

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H', NEW DELHI**

**BEFORE SH. N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. KUL BHARAT, JUDICIAL MEMBER**

ITA No.1107/Del/2021
Assessment Year: 2011-12

Puneet Jain L.M. Agarwal & co. (CA) KA- 32, Kavi Nagar, Ghaziabad PAN No.AEAPJ7349M	Vs	Pr. CIT Ghaziabad
(APPELLANT)		(RESPONDENT)

Appellant	Sh. L. M. Aggarwal, CA Sh. Deepanshu Aggarwal, CA
Respondent	Sh. M. Baranwal, CIT DR

Date of hearing:	21/11/2022
Date of Pronouncement:	23/11/2022

ORDER

PER N.K. BILLAIYA, AM:

This appeal by the assessee is preferred against the order of the Pr. CIT, Ghaziabad dated 18.03.2020 framed u/s. 263 of the Act.

2. The sum and substance of the grievance of the assessee is that the CIT(A) erred in assuming jurisdiction u/s. 263 of the Act and further erred in issuing direction to the AO against the valid assessment framed u/s. 147 r.w.s. 143 (3) of the Act.

3. Representative of both the sides were heard at length. Case records carefully perused.

4. Briefly stated the facts of the case are that the original return of income was filed on 21.06.2011 declaring income of Rs.159880/-. Proceeding u/s. 147 of the Act were initiated by issue of notice u/s. 148 of the Act on 26.03.2018. The assessee was asked to explain cash deposits aggregating to Rs.5364835/- in the bank account. In his reply the assessee stated that he was doing a business as commission agent at Kirana Mandi, Ghaziabad and the cash deposited in the bank account represented sale proceeds of goods on which the assessee has declared profit @ 8 % u/s. 44 AD of the Act. After discussion the assessment was completed on total income of Rs.4.30 lacs after making an addition of Rs.270120/-.

5. Assuming jurisdiction conferred upon him by the provision of section 263 of the Act the Pr. CIT issued notice dated 03.01.2020 as under :-

(i) It is evident from the material placed on record that you have opted for presumptive scheme of section 44 AD of the IT Act, 1961. However, your A. R. in his written submission dated 21.05.2018, has very categorically stated that "the assessee doing commission agent business for the principal in Kirana Mandi, Ghaziabad and

purchase goods from Ghaziabad Kirana Mandi for nearby Distt. Retail shopkeepers and send the goods by transport to the customer shopkeepers who deposit the petty cash payment of the goods in cash by depositing the same in bank account of the assessee in Bank of Baroda.” The AO has not appreciated that the provisions of section 44AD (6) (ii) of the I. T. Act, 1961 have categorically debarred persons earning income in the nature of commission or brokerage from opting for the scheme of section 44AD of the IT Act, 1961. The AO was, therefore, duty bound to confront you regarding the above noted legal situation and he should have, accordingly insisted on production of books of account and relevant documents, and he should have examined the same. Further, there is no order sheet entry also which may indicate that the A.O. ever insisted on production of books of account. The A.O. should have initiated penalty u/s. 271 A of the Act, 1961 for non maintenance of books of accounts etc.

(ii) The AO’s passive attitude throughout the assessment proceedings and his failure to make proper enquiries have rendered the assessment order passed by him to be susceptible to be erroneous is so far as it is prejudicial to the interest of the Revenue. The Hon’ble Delhi High Court, in the case of Gee Enterprises Vs. Addl. CIT (1975) 99 ITR 375 (Del.) has held that the word erroneous includes cases

where AO has remained passive and he has failed to ascertain true facts by making necessary enquiries.

6. In his reply the assessee reiterated that being a commission agent he has filed the return u/s. 44 AD of the Act. After considering the facts and the submissions the Pr. CIT concluded as under :-

“I have gone through the assessment record, including the assessment order, as well as the response of the assessee to the show cause notice u/s 263 issued by me. In his reply dated 21.05.2018 submitted before the A.Q., in response to query no. 2, the assessee has clearly stated that he is doing commission agent business for the principal in Kirana Mandi. Ghaziabad Copy of the said reply is enclosed as Annexure-A to this order. Since the assessee has himself conceded that he is a commission agent and since sub-section-6, clause (ii) of section 44AD clearly excludes persons earning income in the nature of commission from the applicability of section 44AD, the order passed in the assessee's case by the ITO, Ward-2(1), Ghaziabad is erroneous and prejudicial to the interest of the Revenue. The judgements of Hon'ble Courts relied upon by the assessee are not applicable to the facts of his case e.g., the assessee has placed reliance on the judgement of the Hon'ble Supreme Court in the case of M/s. Malabar Industrial Company Ltd., vs. CIT (2000) 109 Taxman 66. However, in that case the Hon'ble Court had observed that “..... when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may

not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the Assessing Officer is unsustainable in law” whereas in the instant case there are no two views possible. The assessee has unambiguously stated that he was doing commission agent business and section 44AD (6)(ii) categorically excludes such business from the applicability of section 44AD.”

7. Before us the Counsel for the assessee vehemently stated that there is no error in the assessment order making the assessment order erroneous and pre judicial to the interest of the revenue. The Counsel further stated that the assessee has furnished complete details in support of his claim. The DR strongly supported the findings of the Pr. CIT.

8. We have given a thoughtful consideration to the rival submissions. The undisputed fact is that cash amounting to Rs.5364835/- was found to be deposited in the bank account of the assessee. It is also not in dispute that prior to receiving the notice issued u/s. 148 the assessee had filed return of income declaring of Rs.159880/-. Only after receiving the notice u/s. 148 the assessee revised the return claiming that his income is subject to presumptive tax u/s. 44 AD of the Act and treating the cash deposit as his business receipt he returned profit @ 8% u/s. 44 AD of the Act.

9. This action of the assessee was accepted by the AO without realising that provisions of section 44AD of the Act do not apply to a commission agent thereby making the assessment order erroneous in law and because of this error the AO did not examine the cash deposit of Rs.5364835/- making the assessment order pre judicial to the interest of the revenue.

10. On finding these errors the Pr. CIT rightly assumed the jurisdiction cast upon him by the provisions of section 263 of the Act, therefore, we do not find any error or infirmity in the findings of the Pr. CIT. The appeal of the assessee is accordingly dismissed.

Order pronounced in the open court on 23.11.2022

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

NEHA, Sr. Private Secretary

Date:- .11.2022

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI