

Ranjan Constructions Vs. Central Board of Direct Taxes

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Court : Orissa

Decided On : Jul-02-1997

Reported in : [1998]232ITR76(Orissa); 1997(II)OLR338

Judge : A. Pasayat and ;S.C. Datta, JJ.

Acts : [Income Tax Act, 1961](#) - Sections 40, 44AD, 44AD(2), 44AE and 44AE(3)

Appeal No. : O.J.C. Nos. 69, 71, 73, 74, 793, 1178, 1179, 2599 and 2600 of 1997

Appellant : Ranjan Constructions

Respondent : Central Board of Direct Taxes

Advocate for Def. : P.K. Mishra, Adv.

Advocate for Pet/Ap. : B.P. Mohanty, ;N. Paikray, ;R.P. Kar, ;A.N. Ray, ;M.K. Badu and ;A. Das, Advs.

Judgement :

A. Pasayat, J.

1. The challenge in these writ applications revolves round the legality of Circular No. 737 (see : [1996]218ITR97(All)), dated February 23, 1996, issued by the Central Board of Direct Taxes (in short 'CBDT'), relating to admissibility of deduction on account of salary and interest to the partners of firms opting for

estimation of income under Sections 44AD and 44AE of the Income-tax Act, 1961 (in short the 'Act'). Same was issued on the ground that doubt has been raised relating to deduction as regards salary and interest to the partners of a firm while estimating income on the basis of the aforesaid two provisions. The view impugned as expressed in the circular is at paragraph 4 thereof, and reads as follows (page 98) :

'4. Clause (b) of Section 40 lays down restriction on the deduction allowable on account of salary and interest to the partners and is not an enabling section for claiming deduction. The admissible deductions are specifically mentioned under Sections 30 to 38 of the Income-tax Act. Hence, Sections 44AD(2) and 44AE(3) only state this obvious position by way of clarification. However, in view of the non-obstante clause in subsection (1) of Sections 44AD and 44AE, there is no ambiguity about the intention of the Legislature in this matter and the provisions of the Act are quite clear. As already said above, the doubt has primarily arisen because of the error in the Explanatory Notes to the Finance Act, 1994. Therefore, for the sake of clarity and removal of doubts in this regard, the following lines are deleted from paras 31.3 and 32.2 of Circular No. 684, dated June 10, 1994 : In the case of firms, the normal deductions to the extent allowed under Clause (b) of Section 40 will be allowed.'

2. According to learned counsel for the petitioners, the impugned view as expressed in paragraph 4 was at variance with clarifications already issued by the Central Board of Direct Taxes in its Circular No. 684 (see [1994] 208 ITR 8), dated June 10, 1994. It is their stand that the view expressed in Circular No. 684 (see [1994] 208 ITR 8), is in conformity with law and supersession thereof by the impugned circular is illegal. In OJC Nos.793, 2599, 2600, 1178 and 1179 of 1997 assessments have been completed basing on the impugned circular. In rest of the writ petitions notice issued for assessment/reassessment purportedly basing on the circular is under challenge.

3. Mr. P.K. Mishra, learned counsel for the Revenue, submitted that the writ applications have become infructuous in view of insertion of the provisos to Sub-section (2) of Section 44AD and Sub-section (3) of Section 44AE. Learned counsel

for the petitioners submitted that the writ applications are to be allowed because the provisos have been inserted with retrospective effect.

4. The relevant provisions read as follows :

'44AD(1) 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' :

Provided that nothing contained in this sub-section shall apply in case the aforesaid gross receipts paid or payable exceed an amount of forty lakhs rupees.

(2) Any deduction allowable under the provisions of Sections 30 to 38 shall, for the purposes of Sub-section (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed :

Provided that where the assessee is a firm, the salary and interest paid to its partners shall be deducted from the income computed under Sub-section (1) subject to the conditions and limits specified in Clause (b) of Section 40.' '44AE(3) Any deduction allowable under the provision of Sections 30 to 38 shall, for the purposes of Sub-section (1) be deemed to have been already given full effect to and no further deduction under those sections shall be allowed : Provided that where the assessee is a firm, the salary and interest paid to its partners shall be deducted from the income computed under Sub-section (1) subject to the conditions and limits specified in Clause (b) of Section 40.'

5. The provisos have been inserted by the Finance Act, 1997, with retrospective effect from April 1, 1994. A bare reading of the newly added provisions leaves no doubt that where the assessee is a firm, salary and interest paid to its partners shall be deducted from the income computed under Sub-section (1) of Section 44AD subject to the conditions and limits specified in Clause (b) of Section 40.

Section 40(b) deals with the modalities for working out deductions, if any, for deduction on account of payment of salary, bonus, etc., and limits for such deduction. Similar is the case with Sub-section (1) of Section 44AE.

6. A combined reading of the newly added provisos operating with retrospective effect from April 1, 1994, makes it abundantly clear that the effect of Circular No. 737 (see : [1996]218ITR97(All)), dated February 23, 1996, is lost. Consequently assessments made on the basis of the circular cannot stand. They are accordingly vacated. However, the concerned Assessing Officer is free to redo the assessments on the basis of the amended provisions as referred to above. So far as cases where notices are under challenge are concerned, it is open to the concerned assesseees to bring to the notice of the Assessing Officer the amended provisions. If it is done, the Assessing Officer shall take note of the same and act according to law.

7. The writ applications are allowed to the extent indicated above. No costs.

S.C. Datta, J.

8. I agree.

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