

**IN THE INCOME TAX APPELLATE TRIBUNAL PATNA BENCH
VIRTUAL HEARING AT KOLKATA**

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.48& 68/Pat/2020
Assessment Year: 2013-14**

North Bihar Distributor Line Bazar, Sadar, Purnea- 854301 (PAN: AAEFN8074F)	Vs.	Income Tax Officer, Ward-3(1), Purnea.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri R. K. Jha, CA
Respondent by : Shri Rupesh Agrawal, Sr. DR

Date of Hearing : 08.05.2023
Date of Pronouncement : 22.05.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

Thesetwo appeals filed by the assessee are against the order of Ld. CIT(A), Bhagalpur vide Memo No. CIT(A)/BGP/10169/2018-19/919-923 dated 04.07.2019 against the order of ITO, Ward-3(1), Purnia u/s. 143(3)/147 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 26.10.2018 for AY 2013-14.

2. We note that both the appeals by the assessee are against the same, one order of Ld. CIT(A). Date of filing of these two appeals are different i.e. 24.06.2020 for ITA No. 68/Pat/2020 and 26.08.2020 for ITA No. 48/Pat/2020. Certain defects were pointed by the registry in the appeal filed on 29.06.2020. While removing the defects, another appeal has been filed by the assessee and taken on record by the Registry which otherwise ought to have been done in the first original appeal filed on

24.06.2020. Accordingly, we take up both the appeals together for adjudication. At the same time, we direct the registry as well as the assessee to avoid such duplicity.

3. Appeal of assessee is time barred by 238 days for which petition for condonation of delay is on record. From the petition filed by the assessee, we note that certain medical exigencies arose with the spouse of the Ld. AR of the assessee. Important fact which is placed before us is that assessee had deposited the fee on 05.09.2019 for filing the appeal before the Tribunal, immediately when the impugned order was served on 05.09.2019, which adequately demonstrates the intentions of the assessee to file the appeal within the prescribed limitation. Considering these facts, we condone the delay in filing the appeal before us and take up the matter for adjudication.

4. Grounds taken by the assessee are:-

(a) in ITA No. 48/Pat/2020:

1. *For that the appellate order passed u/s. 250 of the Act is bad in law.*
2. *For that the ld. CIT(appeals) has not been justified in confirming the order passed by the ld. AO u/s. 143(3)/147 of the Act.*
3. *For that the Ld. CIT(Appeals) has not been justified in confirming the profit of Rs.3,73,827/- which is estimated @ 8% of the Gross receipt.*
4. *For that the Ld. CIT(Appeals) has not been justified in confirming the initiation of penalty proceedings u/s. 271B of the Act.*
5. *For that the Ld. CIT(Appeal) has not been justified in confirming the initiation of penalty proceedings u/s. 271(1)(c) of the Act.*
6. *For that the humble appellant craves leave of the Hon'ble ITAT to take, raise, press, plead and/or argue any other ground or grounds which may arise during the course of hearing of the appeal. "*

(b) in ITA No. 68/Pat/2020:

1. *The learned AO & CIT (A) have grossly erred in taking an assumption that the ITR was filed invoking provisions of section 44AD of*

the act, the assessee on the other hand has already submitted through their AR that no such presumptive basis of taxation was resorted to neither could such provision attract since complete record keeping was being done, and that such books of accounts were furnished when the AO required the same to be done, Non Audit of the books of accounts does not automatically cause application of the deeming provision of section 44AD and that any addition based on such flimsy grounds is prejudicial to the assessee and fit to be deleted.

2. The Learned AO & CIT (A) have failed to appreciate that non audit under section 44AB of the Act could carry a penalty as proposed in that respective section and does not trigger the application of presumptive basis of calculation of Income based on turnover as proposed under section 44AD of the Act. Such arbitrary addition without rejecting the books of accounts specially where the AO found to his satisfaction the information asked for viz books of accounts, and related bills and vouchers is not tenable in law, and therefore liable to be quashed,

3. That for reasons recorded in writing the said assessment order is impugned and the addition of Rs. 2,04,540/- is bad in law fit to be set aside,

4. To urgent any other ground or alter the existing grounds of appeal, submission and or citations of circulars/notifications/judicial or quasi judicial pronouncements/judgments etc. at the time of hearing and we pray for the admissibility of it with your learned self's permission”

5. Brief facts of the case are that assessee is a partnership firm engaged in the business of wholesale trading of medicine. Return of income was filed on 05.09.2018 reporting total income of Rs. 1,300/- after claiming deduction towards remuneration and interest paid to partners. In the course of assessment proceedings assessee produced bank account statement, sale register, purchase register, computation of income and same was verified, as noted in the assessment order by the ld. AO.

5.1. Assessee was asked to explain the reason for non-audit of books of accounts since income reported by the assessee is less than 8% of its gross receipts / turnover. In this respect, it was submitted that assessee did not file its return of income claiming profit u/s 44AF. Return of income was filed after claiming deductions u/s 30 to 38 of the Act in the profit and loss account including interest and salary paid to partners.

Therefore, question of reporting net profit u/s 44AF does not arise. Its gross receipts from the wholesale business of medicines is Rs. 46,72,241/-. Book profit is Rs. 1,69,494/- from which deduction for salary and interest paid to partners of Rs. 1,68,199/- has been claimed, reporting Rs. 1,295/- as total income for the year under consideration.

5.2. Ld. AO drew attention to the provisions of section 44AD(5) according to which if an assessee claims that the profits from the business are lower than the profits and gains as specified in sub section (1) then, the assessee shall be required to keep and maintain such books of accounts and get them audited and furnish a report of such audit as required u/s.44AB of the Act. According to ld. AO, in the instant case, since assessee had disclosed profitability of less than the presumptive rate of taxation of 8%, it was supposed to maintain the books, get them audited and furnish a report of such audit.

5.3. Ld. AO estimated the profitability @8% on the turnover of Rs.46,72,841/-, which comes to Rs.3,73,827/-. After reducing the book profit of Rs.1,69,494/- as reported, the balance amount of Rs.2,04,538/- was added to the total income of the assessee. Aggrieved, assessee went in appeal before the ld. CIT(A).

5.4. Before the ld. CIT(A), assessee submitted that non-audit of books of accounts as mandated u/s.44AB cannot be the ground for exercising the deeming fiction of presumptive taxation by the ld. AO. It was also contended that ld. AO erred in estimating the business income when the books of accounts were accepted by him to his satisfaction as there is no express mention by the ld. AO about rejecting the books of accounts maintained by the assessee which were produced in the course of assessment proceedings. However, not convinced by the plea made by the assessee, ld. CIT(A) did not find favour with the assessee and

sustained the addition made. The finding given by the ld. CIT(A) are reproduced as under for ease of reference:

“2) The assessee had taken 2 grounds, both directed against the addition made by the AO. Vide ground no.2, the assessee pleaded that non audit of books of accounts as mandated u/s.44AB cannot be the ground of exercising the deeming fiction of presumptive taxation. The ground taken by the assessee is carefully perused. Provisions of section 44 are in the nature of special provisions for assessing the incomes in cases where the assessee are engaged in some particular trades, retail business, business of plying, hiring or leasing of goods carriages. As rightly observed by the assessee, these are in the nature of deeming provisions. Section 44AD lays down that in the case of an individual assessee engaged in an eligible business, a sum equal to 8% of the total turnover/gross receipts, or, a sum higher than the aforesaid sum claimed to have been earned by the 'assessee, shall be deemed to be the profits from such business. Provisions of section 44AF are also similar, with the only difference that the deemed profitability would be @5% of the turnover, as against 8% of the turnover in section 44AD. Under both these sections, the sub-section (5) says down that in case an assessee claims that the profits from his business are lower than the percentage so specified in the sub section (1) (i.e. 5% or 8% of turnover), then he is required to keep and maintain such books of accounts and other documents as required under sub section (2) of section 44AA and get them audited and furnish a report of such audit as required u/s.44AB. This implies that if the profitability disclosed is lower than the presumptive rate of taxation, then the assessee should maintain books, get them audited and furnish a report of such audit report as required u/s.44AB of the Act. The profitability disclosed in the instant case of Rs.1300/- being lower than the presumptive rate of taxation, such profits disclosed would not be admissible or accepted as there is no compliance-with the requirements of sub-section (5) of 44AD / 44AF of the Act. Thus, the assessee's ground deserves to be dismissed. Ground no.2 is dismissed.

3) Ground no.1 of the assessee is that the AO erred in estimating the income when the books of accounts were accepted by him to his satisfaction. It is not the satisfaction of the AO 'of the books maintained by the assessee, which would determine the assessment of incomes. The provisions of section 44 are clear in that, either the profits are to be estimated at the rates mentioned in the respective sections of 44AD / 44AF / 44AE etc. or of a higher amount if so disclosed by the assessee. But if the profits disclosed are lower than either of them; then the assessee should maintain books of accounts, get them audited and furnish a report to that extent. Section 44 does not give any scope to the AO of expressing his satisfaction or otherwise over the maintenance of books by the assessee, Thus, whether or not the AO was satisfied with the books maintained by the assessee, is not relevant. The profit disclosed being less than the stipulated rates of profit, the audit of books is compulsory. Further, it is also seen from the assessment order that the AO did not express his satisfaction about the maintenance of books. Accordingly, ground no.1 of the assessee also stands dismissed.”

6. Before, Id. Counsel for the assessee reiterated the submissions made before the authorities below which are narrated in the above paragraphs. Before delving on the issue raised by the assessee in this appeal, we refer to the relevant provisions of the Act for gainful understanding.

6.1. Section 44AB deals with audit of accounts of certain persons carrying on business or profession.

44AB. Every person,—

(a) carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds sixty lakh rupees in any previous year; or

(b) carrying on profession shall, if his gross receipts in profession exceed fifteen lakh rupees in any previous year; or

(c) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AE or section 44BB or section 44BBB, as the case may be, and he has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, in any previous year; or

(d) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year,

get his accounts of such previous year audited by an accountant before the specified date and furnish by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed :

Provided that this section shall not apply to the person, who derives income of the nature referred to in section 44B or section 44BBA, on and from the 1st day of April, 1985 or, as the case may be, the date on which the relevant section came into force, whichever is later :

Provided further that] in a case where such person is required by or under any other law to get his accounts audited, it shall be sufficient compliance with the provisions of this section if such person gets the accounts of such business or profession audited under such law before the specified date and furnishes by that date the report of the audit as required under such other law and a further report by an accountant in the form prescribed under this section.

Explanation.—For the purposes of this section,—

- (i) "accountant" shall have the same meaning as in the Explanation below sub-section (2) of section 288;*
- (ii) "specified date", in relation to the accounts of the assessee of the previous year relevant to an assessment year, means the due date for furnishing the return of income under sub-section (1) of section 139.*

6.2. From the above provision, it is noted that clause (d) requires, where the assessee has claimed its income to be lower than the profits and gains so deemed to be the profits and gains of his business and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year, to get its accounts audited and furnish the report of such audit in the prescribed form. In the present case, assessee has reported its income as per the profit and loss account after claiming deductions u/s 30 to 38 of the Act including salary and interest paid to partners i.e. reported total income of Rs.1,295/-. No audit has been undertaken for the books of accounts maintained by the assessee and therefore no audit report is furnished for which ld. AO made an enquiry from the assessee.

6.3. Section 44AD deals with special provision for computing profits and gains of business on presumptive basis.

44AD. (1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an eligible assessee engaged in an eligible business, a sum equal to eight per cent of the total turnover or gross receipts of the assessee in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the eligible assessee, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

(2) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of sub-section (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed :

Provided that where the eligible assessee is a firm, the salary and interest paid to its partners shall be deducted from the income computed under sub-section (1) subject to the conditions and limits specified in clause (b) of section 40.

(3) The written down value of any asset of an eligible business shall be deemed

to have been calculated as if the eligible assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

(4) The provisions of Chapter XVII-C shall not apply to an eligible assessee in so far as they relate to the eligible business.

(5) Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee who claims that his profits and gains from the eligible business are lower than the profits and gains specified in sub-section (1) and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (2) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB.

(6) The provisions of this section, notwithstanding anything contained in the foregoing provisions, shall not apply to—

- (i) a person carrying on profession as referred to in sub-section (1) of section 44AA;*
- (ii) a person earning income in the nature of commission or brokerage; or*
- (iii) a person carrying on any agency business.]*

Explanation.—For the purposes of this section,—

(a) "eligible assessee" means,—

- (i) an individual, Hindu undivided family or a partnership firm, who is a resident, but not a limited liability partnership firm as defined under clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009); and*
- (ii) who has not claimed deduction under any of the sections 10A, 10AA, 10B, 10BA or deduction under any provisions of Chapter VIA under the heading "C. - Deductions in respect of certain incomes" in the relevant assessment year;*

(b) "eligible business" means,—

- (i) any business except the business of plying, hiring or leasing goods carriages referred to in section 44AE; and*
- (ii) whose total turnover or gross receipts in the previous year does not exceed an amount of sixty lakh rupees.*

6.4. Sub-section (1) of section 44AD starts with non-obstante clause for anything contained in section 28 to 43C providing for deeming a sum equal to eight percent of the total turnover or gross receipts of the business of the assessee to be the profits and gains of the said business

or a sum higher than eight percent as claimed to have been earned by the assessee. An exception for not applying this deeming provision of 44AD(1) is available in sub-section (5) wherein if the profits and gains from the business are lower than what is specified in sub-section (1), then, assessee shall be required to keep and maintain books of accounts and other documents as prescribed in section 44AA(2) and get them audited and furnish a report of the audit in accordance with section 44AB of the Act. Case of the assessee falls under clause (d) of section 44AB (extracted above) for the purpose of requirement of audit and furnishing of audit report.

7. In the present case before us, from the discussion made above on the relevant provisions, the contention of the assessee that non-audit of books of accounts cannot lead to invocation of presumptive taxation, is not tenable. We find that Id. CIT(A) as elaborately dealt with the contentions raised by the assessee and has given meritorious finding as to applicability of provisions of section 44AD read with 44AA and 44AB of the Act on the factual matrix of the assessee while sustaining the addition made by the Id. AO. The same are already reproduced above for ease of reference. We do not find any reason to interfere with the finding given by the Id. CIT(A). Accordingly, grounds taken by the assessee are dismissed.

8. In the result, appeals of the assessee are dismissed.

Order pronounced in the open Court on 22nd May, 2023.

Sd/-
(Rajpal Yadav)
Vice President

Dated: 22nd May, 2023

JD, Sr. P.S.

Sd/-
(Girish Agrawal)
Accountant Member

Copy to:

1. The Appellant:
 2. The Respondent
 3. CIT(A), National Faceless Appeal Centre (NFAC), Delhi
 4. CIT ,
 5. DR, ITAT, Patna Bench, Patna
 - 6.
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata