

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE: HON'BLE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 259/JP/2023
निर्धारण वर्ष/Assessment Year : 2016-17.

Smt. Urmila Tank, A-257, Ashirwad, Jagdamba Nagar, Ajmer Road, Jaipur.	बनाम Vs.	The Income Tax Officer, Ward 5(2), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. ABGPT 6898 N		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Rahul Chatter, Advocate.

राजस्व की ओर से / Revenue by : Ms Monisha Choudhary (JCIT)

सुनवाई की तारीख / Date of Hearing : 22/08/2023

उद्घोषणा की तारीख / Date of Pronouncement: 26/09/2023

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

This appeal by the assessee is directed against the order of Id. CIT(A), National Faceless Appeal Centre (NFAC), Delhi dated 22.02.2023 for the assessment year 2016-17. The assessee has raised the following grounds of appeal :-

1. The Id. Commissioner of Income Tax (Appeals) have erred on facts and in law in confirming the addition of Rs. 3,02,365/- on account of duty drawback. The Commissioner of Income Tax (Appeals) has confirmed the duty drawback as other receipts and not the part of total turnover.
2. The Commissioner of Income Tax (Appeals) have erred on facts and in law in confirming the addition of Rs. 22,031/- under section 44AD.
3. The appropriate cost be awarded to the assessee.

4. The assessee craves right to add, alter or amend any of the grounds of appeal.

2. The appeal filed by the assessee is delayed by 3 (three) days. In this regard the assessee has filed application along with affidavit requesting condonation of delay. In the application the assessee submitted that she had filed the appeal on line before the Tribunal on 22.04.2023 within the time limit. The due date of filing the appeal before the Tribunal was 23.04.2023. However, due to some unforeseen circumstances, the assessee had to go outstation and because of that reason the hard copy of the appeal could only be submitted before the Tribunal on 26.04.2023 and in this way the delay of 3 (three) days occurred. The assessee, therefore, requested to condone the delay.

3. On the other hand, the Id. D/R contested the said application and submitted that the reasons mentioned in the application for seeking condonation of delay do not come within the ambit of sufficient cause, therefore, delay may not be condoned.

4. Having heard the rival parties on this application and on perusal of the record, we find that it is an undisputed fact that the present appeal was filed on-line on 22.04.2023 i.e. within time limit. However, hard copy of the same was submitted in the Office of ITAT only on 26.04.2023. Considering the reasons mentioned in the application and also keeping in view the principles laid down by Hon'ble Supreme Court in the case of Collector Land Acquisition vs. Mst. Katiji, 1987 AIR 1353 and taking a lenient view considering over-all situation in the present case, we condone the delay of 3 (three) days and admit the appeal for adjudication on merits.

Now we come to the merits of the present appeal.

Ground No. 1 raised by the assessee relates to challenging the order of Id. CIT (A) in upholding the addition on account of duty drawback.

5. In this regard, the Id. A/R appearing on behalf of the assessee reiterated the same arguments as was raised by him before the revenue authorities and has also relied upon his written submissions in this regard. The relevant portion of his written submissions in support of his arguments are reproduced herein below :

"1. In respect of addition of Duty Drawback of Rs 302365/-

- (i) Assessee has shown her income from business and profession u/s 44AD by declaring total gross receipt of Rs 49,76,925/- which included duty draw back of Rs 3,02,365/-.

Ld AO has considered this duty draw back as other income and not treated it as a part of turnover for the purpose of calculation of turnover u/s 44AD of the Act.

- (ii) In section 44AD of Income Tax 1961, there are two words used for calculation of turnover first is '**turnover**' and second is '**gross receipts**'.

According to Subsection 1 of Section 44AD of the Income Tax Act:

"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"

- (iii) The "***Gross Receipts***" word is not defined in Income Tax Act, 1961. **For the purpose of calculation of gross receipts u/s 44AD all receipts from business and profession as defined in Section 28 of Income Tax Act, 1961 is a part of gross receipts.**

As per **Section 28** of the Income Tax Act, 1961 following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",—

- (i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year ;
- (ii) any compensation or other payment due to or received by,—
 - (a) any person, by whatever name called, managing the whole or substantially the whole of the affairs of an Indian company, at or in connection with the termination of his management or the modification of the terms and conditions relating thereto;
 - (b) any person, by whatever name called, managing the whole or substantially the whole of the affairs in India of any other company, at or in connection with the termination of his office or the modification of the terms and conditions relating thereto ;
 - (c) any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person, at or in connection with the termination of the agency or the modification of the terms and conditions relating thereto ;
 - (d) any person, for or in connection with the vesting in the Government, or in any corporation owned or controlled by the Government, under any law for the time being in force, of the management of any property or business ;
 - (e) any person, by whatever name called, at or in connection with the termination or the modification of the terms and conditions, of any contract relating to his business;

(iii) income derived by a trade, professional or similar association from specific services performed for its members ;

(iiia) profits on sale of a licence granted under the Imports (Control) Order, 1955, made under the Imports and Exports (Control) Act, 1947 (18 of 1947) ;

(iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India ;

(iiic) any duty of customs or excise re-paid or re-payable as drawback to any person against exports under the Customs and Central Excise Duties Drawback Rules, 1971;

(iiid) any profit on the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992); etc

(iv) The same has also been given in the "Guidance Note on Tax Audit under Section 44AB of the Income-tax Act, 1961" issued by Institute of Chartered Accountants of India that **duty drawback is part of gross receipt for the purpose of calculation of turnover / gross receipts** under the head Business and Profession.

Para 5.16 of "Guidance Note on Tax Audit defines 'GROSS RECEIPTS.' Accordingly, the term "**gross receipts**" is also not defined in the Act. It will include all receipts whether in cash or in kind arising from carrying on of the business which will normally be assessable as business income under the Act.

As per said clause, broadly speaking, among other things, sub clause (ii) provides that the following items of income and/or receipts would be covered by the term "gross receipts in business":

(i) Any duty of customs or excise or service tax re-paid or repayable as drawback to any person against exports under the Customs and Central Excise Duties and Service tax Drawback Rules, 1995;

That Hon'ble **ITAT Bench Delhi in the matter of Sanjay Bahl v. ITO (ITA No. 5709-5710/DEL/2018 dated 24.04.2019)** has discussed this very issue and dismissed the appeal of the assessee and confirm the addition made by the Id. assessing officer wherein assessee has not taken the duty draw back under the gross receipt and while filing the return u/s 44AD of the Act and Id. assessing officer added the duty draw back to the total income of the assessee and Hon'ble Bench held that:-

I have heard both the parties and perused the records, especially the impugned order. I find that the assessee has declared his business income u/s. 44AD of the Act and the gross receipts/ turnover has been shown as Rs. 21,38,294/- and profit has been declared as @8% of turnover which amounts to Rs. 1,17,064/- and as per Export Summary Data provided by CBEC, Rs. 1,22,983/- has been sanctioned to the assessee as Duty Drawback during the FY 2014-15. The AO observed that the amounts sanctioned as duty drawback has not been taken into account while computing income of the assessee for the relevant year. I further find that the provisions of Section 44AD clearly stipulates that a sum equal to 8% of total turnover or gross receipts of the assessee in the previous year on account of such business of the such business shall be deemed to be the profits and gains of the such business chargeable to tax under the head of profits and gains of business or professions.

I further note that in this case the duty drawback of Rs. 1,22,983/- is undoubtedly part of gross receipts of the assessee, therefore, it is to be included while working out profit 8% of the gross receipts.

Further, section 28(iii)(c) of the Act clearly brings the receipt of duty draw back in the nature of business receipts. I uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground raised by the Assessee.

- (v) Ld. AO in assessment order and Ld. CIT (A) in their order, both have taken the definition of turnover from the circular no 571 date 1-8-1990 and refer the section 80HHC to define the word turnover.

In this regard we wish to submit that the **word export turnover and total turnover define in section 80HHC is only for computing the deduction u/s 80 HHC and this is entirely different from section 44AD.**

Circular no 571 refers the circular no 564. Circular no 564 dated 5-7-1990 clarified that purpose of exclusion of export cash compensatory support (CCS), duty drawback (DDK) etc from the definition of total turnover. As per this circular, deduction under section 80HHC is allowed if the sale proceeds are receivable in convertible foreign exchange. The deduction under this section shall be allowed only if the sale proceeds are received in or brought into India within a period of six months from the end of the relevant previous year. **As the duty drawback etc were not brought in India, they were not part of export turnover, still they are part of profit from business and profession.**

If an assessee has 100 percent export turnover, and export turnover does not include the duty drawback but total turnover includes duty drawback then exporter will get less deduction as deduction u/s 80HHC will be allowing in portion of export turnover to total turnover. To make it identical the export turnover and total turnover, so that exporters may not get less deduction, the drawback was excluded from the total turnover. It is nowhere means that duty drawback is not the part of Total turnover of business. It is clearly stated that cash compensatory

support (CCS), duty drawback (DDK) etc are part of profit from business and profession.

From the above, it is clear that duty drawback is part of gross receipt, therefore it should be treated as part of gross receipt and should not be added as other income in total income of the assessee."

6. On the other hand, the Id. D/R supported the orders of the revenue authorities and submitted that the revenue authorities have passed well reasoned orders which need no interference and thus requested for dismissal of the ground.

7. We have heard the rival contentions, perused the material on record, judgments cited before us and also gone through the impugned orders of the revenue authorities. From the record, we find that the assessee is engaged in the business of export of garments as well as some local sales and having her income also from job work. During the year under consideration, the assessee had shown gross receipt of Rs. 49,76,925/- and declared G.P. @ 8% under section 44AD of the I.T. Act, 1961. The details of the said turnover are as under :-

SR No	Description	Amount
1	Export sales	3970866
2	Local Sales	29066
3	Job work	674628
4	Duty Draw back	302365
Total Turnover		4976925/-

The AO after considering and evaluating facts of the present case had concluded that the export incentive and duty drawback is not part of turnover and accordingly a sum of Rs. 3,02,365/- was added to the total income of the assessee. The Id. CIT (A) also upheld the AO's view of exclusion of duty drawback from the total turnover and was of the view that the said amount is to be assessed separately. While dismissing this ground raised by the assessee, the Id. CIT (A) also relied upon Circular issued for clarification of deduction under section 80HHC. After scrutinizing and analyzing the entire facts as well as legal proposition, we find that since the assessee had shown her income from business and profession under section 44AD by declaring total gross receipt of Rs. 49,76,925/- which also included duty drawback of Rs. 3,02,365/- and as per the provisions of section 44AD of the IT Act there are two key words used for calculation of turnover, first is " **turnover** " and second is " **gross receipts** ", and since the "gross receipts" word is not defined in IT Act, 1961, therefore, for the purpose of calculation of "gross receipts" under section 44AD, all the receipts from business and profession as defined in section 28 of the IT Act, 1961 is to be taken as part of "gross receipts". For convenience, the provisions of section 28 of the IT Act, 1961 is reproduced herein below, wherein it has been categorized that following income shall be chargeable to Income-tax under the head " **Profits & Gains of business or profession** " :-

- " 28 (i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year ;
- (ii) any compensation or other payment due to or received by,—
- (a) any person, by whatever name called, managing the whole or substantially the whole of the affairs of an Indian company, at or in connection with the

- termination of his management or the modification of the terms and conditions relating thereto;
- (b) any person, by whatever name called, managing the whole or substantially the whole of the affairs in India of any other company, at or in connection with the termination of his office or the modification of the terms and conditions relating thereto ;
- (c) any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person, at or in connection with the termination of the agency or the modification of the terms and conditions relating thereto ;
- (d) any person, for or in connection with the vesting in the Government, or in any corporation owned or controlled by the Government, under any law for the time being in force, of the management of any property or business ;
- (e) any person, by whatever name called, at or in connection with the termination or the modification of the terms and conditions, of any contract relating to his business;
- (iii) income derived by a trade, professional or similar association from specific services performed for its members ;
- (iiia) profits on sale of a licence granted under the Imports (Control) Order, 1955, made under the Imports and Exports (Control) Act, 1947 (18 of 1947) ;
- (iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India ;
- (iiic) any duty of customs or excise re-paid or re-payable as drawback to any person against exports under the Customs and Central Excise Duties Drawback Rules, 1971;**
- (iiid) any profit on the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992); etc

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As per plain reading of sub clause (iiic) of section 28, it has been clarified that any duty of customs or excise re-paid or re-payable as drawback to any person against exports under the Customs and Central Excise Duties Drawback Rules, 1971, shall be chargeable to income-tax under the head "**Profits and Gains of business or profession**". The said interpretation has also been given in the "**Guidance Note on Tax Audit under section 44AB of the I.T. Act, 1961**" issued by Institute of Chartered Accountants of India wherein it has been clarified that duty drawback is part of gross receipts for the purpose of calculation of turnover/gross receipts under the head "Business and Profession". Para 5.16 of "Guidance Note on Tax Audit" defines "Gross Receipts". Accordingly, the term "Gross Receipts" is also not defined in the Act. It will include all receipts whether in cash or in kind arising from carrying on of the business which will normally be assessable as business income under the Act. The said interpretation has already been upheld by the Coordinate Bench of ITAT Delhi in the case of Sanjay Bahl vs. ITO in ITA No. 5709-5710/Del/2018 dated 24.04.2019. The relevant portion of the said decision is reproduced herein below :-

" I have heard both the parties and perused the records, especially the impugned order. I find that the assessee has declared his business income u/s 44AD of the Act and the gross receipts/turnover has been shown as Rs. 21,38,294/- and profit has been declared as @ 8% of turnover which amounts to Rs. 1,17,064/- and as per Export Summary Data provided by CBEC, Rs. 1,22,983/- has been sanctioned to the assessee as Duty Drawback during the FY 2014-15. The AO observed that the amounts sanctioned as duty drawback has not been taken into account while computing income of the assessee for the relevant year.

I further find that the provisions of Section 44AD clearly stipulates that a sum equal to 8% of total turnover or gross receipts of the assessee in the previous year on account of such business of the such business shall be deemed to be the profits and gains of the such business chargeable to tax under the head of profits and gains of business or professions. I further note that in this case the duty drawback of Rs. 1,22,983/- is undoubtedly part of gross receipts of the assessee, therefore, it is to be included while working out profit 8% of the gross receipts. Further, section 28(iii)(c) of the Act clearly brings the receipt of duty draw back in the nature of business receipts. I uphold the action of the Id. CIT (A) on the issue in dispute and reject the ground raised by the assessee”.

7.1 I have also noticed that the revenue authorities in the respective orders have taken the definition of “turnover” from the Circular No. 571 dated 1.8.1990 and refers to section 80HHC to define the word “turnover”. Whereas I am of the view that the words “Export Turnover” and “Total Turnover” defined in section 80HHC is only for the purpose of computing the deduction under section 80HHC, which admittedly is entirely different from the purview of section 44AD.

7.2 Circular No. 571 refers to Circular No. 564 dated 5.7.1990 wherein it is clarified that purpose of exclusion of export cash compensatory support (CCS), duty drawback (DDK) etc. from the definition of total turnover. As per this circular, the deduction under section 80HHC is allowed if the sale proceeds are receivable in convertible foreign exchange. The deduction under this section shall be allowed only if the sale proceeds are received in or brought into India within a period of 6 (six) months from the end of the relevant previous year. Since the duty drawback etc. were not “brought” in India, therefore, they cannot be part of export turnover, but

still they are part of Profit from business and profession. From the above discussion, it is clear that duty drawback is part of "gross receipt". Therefore, it should be treated as gross receipt and thus cannot be added as "other income" in computing the total income of the assessee. As far as the decision of Hon'ble Delhi High Court in the case of CIT vs. Ritesh Industries Ltd. (2005) 274 ITR 324 (Delhi) relied upon by the revenue authorities is concerned, the said case deals with section 80HHC of the IT Act, 1961. However, the facts of the present case are with regard to section 44AD of the IT Act, 1961. Therefore, the parimateria contained in the said judgment so referred by the revenue authorities is altogether different from the facts of the present case and is not applicable to the facts of the present case. Therefore, considering the totality of the facts and circumstances of the case as discussed above and also considering the decision of coordinate bench of the ITAT Delhi in case of Sanjay Bahl vs. ITO (supra), I am of the view that the duty drawback is part of gross receipts. Therefore, I treat the same as part of gross receipts. The AO is directed to treat the duty drawback as part of gross receipts and addition so made is directed to be deleted. Ground No. 1 is thus allowed.

Ground No. 2 raised by the assessee relates to addition of Rs. 22,031/-.

8. In this regard the Id. A/R reiterated the same arguments as made before the revenue authorities. The written submissions made by the Id. A/R are as under :-

“ **II. In respect of addition of Rs 22031/-**

Ld AO has made addition of Rs 22031 on the ground that assessee has made export of Rs 45,48,621/-, but has shown export sale only of Rs.39,70,666/-. Ld AO has taken the turnover of Rs 45,48,621/- on the basis of CBEC data and accordingly, a sum of Rs.5,77,655/- is added in the total turnover of assessee. In this regard we wish to submit as under :

- (i) Assessee has made export sale of Rs 39,70,666/- during the year. Complete invoice wise details alongwith FOB value, freight and insurance value and CIF value has been submitted to the Ld AO during the course of security assessment. Details are again enclosed herewith. Photocopy of the invoices along with the shipping bill were also submitted to the Ld AO at the time of scrutiny, copy of which is enclosed.
- (ii) Additions were made on the basis of some CBEC data. Assessee has asked the Ld. AO to provide CBEC data to her for reconciliation, however the same was not provided to her by the Ld. AO.
- (iii) As assessee has maintained complete books of accounts and provided complete details of the export sale to the Ld. AO, therefore no addition should be made in respect of turnover of Rs 577655/-.

In view of above additions Rs 22031/-made by the AO is uncalled for and prayed to be deleted.

Therefore, it is humbly submitting that addition made by the Id. Assessing officer and confirm by the Id. CIT(A) completely baseless, on the basis of assumption and presumption and same may kindly be deleted.”

9. On the other hand, the Id. D/R supported the orders of the revenue authorities and submitted that the revenue authorities have passed well reasoned orders which need no interference and thus requested for dismissal of the ground.

10. Having heard the rival submissions, after evaluating and analyzing the record, I noticed that the AO had made the addition of Rs. 22,031/- on the ground that assessee has made export of Rs. 45,48,621/- but has shown export sale only of Rs. 39,70,666/-. The AO has taken the turnover of Rs. 45,48,621/- on the basis of CBEC data and accordingly a sum of Rs. 5,77,655/- was added in the total turnover of the assessee. Although assessee has stressfully argued before me that he had export sales of Rs. 39,70,666/- during the year under consideration and in this regard it was submitted that complete invoice details along with FOB value, freight and insurance value and CIF value has been submitted to the AO during the course of scrutiny assessment. The Id. A/R also referred to the paper book wherein the details of export sales and export invoices for the year under consideration are annexed at pages 1 to 12. It was further submitted that the AO had not provided CBEC data for reconciliation, therefore, the addition made are liable to be set aside.

10.1 I find that the AO has specifically mentioned in the assessment order at para 3.3.1 as under :-

" 3.3.1 (a) As per CBEC data, assessee has made 11 transactions. These transactions containing invoice value & FOB value are Rs. 45,48,621/- & Rs. 43,80,195/- respectively.

(b) As per details uploaded, assessee has claimed only 10 transactions and 1 invoice cancelled. Assessee has not filed any details of cancelled invoice.

(c) Assessee has claimed FOB value of Rs. 39,70,866/- for the purposes of turnover. The said value does not contain any freight & insurance.

(d) On perusal of Invoice Bills issued by assessee & copy of shipping bill issued by Indian Customs EDI Systems, it is found that the invoice value of 10 transactions of Rs. 40,99,463/- & Euro 58828.29.

In view of above facts, it is clear that assessee has shown less export of Rs. 5,77,755/- (4548621-3970866). Accordingly, a sum of Rs. 5,77,655/- is added in the total turnover of assessee and applied net profit @ 8% and add to the total income of the assessee."

I noticed that the AO has categorically mentioned that as per details up to date the assessee has claimed only 10 transactions and one invoice cancelled. However, in this regard the assessee has not filed any details of cancelled invoice. Apart from this, the assessee has claimed FOB value of Rs. 39,70,866/- for the purposes of turnover but the said value does not contain any freight and insurance. Even on perusal of invoice, bills issued by the assessee and considering the copy of shipping bill issued by Indian Customs EDI Systems, it was found that the invoice value of 10 transactions was of Rs. 40,99,463/- and Euro 58828.29. Since the onus and the burden was upon the assessee to file the complete details of cancelled invoice and reconcile the same, but the assessee has failed to discharge her burden, therefore, the AO had no option but to conclude that assessee had shown less export of Rs. 5,77,755/- (4548621-3970866) and accordingly a sum of Rs. 5,77,655/- was added in total turnover of the assessee and thus applied net profit @ 8% and added to the total income of the assessee. We find no error or reason to interfere or to divert from the well reasoned finding so recorded by the revenue authorities as even before us the assessee has not filed any documentary evidence to controvert or rebut the reasons and lawful findings so recorded by the revenue authorities.

Therefore, in view of my above discussion, ground no. 2 of the assessee is dismissed.

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

Order pronounced in the open court on 26/09/2023.

Sd/-
(संदीप गोसाईं)
(SANDEEP GOSAIN)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 26/09/2023.

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant-Smt. Urmila Tank, Jaipur.
2. प्रत्यर्थी / The Respondent- The ITO Ward 5(2), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 259/JP/2023}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

