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**Baghel Construction Vs. Union of India (Uoi) and ors.**

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**SooperKanoon Citation** : sooperkanoon.com/482245

**Court** : Allahabad

**Decided On :** Jan-28-1997

**Reported in** : (1999)154CTR(All)74; [1998]234ITR690(All)

**Judge** : R. Dayal and ;R.K. Gulati, JJ.

**Acts** : Income Tax Act, 1961 - Sections 40, 44AD, 44AD(1) to 44AD(4), 44AD(5) and 143(3); Finance Act, 1997

**Appeal No.** : Civil Miscellaneous Writ Petition No. 60 of 1997

**Appellant** : Baghel Construction

**Respondent** : Union of India (Uoi) and ors.

**Advocate for Def.** : Bharat Ji Agarwal, Adv.

**Advocate for Pet/Ap.** : V.K. Rastogi, Adv.

**Judgement** :

1. Heard Sri V.K. Rastogi, advocate, for the petitioner, and Sri Bharat Ji Agarwal, senior standing counsel, for the respondents on admission.

2. By this petition, the petitioner challenges the vires of Section 44AD of the Income-tax Act and Circular No. 737 dated February 23, 1996, issued by the Central Board of Direct Taxes and seeks certain consequential reliefs.

3. Learned counsel for the petitioner submits that Section 44AD, which raises a presumption of gross profits at the rate specified therein in respect of an assessee engaged in the business of civil construction, is arbitrary and that the impugned circular does not allow an assessee the benefit of Section 40(b) of the Act with retrospective effect and as such both the provisions are liable to be struck down. However, we do not see any merit in the submission. Sub-section (5) of Section 44AD makes the provision of Sub-section (1) of that section optional by providing that nothing contained in Sub-sections (1) to (4) of that section would apply, where the assessee claims and produces evidence to prove that the profits and gains from the aforesaid business are lower than the profits and gains specified in Sub-section (1), and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee and determine the sum payable by the assessee on the basis of assessment made under Sub-section (3) of Section 143. Furthermore, Section 40(b) does not provide for any deduction, as it is restrictive in nature. If any deduction is allowable, it is to be allowed under any other provision not under Section 40(b). Learned counsel for the petitioner submits that the case of the petitioner was covered under Sub-section (5) of Section 44AD, but the assessment was made in terms of Section 44AD. If it is so, this would be a matter which could be taken in appeal.

4. The petition is dismissed in limine.

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