IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

ITA No.55 of 2009 with ITA No.38 of 2010.

Judgment reserved on : 25.08.2015.

Date of decision: September 09,2015.

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1. ITA No.55 of 2009.

Commissioner of Income Tax .....Appellant.

Versus

Rakesh Mahajan .....Respondent.

2. ITA No.38 of 2010.

Commissioner of Income Tax .....Appellant.

Versus

Rakesh Mahajan .....Respondent.

Coram

The Hon'ble Mr. Justice Mansoor Ahmad Mir, Chief Justice.

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Whether approved for reporting?[1] Yes

For the Appellant(s) : Mr.Vinay Kuthiala, Senior Advocate with Mr.Diwan Singh Negi, Advocate.

For the Respondent(s) : Mr.Vishal Mohan, and Mr.Aditya Sood, Advocates.

Tarlok Singh Chauhan, Judge.

Since common questions of law arise for determination, therefore, both the appeals were taken up together for disposal.

ITA No.55 of 2009.

The facts, in brief, may be noticed.

Whether the reporters of the local papers may be allowed to see the Judgment?

2. The assessee is a Civil Contractor, who filed his return for Assessment Year 2005-06 declaring income from Govt. contracts as well as from running trucks on hire. In respect of the contract work, gross receipts were declared at `12.09 crores on which net income was shown at `62,66,030/- which came to just about 5% of the gross receipts. The expenses debited against the contract receipts included expenses on freight and carriage amounted to `1,18,82,601/-.

3. Whereas, in respect of the truck hire business, the assessee declared estimated receipts of `15,03, 466/- which were stated to be net of expenses on diesel and salaries to drivers and conductors. Against these estimated net receipts, the assessee claimed expenses on tyres and spares, interest and deprecation etc. and finally declared net income of `5,95,813/-. It was stated in the return that the assessee owned 15 trucks out of which 9 trucks were run on hire and the income therefrom had been declared on estimate basis under Section 44AE of the Income Tax Act (for short the 'Act'). The remaining 6 trucks were used in the contract business and expenditure incurred on the same was included in the freight expenses of `1,18,82,601/-.

4. As against the returned income of `68,75,230/-, the Assessing Officer (in short 'A.O.') completed the assessment on 31.12.2007 assessing total income at `98,30,115/-. In the course of assessment proceedings, the A.O. noted that no expenses on diesel and fuel had been shown in respect of the trucks run on hire

on the ground that net receipts from the trucks were declared on estimate basis under Section 44AE. On the other hand, huge expenses of `1,18,82,601/- were debited against the contract income on account of freight and carriage and no details could be furnished by the assessee to show the break-up of these expenses in respect of each of the six trucks stated to be used in the contract business. The A.O. observed that the freight expenses debited in the contract account were apparently excessive considering that they were stated to be incurred only on six trucks and was of the view that since the assessee was unable to provide truck-wise details of such expenses, it was entirely possible that these expenses of `1.18 crores included expenses incurred on the trucks run one hire. Since it was not possible to verify the actual expenses on freight incurred in the contract business, the A.O. held that the accounts were incorrect and incomplete and that the net income from contracts had been suppressed by inflating the expenses on freight. The A.O., therefore, rejected the books of accounts under Section 145(3) and estimated net profit from contract at 8% of gross receipts which came to `96.73/- lacs. After giving credit for income already declared from contract as well as from running of trucks, the A.O. made an addition of `28,10,914/- to the contract income declared and further found that depreciation on trucks stated to be run on hire had been claimed at 40% and since the assessee was unable to specify the trucks that were actually used in the hiring business, he held that the enhanced rate of

depreciation was not allowable and that depreciation should be allowed on all trucks at the normal rate of 25%. Accordingly, further addition of `1,43,971/- was made on account of depreciation on trucks.

5. The assessee filed an appeal against the assessment order before the Commissioner of Income Tax (Appeals) ('CIT (A)') who vide order dated 11.11.2008 passed in appeal No.IT/358/07-08/SML dismissed the same and held that the freight expenses of `1.18 crores debited in respect of the six trucks used in the contract business were clearly excessive and since there was no evidence to show that such expenses were only in respect of these six trucks to the exclusion of the other nine trucks run on hire, the accounts had been correctly rejected and net profit had been rightly estimated by the A.O. The disallowance on account of depreciation was also confirmed by the CIT (A).

6. The assessee filed further appeal before the Income Tax Appellate Tribunal ('ITAT'), who vide impugned order dated 15.05.2009 passed in ITA No.1076/Chandi/2008 has allowed the same in its entirety and observed that books of account in respect of the contract business had been found by the A.O. to be properly maintained and that no instance had been brought out to show that any expenses on trucks used in the hiring business had been debited in the accounts of the contract business. It was further observed that details of expenses of `1.18 crores had been furnished by the assessee and these included payment of hire

charges for which partywise details were furnished and on which tax had been deducted at source. Thus, the freight expenses could not be considered to be excessive or incorrect and no specific reason had been brought out by the A.O. which could lead to the rejection of the books of account and it was held that the A.O. was not justified in rejecting the accounts and in estimating the contract profits to be higher than that declared. It was also held that since the A.O. had accepted the income declared from hiring of trucks, there was no reason to restrict the depreciation allowable on the trucks run on hire and accordingly deleted the addition of `1,43,971/- on this account also.

7. It is against the aforesaid orders that the present appeal has been filed and vide order dated 13.11.2009 was admitted on the following substantial questions of law as taken in the memorandum of appeal.

> "1. Whether the accounts maintained by the Assessee were incorrect and incomplete in terms of section 145(3) of the Income Tax Act, when it was not possible to verify from such accounts whether any unvouched expenses relating to one business, profits from which were declared on estimate basis, have actually been debited in the accounts of another business?
>
> 2. Whether the findings of the ITAT that the accounts are not incorrect or incomplete are clearly vitiated and liable to be held as perverse?
>
> 3. Whether the Ld. ITAT has misinterpreted and misconstrued the material on record?"

ITA No.38 of 2010.

The facts, in brief, may be noticed.

8. The assessee is a Civil Contractor who filed his return for Assessment Year 2006-07 declaring income from Govt. contracts and other works as well as from running trucks on hire. In respect of the contract work, gross receipts were declared at `14.56 crores on which net income was shown at `58,22,845/- which came to just about 4% of the gross receipts. The expenses debited against the contract receipts included expenses on freight and carriage amounted to `1,46,39,970/-.

9. Whereas, in respect of the truck hire business, the assessee declared estimated receipts of `11,00,922/- which were stated to be net of expenses on diesel and salaries to drivers and conductors. Against these estimated net receipts, the assessee claimed expenses on purchase of tyres and spares and depreciation and finally declared net income from truck hire at `3,95,600/-. It was stated in the return that the assessee owned fifteen trucks out of which nine trucks were run on hire and the income therefrom had been declared on estimate basis under Section 44AE of the Income Tax Act. The remaining six trucks were used in the contract business and expenditure incurred on the same was included in the freight expenses of `1,46,39,970/-.

10. As against the returned income of `65,33,790/-, the A.O. completed the assessment on 31.12.2008 assessing total income at `1,19,87,466/-. In the course of assessment proceedings, the A.O.

noted that no expenses on diesel and fuel had been shown in respect of the trucks run on hire on the ground that net receipts from the trucks were declared on estimate basis under Section 44AE. On the other hand, huge expenses of `1,46,39,970/- were debited against the contract income on account of freight and carriage and no details could be furnished by the assessee to show the break-up of these expenses in respect of each of the six trucks stated to be used in the contract business. The A.O. observed the freight expenses debited in the contract account were apparently excessive considering that they were stated to be incurred only on six trucks and was of the view that since the assessee was unable to provide truck-wise details of such expenses, it was entirely possible that these expenses of `1.46 crores included expenses incurred on the trucks run on hire. Since it was not possible to verify the actual expenses on freight incurred in the contract business, the A.O. held that the accounts were incorrect and incomplete and that the net income from contracts had been suppressed by inflating the expenses on freight and he, therefore, rejected the books of accounts under Section 145(3) and estimated net profit from contract at 8% of gross receipts which came to `1,16,45,687/-. After giving credit for income already declared from contract as well as from running of trucks, the A.O. made an addition of ` 54,05,031/- to the contract income declared.

11. The assessee filed an appeal against the assessment order before the Commissioner of Income Tax (Appeals), who vide

order dated 21.07.2009 allowed the same following the order of the ITAT in assessee's own case for the Assessment Year 2005-06 in ITA No.1076/Chandi/2008 (Para 6 supra).

12. The Department filed further appeal before the Income Tax Appellate Tribunal, who vide impugned order dated 20.04.2010 dismissed the revenue's appeal following its own order in assessee's own case for Assessment Year 2005-06 (Para 6 supra). It was observed that books of account in respect of the contract business had been found by the A.O. to be properly maintained and that no instance had been brought out to show that any expenses on trucks used in the hiring business had been debited in the accounts of the contract business. It was further observed that details of the expenses had been furnished by the assessee and these included payment of hire charges for which partywise details were furnished and on which tax had been deducted at source. Therefore, the freight expenses could not be considered to be excessive or incorrect and no specific reason had been brought out by the A.O. which could lead to the rejection of the books of account. Following the order for Assessment Year 2005-06, it was held that the A.O. was not justified in rejecting the accounts and in estimating the contract profits to be higher than that declared.

13. It is against the aforesaid orders that the present appeal has been filed and vide order dated 21.06.2011 was admitted on the following substantial questions of law as taken in the memorandum of appeal.

"1. Whether the accounts maintained by the Assessee were incorrect and incomplete in terms of section 145(3) of the Income Tax Act, when it was not possible to verify from such accounts whether any unvouched expenses relating to one business, profits from which are declared on estimate basis, have actually been debited in the accounts of another business?

2. Whether the findings of the ITAT that the accounts are not incorrect or incomplete are clearly vitiated and liable to be held as perverse?"

14. It is vehemently contended by learned Senior Counsel for the revenue that the decision of the ITAT on the issue of rejection of books of accounts and estimation of income from contract business is absolutely erroneous as it has failed to appreciate the provisions of Section 145(3) readwith Section 144 of the Act. It is further contended that while assessing the income of the assessee from running of the trucks on hire, the provisions of Section 44AE have been completely ignored.

15. On the other hand, learned counsel for the assessee would contend that the order passed by the ITAT is in accordance with law and, therefore, called for no interference.

We have heard learned counsel for the parties and have gone through the records of the case.

16. Since all the questions are inter-related and inter-connected, the same are taken up together for consideration.

17. It is not in dispute that the assessee in ITA No.55 of 2009 had maintained accounts in respect of the contract business

showing a huge turn over of `12.09 crores and insofar as the business in respect of trucks stated to be run on hire, the following account was furnished in the return:-

Tyres and spares	4,84,601/-	Receipts	15,03,466/-
Bank interest	58,571/-	Insurance claim	20,813/-
Bank charges	1,369/-		
Depreciation	3,83,925/-		
Net profit	5,95,813/-		

18. No separate accounts were maintained in respect of gross hiring receipts, diesel expenses and salaries of the drivers and helpers. Therefore, we are, prime facie, of the considered view that looking into the nature of the accounts maintained , the A.O. had rightly expressed his doubt regarding the correctness thereof.

19. It has been specifically recorded by the A.O. that when the assessee was asked to explain the freight and carriage expenses and how these were connected with the nine trucks, the assessee failed to give any reasonable explanation except maintaining that earlier also these accounts had been accepted by the A.O. This by no means can be held to be a valid explanation, more particularly, when the books of accounts have been rejected mainly on the ground that the assessee was unable to convince the A.O. that freight and expenditure of `1,18,82,600/- debited in the contract account do not pertain to the expenditures on balance nine trucks. As per the A.O., the books of accounts had been written in such a way that the assessee could show net profit from hiring of trucks on higher side while, on the other side, he could reduce the

profits from contract business by showing expenses on account of freight and carriage.

20. The learned counsel for the assessee would, however, argue that the assessee was maintaining regular books of accounts which were duly verified and audited, therefore, on mere suspicion the accounts could not have been rejected. He would further argue that the A.O. had infact failed to pin-point any expenditure claimed to be un-vouched and it was only on conjectures, surmises and suspicion that the books of accounts had been rejected.

21. Having gone through the records of the case, we are unable to agree with the aforesaid contention of the assessee for the reason that not only were the accounts properly maintained, but even the freight and carriage expenses debited in the profit and loss account at `1,18,82,600/- are far too excessive, particularly keeping in view the fact that only six trucks were used for contract business. Further, the freight and carriage expenses that were debited were not segreable from unvouched expenses for plying of other nine trucks for which profit had been shown under Section 44AE of the Act. Admittedly, the assessee had failed to segregate expenses of the contract business from other nine trucks. Therefore, in such circumstances, no credence whatsoever could have been given to the books of accounts.

22. We are not satisfied that the reasoning given by the ITAT to reverse such findings only on the ground that the A.O. ought to have satisfied that either the accounts maintained were

incorrect or incomplete or the method of accounting followed was such as would not lead to correct estimation of income. We are further failed to understand how the burden to establish that the books of accounts maintained were incomplete or incorrect would rest upon the A.O. The CIT (A) could not have un-necessarily been influenced by the fact that the assessee had been filing his return regularly and was continuing the business of contract and truck hiring to conclude that the accounts were properly maintained. Merely because no one had earlier cared to scrutinize the accounts furnished by the assessee could not be a ground to dislodge the order passed by the A.O. Even otherwise, there is no presumption in law attaching presumption of correctness to the continuity of income tax returns. The assessments of each year have to be viewed and scrutinized independently as these are separate and distinct assessments.

23. Admittedly, the assessee had claimed truck running expenses at `1,18,82,600/-, but the same was only qua six trucks being used for the contract business being carried out by the assessee which apparently was an impossibility, more particularly, when the assessment relates to the Assessment Year 2005-06, when the value of rupee was far more higher than today.

24. Likewise, in ITA No.38 of 2010, the assessee had maintained accounts in respect of contract business which showed a huge turn over of `14.56/- crores. Whereas, in respect of trucks

which were stated to be run on hire, the account furnished was as under:-

Purchases	5,75,600/-	Receipts	11,00,922/-
Depreciation	1,29,721/-		
Net profit	3,95,600/-		

The aforesaid return admittedly pertains to nine trucks, whereas, the details of the freight expenses reflected by the assessee for only six trucks are a whopping `1.46/- crores which was bifurcated in various heads of expenses like diesel, repairs, spares, tyre, retreading etc. At no stage, the assessee furnished any truckwise bifurcation of such expenses or any other evidence to show that these expenses were only incurred on the six trucks stated to be used in the contract business. Running accounts have been maintained in the books in respect of diesel, repair and spares etc. without any indication as to which item of expenses was incurred for which particular truck. A mere assertion on the part of the assessee that the entire expenses related to the six trucks used in the contract business cannot at all be accepted without there being any supporting evidence and the accounts to this effect which could show that the assessee had made efforts to segregate the expenses incurred on the trucks used in the contract business or the expenses incurred on the trucks on hire.

25. It cannot be disputed that what is taxable under the Act is the real accrued or arisen income and irrespective of the method of accountancy adopted by the assessee, in case a true picture of

the profits and gains, that is to say, the real income is disclosed, then the same ought not to be ordinarily disturbed. In such circumstances, the Department is bound by the assessee's choice of method regularly employed, but then in case by this method, the true income or profit of accounts cannot be arrived at, then the A.O. had every reason to invoke Section 145 of the Act in order to work out the real income and thereby deduce the profit and gain therefrom. As already observed earlier, the A.O. had given cogent reasons for not accepting the accounts. Though, these findings were set aside by the ITAT, but then even the ITAT did not conclude that the method of accountancy as employed by the assessee was in any manner correct. In absence of such findings, the order passed by the ITAT cannot be sustained.

26. In ***Commissioner of Income Tax*** versus ***M/s. Mcmillan and Co., AIR 1958 SC 207***, the Hon'ble Supreme Court has laid down that if true income or profit cannot be ascertained on the basis of the assessee's methods of preparing accounts, then income must be computed upon such basis and in such a manner as the ITO may determine. This infact is the underlying principle enshrined under Section 145(3) which directs the A.O. to compute the income according to his best judgment in case where the accounts are found by him to be incorrect or incomplete.

27. Similarly, in ***Commissioner of Income Tax*** versus ***British Paints India Ltd. (1991) 188 ITR 44***, the Hon'ble Supreme Court has further held that it is not only a right but duty of the A.O.

to consider whether the books have disclosed the true state of accounts and whether the correct income can be deduced therefrom.

28. At this stage, we may also refer to a Division Bench judgment of the Bombay High Court in ***Dhondiram Dalichand*** versus ***Commissioner of Income Tax, Poona (1971) 81 ITR 609,*** wherein it has been held that in absence of quantitative details of stock, which made it impossible to verify the correctness of stock shown, the method of accounting was such that the correct profit could not be deduced therefrom and the AO was justified in rejecting the accounts and determining profits.

29. The aforesaid judgment squarely applies to the instant case of the assessee, where the AO has found that it was impossible to verify the correctness of the expenses on freight debited in the contract account, and hence impossible to deduce the correct income from the accounts.

30. Thus, on the basis of the aforesaid exposition of law, it can safely be concluded that the income or profits as ascertained and determined by the assessee himself cannot always be accepted as correct because it is the duty of the A.O. to consider whether the books disclose the true state of accounts and whether the correct income can be deduced therefrom.

31. In such circumstances, no exception can be taken to the order passed by the A.O. whereby he after recording his

dis-satisfaction and after recording reasoning thereof, passed the impugned assessment order in both the cases.

32. The learned counsel for the respondent, at this stage, would rely upon a judgment of this Bench in ***ITA No.24 of 2009, titled Commissioner of Income Tax*** *versus* ***M/s Swastik Food Products***, decided on 25th June, 2014, to canvass that until or unless the findings recorded by the ITAT were perverse, the same cannot be interfered with. He in particular relied upon the following observations:-

> "15. The findings recorded by the CIT (A) and the ITAT are based on true appreciation of facts and correct appreciation of the provisions of law and there is nothing on record to suggest or even infer that the said findings are in any manner perverse. A finding on a question of fact is open to attack only in case the same is erroneous in law or where the said finding can be termed to be perverse. In this case, both the aforesaid ingredients are lacking. The substantial questions of law are answered accordingly."

33. Obviously, there cannot be any quarrel with what has been held in ***M/s Swastik Food Products*** (supra). But, then this is a case where the findings recorded by the ITAT are not only erroneous but perverse. No fault could have been found by the ITAT when the A.O. had not only doubted the accounts, but had given cogent reasons for concluding that the accounts submitted by the assessee were incorrect and incomplete. It also needs to be noted that in ITA No.55 of 2009, even CIT (A) had concurred with the findings recorded by the A.O., whereas, the CIT (A) in ITA No.38 of 2010 had no option but to have followed the order given by

the ITAT in ITA No.1076/Chandi/2008 which is already under challenge in ITA No.55 of 2009.

34. In view of the aforesaid discussion, we find merit in these appeals and answer all the aforesaid questions in favour of the revenue and against the assessee. Consequently, both the appeals are allowed by setting aside the order passed by the ITAT while restoring the order passed by the A.O. The parties are left to bear their own costs. Pending applications, if any, also stand disposed of. Registry is directed to place a copy of this judgment on the file of connected matter.

(Mansoor Ahmad Mir),
Chief Justice.

(Tarlok Singh Chauhan),
Judge.

September 09, 2015.
(krt)