessee. Therefore, disallowance u/s.184(5) of the Act cannot be held as correct and sustainable. I may point out that there was some non-compliance on the part of the assessee but while invoking provisions of Section 145(3) of the Act and proceeding to frame assessment u/s.144 of the Act, the AO has not alleged any other notice except notice dated 03.11.2014 and notice dated 23.01.2015. As I have already mentioned that regarding notice dated 03.11.2014, there is no mention of any non-compliance in the remarks column as mentioned in the assessment order by the AO and in respect of notice dated 23.01.2015 the AO himself noted that the assessee produced bank statement, list of sundry debtors and the assessee did not file reply of questionnaire and documents called for but the AO has not alleged that the assessee did not produce books of accounts

as required by the said notice. In these circumstances, invoking provisions of Section 184(5) of the Act cannot be held as justified and I decline to accept the findings of authorities below and, thus, the same are dismissed. Accordingly, ground No.4 is allowed and the AO is directed to allow the interest and salary paid by the assessee firm to its partners.”

13. Following the decision of the Tribunal (supra), I direct the AO to allow the salary paid to partners and allow this ground of appeal.
14. In the result, appeal of the assessee is partly allowed.

Order pronounced on 14/06/2021.

Sd/-
(Chandra Mohan Garg)
JUDICIAL MEMBER

Cuttack; Dated 14/06/2021
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Deokaran Das Rembilash, Old Station Road, Rourkela
2. The Respondent. ITO, Ward -4, Rourkela.
3. The CIT(A)-, Sambalpur
4. Pr.CIT-, Sambalpur
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack