

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI "G" BENCH, MUMBAI**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
&
SHRI PAWAN SINGH, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 2045/Mum/2017
(निर्धारण वर्ष / Assessment Year : 2011-12)

ITO 17(3)(3), Aayakar Bhavan, R.No. 123 1 st Floor, M.K. Road, Mumbai 400020	बनाम/ Vs.	Siddharam D. Kamble M/43, Shiv Shakti Nagar, Gen. J. B. Marg, Nariman Point, Mumbai 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AICPK7155J		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri Abhi Rama Karthikey S., Sr.D.R.
प्रत्यर्थी की ओर से/Respondent by :	None

सुनवाई की तारीख / Date of Hearing	04/06/2019
घोषणा की तारीख /Date of Pronouncement	06/06/2019

आदेश/ORDER

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the Revenue against the order of the Commissioner of Income Tax (Appeals)-28, Mumbai, ('CIT(A)' in short), dated 02.12.2016 arising in the assessment order dated 27.03.2015 passed by the Assessing Officer (AO) under s. 144 r.w.s. 147 of the Income Tax Act, 1961 (the Act) concerning AY 2011-12.

2. The grounds of appeal raised by Revenue read as under:

- “1) *“On the facts and circumstances of the case and in law, the learned CIT(A) has erred in directing to delete the addition of Rs.1,10,91,114/- u/s.68 of the Act and in further directing the AO to apply 10% NP (Net) to the said receipts after rejection of books since none produced, without appreciating the facts that –*
- (i) Due to the non-cooperative and recalcitrant attitude of the assessee during the assessment proceedings, in that, the assessee neither filed his return of income, nor complied with the statutory notices; the assessment order was passed u/s.144 of the Act.*
 - (ii) The assessee has failed to discharge the primary onus case upon him to prove the source of receipts of Rs.1,10,91,114/-.*
 - (iii) The assessee’s gross receipts during the year exceeded the limits prescribed u/s.44AB of the Act, and accordingly, not only was the assessee required to maintain his books of account, but also furnish an Audit Report thereof, which the assessee has failed to do so.*
 - (iv) The Ld.CIT(A) has erred in adjudicating the issue in favour of the assessee by merely relying upon the submissions and evidences furnished by the assessee, without carrying out further investigations during the appellate proceedings.*
 - (v) The Ld.CIT(A) ought to have remanded back the matter to the file of the AO for considering the assessee’s submissions and evidences, and to carry out further investigations to verify the authenticity of the assessee’s claims.*
 - (vi) The admission of the additional evidences by the Ld. CIT(A), without affording the AO an opportunity to verify the same is in violation of Rule 46A of the I.T. Rules, 1962”.*”

3. When the matter was called for hearing, none appeared on behalf of the assessee. Accordingly, the matter is proceeded ex parte in the absence of assessee.

4. Learned DR for the Revenue relied upon the order of the AO.

5. We have carefully considered the submissions made on behalf of the Revenue as well as the assessment order passed by the AO and the appellate order passed by the CIT(A). It is true that assessee has not

provided the requisite details before the AO which led to certain additions under s.68 of the Act for an amount of Rs.1,10,91,110/-. However, before the CIT(A), the assessee has made submissions that he is a Civil Contractor and the receipts were in the course of execution of business. The claim of assessee being Civil Contractor is supported by the TDS deduction etc. as noted by the CIT(A). Having regard to conspectus of facts, the CIT(A) estimated 10% net profit rate on the gross receipt as assessed income to meet the ends of justice. While doing so, the CIT(A) observed and rightly so that ex parte assessment cannot be based on wild guesses or surmises, suspicion and conjunctures. The key issue involved is whether the CIT(A) ought to have resorted to some reasonable estimations on the gross receipt or ought to have confirmed the action of the AO towards taxability of full amount of gross receipt. We are of the clear view that some estimations ought to be made *albeit* after obtaining consultations by way of remand report from the AO. At the same time, we are alive to the mandate of law that the CIT(A) is a superior authority vested with power of both adjudication as well as appellate functions. The CIT(A) has adjudicated 10% of receipt having regard to the legislative estimations of 8% benchmarked for the purposes of Section 44AD of the Act. Section 44AD of the Act provides for computing profits and gains of business @ 8% of the gross receipt of presumptive basis. Such presumptive rates are naturally derived after analyzing empirical data available in the field and after elaborate making statistical analysis. Thus, the presumptive rate of 8% adopted by the legislature cannot be said to be devoid of any scientific basis. The CIT(A), on the other hand, has estimated the income at 10% i.e. 2% higher than the rate adopted by the legislature. The CIT(A) in our view has adopted rational approach to bring the end to the dispute. Thus, in departure with general practice of remitting the matter to the AO, we do not consider it necessary to remit the matter in the instant case back to the

file of the AO [or to the CIT(A)] for purported violation of Rule 46A having regard to the peculiar facts of the case in hand. We endorse the action of the CIT(A) being fair and reasonable and resonate with the circumstances of the case. Thus, we decline to interfere with the order of the CIT(A).

6. In the result, the appeal filed by the Revenue is dismissed.

This Order pronounced in Open Court on 06/06/2019

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER
Mumbai: Dated 06/06/2019

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रहित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार,
आयकर अपीलीय अधिकरण, मुंबई ।