

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH 'B', JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSIAN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 563/JP/2018
निर्धारण वर्ष / Assessment Year : 2014-15.

The Assistant Commissioner of Income-tax, Central Circle-1, Jaipur.	बनाम Vs.	Shri Alkesh Patni F-34, 4 th Avenue Lotus Street, JLN Marg, Lal Bahadur Nagar (West), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AGJPP 2416 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by : Shri B.K. Gupta, (CIT)
निर्धारिती की ओर से / Assessee by : Shri S.L. Poddar (Advocate)

सुनवाई की तारीख / Date of Hearing : 29.10.2020.
घोषणा की तारीख / Date of Pronouncement : 18/03/2021.

आदेश / ORDER

PER SANDEEP GOSIAN, J.M.

This appeal by the revenue is directed against the order dated 24.02.2018 of Id. CIT (A)-4, Jaipur for the assessment year 2014-15. The revenue has raised the following grounds of appeal :-

1. Whether on the facts and in the circumstances of the case CIT (A) was right in deleting the addition of Rs. 5,95,441/- made by AO on the basis of cash found during the search accepted in his statements u/s 132(4) and statement u/s 131.

2. Whether on the facts and in the circumstances of the case CIT (A) was right in deleting the addition of Rs. 2,16,000/- made by AO based on the statement u/s 131 of the IT Act, on account of unaccounted cash payment.
3. Whether on the facts and in the circumstances of the case CIT (A) was right in deleting the addition of Rs. 23,68,320/- made by AO based on the statement u/s 131 of the IT Act, on account of unaccounted cash payment.
4. Whether on the facts and in the circumstances of the case CIT (A) was right in deleting the addition of Rs. 1,39,14,000/- made by AO on account of unaccounted expenditure accepted in his statement u/s 132(4) and statement u/s 131.
5. Whether on the facts and in the circumstances of the case CIT (A) was right in deleting the addition of Rs. 63,596/- made by AO based on the statement u/s 131 of the IT Act, on account of unaccounted expenditure.
5. The appellant craves leave or reserves the right to amend, alter, add or forego any ground (s) of appeal at any time before or during the hearing of this appeal.

2. The assessee is an Individual and is engaged in the business of civil construction under the name and styled as M/s. Jain Construction Company. A search and seizure under section 132 of the IT Act, 1961 was conducted on 23.05.2013 at the various residential/business premises of Rajendra Jain/Rajendra Baradiya & other persons of the group along with the assessee. The assessee filed the return of income on 31.03.2015 for the assessment year 2014-15 declaring total income at Rs. 3,61,810/- under the provisions of section 44AD of the Income Tax Act, 1961. After introduction of section 44AD the assessee has opted the presumptive scheme under section 44AD and has been regularly filing the returns since 1996-97 onwards. A copy of the acknowledgement of return for the

assessment year 2014-15 along with computation of income is available on record. The AO while making the assessment, accepting the returned income of Rs. 3,61,810/-, assessed the total income at Rs. 1,79,39,030/- for the A.Y. 2014-15 by making various additions. The assessee challenged the action of the AO before the Id. CIT (A), who partly allowed the appeal of the assessee.

3. Aggrieved by the order of the Id. CIT (A), the revenue filed appeal before this Tribunal. The Id. D/R submitted that provisions of section 44AD of the I.T. Act has overriding effect over the provisions of section 28 to 43C of the Act. Further, as per section 44AD(4), the provisions of Chapter XVII-C, which is relating to advance tax are not applicable when income is declared under section 44AD of the Act. Thus, the Legislature has made specific exclusion in section 44AD itself. Further, there is nothing in section 153A, which exclude applicability of such provisions in cases, where a search was conducted under section 132 of the Act and return of income in response to notices issued u/s 153A/142 was filed under section 44AD of the Act. In the impugned order, the Id. CIT (A) has deleted the additions without properly examining the seized documents and considering the provisions of section 153A of the Act. It is humbly submitted that in a search assessment, the burden is on the assessee to explain the entries recorded on the seized material as well as source of assets found during the course of search and it cannot be allowed to take shelter under the provisions of section 44AD of the Act. Placing reliance on the various decisions of the Hon'ble High Courts, the Id. D/R supported the order of the A.O.

4. On the other hand, the Id. Counsel for the assessee filed the written submissions as under :

That all the additions made by the AO are related to the business transactions of the assessee which are covered by the turnover declared by the assessee in the return filed under section 44AD of the Income Tax Act, 1961. The AO has accepted the turnover declared by the assessee under section 44AD of the Act in all the years covered in block period. But as per seized documents the turnover of the assessee was never exceeded the limit prescribed u/s 44AD of the IT Act.

That in another assessment years falling in block period from assessment years 2008-09 to 2013-14, the AO has accepted the turnover and profit declared u/s 44AD of the Act. Only meager additions were made for expenditure and cash payment against material purchases which has been deleted by the Id. CIT (A) in appeal and due to small tax effect the department has not preferred appeal against the CIT (A)'s order. The departmental appeal is only for the year under consideration. There is no addition sustained in the earlier years by Id. CIT (A).

That the Id. D/R has wrongly observed regarding percentage completion method. The assessee has submitted that he has taken the turnover on the basis of percentage completion of project for declaring profit u/s 44AD of the Act by estimating that how much percentage of work is completed for the purpose of computing turnover.

The Id. CIT (A) has mentioned that there was no occasion for recording the statement under section 131 of the Act when the assessee has already admitted that he was not maintaining books of accounts and the returns were filed under section

44AD of the IT Act. It was only pressure tactics of the department that after completion of search they issued notice under section 131 and recorded the statement by pressure for obtaining more surrender.

Therefore, the surrender was made under pressure, threat and coercion on the papers which are related to the turnover of the assessee declared under section 44AD of the Income Tax Act, 1961. None of the entries found in the seized documents are outside the scope of section 44AD of the Income Tax Act, 1961.

The case laws given by the Id. D/R are not applicable under the facts of the case of the assessee as no assets or valuable was found during the course of search. The entries found are business transactions which are covered under section 44AD of the Income Tax Act, 1961. The Id. CIT (A) has given categorical findings in this regard on page 25 para 10, page 32 para 12 and page 35 para 15 which are very specific and in detail.

The Id. Counsel for the assessee submitted that the appeal of the revenue be dismissed.

5. We have heard the rival contentions and considered the material available on record. On careful perusal of the records, the grounds are decided as under –

5.1. In respect of ground no. 1, relating to deletion of addition of Rs. 5,95,441/-, the AO made the addition mainly on the basis of statement of the assessee recorded under section 131 although statement of the assessee was already recorded under section 132(4) of the Act during the course of search on 23.05.2013. The assessee, in the statement recorded under section 132(4) has

categorically stated that since he was not maintaining books of account, therefore, he was not in a position to explain and link the source of cash. He submitted that the cash found was out of savings from business as well as of the family. During the course of assessment proceedings, the AO again recorded the statement of the assessee on 16.07.2013 under section 131 of the IT Act and accordingly made the addition. Before the Id. CIT (A), the assessee has submitted that he had disclosed the income under the presumptive tax scheme under section 44 AD as he was not maintaining books of accounts. The assessee submitted that on the total construction receipts of Rs. 56,40,20/-, by applying the net profit rate of 8.04% as per provisions of section 44AD, disclosed the income at Rs. 4,53,640/-, which has been accepted by the AO. The Id. CIT (A) after discussing the matter in para 6.3, allowed the ground of the assessee as under :-

" 6.3. I have perused and carefully considered the order of the Assessing Officer and also the submission made citing various judgments by the appellant. It is a case where the appellant had disclosed income u/s 44AD of the Income Tax Act, 1961. The Assessing Officer has made the addition by treating the cash found as unexplained. The Assessing Officer has supported addition by quoting the statement of the appellant recorded u/s 131 on 16.07.2013. In the statement recorded u/s 132(4) appellant has stated that he was not maintaining books of accounts as income was being disclosed u/s 44AD which did not require maintenance of books of accounts. I am in agreement with the view taken by the AO. I have already indicated in the general analysis that if as per evidence found as a result of search, the total turnover is exceeding the limit prescribed u/s 44AD, the income has to be computed as per regular provision and not under presumptive scheme.

If what is found is only relating to payments made which has nexus with the business of civil construction carried on and not in respect of any other activity, the payment will be merging into calculation of presumptive scheme and no separate addition can be made while framing assessment u/s 153A.

For this ground the appellant has not been able to establish factually the presence of cash of Rs. 6,47,500/-. In my opinion this cash is part of the turnover which is not disclosed by the appellant. Accordingly the AO shall tax it at the rate of 8.04% in terms of section 44AD (8.04% declared by appellant). The AO is thus directed to make an addition of Rs. 52,059/-. Ground No. 2 is allowed as indicated."

The Id. CIT(A) has granted relief to the assessee by holding that the assessee had disclosed income u/s 44AD of the Act. In the statement recorded u/s 132(4) of the Act, the assessee has stated that he was not maintaining books of accounts as income was being disclosed u/s 44AD which did not require maintenance of books of accounts. The Id. CIR(A) has further held that in the general analysis, if as per evidence found as a result of search, the total turnover is exceeding the limit prescribed u/s 44AD, the income has to be computed as per regular provision and not under presumptive scheme. If what is found is only relating to payments made which has nexus with the business of civil construction carried on and not in respect of any other activity, the payment will be merging into calculation of presumptive scheme and no separate addition can be made while framing assessment u/s 153A.

The assessee has not been able to establish factually the presence of cash of Rs. 6,47,500/- and the Id. CIT(A) held that this cash is part of the turnover which is not disclosed by the assessee, therefore, the AO shall tax it at the rate of 8.04% in terms of section 44AD (8.04% declared by assessee). In view of the above facts and

circumstances of the case, we find no infirmity in the order of the Id. CIT (A), the same is upheld. Ground no. 1 is allowed.

5.2. **Ground no. 2** relates to deletion of addition of Rs. 2,16,000/- on account of interest payment to M/s. Ravishi Industries on the loan of Rs. 22,50,000/- taken on 25.05.2012 and returned on 12.01.2013. The AO made the addition of this amount on the ground that the same was not verifiable from the books of accounts. The Id. CIT (A) decided this matter by observing in para 8.2 as under :-

"8.2. I have perused and carefully considered the order of the Assessing Officer and also the submission made citing various judgments on this issue by the appellant. It is a case where the appellant had disclosed income u/s 44AD of the Income Tax Act, 1961. The Assessing Officer has made the addition by treating the payment of interest as unverified. The Assessing Officer has supported addition by quoting the statement of the appellant recorded u/s 131 on 16.07.2013. In the statement recorded u/s 132(4) appellant has categorically stated that he was not maintaining books of accounts as income was being disclosed u/s 44AD which did not require maintenance of books of accounts. In view of this, the statement recorded u/s 132(4) would prevail over statement recorded u/s 131. The appellant has further quoted various board circulars decrying surrender in confessional statement. I am in agreement with the submission of the appellant that when income was declared u/s 44AD and so accepted by the Assessing Officer there was no case for making addition of the payment of interest on the ground that it was not verifiable. Obviously, the appellant was not in a position to get the payment of interest verified with reference to books of accounts as no books of accounts has been maintained. Hence the addition is hereby deleted. Appellant's Ground No. 3 is allowed."

The Id. CIT(A) has deleted the addition under consideration by holding that the statement recorded u/s 132(4) of the Act, the assessee has categorically stated that he was not maintaining books of accounts as income was being disclosed u/s 44AD which did not require maintenance of books of account. In view of this, the statement recorded u/s 132(4) would prevail over statement recorded u/s 131 of the Act. The assessee has further quoted various board circulars decrying surrender in confessional statement. The Id. CIT(A) has in agreement with the submission of the assessee that when income was declared u/s 44AD and so accepted by the Assessing Officer there was no case for making addition of the payment of interest on the ground that it was not verifiable. The assessee was not in a position to get the payment of interest verified with reference to books of accounts as no books of accounts has been maintained. In view of the above facts and circumstances of the case, we find no infirmity in the order of the Id. CIT (A), the same is upheld. Ground no. 2 is allowed.

5.3. **Ground No. 3** relates to deletion of addition of Rs. 23,68,320/- on account of unaccounted cash payment. The AO made the addition on the basis of page nos. 20 and 22 of Exhibit 3 on the ground that the payment of Rs. 23,68,320/- is unexplained and not verifiable. He has also referred to the statement recorded under section 131 ignoring the statement recorded under section 132(4) at the time of search on 24.05.2013. The Id. CIT (A) dealt with the issue in para 10 of his order as under :-

" 10. I have perused and carefully considered the order of the Assessing Officer and also the submission made by the appellant which are well supported by various judgments. It is a case where the appellant had disclosed income u/s 44AD of the Income Tax Act, 1961. The Assessing Officer has made the addition of Rs. 23,68,320/- on the basis of page no. 20 and 22 of exhibit 3 on the ground that the payment of Rs. 23,68,320/- is unexplained and not verifiable. The

learned Assessing Officer has referred the statement of the appellant recorded u/s 131 on 16.07.2013 wherein appellant was made to accept the expenditure as unexplained as he was not in a position to get the same verified with reference to books of accounts as no books of accounts has been maintained. I have considered the reply of the appellant also wherein it has been stated that the appellant has disclosed gross receipts of Rs. 56,40,320/- and on such gross receipts income of Rs. 4,53,640/- has been disclosed by way of rate application of 8.04%. Income was disclosed u/s 44AD and the same was accepted. The case of the appellant is that in the circumstances expenditure of Rs. 51,86,680/- is already available (5640320-453640) which covers the above expenditure of Rs. 23,68,320/- treated by the Assessing Officer as unexplained. Considering the fact I am in agreement with the appellant that there was no occasion for recording statement u/s 131 on the same issue when appellant already stood examined u/s 132(4) on 13.05.2013. In the statement recorded u/s 132(4) appellant has categorically stated that he was not maintaining books of accounts as income was being disclosed u/s 44AD which did not require maintenance of books of accounts. In view of this the statement recorded u/s 132(4) would prevail over statement recorded u/s 131. I am in agreement with the submission of the appellant that when income was declared u/s 44AD and so accepted by the Assessing Officer there was no case for making addition of the cash payment which stood covered by the deemed expenditure of Rs. 51,86,680/-. Hence the addition is hereby deleted. Appellant's Ground No. 4 is allowed."

The Id. CIT(A) has deleted the addition under consideration by holding that the Assessing Officer has made addition of Rs. 23,68,320/- on the basis of page no. 20 and 22 of exhibit 3 on the ground that the payment of Rs. 23,68,320/- is unexplained and not verifiable. The Assessing Officer has referred the statement of

the appellant recorded u/s 131 on 16.07.2013 wherein assessee was made to accept the expenditure as unexplained as he was not in a position to get the same verified with reference to books of accounts as no books of accounts has been maintained. The Id. CIT(A) also held that the assessee has disclosed gross receipts of Rs. 56,40,320/- and on such gross receipts income of Rs. 4,53,640/- has been disclosed by way of rate application of 8.04%. Income was disclosed u/s 44AD and the same was accepted. In the statement recorded u/s 132(4) assessee has categorically stated that he was not maintaining books of accounts as income was being disclosed u/s 44AD which did not require maintenance of books of accounts. In view of this the statement recorded u/s 132(4) would prevail over statement recorded u/s 131, the Id. CIT(A) held that when income was declared u/s 44AD and so accepted by the Assessing Officer there was no case for making addition of the cash payment which stood covered by the deemed expenditure of Rs. 51,86,680/-. Looking to the facts and circumstances of the case as discussed by the Id. CIT (A), no interference is called for. The order of the Id. CIT (A) is upheld. Ground No. 3 is allowed.

5.4. **Ground No. 4** relates to deletion of addition of Rs. 1,39,14,000/- on account of unaccounted expenditure. The AO made the addition on the basis that the assessee has failed to verify the expenditure from his books of accounts. He has also referred to Exhibit 4 page 11 of Annexure AS. The Id. CIT (A) after considering the all the relevant details decided the issue in para 12 of his order as under :-

" 12. I have perused and carefully considered the order of the Assessing Officer and also the submission made by the appellant. It is

a case where the appellant had disclosed income u/s 44AD of the Income Tax Act, 1961. The Assessing Officer has made the addition of Rs. 1,39,14,000/- on the basis of page no. 11 of Annexure AS Exhibit – 4 on the ground that the payment of Rs. 1,39,14,000/- is unexplained and not verifiable. The Assessing Officer has referred the statement of the appellant recorded u/s 131 on 16.07.2013 wherein appellant has accepted the expenditure as unexplained as he was not in a position to get the same verified with reference to books of accounts as no books of accounts has been maintained. I have considered the reply of the appellant also wherein it has been stated that the above page itself discloses that it was an estimate of expected expenditure on construction at three sites. Further the appellant has submitted these construction work receipts stand disclosed in Assessment Year 2013-14 of Rs. 98,60,000/- and Assessment Year 2014-15 of Rs. 56,40,320/-. In view of the detailed submission of the appellant which are with cogent reasons, I am of the view any alternative but to delete the addition. Appellant's Ground No. 5 is allowed."

The Id. CIT(A) has deleted the addition by holding that the Assessing Officer has made the addition of Rs. 1,39,14,000/- on the basis of page no. 11 of Annexure AS Exhibit – 4 on the ground that the payment of Rs. 1,39,14,000/- is unexplained and not verifiable. The Assessing Officer has referred the statement of the assessee recorded u/s 131 on 16.07.2013 wherein assessee has accepted the expenditure as unexplained as he was not in a position to get the same verified with reference to books of accounts as no books of accounts has been maintained. The Id. CIT(A) has considered the reply of the assessee, wherein it has been stated that the above page itself discloses that it was an estimate of expected expenditure on construction at three sites. Further the assessee has submitted these construction work receipts

stand disclosed in Assessment Year 2013-14 of Rs. 98,60,000/- and Assessment Year 2014-15 of Rs. 56,40,320/-. Considering the above facts and circumstances of the case as discussed by the Id. CIT (A), we find no infirmity in the order of the Id. CIT (A), the same is upheld. Ground No. 4 is allowed.

5.5. **Ground No. 5** relates to deletion of addition of Rs. 63,596/- based on the statement under section 131 of the IT Act, on account of unaccounted expenditure. The AO has made the addition on the basis of seized paper page no. 50 of Annexure –AS Exhibit-8 referring to the statement recorded under section 131 of the Income Tax Act, 1961. The Id. CIT (A) after discussing the matter at para 15 of his order, deleted the addition as under :-

" 15. I have perused and carefully considered the order of the Assessing Officer and also the submission made by the appellant. It is a case where the appellant had disclosed income u/s 44AD of the Income Tax Act, 1961. The Assessing Officer has made the addition of Rs. 63,596/- on the basis of page no. 50 of annexure AS exhibit-8 on the ground that the payment of Rs. 63,596/- is unexplained and not verifiable. The learned Assessing Officer has referred the statement of the appellant recorded u/s 131 on 16.07.2013 wherein appellant was cornered to accept the expenditure as unexplained as he was not in a position to get the same verified with reference to books of accounts as no books of accounts has been maintained. I have considered the reply of the appellant also wherein it has been stated that the appellant has disclosed gross receipts of Rs. 56,40,320/- and on such gross receipts income of Rs. 4,53,640/- has been disclosed by way of rate application of 8.04%. Income was disclosed u/s 44AD and the same was accepted. The case of the appellant is that in the circumstances expenditure of Rs. 51,86,680/- is already available

(5640320-453640) which covers the above expenditure of Rs. 63,596/- treated by the Assessing Officer as unexplained. In the statement recorded u/s 132(4) appellant has categorically stated that he was not maintaining books of accounts as income was being disclosed u/s 44AD which did not require maintenance of books of accounts. In view of this the statement recorded u/s 132(4) would prevail over statement recorded u/s 131. I am in agreement with the submission of the appellant that when income was declared u/s 44AD and so accepted by the Assessing Officer there was no case for making addition of the cash payment which stood covered by the deemed expenditure of Rs. 51,86,680/-. Hence the addition is hereby deleted. Appellant's Ground No. 7 is allowed."

The Id. CIT(A) has deleted the addition under consideration by holding that in the statement recorded u/s 132(4) of the Act, the assessee has categorically stated that he was not maintaining books of accounts as income was being disclosed u/s 44AD which did not require maintenance of books of accounts. In view of this the statement recorded u/s 132(4) would prevail over statement recorded u/s 131. The Id. CIT(A) also held that when income was declared u/s 44AD and so accepted by the Assessing Officer there was no case for making addition of the cash payment which stood covered by the deemed expenditure of Rs. 51,86,680/-.

5.6 Having gone through the records of the present case, we find that the Id. CIT (A) after considering the facts of the case as well as the submissions of the assessee has rightly concluded there was no case for making addition of the cash payment which stood covered by the deemed expenditure of Rs. 51,86,680/-. Therefore we find no justification or relevance to interfere or deviate from the order passed by the

Id. CIT (Appeals). Therefore, we upheld the order of Id. CIT (A) and delete the addition.

6. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 18/03/2021.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Sd/-
(संदीप गोसाई)
(SANDEEP GOSIAN)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 18/03/2021.

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant-The DCIT, Central Circle-1, Jaipur.
2. प्रत्यर्थी / The Respondent-Shri Alkesh Patni, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File {ITA No. 563/JP/2018}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar