

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.2360/M/2023
Assessment Year: 2014-15**

M/s. Balupuri Ashupuri Goswami, 135/1080, Motilal Nagar No.10, Opp. Saibaba Mandir, Goregaon, Navi Mumbai – 400 104 PAN: AEQPG7250J	Vs.	Income Tax Officer, Ward-31.2.3 (Now 14.4.1 Mumbai) Kautilya Bhavan, Mumbai – 400 051
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Devendra Jain, A.R.
Revenue by : Shri Ajay Singh, Sr. D.R.

Date of Hearing : 12 . 01 . 2024
Date of Pronouncement : 22 . 01 . 2024

O R D E R

Per : Kuldip Singh, Judicial Member:

At the very outset it is brought to the notice of the Bench by the registry by raising a defect memo that the present appeal is time barred by 124 days. The Ld. A.R. for the appellant, M/s. Balupuri Ashupuri Goswami (hereinafter referred to as ‘the assessee’) sought to condone the delay by moving an application supported with an affidavit on the grounds inter-alia that prior to the due date of filing appeal brother of the assessee namely Shri Mangupuri died in his native place Ailani, Someshwar, Dist. Pali, Rajasthan and his last

rites were performed on 05.01.2023 and other after death rites were performed around a month thereafter; that during the intervening period the assessee had to remain present in Rajasthan for attending family matters which took around 4-5 months; that thereafter Shri Bhanaram Choudhary, Income Tax Practitioner engaged by the assessee for filing the present appeal could not return to Mumbai due to marriage of his son but on his return he handed over the relevant papers to the assessee for filing the appeal and ultimately the assessee had filed the appeal on 01.02.2023; that the delay in filing the appeal was neither intentional nor willful.

2. However, on the other hand, the Ld. D.R. for the Revenue opposed the application for condonation of delay on the ground that the late filing of appeals in this case is apparently malafide due to callous attitude of the assessee and prayed for dismissal of the application.

3. Keeping in view the unavoidable reasons which were beyond the control of the assessee viz. due to death of his real brother and due to marriage ceremony of son of the legal practitioner namely Shri Bhanaram Choudhary engaged by the assessee, the appeal could not be filed, which we find a sufficient cause to condone the delay in view of the settled principle of law laid down by the Hon'ble Supreme Court in case of Land Acquisition Collector vs. MST Katiji & Others 167 ITR 471 (SC) wherein the Hon'ble Supreme Court has held that "it is on contention of delay that when substantial justice and technical considerations are pitted against each other, the case of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in injustice

being done because of a non deliberate delay” so we condone the delay in filing the present appeal.

4. The assessee by filing the present appeal, sought to set aside the impugned order dated 30.12.2022 passed by National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)) qua the assessment year 2014-15 on the grounds inter-alia that :-

“1. In the facts and circumstances and in law, Ld Faceless CIT(A), has erred in confirming the assessment order without considering all the submissions.

2. In the facts and circumstances and in law, Ld Faceless CIT(A), has erred in rejecting the first ground raised relating to consideration of income returned in a no est of return of income on the ground that appellant has not submitted on it. He ought to have suo-muto adjudicated the same ground as per settled law that non est return cannot be acted upon.

3. In the facts and circumstances and in law, Ld Faceless CIT(A), has erred in the income computed @ 20% on alleged suppressed sale instead of claimed @ 8% as provided in 44AD during the course of assessment proceedings.

4. The appellant prays for condonation of delay occurred in filing the appeal in time prescribed since appellant was prevented by sufficient causes.

The appellant craves a leave to add, alter, amend or modify any of the grounds of appeal.”

5. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee’s return of income declaring total income of Rs.1,62,660/- and revised return for Rs.2,38,130/- was subjected to scrutiny the Assessing Officer (AO) who has noticed that the assessee has shown turnover of Rs.14,69,895/- and declared the income of Rs.3,02,525/-. From the perusal of the bank statement of current account No.CAPUB/50 of

the assessee maintained with Saraswat Co-operative Bank Ltd. it was noticed by the AO that the assessee has deposited total cash amount of Rs.26,99,300/- during the year under consideration. From the perusal of the bank statement of saving bank account maintained with Saraswat Co-operative Bank Ltd. the AO further noticed that during the period under consideration assessee had deposited Rs.21,70,400/- which was regarding payment to various parties by cheque of small amounts. Declining the contentions raised by the assessee that under section 44AD of the Income Tax Act, 1961 (for short 'the Act') 8% of turnover may be estimated, the AO proceeded to make the addition of Rs.14,80,125/- being 20% of the suppressed sales, the profit rate otherwise shown by the assessee on its claimed turnover.

6. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the addition by dismissing the appeal. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing the present appeal.

7. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

8. We have perused the order passed by the Ld. CIT(A) who has confirmed the addition made by the AO by returning following findings:

“7. The Second ground of this appeal is relating to the addition of Rs.14,80,125/- being 20% of suppressed sale made by the AO.

7.1 The relevant extracts of Assessing Officer's order are reproduced as under:

10. Further, section 44AD of the Income Tax Act, 1961, reads as under:

"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".

10.1. Hence, it is evidently clear that section 44AD does not states that only 8% profit is to be declared, but mentions that any sum higher than eight percent of the total turnover may be treated as profit, which has been declared @ 20% by the assessee himself while filing the return of income. Hence, profit @ 20% is found to be totally justified, on suppressed turnover of Rs. 57,80,125/- (72,50,000 14,69,875) and accordingly, Rs. 11,56,025/-, being 20% of Rs. 57,80,125/-, is added to the total income of the assessee.

7.2 During the appeal proceeding, the appellant has made the following submission in respect of Ground No. 2 vide letter dated 04-03-2022 is extracted below: -

Appellant's submission

6. In the facts and circumstances the appellant submits and prays to apply 8% on total turnover of Rs. 72,50,000 as per the provisions of sec. 44 AD. The appellant further submits that he has come out with clean hands in declaring / admitting the correct turnover of Rs. 72,50,000. Further, it is a common business prudence that more the turnover, less the profit. Therefore, taking 20% on undisclosed turnover is a hyper technical view and thus, the appellant is before you for justice to correct AO's view.

7. The appellant relies upon the judgment of Hon'ble Ahmadabad Tribunal in Abhi Developer's case, (2007) 12 SOT 444 pg.

7.3 The appellant has objected to the estimation of income @20% on the suppressed turnover. In this respect the appellant has stated that the AO should have estimated the income @ 8% as per the provisions of Sec. 44AD of the Income Tax Act. The appellant further stated that he has come out with clean hands in declaring / admitting the correct turnover of Rs. 72,50,000/-. Another contention submitted by the appellant is that it is common business prudence that more the turnover, less the profit.

7.4 The contentions of the appellant are carefully examined with reference to the records available. First of all, the provisions of section 44AD does not put a ceiling of 8% rather 8% is the minimum of profit to be declared in case an assessee choose to adopt profit as per the provisions of section 44AD. The section provides that the income has to be declared at a higher percentage if the actual income is more then 8%. In the case of the appellant, he opted for declaring profit as per the provisions of section 44AD but the percentage of profit declared by him in his original return as well as in the revised return was near to 20% of the gross receipts. The AO while estimating the income on the suppressed gross receipts has also considered the percentage of profit declared by the appellant in the earlier and subsequent years. The AO has placed a chart of the percentage of profits declared by the appellant in the assessment order which is reproduced below:

Sl. No.	A.Y.	Turnover(Rs.)	Profit (Rs.)	Profit %
1	2012-13	11,32,5127-	1,96,5697-	17.36%
2	2013-14	11,89,5697-	2,02,5127-	17.02%
3	2014-15 (Original)	13,00,0127-	2,19,8567-	16.91 %
4	2014-15 (Revised)	14,69,8957-	3,02,5257-	20.58 %
5	2015-16	20,55,8527-	3,86,5337-	18.80%

It is seen that the appellant himself was declaring profit at a percentage near to 20% consistently. The appellant has not been able to give any reason for adopting profit at the rate of 5% on the suppressed gross receipts other then saying that higher gross receipts means lower percentage of profit but this argument is also not corroborated further. It is not always true that higher gross receipts results in lower profit margins. The appellant has further stated that he has come out with clean hands in declaring / admitting the correct turnover of Rs.72,50,000/- is also not factually correct. The appellant

had admitted the turnover only after the case was selected for scrutiny and the AO had detected the discrepancy. Under the circumstances, I do not find any reason to interfere with the order passed by the AO. Therefore, this ground of the appellant is hereby dismissed.”

9. Undisputedly during the assessment proceedings in response to the statutory notices issued by the AO, the assessee has admitted that he has the turnover of Rs.72,50,000/- during the year under consideration. It is also not in dispute that apart from the suppressed sale the assessee shown 20% profit element on the claimed turnover of Rs.2,38,130/- during the year under consideration. It is also not in dispute that during the year and preceding years the assessee has consistently earned the profit @ 17.36% to 20.58% as shown in the table in para 7.4 of the impugned order passed by the Ld. CIT(A).

10. In the backdrop of the aforesaid undisputed facts the Ld. A.R. for the assessee contended that since the assessee is not maintaining books of accounts his profit on the admitted turnover of Rs.72,50,000/- at the rate of 8% under section 44AD may be estimated.

11. We are of the considered view that when the assessee has himself claimed the profit at 20.58% during the year under consideration and 18.80% in the subsequent years and has suppressed the turnover which was detected by the AO, the assessee cannot be allowed to approbate and reprobate in the face of admitted fact that the assessee has himself admitted turnover of Rs.72,50,000/- during the year under consideration. So the Ld. CIT(A) has rightly confirmed the profit percentage of 20% for the year under consideration made by the AO.

12. So finding no illegality or perversity in the impugned findings the appeal filed by the assessee is hereby dismissed.

Order pronounced in the open court on 22.01.2024.

**Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 22.01.2024.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.