

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई।
**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH: CHENNAI**

श्री जॉर्ज माथन, न्यायिक सदस्य एवं
श्री इंदूरी रामा राव, लेखा सदस्य के समक्ष

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.1021 to 1027/Chny/2019
निर्धारण वर्ष /Assessment Year: 2009-10 to 2015-16

Shri S.Ravi,
22,Beach Road,Seetharam Nagar,
Cuddalore.

[**PAN: AFKPR 8737 A**]
(अपीलार्थी/**Appellant**)

Vs. The Assistant Commissioner
of Income Tax,
Corporate Circle—2(1),
Chennai.

(प्रत्यर्थी/**Respondent**)

अपीलार्थी की ओर से/ Appellant by

: Mr.Bharath R.Srinivas,
Advocate

प्रत्यर्थी की ओर से /Respondent by

: Mr.Salendra Mammidi,
PCIT,D.R

सुनवाई की तारीख/Date of Hearing

: 24.09.2019

घोषणा की तारीख /Date of Pronouncement

: 24.09.2019

आदेश / ORDER

PER BENCH:

These appeals are filed by the assessee against the common Order of the Commissioner of Income Tax (Appeals)-18, Chennai, in ITA Nos.41,42,69,70,71,43 & 72/18-19 dated 09.01.2019 for the assessment years 2009-10 to 2015-16.

2. Mr.Bharath R.Srinivas represented on behalf of the Assessee, and Mr.Salendra Mammidi represented on behalf of the Revenue.

3. Since the issue arising out of penalty levied u/s.271A r.w.s 274 of the Act is common in all these appeals, we heard these appeals together and dispose of the same by this common order.

4. The assessee has filed concise grounds of appeal as follows:-

"1. Assessment Order passed by the AO is without jurisdiction for the following reasons:

(a) The Assessment Orders were passed by the AO in respect of AYS 2009-10, 2010-11, 2011-12, 2013-14 and 2014-15 without prior approval of Joint Commissioner of Income Tax (JCIT) as per Sec. 153D of the Act. The approval dated 27.12.2016 in respect of AYS 2012-13 and 2015-16 u/s 153D(provided to the counsel for appellant during hearing dated 11th June 2019 before this Hon 'ble Tribunal) fails to conform to procedure prescribed under Clause 9 of Manual of Office Procedure, Volume II(Technical) issued by the Directorate of Income Tax, CBDT.

(b) There were no incriminating materials unearthed during the assessment proceedings to warrant invocation of Sec. 153A of Act.

(c) In view of CIT(A)'s order, assessment under Sec. 144 is not correct, therefore the entire assessment is void-ab-initio.

2. Infirmities in the order of CIT(A):

(a) The CIT(A) ought not to have held assessment u/s 153A to be valid while observing that assessment orders cannot be construed as best judged order passed u/s 144.

(b) The CIT(A) on one hand observes that adoption of 6% of the turnover will meet the ends of justice, but passes its order by directing AO to adopt 7% instead of 9%.

(c) The CIT(A) ought to have considered that the entire assessment was made on basis of assumption to invoke Sec.153A, as the AO states Assessee has not maintained books of accounts but invokes Sec.145(3) to reject the books which according to AO does not exist.

3. The revised demand of the AO sought to be recovered pursuant to CIT(A)'s order vide letter dated 27.02.2019 is incorrect and inconsistent with the order of CIT(A).

4. In order dated 09.10.2019 passed by CIT(A) in respect of penalty proceedings imposed by AO under Section 271A rws 274 of the Act, the following were observed while allowing the appeals of the Appellant by dropping penalty proceedings for AYs 2009-10 to 2015-16:

(a) Assessee was maintaining books of accounts and also kept vouchers for expenditures.

(b) No specific books of accounts have been prescribed for business of a civil contractor and thus rigor of penalty u/s 271A is not applicable.

(c) Reference was made to sub section (2) of Sec. 44AA of the Act, to indicate that the appellant had maintained books of accounts and other documents that could have enabled AO to compute Assessee's total income in accordance with the Act.

5. The Revenue Department was aware about the income declared by the Assessee in returns for the subject assessment years.

6. The AO / CIT(A) were not having any issue with the turnovers declared by the Assessee during the subject assessment years. This indicates that there was no undisclosed income or any ulterior motive on part of the Assessee in respect of declaring profits for the subject assessment years."

5. It was submitted by Id.AR that the assessee is a sole proprietor of business under the name of M/s.Sai Construction, which is doing the business of civil construction. On account of search on the group of JSTV Trust, consequential search u/s.132 of the Act had taken place on the assessee's premises on 10.11.2014. It was submitted that notice u/s.153A came to be issued on the assessee on 16.06.2015. In response to notice u/s.153A, the return came to be filed on 16.07.2015. The assessment came to be completed u/s.153A of the Act r.w.s.144 on 29.12.2016 wherein the Assessing Officer had invoked the provisions of section 145(3) of the Act and rejected the books of accounts as maintained by the assessee and estimated the income of assessee at 9% of the gross receipts by applying the principles of section 44AD of the Act. It was submitted that in the course of search, no books of accounts were found at the business premises, only cash vouchers were found and seized. The assessee had claimed that books of accounts are maintained by his Auditor and the assessee was only submitting his receipts, bank statements and bills pertaining to expenditure, etc., to his Auditor. The assessee had categorically mentioned that he was not aware of the cash

book, bank book, individual ledger accounts for expenses, trial balance, etc. It was submitted that Auditor had also been called and statements recorded u/s.131 of the Act. The Auditor had appeared and had stated that he was not in possession of any of the books of account except tally back up accounts based on the data provided by the assessee. It was submitted that on account of non-maintenance of books of accounts, penalty proceedings u/s.271A of the Act has also been levied on the assessee. It was a further submission that against the levy of penalty u/s.271A of the Act, the assessee had filed an appeal before the Id.CIT(A). It was submitted that Id.CIT(A) had in his impugned order under appeal reduced the estimation of income to 7% from 9% as estimated by the Assessing Officer. It was submitted that no estimation was liable to be made. It was submitted that in respect of penalty levied u/s.271A of the Act, Id.CIT(A) had allowed the assessee's claim by holding that:

"The assessee is a civil contractor and is not involved in a specified business for which specific books of account and documents are statutorily required to be maintained in terms of Section 44AA read with Rule 6F(1) of the Income Tax Rules, 1962. It is a fact that books of account as contemplated in Sec.44AA are not maintained by the assessee. This being the case, even though specified

books of account as per the Act are not maintained, assessee was maintaining bank accounts, keeping vouchers for expenditure. The Provisions which the Assessing Officer could rely upon is sub-section(2) of section 44AA of the Act which enjoins upon the Appellant to keep and maintain such books of account and other documents as may enable the Assessing Officer to compute Appellant's total income in accordance with the provisions of the Act. No specific books have been prescribed for business of a civil contractor carried on by the assessee and thus the rigour of levy of penalty u/s.271A is not applicable in the Appellant's case."

It was thus a submission that there was no requirement of maintaining of books of accounts and consequently, rejection of assessee's books, and estimation of the income of assessee was not permissible. It was submitted that estimation as done by the Assessing Officer and as reduced by the Id.CIT(A) at 7%, was liable to be deleted and returned income accepted.

6. In reply, the Id.DR vehemently supported the orders of the Assessing Officer and the Id.CIT(A). It was submitted that in course of search on the assessee, incriminating materials have been found and as the assessee was unable to substantiate the expenditure claimed, the Assessing Officer had rejected the assessee's books of accounts maintained on tally back up accounts by the Auditor. It was

submitted that the assessee was also not maintaining any books from which the true and correct income of assessee could be determined properly. It was submitted that the estimation done by the Id.CIT(A) was liable to be upheld.

7. We have heard the rival contentions and perused the material available on record. In reply to very specific query as to whether the assessee's turnover exceeded the amount prescribed for applicability of provisions of section 44AD of the Act, it was submitted by the Id.PCIT D.R that the turnover of the assessee for each of the assessment year far exceeded the limit for applying the provisions of section 44AD of the Act.

8. A perusal of facts in the present case clearly shows that there is a search in the case of assessee, and no regular books of accounts required for determination of the income of assessee was found available. The assessee as well as his Auditor has categorically admitted that the books are prepared on tally software on the basis of the vouchers and details submitted by the assessee. It is also an admitted fact that the Revenue has not filed any appeal against the order of the Id. CIT(A) in respect of deletion of penalty levied u/s.271A of the Act. A perusal of the order of Id. CIT(A) in para 5.5. of his order in respect of penalty levied u/s.271A of the Act clearly

shows that the Id.CIT(A) has gone on record with a finding that the assessee being a civil contractor, is not involved in a specified business for which specific books of account and documents are statutorily required to be maintained in terms of section 44AA read with Rule 6F(1) of Income Tax Rules, 1962. A perusal of para 5.4 of Id.CIT(A)'s order cancelling the penalty levied u/s.271A of the Act shows that:

"The Appellant's explanation that the profits could be worked out by preparing "income and expenditure statement", is plausible. In fact, the Assessing Officer could disallow such expenditures if he comes to a conclusion that they are not substantiated or are not incurred wholly and exclusively for the purpose of the Appellant's business. In fact, I have in the quantum appeals vide order in ITA Nos.279 to 285/18-19 dated 09.01.2019. I have given partial relief to the Appellant by holding that 7% of the turnover as income from contract business would meet the ends of justice."

Ld.CIT(A) has categorically given a finding that the Assessing Officer could disallow such expenditure, if he comes to a conclusion that they are not substantiated or are not incurred wholly and exclusively for the business of assessee. In the present case, admittedly there are incriminating materials alleged to have been found in the course of search. There is nothing talked about the incriminating materials in the assessment order. How the incriminating materials have been used for the purpose of determining the income of assessee, is not coming out. When the turnover of assessee exceeds the limit prescribed for the applicability of provisions of section 44AD of the

Act, then obviously provisions of section 44AD cannot be applied. In fact, a perusal of the provisions of section 44AD of the Act also clearly shows that the assessee could disclose a lower income, if he maintains books of accounts and is able to substantiate the claim of lower income. In the present case, there are records available from which the income of assessee could be reasonably determined. In any case even the audit of account u/s.44AB of the Act being the Audit report submitted by the Auditor are on the basis of the tally accounts maintained, and cash vouchers have been found in the course of search. True, the substantial effort would be required for determining the correct income, but that would not be ground enough for rejecting the books of accounts of the assessee and estimating the income directly. Even if estimation was to be adopted, then comparative study would have to have been done. This is not done in the present case. Obviously, the assessee's accounts for the earlier and subsequent years could be based as comparative study. This being so, as the assessment has been done for estimating the income and Id.CIT(A) has reduced the said estimate. The estimation itself is impermissible under law, especially in view of the fact that incriminating materials have been found in the course of search. Consequently, the assessment order and the impugned order of Id.CIT(A) in respect of present appeals are set-

aside and the issues in the appeals are restored to the file of Assessing Officer for re-adjudication and for determination of the correct income of assessee on the basis of the materials available and found the course of search. The Assessing Officer shall not resort to short cut method of applying provisions of section 44AD of the Act, when the turnover of assessee exceeds the prescribed limit u/s.44AD of the Act.

9. In the result, all the appeals of assessee are partly allowed for statistical purposes.

Order pronounced in the open Court after conclusion of hearing on the 24th September, 2019 in Chennai.

Sd/-

(इंटूरी रामा राव)

(INTURI RAMA RAO)

लेखा सदस्य/**ACCOUNTANT MEMBER**

Sd/-

(जॉर्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 24th September, 2019.

K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF