

IN THE INCOME TAX APPELLATE TRIBUNAL, NAGPUR BENCH, NAGPUR
BEFORE SHRI SANDEEP GOSAIN, JM & SHRI ARUN KHODPIA, AM

ITA No. 156/NAG/2021
Assessment Year: 2019-20

Ms. Nikita Shankar Lal Tanwani Near Shankar Mandir, Shankar Nagar, Pandhuna Pandhurna Chhindwara – 480 334 (M.P.)	Vs.	The ACIT Central Circle 2(1) Nagpur
PAN No.:BORPT 4644 F		
Appellant		Respondent

Assessee by: Shri Manoj G. Moryani, Adv. &
Shri Bhavesh Moryani, Adv

Revenue by :Shri Piyush Kolhe (CIT-DR)

Date of Hearing: 28/04/2022

Date of Pronouncement: 8 /6 /2022

ORDER

PER: SANDEEP GOSAIN, J.M.

The captioned appeal has been filed by the assessee challenging the impugned order dated 8th October 2021, passed by the Commissioner of Income Tax (Appeals)-3, Nagpur, [in short "*the learned CIT(A)*"] under section 250 of the Income Tax Act, 1961 (in short "*the Act*") for the assessment year 2019-20.

2. The present appeal has been filed on the following grounds:-

"1. *The passed is illegal, invalid and bad in law.*

2. *On the fact and circumstances learned Commissioner of Income Tax (Appeals)-3, Nagpur erred in confirming income determined by the Assessing Officer at Rs. 27,00,000/- U/s. 69A is illegal, invalid and bad in law.*

3. *On the fact and circumstances learned Commissioner of Income Tax (Appeals)-3, Nagpur ought to have accepted returned of Rs. 27,00,000/- filed before due date of return of income and assessee has paid advance tax as per provision 208 to 211 of the Income Tax Act, therefore not considering the same treated the same confirmed the addition by treating the same as unexplained money is unjustified, unwarranted and excessive.*

4. *On the fact and circumstances learned Commissioner of Income Tax (Appeals)-3, Nagpur ought to have accepted returned income and rejecting the contention of the assessee and income treated U/s. 69A is unjustified, unwarranted and excessive.*

5. *On the fact and circumstances learned Commissioner of Income Tax (Appeals)-3, Nagpur ought to have accepted cash in hand shown by the assessee of Rs.33,00,000/-and return income of Rs.27,00,000/- were regular income out of which 11,50,000/- brokerage income though the assessee has submitted brokerage details and treating the same U/s. 69A as unexplained money is unjustified, unwarranted and excessive.*

6. *On the fact and circumstances learned Commissioner of Income Tax (Appeals)-3, Nagpur without going into merits of the case and statutory provision provided U/s. 44AD of the Act rejected the claim of income the assessee by making addition U/s. 69A of the Act, therefore addition confirmed is illegal, invalid and bad in law.*

7. The learned Commissioner of Income Tax (Appeals)-3, Nagpur erred in not accepting the contention of the assessee and without going into to the merits of case confirmed the income U/s. 115BBE, therefore order passed is illegal, invalid and bad in law.

8. The learned Commissioner of Income Tax (Appeals)-3, Nagpur erred in not considering the wrong levy of interest U/s. 234A, 234B & 234C."

3. Grounds no.1, raised by the assessee being general in nature, hence, no separate adjudication.

4. The issue arising out of grounds no.2, 3, 4, 5, 6 and 7, relates to returned income shown by the assessee under section 44AD of the Act.

5. Brief facts are, the assessee is engaged in the business of Kirana and general items in individual capacity. He filed his original return of income under section 139(1) of the Act on 12th June 2019, declaring total income at Rs.27,00,000/-. A search and seizure action was conducted in Locker no.305, inHU Volt, HU Tower Maskasath, Itwari, Nagpur on 22nd November 2018, requisition under section 132A of the Act was made in the name of Ms. Nikita Shankarlal Tanwani. In locker No.305, cash of Rs.1,88,50,500/- was found. The aforesaid cash of Rs.50,00,000/- belongs to ShriShankarlal Tanwani and Rs.15,00,000/- belongs to Shankar Kirana Stores, Rs.21,50,000/- belongs to Smt.

Asha S. Tanwani, and Rs.33,00,000/- belongs to Ms. Nikita Tanwani (the assessee herein) and Rs.19,00,000/- belongs to Smt. HarshaTanwani. Summons under section 131 of the Act was issued to the assessee and the assessee has filed detailed reply in response to summons under section 131 of the Act before the Dy. Director of the Income Tax on 14th January 2019. The assessee's statement was recorded, and the contention of the Assessing Officer is that the assessee had shown abnormal profit under section 44AD of the Act. The assessee claimed that he has filed the return of income for the year under consideration declaring total income at Rs.27,00,000/- and claimed that cash of Rs.33,00,000/- found in the locker belongs to her and it is out of the income earned by her. The assessee has claimed that during the year under consideration, cash of Rs.18,00,000/-, was deposited out of the business income of Rs.27,00,000/- and opening balance of previous year. During the year, the assessee has offered income from business at Rs.15,50,000/- under section 44AD of the Act and shown total turnover of Rs.19,00,000/- and also income from other sources at Rs.11,58,300/- was offered for taxation which is more than 50% of the total turnover. The Assessing Officer noticed that the turnover shown was not supported by any bills and vouchers and has

treated as not genuine either in respect of turnover or in respect of quantum of net income shown under section 44AD of the Act. Accordingly, the Assessing Officer rejected the entire amount of Rs.27,00,000/- on account of business income shown by the assessee which was treated as unexplained money under section 69A of the Act in the hands of the assessee. The assessee also submitted the remaining amount the assessee has estimated income for the assessment year 2018-19 at Rs.14,57,200/- and paid advance tax on the aforesaid income before the action taken by the department. Being not satisfied with order so passed by the Assessing Officer, the assessee carried the matter before the first appellate authority.

6. The learned CIT(A) confirmed the order so passed by the Assessing Officer by observing as under:-

"4.1 A.Y. 2019-20

..... Grounds of appeal no.2, 3 and 4 are challenging the AO's decision that the business income of Rs.27,00,000/- shown by the appellant is unexplained money u/s 69 of the Act.

Facts and circumstances of the case for A.Y. 2019-20 are same as of the A.Y. 2018-19. In the return of income filed for A.Y. 2019-20, the appellant has offered business income of Rs.15,50,000/- u/s 44AD of the Act on total turnover of Rs.19,00,000/-, which is the net profit rate of 80%. As mentioned earlier, in the sworn statement recorded u/s 132(4) of the Act during the search operation the appellant had stated that she occasionally sit at her father's kirana stores run under her father's prop. Firm M/s. Shankar Kirana Stores and assists her father in that business. It is evident from the material available on record that she is not doing any independent business of her own. Therefore, the AO was correct in coming to the conclusion that the business

income of Rs.15,50,000/- is the abnormal profit on the fictitious turnover, in order to support cash deposit in the locker. The AO was correct in concluding that the business income of Rs.15,50,000/-, is nothing but the unexplained money u/s 69 of the Act. Accordingly, the ground of appeal no.2, 3 and 4 are "dismissed".

6.1 The assessee being aggrieved with the order so passed by the learned CIT(A), filed appeal before the Tribunal.

7. Before us, the learned Counsel, ShriManoj G. Moryani alongwith ShriBhavesh M. Moryani, appearing for the assessee, submitted that the assessee has shown better income as stated in section 44AD of the Act and there is no provision in the Income Tax Act, 1961, to reduce the income of the assessee and the aforesaid income was also supported by sales account a copy of which is placed at Page-5 to 12 of the Paper Book, which were also submitted before the Assessing Officer during the course of assessment proceedings. No mistake has pointed out by the Assessing Officer in his assessment order and the assessee has filed return of income under the presumptive taxation in order to avoid long drawn procession in small traders. The learned Counsel further submitted that since the assessee has shown under provisions of section 44AD of the Act, therefore, the question does not arise of making addition under section 69A of the Act. The learned Counsel further submitted the assessee was not covered under section

132 of the Act and the claim of the assessee is that the cash of Rs.33,00,000/- were found from locker of Ms. Nikita Tanwani, were belonged to the assessee and the same were out of his income earned for which return of income has already filed and cash in hand available as per Balance Sheet filed alongwith return of income, which is placed at Page-4 of the Paper Book. The learned Counsel further brought to the notice of this Bench that that during the assessment proceedings notice under section 153A of the Act was issued and in response to the notice the assessee immediately filed his return of income manually on 12th December 2019, and also electronically filed the same return of income on 14th August 2020, declaring net taxable income of Rs.9,78,300/-, a copy of which is placed at Page-13 to 18 of the Paper Book. The learned Counsel further submitted that the Assessing Officer has not accepted the contention of the assessee and without any basis with respect to the addition made at Rs.15,50,000, and treated the same as unexplained money under section 69A of the Act and charged income tax under section 115BBE of the Act. The learned Counsel submitted that though the provisions of section 69A of the Act is not applicable to the facts of the present case, but still the Department has charged income tax under section 115BBE of the Act which is

unjustified, unwarranted and excessive. The learned Counsel invited the attention of the Bench as to the provisions of section 69A of the Acts which is reproduced as under.

"S. 69A Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year"

8. The learned Counsel submitted that a plain reading of the aforesaid provisions of section 69A of the Act, depicts that the provisions of the said section are applicable when there is unexplained money, etc., and which are not recorded in the books of account of the assessee maintained by the assessee for any source of income. However, in the present case, the assessee is not maintaining any books of accounts and return of income has been filed under section 44AD of the Act. Therefore, provisions of section 69A of the Act are not applicable in the case of assessee. The learned Counsel, in support of his arguments relied upon the following case laws:-

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- i) *CIT v/s Surinder Pal Anand, Surinder Pal Anand, [2011] 242 CTR 0061 (P&H HC)*
- ii) *Dinesh Kumar Verma v/s ITO,, [2021] TaxPub(DT) 63 (Mum.Trib.)*
- iii) *Virender Kumar v/s ITO, ITA no.1100/Jp./2019, order dated 10.03.2021;*
- iv) *KadigariNarasimha Reddy v/s ITO, ITA no.581/Hyd./2013, order dated 30.11.2015;*
- v) *Shri Thomas Eapen v/s ITO, ITA no.451/Coch./2019, order dated 19.11.2019;*
- vi) *KokkarnePrabhakara v/s ITO, ITA no.1239/Bang./ 2019, order dated 11.09.2020;*
- vii) *Mr.Pradeep Jain v/s ITO, ITA no.8001/Del./2018, order dated 04.06.2019; and*
- viii) *Smt. KiranVallabhaiAhir v/s ITO, ITA no.65/Srt./2017, order dated 10.02.2020;*
- ix) *ACIT v/s Aggarwal Construction Co., [2007] 106 ITD 129 (Chd. Trib.);*
- x) *Om PrakashKarnani v/s ACIT, [2021] TaxPub (DT) 841 (Jp. Trib.).*

9. During the course of the appellate proceeding the learned Counsel, in support of his arguments relied upon the following case laws

- i) *Girish V. YalakkishettarSujatha Buildings v/s ITO [2020] 58 CCH 0073 (Bang.Trib)*

- ii) Honey Rahulan v/s ITO, ITA No. 150/Coch/2020 dated 09/06/2020*
- iii) Syed Khalid Saifullah v/s. ITO, [2020] TaxPub(DT) 2006 (Del-Trib);*
- iv) SaurabhMalhotra v/s. ITO, ITA No. 72/Agra/2016 dated 28/02/2018;*
- v) Syed Maqsoodulla v/s. ITO, ITA No. 397/Bang/2019 dated 11/09/2020*
- vi) Om PrakashKarnani v/s. ACIT [2021] TaxPub(DT) 0841 (JP-Trib);*
- vii) DineshkumarVerma v/s. ITO, ITA No. 1183/Mum/2019, dated 28/12/2020*

10. In view of the above, the learned Counsel for the assessee further submitted the assessee has already paid advance tax before any action taken by the Department for the A.Y. 2019-20 and estimated income for previous relevant to the A.Y. 2019-20 and paid advance tax. The learned Counsel humbly prayed that the addition made under section 69A of the Act by the Assessing Officer may kindly be deleted, as the return of income has been filed under section 44AD of the Act which is supported by sale register. The learned Counsel while concluding his arguments submitted that when the summons under section 131 of the Act has been issued to the assessee, the learned Counsel has filed detailed reply before the Dy. Director of

Income Tax (Hqs.), a copy of reply is placed at Page-1 to 9 of the Paper Book (Part-II) for the assessment year 2019-20. The learned Counsel further submitted that the return of income filed by the assessee before the action taken by the Department. The learned Counsel has already filed copy of acknowledgment of return of income for the A.Y. 2018-19 before the Dy. Director of Income Tax (Hqs.). The learned Counsel further drawn our attention that the learned Counsel already submitted copy of capital position for the previous year relevant to the assessment year 2018-19 before the Dy. Director of Income Tax (Hqs.) showing the cash balance kept in locker. The learned Counsel further submitted that the assessee has already paid advance tax. The learned Counsel further drawn our attention that as per question no.25 of the statement recorded on 27th November 2018, which is placed at Page-57 to 62 of the Paper Book, the assessee specifically stated that the aforesaid sum of Rs.33,00,000/- belongs to the assessee.

11. The learned Departmental Representative relied upon the order of the authorities below. The learned departmental representative also filed written submission stating that the statement U/s. 132(4) was recorded and same may kindly be considered. In the written

submission the department has accepted that the assessee has stated in the statement recorded U/s. 131 that the cash of Rs. 1,88,50,000/- were belonged to following family members.

S.No.	Name of Family Members	Relation with assessee	Amount
1.	ShankarlalTanwani	Father	50,00,000/-
2.	M/s. Shankar Kirana Store	Prop. business of Father	15,00,000/-
3.	AshaShankarlalTanwani	Mother	21,50,000
4.	Nikita ShankarlalTanwani	Assessee	33,00,000/-
5.	HarshaSantoshTanwani	Anti	19,00,000/-
		TOTAL	1,88,50,000/-

12. The main contention of the department is that the assessee has shown the abnormal amount of profit U/s. 44AD to explain the money found and seized from locker. In the written submission the department has further relied on statement recorded U/s. 131 of the Act. The contention of the departmental representative were that from the assessee has kept cash at Rs. 33,00,000/- in her locker and stated that the source of income is retail business. The departmental representative further stated that the assessee does not have any documents to prove cash found in the locker and stated that it is not possible to generate such huge amount of abnormal profit from such business and relied on the order of lower authorities.

13. The departmental representative further relied on further judgments.

- a. Ashok H. JariwalaVs ACIT [20017] 84 taxmann.com 196 (SC)/[2017 250Taxman 14 (SC), 2017-TIOL-236-SC-IT;
- b. Krish Kumar Vs ITO, [2019] 107 taxmann.com 464 (SC)/[2019] 265 Taxman 227 (SC);
- c. ArvindJarandhanPandeyVs ITO, [2019] 104 taxmann.com 127 (Bombay)/[2019] 262 Taxman 401 (Bombay);
- d. Fakir Mohmed Haji HasanVs CIT [2002] 120 Taxman 11 (Gujrat)/[2001 247 ITR 290 (Gujrat)/2001] 165 CTR 111 (Gujrat);
- e. CIT VsArunMalhotra [2014] 47 taxmann.com 385 (Delhi/[2014) 363 ITR 195 (Delhi);
- f. CIT Vs P. Mohanakala, [2007] 161 Taxman 169 (SC)/[2007] 291 ITR 278 (SC)/[2007] 210 CTR 20 (SC);
- g. CIT Vs G.S. Tiwari& Co., [2014] 41 taxmann.com 17 (Allahabad)/[2014] 220 Taxman 111 (Allahabad) (MAG)/[2013] 357 ITR 651;

14. The Learned Counsel for the assessee submitted that the only contention of department is that the assessee has shown abnormal amount of profit and not supported with bills and voucher but in the case of the assessee the income has been shown U/s. 44AD of the Act and supported sale register, which were already submitted by the

assessee during the course of assessment proceedings as well as during the course of appellate proceeding before the CIT(A).

15. The judgments cited by the department, it is found that facts mentioned in judgments are totally different as compared to fact of the assessee case, hence not considerable in case of the assessee.

- a) *In the case of Ashokbhai H Jariwala v/s ACIT (2017) 250 Taxman 14 (SC) relied upon by the departmental officers the ratio of the case speaks about contradictions in the statement of assessee and his sister as alleged by the department, the assessee filed SLP challenging the Order of High Court whereby the High Court held that where there was contradiction in statement of assessee and his sister with respect of ownership of actual amount in cash, seized cash would be included as unexplained income in hands of assessee under section 69A. So far as the case of assessee is concerned the aforesaid facts are totally different and not applicable in the case of the assessee and distinguish on fact itself.*
- b) *In the case of Hon'ble SC in Krishan Kumar vs. ITO (2019) 265 Taxman 227 (SC) relied upon by the departmental officers the ratio of the cases speaks about non-furnishing of details and explanation of source of deposits wherein the assessing officer had made addition of peak cash in hand of Rs. 36,80,00/- under section 68. However, AO obtained the copy of VAT return from department and found that sales figures were shown at Rs. 9 lakhs only and assessee had also filed Trading and Profit and loss account in the balance sheet with VAT return. It was held that Assessee filed an income tax return showing gross receipts of Rs. 9 lakhs and there were cash deposits of more than Rs. 37 lakhs in saving bank account. Though assessee tried to explain the*

source of cash deposits by taking a stand that actual sales were Rs. 29 lakhs instead of Rs. 9 lakhs, in absence of any evidence furnished by assessee, the same deserves rejection. The said case law is clearly distinguishable from the Appellant's since, the Appellant has filed return of income under section 44AD whereas in the caselaw relied upon by departmental representative the assessee has filed normal return of Income wherein it was mandatory for the assessee to maintain books of account and documents whereas as per section 44AD, Appellant is not under obligation to maintain books of accounts or documents. It was a fact that the appellant had not maintained books of account and that is why he had opted for 8% income as per section 44AD. The section also did not put obligation on the assessee to maintain books of account, in view of the fact that his income has been assessed as per section 44AD, he cannot be punished for not maintaining the same.

- c) *In the case of Hon'ble Bombay High Court in ArvindJanardhanPandey vs. ITO (2019) 262 TAXMAN 0401 (Bom-HC) the Assessee was engaged in the activity of securing admissions for students in various academic institutions upon payment of capitation fees in cash. During search operation, some incriminating documents were impounded and seized including a diary. Seized diaries contained various entries of payments allegedly made by assessee to various educational institutions. AO during post-search inquiries, sent several notices to assessee and called for various details such as full name and address of students on whose behalf such amount was collected and paid over to educational institutions. But, assessee did not supply such information and AO carried out estimation of assessee's income and made additions. Tribunal gave partial relief to assessee and reduced the additions to 20% of total cash payments by way of assessee's profit as against 25% estimated by CIT(A). It was held that in absence of assessee bringing on record any material to enable the*

revenue authorities to estimate the same with any degree of accuracy, revenue was left with no choice but to estimate the same on the basis of available material on record. What would be the calculation of percentage of amount that the assessee would have retained in himself, in such circumstances, would always be a matter of estimation. Thus, appeal of assessee was dismissed. The relied upon case is clearly distinguishable from Appellant's case. The facts laid down are not applicable to Appellant's as can be inferred from the facts. Further, the ratio laid down by the Hon'ble Court speaks about the obligation of assessee to produce or bring on record any material to enable revenue authorities to estimate whereas in Appellant's case no such obligation can be placed on account of section 44AD of the Income Tax Act, 1961.

- d) *In the case of Hon'ble Gujarat High Court in case of Fakir Mohmed Haji HasanVs CIT (2002) 120 Taxman 11 (Gujarat) the Assessee had been found in possession of gold and as such he was the owner of the said gold and value of the said gold was liable to be included in the income of Assessee because of the fact that no explanation regarding source from which investment in the said gold had been made, had been given by Assessee. It was held that Tribunal was perfectly right in holding that the value of the gold was liable to be included in the income of Assessee as the source of investment in the gold or of its acquisition was not explained and that Assessee was not entitled to claim that value of the gold should be allowed as a deduction from his income. The facts laid down are not applicable to Appellant's as can be inferred from the facts.*
- e) *In the case of Hon'ble Delhi High Court in case of CIT v/s ArunMalhotra (2014) 47 taxmann 385, AO made addition under section 69A, keeping in view that purchase transactions from ST and RC were not genuine and export transactions relating to ball pens were bogus.*

The said transactions were related to assessment year 1994-95, in which assessee had filed no return. AO observed that deduction under section 80HHC(4) was not available to assessee on failure to submit Form No. 10CCAC. CIT(A) held that purchase transactions were bogus, but export transactions were genuine and directed AO to recompute deduction under section 80HHC on basis of return filed by IGI successor company for assessment year 1995-96 and to determine disallowance under section 40A(3) required to be made. Thereafter, AO did not allow deduction under section 80HHC. On appeal, CIT(A) deleted said addition. Tribunal deleted the addition made by AO solely on the basis of statement of 'CP', the ostensible proprietor of 'ST' and 'RC' keeping in view that no evidence was found in course of search proceedings to held purchase and sale transactions were bogus and thus entire addition made was deleted. It was held that Tribunal failed to notice the facts found and recorded by AO and findings of CIT (A) in regard to validity of purchase and sale transactions. Further, in case statements of CP were debatable, it was also recorded that Tribunal had not decided the ground of appeal that assessee had not filed certificate as per section 80HHC(4) and, therefore, was not eligible for deduction in the said section. Hence, matter remanded to Tribunal to examine all evidences in detail and decide the matter afresh. The said case law is clearly distinguishable from the facts of Appellant's case In the instant case the return of income was filed by the Appellant under section 44AD declaring the cash position of Rs. 33,00,000/- whereas in the case relied upon by departmental representative no return of income was filed and also the transactions were alleged to be bogus whereas the same is not with the case of Appellant. Also, the transactions and the cash entries have been duly explained by the Appellant and Appellant's father.

- f) *In the case of CIT v/s P.Mohankala((2007) 291 ITR 278 (SC)), the caslaw speaks about the Assessing*

Officer, rejecting the explanation of the assessee's that the amounts credited in their respective accounts were gifts from NRI, proceeded to add it as the income of the assessee's from the undisclosed sources, on the ground that so called gifts were not real and genuine. On appeal, the Commissioner (Appeals) upheld the findings of the Assessing Officer. On further appeal, the Tribunal observed that the letters exchanged by the person who had sent foreign exchange to the assessee's only indicated that there was no love and affection between them and upheld the order of the Assessing Officer. The High Court re-appreciated the evidence available on record and substituted its own findings for that of the Tribunal and other authorities. The High Court came to the conclusion that reasons assigned by the Tribunal and other authorities were in the realm of surmises, conjectures and suspicions. In appeal to the Supreme Court, the revenue contended that re-appreciation of evidence and substitution of the findings by the High Court was impermissible and that when once explanation offered by the assessee's was found unsatisfactory, the sums credited in the books were to be charged to income-tax as the income of the assessee's. It was held by Hon'ble Supreme Court that the opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion. The factual matrix of the case is distinguishable since, the Appellant has submitted its return of income by showing opening cash balance at Rs. 3,65,000/- as per capital position. That the addition was made merely on the basis of suspicion. Also, the caselaws speaks about gift received from undisclosed sources as not real and genuine and the same cannot be applied to Appellant's case on the basis of distinguishable facts.

- g) *In the case of Hon'ble High Court of Allahabad (Lucknow Bench) of Commissioner of Income Tax v/s G.S. Tiwari & Co. (ITA No. 5 of 2008) the brief facts are that the*

assessee carried on the business as contractor for civil work of Public Works Department, Nagar Palika, and other Government Departments. The Assessing Officer (AO) had provided several opportunities to the assessee, but the assessee did not attend the proceedings, so the Assessing Office, after issuing the notice, has passed the assessment order under section 144, where he has made the addition pertaining to the sundry creditors to the tune of Rs. 23,14,417 by mentioning that the same were not verifiable on account of non-submission of details but the first appellate authority has deleted the addition by observing that since 8 percent net profit rate was estimated under section 44AD, no separate addition could be made. The first appellate authority also reversed the findings of the Assessing Officer in taking the status of assessee as "AOP" instead of "RF". Being aggrieved, the Department has filed the appeal before the Tribunal, who, vide its impugned order dated July 27, 2007, has upheld the finding of the first appellate authority regarding the application of net profit rate at 8 percent; and deletion of disallowance of sundry creditors. Still not being satisfied, the Department has filed the appeal. It was held that no point of time Respondent took stand that sundry creditors were referable to income of business which had been determined on estimate basis. Hence, Respondent must be held to had failed to establish that unexplained sundry creditors were referable to business income. Appellate Tribunal was not justified in deleting disallowance of unsubstantiated sundry creditors. Impugned order was liable to be set aside Appeal of department allowed. The finding of the said case is quite distinguishable from the Appellant's case as in the caselaw the additions were made on the basis of discrepancy found in the details submitted by the assessee. However, in the Appellant's case, all the required available details were submitted by the Appellant. In the case relied upon by departmental representative, the assessee has total contract receipts,

as per Form 16AA, Rs. 3,03,04,527 and it had wrongly estimated the profit as per section 44AD since, When the turnover is more than 40 lakhs then the provisions of section 44AD is not applicable. However, in the case, Assessing Officer, was inspired from section 44AD and applied the 8 percent net profit rate and made the addition on estimate basis on gross contract receipts. The assessee has shown the sundry creditors to the tune of Rs. 23,14,417/-. No information, as required by law, was furnished by the assessee pertaining to the sundry creditors. When it is so then further examination of the material is required.

Further, as already mentioned above, the assessee's case falls under section 44AD and hence, no obligation is there to maintain the books of accounts or documents. Therefore, the case law relied upon cannot be used against assessee.

16. We have considered the rival contentions perused the order of the authorities below and the material available on record. Following case laws have been relied upon by the learned Counsel for the assessee in support of his arguments:-

- i) *CIT v/s Surinder Pal Anand, Surinder Pal Anand, [2011] 242 CTR 0061 (P&H HC)*

Assessment being made under s. 44AD, 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 and therefore no addition under s. 68 was called for.

- ii) *Dinesh Kumar Verma v/s ITO,, [2021] TaxPub(DT) 63 (Mum.Trib.)*

Held-Maintaining books of account is since quo non for making addition under section 68. Since section 44AD does not obligate assessee to maintain books, provision of section 68 could not be invoked where assessee had filed return of income under provisions of section 44AD without maintaining books of account.

- iii) *Virender Kumar v/s ITO, ITA no.1100/Jp./2019, order dated 10.03.2021;*

Once under the special provision, exemption from maintaining of books of account has been provided and presumptive tax @8% 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 not nexus with the gross receipts. The stand of the assessee before Commissioner of Income Tax (Appeals) and the ITAT that the said mount of Rs. 14,95,300/- was on account of business receipts had been accepted. Learned counsel for the appellant with reference 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

- iv) *KadigariNarasimha Reddy v/s ITO, ITA no.581/Hyd./2013, order dated 30.11.2015;*

The first condition is that assessee should maintain the books of account. In the present case assessee estimates the income and hence, there is no need to maintain books of account. It falls in the first condition itself.

- v) *Shri Thomas Eapen v/s ITO, ITA no.451/Coch./2019, order dated 19.11.2019;*

The CIT(A) held that the provision of section 68 of the Act are not applicable to the case of the assessee. According to the CIT(A), the assessing officer gave a finding that the assessee was not maintaining books of account and therefore provisions of section 68 of the Act cannot be applied to tax the unexplained deposits in the Bank. However, the same can be taxed under section 69A of the Act. According to the CIT(A), quoting of wrong section is not fatal to the addition made and hence, it was held that the unexplained deposits in the bank account are assessable under section 69A of the Act

Further, it is fact on record that the assessee had not maintained books of account that is why he opted for 8% income as per section 44AD of the Act. The section also does not put obligation on the assessee to maintain the books of account, more so in view of the fact that his income has been assessed as per section 44AD of the Act.

- vi) *KokkarnePrabhakara v/s ITO, ITA no.1239/Bang./2019, order dated 11.09.2020;*

The similar issue also came for consideration before coaching bench of the tribunal in case of ThomosEapen in ITA No 451/Coch/2019 wherein it has been held that since scheme of presumptive taxation has been found in order to avoid long drawn crosses of assessment in cases of small traders or in cases of those businesses where incomes are almost are static quantum of all businesses assessing officer could have made addition under section 69A once he had carved out case out of glitches of provisions of section 44AD-In view of above decision once assessment of assessee was completed under section 44AD, there can not be any application of section 68/69A. Being so court direct the AO to delete the addition made by the AO and confirmed by the CIT(A)-Assessee's ground allowed.

- vii) *Mr.Pradeep Jain v/s ITO, ITA no.8001/Del./2018, order dated 04.06.2019;*

Since assessee is involved in small business activity and filed return of income under presumptive provisions under section 44AD of the I.T. Act, there was no justification to consider the sales of assessee to be bogus or to make addition of cash in hand as per details submitted by the assessee because A.O. did not bring any sufficient evidence on record to justify the ITA.No.8001/Del./2018 Mr.Pradeep Jain, Gurgaon. I, therefore, do not find any justification to sustain the addition. I, accordingly, set aside the Orders of the authorities below and delete the entire addition.

- viii) *Smt. KiranVallabhaiAhir v/s ITO, ITA no.65/Srt./2017, order dated 10.02.2020;*

The assessee has not maintained any books of accounts, hence such situation only net profit as per provisions of section 44AD of the Act is required to be estimated as net profit.

- ix) *ACIT v/s Aggarwal Construction Co., [2007] 106 ITD 129 (Chd. Trib.);*

Since the assessee has not maintained any books of account, hence, in such situation only net profit as per provisions of section 44AD of the Act is required to be estimated as net profit and not entire turnover or cash deposits reflected in the bank's account. Therefore, following the ratio laid down in case of CIT v/s PradipShantilal Patel (2014), 42 taxmann.com 002 (Guj.) wherein it was held that where the assessee admitted that the cash deposits pertains to his retail business but details and nature of business were not forthcoming from

the record, considering the total turnover of the assessee, net income to be determined u/s 44AD of the Act, the AO is directed to estimate net profit @ 8% of the total turnover of Rs.53,32,345 being cash deposit in the bank account. Accordingly, ground 1, 2, 3 of the appeal are partly allowed. In the result, appeal of the assessee is partly allowed.

- x) *Om PrakashKarnani v/s ACIT, [2021] TaxPub (DT) 841 (Jp. Trib.).*

It cannot be argued that statute has provided a rate which is not reasonable. Further, having regard to provisions of s. 44AD, which is overriding, it is not possible for the Revenue to argue that profit computed as per the section is not profit computed "in accordance with provisions of this Act" or that the legislature was unaware of provision of ss. 68, 69, 269SS, 269T, 140(3)metc, in the enactment of s. 44AD. Thus, reading entire scheme of the Act one has to hold that profit computed as per s. 44AD of the Act by application of flat rate in one recognized method of computation of total income or part of total income.

The learned Counsel for the assessee in support of his arguments further relied upon the following case laws:-

- i) *Girish V. YalakkishettarSujatha Buildings v/s ITO [2020] 58 CCH 0073 (Bang.Trib)*
- ii) *Honey Rahulan v/s ITO, ITA No. 150/Coch/2020 dated 09/06/2020*
- iii) *Syed Khalid Saifullah v/s. ITO, [2020] TaxPub(DT) 2006 (Del-Trib);*
- iv) *SaurabhMalhotra v/s. ITO, ITA No. 72/Agra/2016 dated 28/02/2018;*

- v) *Syed Maqsoodulla v/s. ITO, ITA No. 397/Bang/2019 dated 11/09/2020*
- vi) *Om PrakashKarnani v/s. ACIT [2021] TaxPub(DT) 0841 (JP-Trib);*
- vii) *DineshkumarVerma v/s. ITO, ITA No. 1183/Mum/2019, dated 28/12/2020*

17. It is admitted fact on record that the assessee has not been maintaining any books of account and opted to file return of income u/s 44AD of the Act. The assessee had already submitted copy of sale account before the Dy. Director of Income Tax (Hqs.) and also before the Assessing Officer as well as before the learned CIT(A). Provisions of section 44AD of the Act do not put obligation on the assessee to maintain the books of account, as the income has been assessed as per section 44AD of the Act. The addition made by the Assessing Officer under section 69A of the Act and there is no bar under section 44AD of the Act. The only fetter provided under section 44AD of the Act is the applicability of the provisions of sections 32 to 38 of the Act. The provisions of section 69A of the Act read as under:-

"Unexplained money, etc.

69A. Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained

by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year."

18. The fact of the case is that, the assessee had shown income before the action taken by the Department under section 44AD of the Act and shown higher income specified in the Act. Since the assessee is involved in a small business activity and filed return of income under presumptive provisions under section 44AD of the Act and the assessee had already submitted sales account before all the authorities and the assessee had also filed capital position along with the return of income showing the cash balance kept in locker. Considering the same as abnormal profit, the Assessing Officer has not educed sufficient evidence to show that the income of the assessee which falls under the provisions of section 69A of the Act. Since the assessee is not maintaining any books of account and in such situation only net profit as per provisions of section 44AD of the Act is required to be estimated as a net profit and not the entire turnover. The assessee submitted that the cash deposited pertains to his retail business. The

assessee filed the sales register which has not been discarded by any of the authorities below. Considering the total turnover sale of the assessee, net income determined under section 44AD of the Act shown by the assessee has to be accepted, as there is no provision in the Income Tax Act, 1961, to reduce the income of the assessee. It is also admitted fact that in the earlier years the department has accepted income U/s. 44AD of the Income Tax Act. The judicial precedences relied upon by the learned Counsel for the assessee also support the case of the assessee and the income determined under section 69A of the Act is directed to be treated as regular return of income of the assessee and returned income shown by the assessee is hereby directed to be accepted. Consequently, the grounds no.2, 3, 4, 5, 6 and 7, are allowed in terms indicated above.

19. Ground no.8, raised by the assessee relates to levy of interest under section 234A, 234B and 234C of the Act.

20. Since the additions made by the authorities below are deleted by us as aforesaid, levy of interest u/s 234A, 234B and 234C of the Act being consequential in nature, hence imposing interest under these sections does not arise. This ground is dismissed.

20. In the result, assessee's appeal is partly allowed.

Order pronounced in the open court on 8/6/2022

Sd/-

Sd/-

(ARUN KHODPIA)
ACCOUNTANT MEMBER

(SANDEEP GOSAIN)
JUDICIAL MEMBER

NAGPUR,

DATED: 8/ 6/2022

***Mishra**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Nagpur City concerned;*
- (5) *The DR, ITAT, Nagpur;*
- (6) *Guard file.*

By Order

Assistant Registrar

ITAT, Nagpur