

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI**

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 1531/Mum/2023
(Assessment Year: 2017-18)**

DCIT, Circle-1, Room No.22, B-Wing, 6 th Floor, Ashar IT Park, Wagle Industrial Estate, Road No. 16Z, Ambika Nagar, Thane(W) - 400604.	Vs.	Shri Kalpesh Kantilal Gada 1503/04, Carlyle Bldg, Raheja Garden, Opp. Tip Top Plaza LBS Marg, Thane-400604. PAN : AGKPG1285F
Appellant)	:	Respondent)

Appellant/Assessee by : Ms Dinkle Hariya a/w Ms. Simoni
Chouhan, CA

Revenue/Respondent by : Shri P.D. Chougule, Sr. DR

Date of Hearing : 10.01.2024

Date of Pronouncement : 16.01.2024

ORDER

Per Padmavathy S, AM:

This appeal of the revenue is against the order of Commissioner of Income Tax, Appeals, / National Faceless Appeal Centre [In short ‘the CIT(A)’] dated 01.03.2023 for the AY 2017-18.

2. The assessee is a partner in R.K. Construction, B.K. and K.K. Developers and K.K.Tex Enterprises and during the year the assessee also carried out trading in Grey clothes. For the assessment year 2017-18 the assessee has disclosed income under section 44AD of the Income Tax Act (the Act) declaring a profit of

Rs.15,11,950 against a gross receipt of Rs.1,88,98,744. The assessee filed the return of income for assessment year 2017-18 on 02.01.2018 declaring total income of Rs.15,53,600. The case was selected for scrutiny under CASS and the statutory notices were duly served on the assessee. During the course of assessment proceedings the assessing officer noticed that assessee has deposited an amount of Rs.1,96,87,000 in the bank account with Axis Bank. The assessee submitted before the assessing officer the cash deposits are arising out of cash income generated from his trading activity. The assessee also submitted various details with regard to his trading activity such as sales register, stock statement, purchase register etc. The assessing officer after perusing the details furnished by the assessee treated the trading activity of the assessee as non-genuine and accordingly made an addition of the entire turnover of the assessee from trading activity to the tune of Rs.1,88,98,744 under section 68 of the Act.

3. Aggrieved the assessee filed appeal before the CIT(A). The CIT(A) allowed the appeal in favour of the assessee by holding that the additions under section 68 cannot be made in the case where the assessee has declared income under section 44AD of the Act.

4. The Revenue is in appeal before the Tribunal raising the following grounds:

"1. On the facts and circumstances of the case, Id. CIT(A) has erred in deleting the addition made u/s 68 of the Income-tax Act, 1961 to the tune of Rs. 1,88,98,744/- shown as sales turnover by the assessee in cash generated from his non-existent trading activity.

2. On the facts and circumstances of the case, Ld. CIT(A) has erred in not appreciating the facts that mere filing of ITR u/s 44AD of the Act, the assessee cannot claim any credits or debits in his bank a/c as business related sales or expenditure respectively since assessee has failed to prove the genuineness of his business nature and purpose of credits and debits in his bank a/c.

3. The appellant craves leave to add, alter, amend and modify any of the above grounds of appeal.”

5. The Ld. AR submitted that the assessee has declared the income from trading in grey clothes under section 44 AD of the Act whereby the assessee is not required to maintain any books of accounts. The Ld. AR further submitted that for the purpose of making an addition under section 68 of the act, the amount should have been credited in the books of accounts for which the assessee does not have proper explanation about the nature and source. In assessee's case no books of accounts maintained and the assessee has estimated the income under section 44AD of the Act. Therefore the Ld. AR argued that no addition can be made under section 68 in assessee's case since it is a settled position that when the assessee has declared income under section 44 AD of the act no addition can be made under section 68. The Ld. AR also submitted that the assessee also produced various documents in support of the trading activity carried on by him which have been completely ignored by the assessing officer and the addition is made without examining the documents in support of the transactions. It is also submitted that the assessee has declared profit on the entire receipt under section 44AD of the Act more than 8% and the assessing officer has added the entire receipt once again under section 68 is not correct.

6. The Ld. DR on the other hand submitted that the assessee has not furnished for details parties to whom sales is made and therefore the assessing officer has correctly treated the sales as non-genuine and made the addition under section 68 of the Act.

7. We heard the parties and perused the material on record. The assessee for the year under consideration has declared income under section 44AD of the Act

with regard to the trading activity in grey clothes. During the course of assessment the assessee submitted certain documentary evidences in support of the trading activities carried on by the assessee. However the assessing officer held that the trading activity of the assessee to be non-genuine for the reason that the documentary evidences submitted by the assessee do not properly substantiate the genuineness of the activity. The CIT(A) allowed the appeal in favour of the assessee stating that when the assessee has declared income under section 44AD of the act no addition can be made under section 68 of the act by relying on various judicial pronouncements.

8. Before proceeding further we will look at the provisions of section 68 of the act which reads as under:

“68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year

9. From the plain reading of the above it is clear that where any sum is found credited in the books of accounts for which the assessee is unable to offer explanation with regard to the nature and source then the same be treated as income under section 68 of the act. Books of accounts have been defined in section 2(12A) of the act to include ledgers, day-books, cash books, account-books and other books, whether kept in the written form or in electronic form or in digital form or as print-outs of data stored in such electronic form or in digital form or in a floppy, disc, tape or any other form of electro-magnetic data storage device. Further it is also settled position that bank passbook cannot be considered as books of accounts. In the light of this legal position, we will now consider the assessee's

case. The assessee in the year under consideration has declared income under section 44AD of the act with regard to the trading activities since the turnover from the trading activity is less than Rs.2 crores. The assessee has declared income on presumptive basis under section 44AD and therefore the requirement for maintenance of books of accounts does not arise. Accordingly we see merit in the contention that addition under section 68 cannot be made in assessee's case since the assessee has offered income on estimation basis under section 44AD of the act. We in this regard notice that similar issue has been considered by Delhi bench of the ITAT in the case of Narendra Kumar Gupta vs DCIT (ITA No.1186/Del/2023 dated 11.10.2023) wherein it is held that-

“6. As regards the rejection of claim of cash from assessee's proprietorship concern, we find that books have not been rejected. It has also not been proved that cash withdrawn is also put to any other use. In such circumstances, there is no reason to reject the source of cash in this regard. In this regard, we draw support from the decision of Hon'ble Delhi High Court in the case of [CIT vs. Kulwant Rai](#) (2007) 291 ITR 36 (Delhi) for the following proposition :-

"16. This cash flow statement furnished by the assessee was rejected by the Assessing Officer which is on the basis of suspicion that the assessee must have spent the amount for some other purposes. The orders of the Assessing Officer as well as the Commissioner of Income-tax are completely silent as to for what purpose the earlier withdrawals would have been spent. As per the cash book maintained by the assessee, a sum of Rs.10,000 was being spent for household expenses every month and the assessee has withdrawn from bank a sum of Rs. 2 lakhs on December 4, 2000 and there was no material with the Department that this money was not available with the assessee. It has been held by the Tribunal that in the instant case the withdrawals shown by the assessee are far in excess of the cash found during the course of search proceedings. No material has been relied upon by the Assessing Officer or the Commissioner of Income-tax (Appeals) to support their view that the entire cash withdrawals must have been spent by the assessee and accordingly, the Tribunal rightly held that the assessment of Rs. 2.5 lakhs is legally not sustainable under [section 158BC](#) of the Act and the same was rightly ordered to be deleted."

7. As regards, the amount belonging to Narender Kumar Gupta and Sons HUF is concerned, we note that 44AD return has been submitted which has been accepted. The income, therefore, therein has been accepted. In such circumstances, there is no reason why the cash due of the income disclosed u/s 44AD should not be accepted. It is settled law that books of account & vouchers are not required in 44AD return. Hence, adverse inference cannot be taken that cash book & vouchers have not been maintained. The same income cannot be taxed twice once in the hands of HUF and once again in the hands of the assessee. In these circumstances, we set aside the orders of the authorities below and decide the issue in favour of the assessee.”

10. We also noticed that similar view is held by the SMC bench of the Mumbai tribunal in the case of Dineshkumar Verma v/s ITO (ITA No.1183/Mum/2019 dated 28.12.2020) where it is held that –

“7. The new ground raised by the assessee challenging action of the Assessing Officer in invoking provisions of [section 68](#) of the Act in absence of books of account goes to the root of validity of addition made u/s 68. The new ground raised by the assessee is legal in nature and hence, can be very well raised even at second appellate stage. The facts and documents to decide the ground are already available on record and no new documents are required to be adduced to decide this legal issue. The coordinate Bench in the case of [Manasi Mahendra Pitkar vs. ITO](#) (supra) under similar set of facts admitted the additional ground challenging the addition made by Assessing Officer u/s 68 of the Act merely on the basis of cash deposits in the bank account. The objection raised by the Id. DR is rejected. The new ground raised by the assessee before the Tribunal being legal in nature is admitted for adjudication on merits in the light of decision rendered by Hon'ble Apex Court in the case of [National Thermal Power Co. Ltd. vs. CIT](#) reported as 229 ITR 383.

8. Before proceeding further to decide this issue it would be imperative to refer to the relevant provisions of [section 68](#) of the Act. The same are reproduced herein under:

"68 Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:"

A bare perusal of [section 68](#) of the Act makes explicitly clear that the addition can be made under the section if, any sum is found credited in the books maintained by the assessee. That is the books should be that of the assessee.

9. The "books or books of account" have been defined in [section 2\(12A\)](#) of the Act. The same reads as under:-

"2(12A) books or books of account" includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electromagnetic data storage device;"

The definition of books under the Act is inclusive. A perusal of the definition shows that the same does not include bank passbook or bank statement. A conjoint reading of above provisions would thus lead to the conclusion that the addition u/s 68 can be made only where any amount is found credit in the books as defined u/s 2(12A) of the Act maintained by the assessee.

10. The Hon'ble Bombay High Court in the case of [CIT vs. Bhaichand N. Gandhi](#) (supra) upholding the decision of Tribunal concluded that bank passbook does not constitute books as envisaged under u/s 68 of the Act. The relevant extract of the judgement reads as under:

"..... the pass book supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not as if the pass book is maintained by the bank as the agent of the constituent, nor can it be said that the pass book is maintained by the bank under the instructions of the constituent. In view of this, the Tribunal was, with respect, justified in holding that the pass book supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee, that is, a book maintained by the assessee or under his instructions. In our view, the Tribunal was justified in the conclusions at which it arrived."

11. Under the provisions of [section 44AD](#) of the Act, where the assessee is engaged in eligible business and has total turnover or gross receipts in the previous year not exceeding Rs.60,00,000/-, the assessee is eligible to file return of income on the basis of presumptive income @ 8% of total turnover or gross receipts. In the present case undisputedly the assessee has not maintained books and has offered his business income to tax on presumptive basis u/s 44AD of the Act. The same has been accepted by the Assessing Officer except for addition u/s.68 of the Act. It is not mandatory for the assessee to maintain books, if the return of income is filed under [section 44AD](#) of the Act.

12. As has been observed earlier that addition under [section 68](#) can be made only if any sum is found credited in the books maintained by the assessee for any previous year and the assessee fails to offer valid explanation for credit of such sum in the books or explanation offered is rejected by the Assessing Officer. In other words maintains of books by the assessee is sine qua non for making addition u/s 68 of the Act. Since [section 44AD](#) does not obligates the assessee to maintain books, the provisions of [section 68](#) cannot be invoked where the assessee has filed return of income under the provisions of [section 44AD](#) of the Act without maintaining books of account.

13. The Hon'ble High Court of Gauhati in the case of [Anand Ram Raitani vs. CIT](#) reported as 223 ITR 544 has held that existence of books of account is a condition precedent for invoking the provisions of [section 68](#) by the Assessing Officer. The relevant extract of the judgement is as under:

"We have gone through [section 68](#) of the Act. The Assessing Officer before invoking the power under [section 68](#) of the Act must be satisfied that there are books of account maintained by the assessee and the cash credit is recorded in the said books of account and if the assessee fails to satisfy the Assessing Officer, the said sum so credited has to be charged to income-tax as the income of the assessee of that previous year. The existence of books of account is a condition precedent for invoking of the power. Discharging of burden is a subsequent condition. If the first point is not fulfilled the question of burden of proof does not arise. The Assessing Officer made the assessment by making addition of the amount for which disallowance was claimed Mr. Bhuyan very candidly admits that addition was made in exercise of the power under [section 68](#) of the Act, therefore, the first condition necessary for invocation of the power is the existence of the books of account."

[Emphasised]

14. The Tribunal in the case of [Madhu Raitani vs. ACIT \(supra\)](#) following the decision rendered in the case of [CIT vs. Bhaichand N. Gandhi \(supra\)](#) and [Anand Ram Raitani \(supra\)](#) held that if books of account are not maintained by the assessee, the provisions of [section 68](#) cannot be invoked. The Tribunal further held that bank passbook cannot be considered as books of account.

Similar view has been taken by the coordinate Bench in the case of [Manasi Mahendra Pitkar \(supra\)](#).

15. The Co-ordinate Bench of the Tribunal in the case of [Shri Kokarre Prabhakara vs. ITO \(supra\)](#), in a similar situation where the assessee had declared income under [section 44AD](#) of the Act without maintaining books and the Assessing Officer had invoked the provisions of [section 68](#) of the Act, the

Tribunal deleted the addition by placing reliance of various decisions of the Tribunal holding that where the returns are filed on the basis of income declared under [section 44A](#) of the Act, there cannot be any application of [section 68](#) of the Act.

16. Thus, in the back drop of the facts, relevant provisions of the Act and case laws discussed above, no addition under [section 68](#) can be made in the instant case. We find merit in ground no.1 raised by the assessee in appeal.”

11. Considering the facts of the present case and the ratio laid down by the above judicial pronouncements we are of the view that the addition made by the assessing officer under section 68 of the entire turnover which the assessee declared under section 44 AD of the act is not tenable. Accordingly we delete the addition made by the assessing officer. The grounds raised by the revenue in this regard are dismissed.

12. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 16-01-2024.

Sd/-
(NARENDER KUMAR CHOUDHRY)
Judicial Member

**SK, Sr. PS*

Sd/-
(MS. PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai