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Court : Orissa

Decided On : Jul-02-1997

Reported in : (1998)145CTR(Ori)82

Appeal No. : OJC Nos. 74, 73, 69, 71, 793, 2599, 2600, 1178 & 1179 of 1997

Appellant : Ranjan Constructions and ors.

Respondent : Central Board of Direct Tax and ors.

Judgement :

A. PASAYAT, J. :

Challenge in these writ applications revolves round legality of Circular No. 737 dt. 23rd February, 1996 issued by CBDT [published at (1996) 131 CTR (St.) 9] relating to admissibility of deduction on account of salary and interest to partners of firms opting for estimation of income under ss. 44AD and 44AE of the IT 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 aforesaid two provisions. View impugned as expressed in the circular is at para. 4 thereof, and reads as follows :

'4. Clause (b) of s. 40 lays down restriction on the deduction allowable on account of salary and interests to the partners and is not an enabling section for claiming deduction. The admissible deductions are specifically mentioned under ss. 30 to 38 of the IT Act. Hence, ss. 44AD(2) and 44AE(3) only state this obvious position

by way of clarification. However, in view of the non obstante clause in sub-s. (1) of ss. 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 Note 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, dt. 10th June, 1994 :

In the case of firms, the normal deductions to the extent allowed under cl. (b) of s. 40 will be allowed.'

2. According to learned counsel for petitioners, impugned view as expressed in para. 4 was at variance with clarifications already issued by CBDT in its Circular No. 684, dt. 10th June, 1994 [published at (1994) 119 CTR (St.) 25]. It is their stand that view expressed in Circular No. 684 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 writ applications have become infructuous in view of insertion of provisos to sub-s. (2) of s. 44AD, and sub-s. (3) of s. 44AE. Learned counsel for petitioners submitted that writ applications are to be allowed because provisos have been inserted with retrospective effect.

4. The relevant provisions read as follows :

'44AD(1) Notwithstanding anything to the contrary contained in s. 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 on amount of forty lakh rupees.

(2) Any deduction allowable under the provisions of ss. 30 to 38 shall, for the purposes of sub-s. (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-s. (1) subject to the conditions and limits specified in cl. (b) of s. 40 '.

' 44AE

(3) Any deduction allowable under the provisions of ss. 30 to 38 shall, for the purposes of sub-s. (1), be deemed to have been already given full effect to and no further deduction under these 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-s. (1) subject to the conditions and limits specified in cl. (b) of s. 40'.

The provisos have been inserted by Finance Act, 1997, with retrospective effect from 1st April, 1994. A bare reading of the newly added provisions leave no doubt that where the assessee is a firm, salary and interest paid to its partners shall be deducted from income computed under sub-s. (1) of s. 44AD subject to the condition and limits specified in cl. (b) of s. 40. Sec. 40(b) deals with 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-s. (1) of s. 44AE.

5. A combined reading of newly added provisos operating with retrospective effect from 1st April, 1994, makes it abundantly clear that effect of Circular No. 737, dt. 23rd February, 1996 (supra) is lost. Consequentially assessments made on the basis of circular cannot stand. They are accordingly vacated. However, the

concerned AO is free to redo assessment on the basis of the amended provisions as referred to shows. So far as cases where notices are under challenge, it is open to the concerned assessee to bring it to the notice of the AO the amended provisions. If it is done, AO shall take note of the same and act according to law.

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

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