

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, BANGALORE**

Before Shri Chandra Poojari, Accountant Member

ITA No.354/Bang/2019 : Asst.Year 2013-2014

ITA No.355/Bang/2019 : Asst.Year 2014-2015

Sri.Girish V.Yalakkishettar Sujatha Buildings Yalakkishettar Colony Dharwad - 580 004. PAN : AAVPY9438R.	Vs.	The Income Tax Officer Ward 2(4) Hubli.
(Appellant)		(Respondent)

Appellant by : Sri.Balram R.Rao, Advocate

Respondent by : Sri.Ganesh R.Ghale, Standing Council for DR

Date of Hearing : 21.01.2020	Date of Pronouncement : 27.01.2020
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ORDER

These appeals filed by the assessee are directed against two different orders of the CIT(A), both dated 26.09.2018, which are emanated from the order passed by the Assessing Officer u/s 143(3) r.w.s. 147 of the I.T.Act. The relevant assessment years 2013-2014 and 2014-2015.

2. Since common issues are raised in these appeals, they were heard together and are being disposed of by this consolidated order, for the sake of convenience.

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3. The assessee has raised the following grounds:-

“1. The learned CIT(Appeals) erred in upholding the Order of the Assessing Officer in the manner in which he did.

2. *The ld.CIT(Appeals) failed to appreciate the fact that the order passed by the Assessing Officer under section 143(3) r.w.s. 147 was bad in law and was liable to be struck down.*

3. *The ld.CIT(Appeals) erred in upholding the addition of Rs.5,96,470/- as unexplained cash deposits made by the Appellant in his Bank Account without appreciating the facts of the Appellant's case.*

4. *The ld.CIT(Appeals) failed to appreciate the fact that the Appellant was engaged in the business of civil construction and the said source for the deposits in the Bank Account were contract receipts and therefore the same was not liable to be added as unexplained deposits.*

5. *For these and other such grounds that may be urged at the time of the hearing of the appeal, the appellant prays that the appeal may be allowed.”*

3. The facts of the case are that the assessee is having income from contract business, share trading etc. offered the income u/s 44AD of the Act. The assessment was reopened by issuance of notice u/s 148 of the Act on 31.08.2016 since the return filed by the assessee was belatedly on 31.03.2017 declaring total income of Rs.2,19,830. On verification of the records, the Assessing Officer found that there are certain deposits with bank account with ICICI Bank, Lakkammanahalli, Dharwad. While completing the assessment, in addition to the offered income, he made further addition of Rs.9,16,300 towards unexplained cash credit in the account of ICICI Bank. The assessee went in appeal before the CIT(A), against the order of the Assessing Officer, who confirmed the addition made u/s 68 of the Act to the tune of

Rs.9,16,300. The CIT(A) though agreed with the A.O. with regard to the addition made u/s 68 of the Act, he gave direction to the A.O. to allow the opening balance in the bank account as deduction while calculating the cash deposits made from unexplained sources during the year. Against this, the assessee is in appeal before the Tribunal.

4. With regard to the reopening of assessment, which is not emanated from the order of the CIT(A), is dismissed.

5. With regard to grounds No.3 and 4, the learned AR submitted that the A.O. has made the additions as unexplained cash deposits in the bank account without considering the explanation offered by the assessee. According to the learned AR, the said amount deposited with the bank was emanated from the contract work carried out by the assessee and it is directly connected with the business of the assessee. It was further submitted that the assessee has not maintained books of account, as such, the income offered by the assessee was under presumptive taxation as per the provisions of section 44AD of the Act. According to the learned AR, since there were no books of account maintained by the assessee, section 68 cannot be applied. It was submitted that the assessee was carrying on small business and he has declared the income u/s 44AD of the Act, there is no necessity of maintaining the books of account and production of bills, vouchers etc.

6. The learned Departmental Representative, on the other hand, submitted that there is no prohibition for making

addition u/s 68 or 69 of the Act, though the assessee offered income u/s 44AD of the Act.

7. I have heard the rival submissions and perused the material on record. The assessee has offered income u/s 44AD of the Act, being a small contractor and trader in shares and the turnover of the assessee is less than Rs.1 crore from the said business activity the income was offered u/s 44AD of the Act. The Assessing Officer not disbelieved the claim of the assessee to be assessed u/s 44AD of the Act. According to him, the assessee has not carried out any construction of building and Form No.26AS also have no details of contract receipts. According to him, the assessee has deposited cash into the bank account whenever there is a shortfall in cash for making payments towards share trading. This is a general observation made by the A.O. He had not brought on record any material to show that the assessee was not engaged in contract work and construction activities. In my opinion, when the assessee offered the income u/s 44AD of the Act, there is no necessity of maintaining any books of account by the assessee. It has given option to the assessee to offer the income under the presumptive basis and the same was opted by the assessee for the assessment year under consideration. The Assessing Officer is not entitled to make any guesswork and he has to make the assessment with reference to evidence and material brought on record. There must be something more than suspicion to support the assessment. A suspicion, however, strong may not take place for proof of evidence. The conclusion which are based on surmises and conjectures, cannot take

place of proof. Therefore, the assessment made by the Assessing Officer, which are predominantly influenced by suspicion, cannot be upheld. In my opinion, mere surmises and conjectures that the assessee had deposited cash in bank account whenever there is cash shortage to make payment, cannot be the basis for a predetermined approach without bringing any specific transactions or evidence brought on record by the Assessing Officer to support his version. If the Assessing Officer wants to assess the income of the assessee under normal procedure, heavy burden on him to bring on record necessary material to show that the assessee is not engaged in contract work of building construction. In the present case, there is only on the basis of suspicion, made an addition after accepting the income offered by the assessee on presumptive basis u/s 44AD of the Act, which cannot be upheld. Being so, the assessment of the assessee to be made u/s 44AD of the Act and the addition u/s 68 of the Act cannot be sustained. Section 44AD provides that where the assessee is engaged in eligible business as proprietor under that section, a sum equal to 8% of the gross receipts shall be deemed to be the profits and gains of such business. Section 44AD exempts the assessee from maintenance of books of accounts. Once the income of the assessee is accepted u/s. 44AD, now the question arises for our consideration is whether the Assessing Officer could make further additions towards various discrepancies in the books of accounts of the assessee.

7.1 Section 44AD of the Act gives an option to the assessee to offer income on presumptive basis. These are special provisions. The assessee has opted for the same and offered to tax income at the rate of 8% of his turnover. The issue is whether, the Assessing Officer can examine statement of accounts in such cases, make additions towards undisclosed purchases, undisclosed expenditure, under valuation of closing stock etc. In our considered opinion such additions go against the spirit of the Act. Section 44AD of the Act was introduced to help the small traders who have difficulties in maintaining books of account and other records. Tax is levied on presumptive basis. The Haryana High Court in the case of CIT vs. Surinder Pal Anand [2010] 192 taxmann 264), had held as follows:-

“7. Section 44AD of the Act was inserted by the Finance Act, 1994 with effect from 1-4-1994. Sub-section (1) of section 44AD clearly provides that where an assessee is engaged in the business of civil construction or supply of labour for civil construction, income shall be estimated at 8 per cent of the gross receipts paid or payable to the assessee in the previous year on account of such business or a sum higher than the aforesaid sum as may be declared by the assessee in his return of income notwithstanding anything to the contrary contained in sections 28 to 43C of the Act. This income is to be deemed to be the profits and gains of said business chargeable of tax under the head "profits and gains" of business. However, the said provisions are applicable where the gross receipts paid or payable does not exceed Rs. 40 lakhs.

8. Once under the special provision, exemption from maintaining of books of account has been provided and presumptive tax at the rate of 8 per cent of the gross receipt itself is the basis for determining the taxable income, the assessee was not under obligation to explain individual entry of cash deposit in the bank unless such entry had no nexus with the gross receipts. The stand of the assessee before the Commissioner of Income-tax (Appeals) and the Tribunal that the said amount of Rs.14,95,300 was on account of business receipts had been accepted. The Ld. AR with reference to any material on record, could not show that the cash deposits amounting to Rs.14,95,300 were unexplained or undisclosed income of the assessee.

9. In view of the above position, we are unable to hold that any substantial question of law arises in this appeal.

10. The appeal is dismissed."

7.2 The Chandigarh Bench of the Tribunal in the case of Nand Lal Popli vs. DC1T in ITA Nos. 1161 & 1162/Chd/2013, order dt. 14/06/2016, held as follows:-

"9. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. The issue to be decided by us is whether accepting the case of the assessee as taxable under the presumptive taxation as provided under section 44AD of the Act, the Assessing Officer can make addition under section 69C of the Act making the cash flow statement provided by the assessee the basis of his addition. 10. Section 44 AD of the Act reads as under:

"44AD (1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an eligible assessee engaged in an eligible business, a sum equal to eight per cent of the total turnover or gross receipts of the assessee in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the eligible assessee, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profit and gains of business or profession".

(2) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of subsection (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed."

10. The provision of the above section are quite unambiguous to the effect that in case of an eligible business based on the gross receipts/total turnover, the income under the head 'profits & gains' of business shall be deemed to be @ 8% or any higher amount. The first important term here is 'deemed to be' which proves that in such cases there is no income to the extent of such percentage, however, to extent, income is deemed. It is undisputed that 'deemed' means presuming the existence of something which actually is not. Therefore, it is quite clear that though for the purpose of levy of income tax 8% or more may be considered as income, but actually this is not the actual income of the assessee. This is also the purport of all provisions relating to presumptive taxation.

11. Putting the above analysis, in converse, it can be easily inferred that the same is also true for the expenditure of the assessee. If 8% of gross receipts are 'deemed' income of the assessee, the remaining 92% are also 'deemed'

expenditure of the assessee. Meaning thereby that actual expenditure may not be 92% of gross receipts, only for the purposes of taxation, it is considered to be so. To take it further, it can be said that the expenditure may be less than 92% or it may also be more than 92% of gross receipts.

12. Further, on the reading on the substantive part of the provision, it is quite clear that an assessee availing the benefit of such presumptive taxation can claim to have earned income @ 8% or above of the gross receipts. In that case, the provisions of sub-section (5) of the said section will be applicable to it, which reads as under:

"44AD (5) Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee who claims that his profits and gains from the eligible business are lower than the profits and gains specified in subsection (1) and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (2) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB."

13. From the combined reading of sub-section (1) and sub-section (5), it is apparent that the obligation to maintain the books of account and get them audited is only on the assessee who opts to claim the income being less than 8% of the gross receipts."

7.3 Now coming to the argument of the learned D.R. that the addition has been made under section 68 of the Act, on which there is no bar even though income offered under section 44AD of the Act, I am quite in agreement with the same. The only fetter provided under section 44AD of the Act are the applicability of provisions of sections 30 to 38 of the Act. The provisions of section 68 of the Act reads as under:

“Cash credits.

68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing

Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :

Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of [section 10](#).”

7.4 The crucial words in the said section for the purposes of present appeal are 'any previous year' an A.O. has found any sum credited in the books of account of the assessee. But can I say on the facts and circumstances of the present case that the A.O. has found any sum credited in assessee's books of account. Therefore, in the present case, the provisions of section 68 of the Act cannot be applied. Asking the assessee to prove to the satisfaction of the Assessing Officer, the expenditure to the extent of 92% of gross receipts, would also defeat the purpose of presumptive taxation as provided under section 44AD of the Act or other such provision. Since the scheme of presumptive taxation has been formed in order to

avoid the long drawn process of assessment in cases of small traders or in cases of those businesses where the incomes are almost of static quantum of all the businesses.

7.5 Applying the propositions of law laid down in the above case law cited supra to the facts of the case on hand, I delete the addition in question.

7.6 Even otherwise, in the present case, the Assessing Officer found certain deposits as unexplained in the bank account of the assessee with ICICI Bank, Dharwad branch at Rs.9.16 lakh. In my opinion, when moneys are deposited in the bank account, the relationship that is constituted between the banker and the customer is one of the debtor and creditor and not of trustee and beneficiary. Applying this principle, the bank statements supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not as if the bank statements are maintained by the bank as the agent of the constituent, nor can it be said that the pass book is maintained by the bank under the instructions of the constituent. Therefore, the bank statements supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee, nor a book maintained by the assessee or under his instructions. As such, addition u/s 68 of the Act of the amount entered only in the bank statements was not justified. My this view is fortified by the judgment of the Hon'ble Bombay High Court in the case of *CIT v. Bhaichand H.Gandhi* [141 ITR 67 (Bom.)] and also the judgment of the Hon'ble Allahabad High Court in the case of *Smt.Sarika Jain v.*

CIT (407 ITR 254). The Hon'ble Allahabad High Court held that the Tribunal is not competent to sustain the addition u/s 69A of the Act after deleting the said addition made by the A.O. and confirmed by the CIT(A) u/s 68 of the Act, the entire order of the Tribunal stands vitiated in law. Being so, the amount found credited in the bank account of the assessee cannot be made an addition u/s 68 of the Act. Accordingly, I am inclined to delete the addition made u/s 68 of the I.T.Act.

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8. The facts of the case in ITA No.354/Bang/2019 for assessment year 2013-2014 are that the assessee is having income from contract business, share trading, etc. The assessee has filed his belated return of income on 23.11.2015 declaring a total income of Rs.4,20,330. Notice u/s 148 of the Act was issued on 21.10.2015 by recording the reasons u/s 147 of the I.T.Act. Later on, while framing the assessment u/s 143(3) r.w.s. 147 of the Act, the Assessing Officer observed that the assessee has deposited cash of Rs.36,26,000 in the bank account with ICICI Bank, Dharwad. The assessee has declared income presumptive profit u/s 44AD of the Act at 8% on total turnover of Rs.65,04,175 as contract receipt and declared income at Rs.5,20,334. According to the A.O., the deposits are made by the assessee for investments in share trading. Whenever there is a short fall in cash, cash has been deposited in the account for making payments in respect of share trading. Since the assessee has not furnished any details of contract work done during the year and no details of construction of

building has been given in Form No.26AS regarding the contract receipt, the A.O. rejected the contract receipts as false cash deposits. Accordingly, he treated the amount deposited with the bank account with ICICI Bank as unexplained credit u/s 68 of the I.T.Act.

9. Against this, the assessee carried the appeal before the CIT(A), who confirmed the order of the Assessing Officer, by observing that since the assessee has failed to substantiate his claim that the cash deposits were part of business turnover as a contractor. However, he has given credit towards opening balance available in the assessee's bank account to be deducted from the cash deposits considered as unexplained by the A.O.

10. Against this, the assessee is in appeal before the Tribunal. The assessee has raised following grounds:-

“1. The learned CIT(Appeals) erred in upholding the Order of the Assessing Officer in the manner in which he did.

2. The ld.CIT(Appeals) failed to appreciate the fact that the order passed by the Assessing Officer under section 143(3) r.w.s. 147 was bad in law and was liable to be struck down.

3. The ld.CIT(Appeals) erred in upholding the addition of Rs.36,26,000/- as unexplained cash deposits made by the Appellant in his Bank Account without appreciating the facts of the Appellant's case.

4. The ld.CIT(Appeals) failed to appreciate the fact that the Appellant was engaged in the business of civil construction and the said source for the deposits in the Bank Account were contract receipts and therefore the same was not liable to be added as unexplained deposits.

5. *For these and other such grounds that may be urged at the time of the hearing of the appeal, the appellant prays that the appeal may be allowed.”*

11. Ground No.2 with regard to the reopening of assessment is not emanated from the order of the CIT(A). Hence, the same is rejected.

12. With regard to grounds No.3 and 4, the learned AR submitted that the A.O. has made the additions as unexplained cash deposits in the bank account without considering the explanation offered by the assessee. According to the learned AR, the said amount deposited with the bank was emanated from the contract work carried out by the assessee and it is directly connected with the business of the assessee. It was further submitted that the assessee has not maintained books of account, as such, the income offered by the assessee was under presumptive taxation as per the provisions of section 44AD of the Act. According to the learned AR, since there were no books of account maintained by the assessee, section 68 cannot be applied. It was submitted that the assessee was carrying on small business and he has declared the income u/s 44AD of the Act, there is no necessity of maintaining the books of account and production of bills, vouchers etc.

13. The learned Departmental Representative, on the other hand, submitted that the Assessing Officer did not accept the presumptive tax offered by the assessee u/s 44AD of the Act and he has rejected the return of income in total and made the addition towards the deposits in the account with ICICI Bank

as unexplained u/s 68 of the Act. The learned DR relied on the orders of the lower authorities.

14. I have heard the rival submissions and perused the material on record. The assessee has offered income u/s 44AD of the Act, being a small contractor and trader in shares and the turnover of the assessee is less than Rs.1 crore from the said business activity, the income was offered u/s 44AD of the Act. The Assessing Officer disbelieved the claim of the assessee to be assessed u/s 44AD of the Act on the reason that the assessee has not furnished any details of contract work done during the year. According to him, the assessee has not carried out any construction of building and Form No.26AS also have no details of contract receipts. According to him, the assessee has deposited cash into the bank account whenever there is a shortfall in cash for making payments towards share trading. This is a general observation made by the A.O. He had not brought on record any material to show that the assessee was not engaged in contract work and construction activities. In my opinion, when the assessee offered the income u/s 44AD of the Act, there is no necessity of maintaining any books of account by the assessee. It has given option to the assessee to offer the income under the presumptive basis and the same was opted by the assessee for the assessment year under consideration. The Assessing Officer is not entitled to make any guesswork and he has to make the assessment with reference to evidence and material brought on record. There must be something more than suspicion to support the assessment. A suspicion, however, strong may not take place for proof of evidence. The

conclusion which are based on surmises and conjectures, cannot take place of proof. Therefore, the assessment made by the Assessing Officer, which are predominantly influenced by suspicion, cannot be upheld. In my opinion, mere surmises and conjectures that the assessee had deposited cash in bank account whenever there is cash shortage to make payment, cannot be the basis for a predetermined approach without bringing any specific transactions or evidence brought on record by the Assessing Officer to support his version. If the Assessing Officer wants to assess the income of the assessee under normal procedure, heavy burden on him to bring on record necessary material to show that the assessee is not engaged in contract work of building construction. In the present case, there is only on the basis of suspicion, made an assessment rejecting the income offered by the assessee on presumptive basis u/s 44AD of the Act, which cannot be upheld. Being so, the assessment of the assessee to be made u/s 44AD of the Act and the addition u/s 68 of the Act cannot be sustained. Section 44AD provides that where the assessee is engaged in eligible business as proprietor under that section, a sum equal to 8% of the gross receipts shall be deemed to be the profits and gains of such business. Section 44AD exempts the assessee from maintenance of books of accounts. Once the income of the assessee is accepted u/s. 44AD, now the question arises for our consideration is whether the Assessing Officer could make further additions towards various discrepancies in the books of accounts of the assessee.

14.1 Section 44AD of the Act gives an option to the assessee to offer income on presumptive basis. These are special provisions. The assessee has opted for the same and offered to tax income at the rate of 8% of his turnover. The issue is whether, the Assessing Officer can examine statement of accounts in such cases, make additions towards undisclosed purchases, undisclosed expenditure, under valuation of closing stock etc. In our considered opinion such additions go against the spirit of the Act. Section 44AD of the Act was introduced to help the small traders who have difficulties in maintaining books of account and other records. Tax is levied on presumptive basis. The Haryana High Court in the case of CIT vs. Surinder Pal Anand [2010] 192 taxmann 264, had held as follows:-

“7. Section 44AD of the Act was inserted by the Finance Act, 1994 with effect from 1-4-1994. Sub-section (1) of section 44AD clearly provides that where an assessee is engaged in the business of civil construction or supply of labour for civil construction, income shall be estimated at 8 per cent of the gross receipts paid or payable to the assessee in the previous year on account of such business or a sum higher than the aforesaid sum as may be declared by the assessee in his return of income notwithstanding anything to the contrary contained in sections 28 to 43C of the Act. This income is to be deemed to be the profits and gains of said business chargeable of tax under the head "profits and gains" of business. However, the said provisions are applicable where the gross receipts paid or payable does not exceed Rs. 40 lakhs.

8. Once under the special provision, exemption from maintaining of books of account has been provided and presumptive tax at the rate of 8 per cent of the gross receipt itself is the basis for determining the taxable income, the assessee was not under obligation to explain individual entry of cash deposit in the bank unless such entry had no nexus with the gross receipts. The stand of the assessee before the Commissioner of Income-tax (Appeals) and the Tribunal that the said amount of Rs.14,95,300 was on account of business receipts had been accepted. The Ld. AR with reference to any material on record, could not show that the cash deposits amounting to Rs.14,95,300 were unexplained or undisclosed income of the assessee.

9. In view of the above position, we are unable to hold that any substantial question of law arises in this appeal.

10. The appeal is dismissed."

14.2 The Chandigarh Bench of the Tribunal in the case of Nand Lal Popli vs. DC1T in ITA Nos. 1161 & 1162/Chd/2013, order dt. 14/06/2016, held as follows:-

"9. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. The issue to be decided by us is whether accepting the case of the assessee as taxable under the presumptive taxation as provided under section 44AD of the Act, the Assessing Officer can make addition under section 69C of the Act making the cash flow statement provided by the assessee the basis of his addition. 10. Section 44 AD of the Act reads as under:

"44AD (1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an eligible assessee engaged in an eligible business, a sum equal to eight per cent of the total turnover or gross receipts of the assessee in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the eligible assessee, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profit and gains of business or profession".

(2) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of subsection (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed."

10. The provision of the above section are quite unambiguous to the effect that in case of an eligible business based on the gross receipts/total turnover, the income under the head 'profits & gains' of business shall be deemed to be @ 8% or any higher amount. The first important term here is 'deemed to be' which proves that in such cases there is no income to the extent of such percentage, however, to extent, income is deemed. It is undisputed that 'deemed' means presuming the existence of something which actually is not. Therefore, it is quite clear that though for the purpose of levy of income tax 8% or more may be considered as income, but actually this is not the actual income of the assessee. This is also the purport of all provisions relating to presumptive taxation.

11. Putting the above analysis, in converse, it can be easily inferred that the same is also true for the expenditure of the assessee. If 8% of gross receipts

are 'deemed' income of the assessee, the remaining 92% are also 'deemed' expenditure of the assessee. Meaning thereby that actual expenditure may not be 92% of gross receipts, only for the purposes of taxation, it is considered to be so. To take it further, it can be said that the expenditure may be less than 92% or it may also be more than 92% of gross receipts.

12. Further, on the reading on the substantive part of the provision, it is quite clear that an assessee availing the benefit of such presumptive taxation can claim to have earned income @ 8% or above of the gross receipts. In that case, the provisions of sub-section (5) of the said section will be applicable to it, which reads as under:

"44AD (5) Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee who claims that his profits and gains from the eligible business are lower than the profits and gains specified in subsection (1) and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (2) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB."

13. From the combined reading of sub-section (1) and sub-section (5), it is apparent that the obligation to maintain the books of account and get them audited is only on the assessee who opts to claim the income being less than 8% of the gross receipts."

14.3 Now coming to the argument of the learned D.R. that the addition has been made under section 68 of the Act, on which there is no bar under section 44AD of the Act, I am quite in agreement with the same. The only fetter provided under section 44AD of the Act are the applicability of provisions of sections 30 to 38 of the Act. The provisions of section 68 of the Act reads as under:

“Cash credits.

68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :

Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of [section 10](#).”

14.4 The crucial words in the said section for the purposes of present appeal are 'any previous year' an A.O. has found any sum credited in the books of account of the assessee. But can I say on the facts and circumstances of the present case that the A.O. has found any sum credited in assessee's books of account. Therefore, in the present case, the provisions of section 68 of the Act cannot be applied. Asking the assessee to prove to the satisfaction of the Assessing Officer, the expenditure to the extent of 92% of gross receipts, would also defeat the purpose of presumptive taxation as provided under section 44AD of the Act or other such provision. Since the scheme of presumptive taxation has been formed in order to avoid the long drawn process of assessment in cases of small

traders or in cases of those businesses where the incomes are almost of static quantum of all the businesses.

14.5 Applying the propositions of law laid down in the above case law to the facts of the case on hand, I delete the addition in question. The Assessing Officer nor the CIT(A) have given any reason as to why the provisions of Section 44AD of the Act are not applicable to this case. This ground of appeal of the assessee is allowed.

14.6 Even otherwise, in the present case, the Assessing Officer found certain deposits as unexplained in the bank account of the assessee with ICICI Bank, Dharwad branch at Rs.36.26 lakh. In my opinion, when moneys are deposited in the bank account, the relationship that is constituted between the banker and the customer is one of the debtor and creditor and not of trustee and beneficiary. Applying this principle, the bank statements supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not as if the bank statements are maintained by the bank as the agent of the constituent, nor can it be said that the pass book is maintained by the bank under the instructions of the constituent. Therefore, the bank statements supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee, nor a book maintained by the assessee or under his instructions. As such, addition u/s 68 of the Act of the amount entered only in the bank statements was not justified. My this view is fortified by the judgment of the Hon'ble Bombay High Court in the case of *CIT v. Bhaichand*

H.Gandhi [141 ITR 67 (Bom.)] and also the judgment of the Hon'ble Allahabad High Court in the case of *Smt.Sarika Jain v. CIT (407 ITR 254)*. The Hon'ble Allahabad High Court held that the Tribunal is not competent to sustain the addition u/s 69A of the Act after deleting the said addition made by the A.O. and confirmed by the CIT(A) u/s 68 of the Act, the entire order of the Tribunal stands vitiated in law. Being so, the amount found credited in the bank account of the assessee cannot be made an addition u/s 68 of the Act. Accordingly, I am inclined to delete the addition made u/s 68 of the I.T.Act.

15. In the result, both the appeals filed by the assessee are partly allowed.

Order pronounced on this 27th day of January, 2020.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Bangalore ; Dated : 27th January, 2020.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Hubballi.
4. The Pr.CIT, Hubballi.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore