

AO cannot invoke best judgment assessment for not complying with sec. 142(1) notice lacked specific requirements

Summary – The Agra ITAT in a recent case of Bhagwat Prasad Sharma., (the Assessee) held that mere non-compliance of a notice under section 142(1) having no terms or requirements, cannot be sufficient reason for making an assessment under section 144

Facts

- The assessee-firm was a contractor executing contracts for various Government departments.
- The Assessing Officer made best judgment assessment under section 144 on ground that the assessee had failed to comply with the requirements of notice under section 142(1). He accordingly, invoked the provisions of section 184(5) and disallowed interest and salary paid to the partners.
- The Commissioner (Appeals) confirmed the action of the Assessing Officer.
- On appeal:

Held

- The Finance Act, 1992 has brought fourth a conceptual change in the scheme of assessment of firms w.e.f. 1-4-1993, the scheme of registration of firms has been done away with and hence either a partnership firm will be assessed as a firm by virtue of section 184 or else, it will be assessed as an AOP on account of section 185.
- A partnership concern assessed as a firm under section 184 is given some tax advantages. The interest paid to any partner computed at a prescribed rate and remuneration paid to working partner would be allowable under section 40(b). If the assessment were to be made in the status of an AOP, such interest or remuneration given to any partner, will not be allowable deduction. Sub-section (5) starts with an *non obstante* clause and is of overriding nature.
- Where the firm, despite complying with other procedural formalities, is guilty of contumacious conduct in courting a best judgment, the firm shall not be assessed as such for such assessment year. It would be assessed in the status of an AOP and all other provisions of the Act would apply accordingly, as if it was an AOP.
- The words used in the new section 184(5) are 'shall' signifying the intention of the Legislature that it is used in the mandatory sense only. Thus, where there is a best judgment assessment under section 144 the status would be AOP only and it cannot be contended that inasmuch as the procedural formalities prescribed by section 184 have been complied with, it should be assessed in the status of firm only.

- On plain reading of Sections 144, 184 and 185, it may be noticed that the A.O. is empowered to disallow the interest and remuneration of partners only under the consideration that the assessment was made under Section 144. The assessment under Section 144 of the Act can be made only if the assessee 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, or having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143. Further, the A.O. shall provide an opportunity of hearing to the assessee.
- If the facts of the case are considered, the admitted facts of the case are that the assessee made compliance and furnished information required by the A.O. The books of the account was also produced by the assessee before the Assessing Officer. It was also demonstrated that the notice issued under section 142(1) with queries were complied by the assessee.
- The revenue has failed to point out whether the notice issued under section 142(1) was with any query or with the terms or was issued without terms of the notice. The revenue has failed to point out that the notice issued under section 142(1) was with some terms of the notices.
- Thus, merely non-compliance of a notice under section 142(1) having no terms or requirements is not sufficient reason for making assessment under section 144 particularly in case of partnership firm where the Assessing Officer wants to invoke section 184(5) and section 185 disallowing the interest and remuneration to partners of firm.
- The assessment made by the Assessing Officer under section 144 is not in accordance with the conditions laid down in section 144.
- Therefore, the Assessing Officer has wrongly made assessment under section 144 though in clause 5 of the assessment order he has taken the status as a 'firm' not as 'AOP'.
- Therefore, the orders of revenue authorities are to be set aside and the claim of the assessee in respect of interest and salary paid to partners is to be allowed.