

**IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH,**  
**MUMBAI**

**BEFORE SHRI ABY T. VARKEY, JM**

आयकर अपील सं/ I.T.A. No.75/Mum/2023  
(निर्धारण वर्ष / Assessment Year: 2016-17)

Sagarkumar Ishwarbhai Bhavani D-103 D-103, Amozan Park II Devki Nagar Link Road, Borivali-West-400103.	<b>बनाम/</b> Vs.	ITO, Ward-32(3)(3) Room No. 105, C-Wing, 1 <sup>st</sup> Floor, Kautilya Bhavan, BKC, Bandra (E), Mumbai-400051.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AGUPB5616P</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Rakesh Joshi (Amicus Curiae)	
Revenue by:	Shri Anil Gupta	

सुनवाई की तारीख / Date of Hearing: 02/03/2023  
घोषणा की तारीख /Date of Pronouncement: 30/05/2023

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the assessee against the order of the Ld. CIT(A)/NFAC, Delhi dated 16.12.2022 for AY. 2016-17.

2. Grounds raised by assessee are as under: -

“1. In the facts and circumstances of the case and in law, the Ld. AO erred in wrongly holding that service tax is liable to be included in the turnover for the purpose of Tax Audit which is against the definition of turnover as per Institute of Chartered Accountants of India guidelines.

Without prejudice to the above

2. In the facts and circumstances of the case and in law, the Ld. AO erred in adding an amount of Rs.8,31,631/- by adopting arbitrary rate of net profit @ 15% while computing income as per normal provisions of the Act and wrongly holding that the appellant is outside the purview of section 44AD & the CIT(A) erred in partly confirming the same.



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3. In the facts and circumstances of the case and in law, the Ld. AO erred in charging interest u/s 234A, B and C and initiating penalty u/s 274 r.w.s. 271(1)(c) and 271B of the Act.”

**3.** Ground no. 1 is against the action of the Ld. CIT(A) confirming the action of the AO in holding that service tax is liable to be included in the turnover for the purpose of taxation u/s 44AD of the Act.

**4.** Brief facts is that the assessee is a civil contractor and filed the return as per the provisions of Section 44AD of the Income Tax Act, 1961 (hereinafter “the Act”). According to the AO, the service tax collected by assessee to the tune of Rs.13,19,494/- and TDS deducted (from payments given to him) should be included in the turnover/gross-receipt; and in that event assessee’s income goes above Rs one crore and needs to undergo audit u/s 44AB of the Act and accordingly presumptive taxation u/s 44AD is not applicable to assessee and estimated the tax at 15% of Rs 1,26,89,625/-. The AO in the assessment order has discussed the issue as under: -

“3.4 Further, assessee has stated that the assessee is following “Exclusive method of accounting” as per guidelines (para 5.9) issued by Institute of Chartered Accountants of india on tax audit under section 44AB of the Income Tax Act,1961 (2014 Edition), which defines ‘turnover’ as the aggregate amount for which sales are affected or services are rendered by the enterprises.

3.5 The details submitted by the assessee are examined carefully but same was not found tenable. It is a fact that specific provisions of the Act override normal provisions of the Act and any such method, whatsoever named has a very limited scope,



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while computing income as per provisions of section 44AD. In your submission you have not considered Direct and Indirect taxes applicable on the said receipts, which are found against the spirit of section 44AD. Section 44AD specifically mentioned in sub section (1) that \* Notwithstanding anything to the contrary contained in section 28 to 43C, in the case of eligible assessee engaged in eligible business, a sum equal to 8% of the total turnover or gross receipts of the assessee in 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 profit and gain of such business chargeable to tax under the head “ Profit and gain of business and profession”. And in sub section (2) it is also stated that “any deduction allowable under the provision of section 30 to 38 shall for the purpose of sub section (1) be deemed to have been already given full effect to and no further deduction under those sections shall be allowed.” In view of the above, method adopted by the assessee is not as per law as the section 44AD has specifically mentioned that expenses claimed u/s.28 to 43C is already considered and not allowable.

3.6 In view of the above discussion and present position in the law, it is crystal clear that in the special provisions, deductions allowable have very limited scope and in the section itself upto 92% of gross receipts are already considered for expenses incurred for the purpose of earning income as per provision of section 44AD. Therefore, assessee is not an “eligible assessee” as per provision of section 44AD and gross receipts as per assessee also comes at Rs.1,26,89,625/- with inclusion of Service tax and TDS etc. The assessee has not offered all the receipts in the return of income and claimed TDS of only



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Rs.1,12,396/- instead of Rs.1,26,896/- to avoid taxability under normal provision and to avoid tax audit. The assessee knowingly not audited his accounts and offered gross receipts by suppressing the receipts, which were already credited in his accounts and TDS were already deducted and deposited in the government treasury. The explanation regarding “turnover/gross receipts” submitted by the assessee is not applicable in the instant case as the section itself is a deeming provision and income from gross receipts are estimated after considering all type of expenses which a assessee may claim under section 28 to 43C and hence, there is nil possibility to consider any expenses in determining value of gross receipts. On the basis of details available on record, facts and circumstances of the case, nature of business, a reasonable profit of 15% is taken as income of the assessee from gross receipts of Rs.1,26,89,625/-. Therefore, income of the assessee is computed to the tune of Rs.19,03,444/- (15% of Rs.1,26,89,625/-) and addition of Rs.8,31,631/is hereby made in the business income of the assessee. Penalty proceeding u/s.274 r.w.s 271(1)(c) is initiated for furnishing inaccurate particulars of income and concealment of income. Penalty is also initiated u/s.274 r.w.s. 271B for not audited books of accounts.”

**5.** Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who dismissed the plea of the assessee by holding as under: -

“5.4 I have considered the submission of the appellant and the order of the AO. I agree with the argument of the Id AO that as per section 44AD of the Act, turnover includes service tax collected by the appellant. Further, I find that as per Section 145A ie of the Act, for the purpose of determining the income



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chargeable under the head ‘Profits and gains of business or profession’, the valuation of purchase and sale of goods or services and of inventory shall be adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods or services to the place of its location and condition as on the date of valuation. Provisions of Section 44AD have overruling effect over the provisions of Section 28 to 43C. However, Section 44AD does not over rule Section 145A hence the Section 44AD has to be read with Section 145A in order to do harmonious interpretation. Thus, in my view the contention of the AO is correct. Accordingly, service tax is required to be included in the turnover. When service tax of Rs 13,19,494/- is included in the turnover, the total turnover exceeds Rs 1 crore and the appellant is no longer eligible assessee for the purposes of section 44AD of the Act. Accordingly ground of the appellant is dismissed.”

**6.** Aggrieved, the assessee has filed this appeal before this Tribunal.

**7.** I have heard both the parties and perused the records. The assessee is a contractor and has shown to have executed work/gross-receipt to the tune of Rs.98,33,150/-; and the assessee being Service Provider had paid Service Tax on the value of work done i.e Service Tax of Rs.13,19,494/- which is charged on the value of work executed. According to assessee, since its gross receipt of Rs.98,33,150/- was below Rs.1 crores, he adopted the special provision for computing profits & gains of business or profession u/s 44AD of the Act and thus offered 8% of turnover, which was not accepted by AO, who asked



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assessee to file the Tax Audit report, financial statement etc. Pursuant thereto, assessee informed him that since its turnover was below the limit prescribed u/s 44AB of the Act, audit report was neither prepared nor submitted. And further that since income was offered u/s 44AD of the Act, he has not maintained any Financial statements; and filed details of contract receipt & copy of bank statements. According to AO, assessee being a service provider was liable to collect and pay service tax on the value of work done amounting to Rs.13,19,494/- and when the same is included in the turnover, the assessee's total turnover exceeds Rs. 1 crores and therefore assessee is not an '*eligible assessee*' u/s 44AD of the Act; and therefore its income ought to have undergone tax audit and therefore, he issued show cause notice to the assessee as to why the receipt should not be taken as Rs.1,26,89,625/- and taxed including in its turnover both Service Tax and TDS i.e. (Rs.1,26,89,625/- with included Service Tax and TDS). Thereafter, he concluded that the assessee ought to have audited his accounts which he did not do and therefore he estimated the profit at 15% of Rs.1,26,89,625/- which was computed at Rs.19,03,944/- ;and since the assessee has already offered an income of Rs.10,11,813/- the balance amount of Rs.8,11,631/- was added in the hands of the assessee. On appeal, the Ld. CIT(A) was pleased to direct the AO to reduce the advances received by the assessee which have been included in the turnover adopted by the AO. However, the Ld. CIT(A) sustained the action of the AO including in its turnover the Service Tax/TDS collected by the assessee as well as the addition made by AO.



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8. It is noted that the assessee who is a contractor (labour contractor) has shown turnover as Rs.98,33,150/- (excluding Service Tax and excess TDS) and offered tax in accordance to section 44AD of the Act i.e. presumptive tax of 8% on turnover/gross-receipt. However, the AO did not accept the computation made by assessee and has included the service tax collected by the assessee. And by including service tax with receipts it breached the threshold limit prescribed u/s 44AD of the Act i.e. 1 crores. It is noted that the Service Tax is indirect tax collected by the assessee and passed on to the Government from the person to whom it has provided the services. So the question is whether Service Tax collected can be added in the turnover of the assessee for the purpose of computation of assessee's turnover u/s 44AD of the Act. The Ld. AR has cited the CBDT Circular No.04/2008 dated 08.04.2008 which clarified that Service Tax paid by the tenant does not par-take the nature of income of the landlord. And the landlord only acts as a collecting agency of Service Tax on behalf of Government. Therefore, it has been clarified by CBDT that tax deducted at source u/s 194I of the Act would be required to be made on the amount of rent paid/payable without including the Service Tax. Further, the Ld. AR drew my attention to Circular No.01/2014 dated 13.01.2014 wherein it has been clarified that service tax is not to be included in the fees for professional services or technical services and no TDS is required to be made on the Service Tax component u/s 194J of the Act. On the strength of the aforesaid circulars of CBDT, according to the Ld. AR, the 'service tax'



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collected by assessee does not have an element of income and therefore cannot form part of gross receipts for the purpose of computing the presumptive tax of the assessee u/s 44AD of the Act. The Ld. AR also brought to my notice the decision of the Hon'ble High Court of Delhi though in the context of presumptive taxation under Section 44BB of the Act (Director of Income Tax-1 Vs. Mitchell Drilling International (P.) Ltd.) (2015) 234 Taxman 818 (Delhi) (2016) 380 ITR 130 wherein the Hon'ble High Court upheld the action of the Ld. CIT(A)/Tribunal holding that for the purpose of computing presumptive income of the assessee u/s 44BB of the Act, the Service Tax collected by the assessee on the amount paid for rendering services is not to be included in the gross receipt.

**9.** In the light of the aforesaid discussion, I find force in the contention of Ld. AR, that service tax collected by assessee from its customers is on behalf of the Government and it needs to be deposited by the assessee in the relevant account of the Government. Therefore 'service tax' collected by assessee does not partake the character of income as referred to in section 5 of the Act; and therefore cannot be included in the gross receipt of assessee for the purpose of computing the presumptive taxation u/s 44AD of the Act. However, from a perusal of neither assessment order nor Ld. CIT(A) order, it is not discernible as to whether the assessee has remitted the service tax to the Government account. So the AO to examine as to whether assessee has remitted the service tax collected by him for the relevant



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assessment year to the Government account as per law. And if the assessee had in fact deposited the service tax in Government account, then it ought not be made part of the turnover for the purpose of presumptive taxation u/s 44AD of the Act. The AO after doing such an exercise to examine whether assessee's income including the TDS, breaches the threshold limit as specified u/s 44AD of the Act; and if it is well within the ken i.e, Rs One Crore, then only the presumptive taxation as per the u/s 44AD may be imposed on the assessee. And in case, if the turnover breaches the threshold limit, then reasonable profit to be estimated in accordance to law after giving opportunity to assessee and also referring to the comparable cases.

**10.** In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 30/05/2023.

**Sd/-**  
**(ABY T. VARKEY)**  
**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 30/05/2023.  
*Vijay Pal Singh, (Sr. PS)*



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**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
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