IN THE INCOME TAX APPELLATE TRIBUNAL
BENGULURU BENCH, BENGALURU
BEFORE SHRI CHANDRA POOJARI, AM

ITA No.397/Bang/2019
Assessment Year: 2015-16

Syed Maqsoodulla, No.14, 7th "A' Cross 'D' Block, Magadi Road Bangalore-560023. [PAN:CYCPS 3116F]	**Vs.**	The Income Tax Officer, Ward-3(2)(1), Bangalore.
(Assessee -Appellant)		**(Revenue-Respondent)**

Assessee	Shri G. Sathyanarayana, CA
Revenue	Shri Ganesh R. Ghale, SC to Department

Date of hearing	10/09/2020
Date of pronouncement	11/09/2020

O R D E R

Per CHANDRA POOJARI, AM:

This appeal filed by the assesee is directed against the order of the CIT(A) dated 02/01/2019.

2. The assessee has raised the following grounds of appeals:

> " 1. The CIT(A) is not justified in making an addition of Rs.36,01,384/- as the unexplained cash credits made by the assessee in depositing the cash to the savings bank account under the facts and circumstances of the assessee's case."

3. The facts of the case are that the assessee had a bank account in ICICI Bank and in that Bank the total cash of Rs.48,57,000/- was deposited. The assessee stated that he had availed jewel loan to the extent of Rs.12,55,616 and the same

was withdrawn and deposited into his account. However, with respect to the balance of Rs.36,01,384/-, the assessee could not substantiate either with evidence or through a cash flow statement. The AO considered that the assessee had no valid explanations to offer regarding the cash deposits other than the jewel loan and accordingly, the balance of Rs.36,01,384/- was treated as unexplained cash credits and brought to tax under the head income from other sources by invoking the provisions of section 115BBE of the I.T. Act.

4. On appeal, the CIT(A) after going through the records found that the total deposits in the bank account was and enhanced it by Rs.13,63,616/-.

5. Against this enhancement the assessee is in appeal before me. The Ld. AR submitted that the assessee filed return of income and offered income under section 44AD by showing 8% of income on the turnover. The AO accepted this income declared by the assessee at Rs.4,84,158/-. Thereafter, by invoking the provisions of section 115BBE, the AO made addition of Rs.3,60,384/-. Further, it was enhanced by the CIT(A) to the tune of Rs.49,65,000/- without giving mandatory notice for enhancement u/s. 251(2) of the I.T. Act. Further, he submitted that the AO had not considered opening balance in support of the Bank account. It was also submitted that the assessee had made frequent withdrawals from the Bank account and re-deposited the same. He further submitted that the deposits in the Bank account cannot be considered, only the peak credit is to be considered as there was repeated withdrawal of deposits. The Ld. AR relied on the following case laws:

> 1) 2015 Tax(Pub)(DT) 1553 (Kol-Trib.) Ram Prasad Mondal vs. ITO wherein it was held that on assessee's failure to explain the sources of deposits in bank accounts, same were added under section 69A as unexplained deposits.

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However, assessee claimed that he should be subject to tax on the basis of peak credit in the account. Hence the issue was remitted to the file of AO to compute peak credit and bring the same to tax. r income from undisclosed sources, addition u/s. 69A, deposits in bank.

In para 6. We have heard the both the counsels. Upon careful consideration we note that the learned counsel of the assessee has claimed that assessee is agreeable if its subject to taxation on the basis of peak credit in the account. We note that assessee has for the first time before us claimed for assessment of peak credit. Hence considering the facts of this case we remit this issue to the file of the AO. The AO shall review assessee's claim and compute the peak credit and bring the same to tax. Accordingly, the appeal filed by the assessee is allowed for statistical purposes.

2) 2015 TaxPub(DT) 3326 (All HC) (2015) 066(1) ITCL 0029 (2015) 376 ITR 0534 CIT vs. saraf Trading Co. wherein it was held that where certain intangible additions were made in the earlier years, that would constitute the source for the credit entry in subsequent year, but a cancelled income which was neither disclosed in the assessment proceedings nor in any other ancillary proceeding for any earlier year can hardly constitute a source for a subsequent credit entry. In the instant case, where all the credits appearing in different accounts were held to be the assessee's own moneys, the assessee would be entitled to set off and a determination of the peak credit after arranging all the credits in the chronological order.

3) 2016 Tax Pub (DT) 4847 (Del . Trib) Shveta Aggarwal vs. ITO wherein it was held that for arriving at a peak credit, the credits and debits be serially arranged, so that a credit following a debit entry may be treated as referable to the later to the extent possible and that not to aggregate but only the peak of the credits be treated as unexplained.

4) (2014) 221 Taxman 0446 Ashok P. Magajikondi v. ITO wherein it was held that the AO has only considered the peak deposits and has given necessary deduction for deposits made out of prior withdrawal and possible receipt from debtors. Therefore, it was concluded that the findings of the lower authorities is correct and no material has been produced and confirmed the addition.

6. On the other hand, the Ld. DR submitted that a perusal of the bank account of the assessee showed that the jewellery loans were taken by the assessee as he was in urgent need of money as the amount was immediately withdrawn in cash. Even

after huge withdrawals, the assessee had been withdrawing cash continuously for a period of one month using ATM or otherwise. So if the cash withdrawn after jewellery loan was always available otherwise. So if the cash withdrawn after jewellery loan was always available with it, there was not any requirement of making day to day cash withdrawals.

7. I have heard the rival submissions and perused the material available on record. In the present case, it is not disputed that the assessee offered income u/s. 44AD of the Act which has been accepted by the AO. After accepting the income declared u/s. 44AD, he went on withdrawing from the Bank account. Section 44AD is the beneficiary provision for small traders as held in the case of Sri Girish V.Yalakkishettar vs. ITO in ITA Nos. 354 & 355/Bang/2019 dated 27/01/2020 wherein it was held as follows:

> *"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 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 remaining1 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 bythe 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."

7.1 The same view was taken by 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".

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(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 remaining1 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 bythe 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."

7.2 In the present case also the assessee's turnover was Rs.9,45,200/- and offered income of Rs.4,84,158/-- u/s. 44AD of the I.T. Act. If the AO wants to make any addition, he shall ignore income returned by the assessee and proceed to scrutiny the accounts so as to make any addition. Therefore, in our opinion, this income offered us. 44AD of the Act is to be accepted. Now, there is no necessity of maintaining books of accounts and production of bills and vouchers Accordingly, I

we delete the addition made by the AO and confirmed by the CIT(A). Further, at this stage, it is observed that the CIT(A) is not justified in enhancing the assessment without giving mandatory notice u/s. 251(2) of the I.T. Act. This ground of appeal of the assessee is allowed.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 11th September, 2020.

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Bengaluru
Dated: 11th September, 2020.

Reddy / GJ

Copy to:
1 Syed Maqsoodulla, No.14, 7th "A' Cross 'D' Block, Magadi Road Bangalore-560023.
2. The Income Tax Officer, Ward-3(2)(1), Bengaluru.
3. The Commissioner of Income-tax(Appeals)-3,Bengaluru
4. The Pr. Commissioner of Income-tax, Bengaluru.
5. D.R., I.T.A.T., Bengaluru Bench, Bengaluru
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Bengaluru