

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER**

ITA.NO.4688/MUM/2012 (A.Y: 2009-10)

Murtuza Kutubuddin Khambati C/o. Khamati Tools Collection 139, Lohar Chawl Mumbai-400002 PAN: AEQPK9223H	v.	Income Tax Officer-14(2)(2) Room No. 304, 3rd Floor Earnest House, Nariman Point Mumbai-400021
(Appellant)		(Respondent)

Assessee by : Shri S.S. Phadkar

Department by : Shri D.G. Pansari

Date of Hearing : 10.06.2019

Date of Pronouncement : 28.08.2019

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals)-25, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 29.06.2012 for the Assessment Year 2009-10.

2. Assessee has raised the following grounds in its appeal: -

- (i) *On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) erred in holding that section 44AF of the Income Tax Act 1961 is not applicable to the facts appellant's case.*
- (ii) *On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) erred in confirming the addition of Rs.31,50,001/- out of business*

receipts from supply of Tools and Hardwares to Petty Dealers in the account with Central Bank of India, Kalbadevi Branch, on the ground that the appellant did not maintain any details as to the purchase and sale effected by the appellant and the Bank Account does not show that there were cash withdrawals from the Bank Account.

- (iii) On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) alternatively ought to have held that the peak of the deposits and withdrawals from the Bank account as income of the appellant.*
- (iv) The appellant craves leave to add, alter, amend or delete any ground(s) of appeal either before or during the course of hearing of the appeal."*

3. At the outset, we have observed from the record before us that this appeal has been disposed off by the Tribunal by order dated 25.08.2015 wherein the appeal of the assessee has been dismissed. Assessee has filed Miscellaneous Application No. 393/Mum/2016 contending that Ground No.1 of the grounds of appeal i.e. whether the provisions of section 44AF are applicable are not to the facts of the assessee's case was not disposed off by the Tribunal in its order dated 25.08.2015. The Tribunal by order dated 12.04.2019 in M.A. No. 393/Mum/2016 recalled its order dated 25.08.2015 for the limited purpose of deciding the issue raised in Ground No.1 of the grounds of appeal of the assessee. Thus, the limited issue before us to adjudicate is as to whether provisions of section 44AF have application to the facts of the assessee's case or not.

4. Ld. Counsel for the assessee submits that the Assessing Officer while completing the assessment treated the cash deposits in Central Bank of India as undisclosed income u/s. 69A of the Act. Ld. Counsel for the assessee submits that the cash deposits represent the business

receipts of the assessee and the assessee is carrying the business of purchases and sale of tools and assessee is very much carrying on the business of purchase of sale of tools. Therefore, he submits that since the turnover of the assessee is less than ₹.40 Lakhs the provisions of section 44AF are very much applicable to the assessee. Ld. Counsel for the assessee submits that to put the litigation to an end, the income may be estimated at 20% or so from the said cash deposits in bank.

5. Ld. DR submits that at the first instance the assessee said that the bank account is not operated by him and at the second instance the assessee stated that cash deposits were out of the business income from supply of tools and this bank account was also not shown by the assessee in the return of income. Further no evidences have been furnished by the assessee to prove that he is into business of supply of tools and hardware. Therefore, when the assessee has not established that he is in the business of supply of tools and hardware the question of application of provisions of section 44AF does not arise.

6. We have heard the rival submissions, perused the orders of the authorities below. On a perusal of the order of the Assessing Officer as well as the Ld.CIT(A), it is very much evident that the assessee has not furnished any evidences to prove that he is into the business of supply of

tools and hardware. Assessee neither produced the bills of purchases nor the bills of sales to prove that he is into the business of supply of tools and hardware. The assessee also did not maintain any Books of Accounts. In the absence of evidences, whatsoever, we are of the view that the assessee has not proved himself that he is into the business of supply of tools and hardware.

7. At this stage it is relevant to refer to the Sub-section (1) of Section 44AF which reads as under: -

“Section 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.”

8. As could be seen from the above provision, an assessee engaged in retail trade in any goods or merchandise shall be taxed at the rate of five per cent of the total turnover or a sum higher than the 5% as declared by the assessee in his return of income shall be deemed to be the profits and gains of retail business chargeable under the head "Profits and gains of business or profession", provided the subsection(1) has no application where an assessee's total turnover exceeds an amount of ₹.40 Lakhs in the previous year. As stated earlier, assessee could not prove that he is

engaged into the business of retail trade in any goods or merchandise with evidences, thus the provisions of section 44AF have no application to the facts of the assessee's case since the assessee has not proved that he is engaged in retailer in goods or merchandise for the assessment year under consideration. Thus, ground No.1 of the grounds of appeal is dismissed.

9. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on the 28th August, 2019

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER
Mumbai / Dated 28/08/2019
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum