

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM

I.T.A. No.4775/Mum/2014
(Assessment Year: 2008-09)

Shri Aslam Harun Memon A-201, Gajala Apt. Samel Pada, Station Road, Nallasopara (W), Thane	Vs.	Income Tax Officer Ward 4(1), 6 th Floor, Ashar IT Wagle Estate, Thane-400 604
PAN/GIR No. AKLPM 8897 L		
(Appellant)	:	(Respondent)
Appellant by	:	None
Respondent by	:	Shri S. K. Debar
Date of Hearing	:	16.08.2018
Date of Pronouncement	:	05.09.2018

ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-II, Thane dated 03.01.2014 and pertains to the assessment year 2008-09.

2. In this case, originally an exparte order was passed by the ITAT in SMC Bench in which case the delay of 108 days was also not condoned. However, in Miscellaneous application dated 19.04.2017, the division bench of this tribunal dated 16.03.2018 referred to the affidavit of the assessee referring to the minor heart attack and found that there was a reasonable cause for the non appearance and have recalled the order.

3. The issue in this case relates to the addition of Rs.9,13,025/- as unexplained cash credit in the hands of the assessee.

4. The brief facts of the case relating to the addition reads as under:

The assessee is engaged in the business of supply of building material. During the year under consideration, he has disclosed sales of Rs. 29,98,990/- with a net profit of Rs.1,49,990/-. The A.O. examined the bank statement of the assessee and other information and he noticed that the assessee had deposited cash and cheques to the tune of Rs, 39,12,015/- in his bank account with Axis Bank. Accordingly, a show cause notice was issued on 22/11/2010 requiring the assessee to explain the source of cash and cheque deposits in the bank account particularly when total sales were Rs. 29,98,990/-. The assessee was also required to explain as to why excess amount of Rs. 9,13,025/- be not added as income from undisclosed source u/s. 68 of the Act. The assessee did not file any reply to the show cause notice which has been reproduced by the A.O. in para 4 of the assessment order. Since there was no response, the A.O. treated a sum of Rs. 9,13,025/- excessively deposited in bank account as unexplained cash credits and made the addition u/s. 68 of the Act.

5. Against the above order, the assessee appealed before the Id. Commissioner of Income Tax (Appeals).

6. The assessee interalia submitted that the assessee is under the scheme of section 44AF for the assessment year 2008-09. Therefore, he did not require to maintain the books of account. However, the assessee has prepared memorandum, balance sheet and profit and loss account. Thereafter the assessee referred to the provisions of section 44AF of the Act. It was submitted that in the instant case, the assessee

turnover is Rs.29,98,990/- on which 5% comes to Rs.1,49,949/- and the assessee has accordingly shown the net profit at Rs.1,49,990/-. It was submitted that the assessee had followed the provision of section 44AF and paid taxes accordingly. However, in his appellate order the Id. Commissioner of Income Tax (Appeals) did not at all refer to this aspect of the assessee's submission. He proceeded to dwell upon the bank account. He was of the opinion that the assessee had income more than what was disclosed at Rs.1,49,990/-. He further held that the income disclosed by the assessee must have been utilized by him for household expenses. He proceeded to direct the Assessing Officer that the assessee must have earned a sum of Rs.6,01,402/- which should be taxed.

7. Against this order, the assessee is in appeal before us.

8. We have heard both the counsel and perused the records. We find that the assessee in this case has made out a case that the assessee's case is falling under the ambit of section 44AF. The provisions of the said section are a special provision which reads as under:

Special provisions for computing profits and gains of retail business.

44AF. (1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an assessee engaged in retail trade in any goods or merchandise, a sum equal to five per cent of the total turnover 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 respect of an assessee whose total turnover exceeds an amount of forty lakh rupees in the previous year.

(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.

(3) The written down value of any asset used for the purpose of the business referred to in sub-section (1) shall be deemed to have been calculated as if the assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

(4) The provisions of sections 44AA and 44AB shall not apply in so far as they relate to the business referred to in sub-section (1) and in computing the monetary limits under those sections, the total turnover or, as the case may be, the income from the said business shall be excluded.]

³⁴[(5) Notwithstanding anything contained in the foregoing provisions of this section, an assessee may claim lower profits and gains than the profits and gains specified in sub-section (1), if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB.]

³⁵[(6) Nothing contained in this section shall apply to any assessment year beginning on or after the 1st day of April, 2011.]

9. In this case, the assessee had a turnover of Rs.29,98,990/- on which 5% come to Rs.1,49,949/- and accordingly the assessee had disclosed profit of Rs.1,49,990/-. From the above it is clear that as per the provisions, the assessee was liable to tax at 5% on its turnover only. The assessee's submission on the applicability of section 44AF has been conspicuously not dealt by the Id. Commissioner of Income Tax (Appeals) for reasons best known to him. In our considered opinion, when the presumptive provision of section 44AF is applicable and the assessee has offered tax accordingly, the Revenue authorities who are acting under the Income Tax Law are bound to follow the provision of law. In

the present case, we find that the Id. Commissioner of Income Tax (Appeals) has not at all disputed that the provision of section 44AF are applicable. He has also not mentioned that the provision of section 44AF is not applicable for any reason. While he has gone on to refer to the bank statement and other statements and have made a surmise that the assessee must have made an income of Rs.6,01,402/- and that the assessee's income disclosed must have been utilised for household expenses. We find that it is settled law that the addition has to be made on the basis of the facts and laws and not on the basis of surmise and conjecture. Accordingly, we set aside the order of the authorities below and delete the addition.

10. In the result, the assessee's appeal stands allowed.

Order pronounced in the open court on 05.09.2018

Sd/-
(Ram Lal Negi)
Judicial Member

Sd/-
(Shamim Yahya)
Accountant Member

Mumbai; Dated : 05.09.2018

Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai