

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकर अपील सं./ITA No. 41/SRT/2020

Assessment Year: (2011-12)

(Physical Court Hearing)

Vipulbhai Labhubhai Sutariya, A-68, Shanti Niketan Society, Nr. Dharam Jivan Row House, Mota Varachha, Surat-395006.	Vs.	The CIT(A)-1, Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: CHOPS 2930 J		
(Appellant)		(Respondent)

Assessee by	Shri Kiran K. Shah, AR
Respondent by	Shri Vinod Kumar, Sr. DR
Date of Hearing	27/05/2022
Date of Pronouncement	23/08/2022

आदेश / O R D E R

PER DR. A. L. SAINI, AM:

Captioned appeal filed by the Assessee, pertaining to Assessment Year (AY) 2011-12, is directed against the separate orders passed by the Learned Commissioner of Income Tax (Appeals)-1, Surat [in short “the ld. CIT(A)”] in Appeal No. CIT(A), Surat-1/10668/2018-19, dated 19.07.2019 which in turn arises out of an assessment order passed by the Assessing Officer under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”), dated 30.11.2018.

2. Grounds of appeal raised by the assessee are as follows:

- “1) The learned CIT(A) grossly erred in assuming 12% profit instead of 8% profit though the return of income was filed as per provisions of section 44AD of the Act.
- 2) The learned CIT(A) grossly erred in not reducing the credit of cash against withdrawal of cash from the bank while estimating turnover of the assessee.
- 3) The appellant reserves right to add, alter or withdraw any grounds of appeal.”

3. At the outset, we note that appeal filed by the assessee is barred by limitation by 143 days. The assessee moved a petition requesting the Bench to condone the delay. The Ld. Counsel for the assessee submitted that assessee has deposited the appeal fee for filling appeal before the Tribunal on 07.09.2019 that within 60 days from the receipt of the order of Id CIT(A), this clearly shows intention of the assessee to file appeal on time. However, the assessee did not send Form No. 36 on time, to his advocate`s office, therefore delay has occurred. The Ld. Counsel also submits that due to late signing Form No. 36 by the assessee, the delay has occurred. Therefore Ld. Counsel contended that delay may be condoned.

4. On the other hand, Learned Departmental Representative (Ld. DR) for the Revenue strongly opposed the plea taken by the assessee and submitted that assessee was sleeping over their rights, hence delay should not be condoned.

5. We have heard both the parties on this preliminary issue. We note that assessee has deposited the appeal fee of Rs.10,000/- on 07.09.2019 i.e. within the 60 days from the receipt of order of Id. CIT(A). This shows clear intention of the assessee to file appeal on time, however Form No. 36 was not signed by assessee on time therefore it was delivered in the office of the Chartered Accountant of the assessee very late, therefore, delay of 143 days has occurred. We note that assessee has deposited appeal fee timely at Rs.10,000/- and therefore there was no mala-fide intention to file the appeal late to take undue advantages or to defraud the revenue. The assessee, wants to pursue the appeal by depositing appeal fee on time. Hence, based on this factual position, we condone the delay and admit the assessee`s appeal for adjudication on merit.

6. Succinct facts are that assessee had filed Income Tax Return showing income Rs.1,54,540/-. The assessing officer gathered information that bank account of assessee showed transactions totaling to Rs.1,62,10,799/- which

were not disclosed by the assessee. Hence, assessing officer issued notice u/s 148 of the Act. In response, the assessee filed Income Tax Return showing income of Rs.7,21,242/- (i.e. Rs.5,66,702/- more than income declared in original Income Tax Return). In scrutiny u/s 143(3) r.w.s. 147, the assessee explained that he is dealing in cement and the transactions appearing in bank account are the business transactions of his cement dealership. The assessing officer accepted this explanation, however he did not agree with income shown. Therefore, assessing officer estimated income @ 12% of total deposits in bank i.e. Rs.1,62,10,799/- and made addition of Rs.12,24,053/- (Rs.19,45,295 - Rs.7,21,242 income already declared by assessee).

7. On appeal, Id CIT(A) partly allowed the appeal of the assessee. Aggrieved, the assessee is in further appeal before us.

8. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the Id. CIT(A) and other material brought on record. We note that solitary grievance of the assessee is that estimated addition should be at the rate of 8% instead of 12 %. Learned Counsel for the assessee submits that learned CIT (A) grossly erred in assuming 12% profit instead of 8 % profit though the return of income was filed by assessee as per provisions of section 44AD of the Act, therefore, Id Counsel prays the Bench that estimation of income may be at the rate of 8%. On the other hand, Learned DR for the Revenue submitted that assessee has hide his income therefore estimation of income should be at the rate of 12%. We note that assessing officer has adopted a rate of 12% because the assessee himself has declared profit on turnover at 12%. Hence, this grievance is ill founded, as noted by Id CIT(A). The Id CIT(A) has held that the cheques returned cannot be treated part of turnover. Hence, he directed assessing officer to reduce the same. Thus, the correct turnover is Rs. 1,51,26,039/- and income @ 12% on the

same is Rs.18,15,125/-. Therefore, the addition was confirmed to the extent of Rs.10,93,883/- (Rs.18,15,125- Rs.7,21,242) by Id CIT(A).

9. Considering the nature of business and voluminous of sales, we hold that the declared percentage for the year under consideration is higher side. The estimation of profit is done normally keeping in mind the following facts:

- (i) The estimate is not opened up to be framed in an arbitrary manner.
- (ii) The estimate by rule of thumb is absolutely infirm.
- (iii) The estimation of rate of profit return must necessarily vary with the nature of the business.
- (iv) There cannot be any uniform yardstick.
- (v) An assessment to be best of judgement can only be based on the material available on record and past records and considering the totality of the facts.
- (vi) Only real income and neither notional income nor astronomical income, can be taxed under the I.T. Act, 1961.

10. It is a settled Law that, only the real income has to be taxed. It is the duty of the tax authorities to act properly and judiciously. As per CBDDT circular dated 03.11.1955 cited in Choksi vs CIT (107 ITR 363) and also as held in the decisions of CIT vs. Ahemndabad Miles (128 ITR 486), CIT vs/ Mattu (139 ITR 1020), CIT vs. Mahalaxmi Mills (160 ITR 920) (SC) CIT vs/ Anger Pressings (161 ITR 159) (SC) and other such cases, it is the duty of the Assessing Officer to draw attention of the assessee to the deductions, relief, and refund to which, he / she himself / herself to be entitled, under facts of the case, if assessee is omitted to make the claim. Just because, assessee has accepted 12% profit on Turnover by mistake does not mean that it is his real income. We note that the return of income was filed by assessee as per provisions of section 44AD of the Act, wherein estimation of income is at the rate of 8% on turnover. Therefore, considering these facts, we direct the assessing officer to estimate income at the rate of 8% of turnover of Rs. 1,51,26,039/-.

11. In the result, appeal filed by the assessee is partly allowed.

Order is pronounced in the open court on 23/08/2022 by placing the result on the Notice Board as per Rule 34(5) of the Income Tax (Appellate Tribunal) Rule 1963.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

सूरत /Surat

दिनांक/ Date: 23/08/2022

SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

// TRUE COPY //

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Surat