

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT “SMC” BENCH,
SURAT

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

आ.अ.सं./ITA No.271/SRT/2022 (AY 2010-11)

(Hearing in Physical Court)

Ravindranath J. Mishra Flat No.204, C-2 Sai Shraddha Residency, Nr. Amigo Industries, Morai Village, Tal- Vapi, Dist. Valsad-396191 PAN : AIFPM 8338 N	Vs	Income Tax Officer, Ward-7 Vapi, Room No. 810, 8 th Floor, Fortune Square-II, Daman Road, Chala, Vapi-396191
अपीलार्थी/ Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से /Assessee by	Ms. Krinjal Bhuta, C.A
राजस्व की ओर से /Revenue by	Shri Vinod Kumar, Sr-DR
सुनवाई की तारीख/Date of hearing	29.12.2022
उद्घोषणा की तारीख/Date of pronouncement	29.12.2022

Order under section 254(1) of Income Tax Act

Per PAWAN SINGH JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of National Faceless Appeal Centre (“NFAC” for short) /Ld.CIT(A)] dated 26.11.2021 for assessment year (AY) 2010-11, which in turn arises out an assessment order passed by Assessing Officer under section 144 r.w.s. 147 of the Income Tax Act, 1961 (‘the Act’) vide order dated 29.09.2017. The assessee has raised the following grounds of appeal:-

“1.The Ld. Commissioner of Income Tax (Appeals)-NFAC, erred in passing the order u/s 144 without exercising best judgment and completely ignoring the submissions made by the appellant

before the CIT(Appeals), Valsad vide the letter dated 29th January, 2019.

2. Without prejudice to the above, the Ld. CIT(A)-NFAC erred in confirming the order of AO passed u/s 144 made without application of best of his judgment as required u/s 144 of the Income Tax Act, 1961. The Ld. CIT(A) ought to have considered the cash withdrawals and cheque payments and restricted the addition to a reasonable profit of 8% as laid down u/s 44AD of the Act.

3. The Ld. Commissioner of Income Tax (Appeals) erred in confirming the additions made by the AO amounting to Rs.8,96,080/- as contractual receipts under the incorrect presumption of facts and ignoring that the amount was already offered to tax in the return of income filed by the appellant.

4. Without prejudice to the above, the Learned Commissioner of Income Tax (Appeals) erred in confirming of action of Ld. AO of charging interest u/s 234A, 234B and 234C of the Income Tax Act, 1961 totalling to Rs.4,27,541/- failing to appreciate that notice u/s 148 to file return of income was not received and therefore return u/s 148 was not filed by the appellant.

5. The Appellant prays:

i) That the notice u/s 148 for re-opening and other notices were not received and the appellant did not get opportunity to be heard and appellant prays for natural justice.

ii) That if at all the addition is to be made, the Ld.AO be directed to restrict it to presumptive tax rate of 8% of cash sales after considering cash and cheque expenses.

iii) That the benefit of basic exemption limit ought to be given while calculation of assessed income.

iv) That the interest u/s 234A and 234C ought to be deleted and interest u/s 234B ought to be corrected as return u/s 148 was not filed because of unawareness.

v) That the demand be stayed till the disposal of order by your honours.

vi) Any other relief your honours may deem fit.

6. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal.”

2. On perusal of record shows that NFAC/Ld. CIT(A) passed impugned order on 26.11.2021, however, present appeal was filed by assessee before Tribunal on 20.09.2022, the registry has calculated delay of 42 days in filing appeal before Tribunal. The assessee has filed his affidavit for condoning such delay. The Ld. Authorized Representative (Ld.AR) for the assessee submits that the order of NFAC/Ld. CIT(A) was not received by assessee and the assessee was not aware about passing of said impugned order though the assessee has given e-mail portal in Form-35 (Appeal Form before Ld. CIT(A)) of his ex-employer, if any, about sending order was not communicated to assessee's e-mail portal. The assessee received demand notice on 01.06.2022 as well as penalty notice of 10.06.2022 and came to know that appeal of assessee has been dismissed. Thus, the period of limitation is to be counted from June 2022. The ld AR for the assessee further submits that the assessee is a layman and earned

very meagre income. The Ld. AR for the assessee submits that assessee has a good case on merit and would suffer prejudice if the delay in filing of assessee's appeal is not condone. The Ld. AR for the assessee submits that there is no deliberate delay in filing the appeal before the Tribunal and same may be condoned.

3. On the other hand, Ld.Senior Departmental-Representative (Ld.Sr-DR) for the Revenue after going through the affidavit filed by assessee and hearing the plea of Ld. AR for the assessee fairly submits that the Bench may take proper view in accordance with law.

4. I have considered the submission of both the parties and perused the materials available on record. I find that main contention of Ld. AR for the assessee is that assessee came to know about the passing of impugned order only on 01.06.2022 when a demand notice, which was subsequently followed penalty notice under section 27(1)(c) of the Act. The assessee has filed appeal before Tribunal on 20.09.2022. Thus from the date of knowledge of dismissal of appeal of assessee by NFAC/Ld. CIT(A) after 42 days. Considering the fact that assessee has filed his affidavit and stated on oath

that he was not served with the impugned order passed by NFAC/Ld. CIT(A) and came to know about dismissal of appeal only on receipt of tax demand notice and thereafter, filed present appeal. Considering the fact that when technical consideration and cause of substantial justice are pitted against each other, the cause of substantial justice should be prevail. Thus, considering the facts of delay in filing of assessee's appeal is condoned. Now adverting the merit of the case.

5. Brief facts of the case that assessee's case was re-opened for assessment year 2010-11 by recording reasons that as per details in ITS data, the assessee has received contractual receipt of Rs.8,95,080/- from Paras Pumps Pvt. Ltd. The Assessing Officer further recorded that no return of income was filed by assessee for assessment year under consideration. On the basis of information available on ITS data, the Assessing Officer was of the view that income of assessee has escaped assessment to the extent of contractual receipt of Rs.8,95,080/-. Notice under section 148 of the Act was issued and served upon the ae on 31.03.2017. The Assessing Officer recorded that no

response was made on the part of assessee. The Assessing Officer issued notice under section 133(6) to Paras Pumps Pvt. Ltd., wherein it was confirmed that assessee performed the duty (contractual obligation) and all payments were made to him.

6. The Assessing Officer further noted that several notices issued to the assessee and on the basis of statement reflected in Form 26AS about contractual payments of Rs.8,96,080/-. The Assessing Officer made addition of entire sum.
7. Aggrieved by the addition in the assessment order passed on 29.09.2017, the assessee filed appeal before Ld. CIT(A). The appeal of assessee was migrated to NFAC/Ld. CIT(A). The assessee filed written submission along with documents while filing his appeal. In the written submission, the assessee stated that during the year under consideration, the assessee stated that during the year under consideration, the received gross receipt to the tune of Rs.8,96,080/- from Paras Pumps Private Limited, though assessee filed his return of income and he has filed his return manually on 05.11.2022 in the office of Income Tax

Officer, Ward-3 Vapi, copy of acknowledgement was provided. The case was re-opened solely on the reasons that assessee has not filed his return of income and notice under section 148 was issued on 31.03.2017. The addition was made by Assessing Officer for the want of compliance and entire contractual receipts was added to the income of the assessee, which is once again added to the total income of assessee.

8. The NFAC/Ld. CIT(A) after considering the submission of assessee noted that claim of assessee that he has filed his return manually for assessment year 2010-11, but the assessee failed to provide copy of such return with acknowledgement. The assessee failed to discharge onus by producing cogent evidence and explanation thereto. The NFAC/Ld. CIT(A) further held that assessee failed to produce books of account, audit report and invoice with documentary evidence that in absence of evidence the addition made by Assessing Officer was confirmed. Further aggrieved the assessee has filed present appeal before the Tribunal.

9. I have heard the submissions of Ld. AR for the assessee and of Ld. Sr-DR for the Revenue and have gone through the order of lower authorities carefully. The Ld. AR for the assessee submits that during the relevant financial year, assessee was working with Paras Pumps Pvt. Ltd., the assessee was providing contractual labour for job work to Paras Pumps Pvt. Ltd. and received total contractual receipt payment of Rs.8,96,080/-. The assessee filed return and offered 12.5% of income earned from such contractual receipt, unfortunately, the copy of return is not available with assessee. However, the assessee is having acknowledgement number, which was mentioned by him while filing his return of income for subsequent assessment year, i.e. 2011-12. Since the assessee could not furnish details, the lower authorities made addition of entire contractual payments. The assessee was working under Paras Pumps Pvt. Ltd. who deducted Tax Deducted at Source (TDS) of Rs.8,960/- while making payment of Rs.8,96,080/-, copy of Form 26AS is placed on record.
10. The Ld.AR of the assessee submits that though return was already filed before ITO, Ward-3, Vapi and case of assessee

was reopened by Assessing Officer by recording reasons that no return of income was filed. Thus, the reasons recorded itself was not valid reason. On merit, the Ld. AR of the assessee submits it is settled law that entire contractual receipt cannot be treated as income and only income component on presuming net profit @ 8% as prescribed in under section 44AD would be taken as an estimation of income. To support her submission, Ld. AR of the assessee relied upon following case law:

- Nishikant T Patne vs. Assistant Commissioner of Income-tax, Circle-3 [2013] 36 taxmann.com 540 (Pune-Trib.)/[2013] 60 SOT 146 (Pune-Trib.)[15-07-2013]
- Commissioner of Income-tax-XII vs. Subodh Gupta [2015] 54 taxmann.com 343 (Delhi)/[2015] 229 Taxman 367 (Del)[09-12-2014]
- Commissioner of Income-tax (Central) Nagpur vs. Premkumar Arjundas Luthra (HUF)* [2016] 69 taxmann.com 407 (Bom)/[2016] 240 Taxman 133 (Bom)/[2017] 297 CETR 614 (Bom)[25-04-2016]
- Brij Bhushan Lal Parduman Kumar vs. Commissioner of Income Tax [TS-5019-SC-1978-O], (1978) CTR (SC) 0134,(1978) 115 ITR 0524 Civil Appeals No. 1701 to 1703 of 1974 dated 06.10.1978

11. Ld. AR for the assessee submits that if assessee has already offered 12.5%of income against total contractual receipt while filing his return of income. Thus no addition is liable to be sustained.

12. On the other hand, Ld. Sr-DR for the Revenue submits that assessee failed to file copy of acknowledgement of return of income as claimed by Ld. AR of the assessee either before Assessing Officer for assessment proceedings or before NFAC/Ld. CIT(A). The NFAC/Lt. CIT(A) confirmed the addition in absence of any evidence. The Ld. Sr-DR for the Revenue submits that order of lower authorities may be sustained.

13. I have considered the rival submissions of both the parties and have gone through the orders of lower authorities carefully. I find that case of assessee was reopened on the basis of ITS data information that assessee has receipt contractual payment of Rs.8,96,080/-. On such information, the Assessing Officer recorded reasons that income of assessee to the extent of contractual payment as escaped assessment. It is not disputed that in response notice under section 148, the assessee neither filed return nor responded to various notices. However, before NFAC/Ld. CIT(A) the assessee in his statement of fact and in written submission submitted that assessee received gross receipt of Rs.8,96,080/- from Paras Pumps Pvt. Ltd.

The assessee also stated that entire contractual receipt was declared by assessee while filing his return of income for assessment year 2010-11 and such fact are duly recorded by NFAC/Ld. CIT(A).

14. I find that NFAC/Ld. CIT(A) despite that while recording such fact has not directed the Assessing Officer to find out the fact, whether the assessee has filed return of income or not. The NFAC/Ld. CIT(A) confirmed the addition of entire contractual receipt. It is settled law that entire receipt cannot be treated as income and I find that Hon'ble Delhi High Court in the case of Commissioner of Income-tax-XII vs. Subodh Gupta [2015] 54 taxmann.com 343 (Del) held that in absence of material to show net profit rate, presumptive net profit rate of 8% as stipulated in section 44AD could be taken for estimation of income. Hence, considering the facts and circumstances of the present case, I direct the Assessing Officer to restrict the addition to the extent of 8% and re-compute the assessment in terms of above condition. In further direct the assessing officer that in case no set off of TDS is given in response to the

original return of income the assessee be granted set off of
TDS in the credit of assessee.

15. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 29/12/2022.

Sd/-
(PAWAN SINGH)
[न्यायिक सदस्य **JUDICIAL MEMBER**]

सूत /Surat, Dated: 29/12/2022

Dkp. Out Sourcing Sr.P.S

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

By order

// True Copy //

Sr.P.S./Assistant Registrar, ITAT, Surat