

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "A", MUMBAI

**BEFORE SHRI PRASHANT MAHARSHI, ACCOUNTANT MEMBER AND  
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER**

ITA 2011/Mum/2024 - A.Y. 2011-12  
ITA 2013/Mum/2024 - A.Y. 2010-11  
ITA 2014/Mum/2024 - A.Y. 2009-10  
ITA 2015/Mum/2024 - A.Y. 2008-09

<b>Mr. Anil Tilakraj Mehra (Individual),</b> 204, Madhu Industrial Premises, Old Nagardas Road, Andheri (E), Mumbai <b>PAN : AAHPM1904A</b>	<b>vs</b>	<b>The ITO.20(1)(1), Mumbai</b> Piramal Chambers, Lalbaug, Parel, Mumbai-400 012
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by : Shri Om Kandalkar  
Respondent by : Shri Manoj Kumar Sinha(CIT DR)  
  
Date of hearing : 08/07/2024  
Date of pronouncement : 12/ 07/2024

**ORDER**

**PER ANIKESH BANERJEE, J.M:**

This bunch of 4 appeals were filed against the order of the National Faceless Appeal Centre, Delhi [for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), for Assessment Years 2008-09 to 2011-12, date of orders 21.12.2024. The impugned orders were emanated from the

orders of the Id. Income-tax Officer 20(1)(1), Mumbai (in short, 'the A.O.')

for A.Y.s 2008-09 & 2009-10 orders passed under section 143(3)/147 of the Act date of order 19/03/2014 & 23/12/2011, respectively. For A.Ys 2010-11 & 2011-12 orders passed by the Id. Assistant Commissioner of Income-tax 20(1), Mumbai under section 143(3) / 147 and 143(3), date of order 24/03/2014 and 21/03/2014 respectively.

2. In the outset, all the appeals are of same nature of facts and having common issue. Therefore, all the appeals were taken together, heard together, and are being disposed of by this common order. **ITA No.2011/Mum/2024** is taken as lead case.

### **ITA No.2011/Mum/2024 (AY 2011-12)**

3. The assessee has taken the following grounds: -

*"i) On the facts and in the circumstances of the case and in law, the learned A.O. erred in not disposing off appeal except to 2 grounds relating to reopening and estimate of income u/s. 44AD.*

*ii) On the facts and in the circumstances of the case and in law, the learned A.O. erred in reopening the assessment U/s. 147 of the Income Tax Act, 1961, and the learned CIT(A) erred in confirming the reopening of the assessment by the A.O. on the ground that the income for the Assessment Year 2011-2012 should have been estimated U/s. 44AD of the Income Tax Act, 1961, by relying on the assessment order for Assessment Year 2009-2010.*

*iii) On the facts and in the circumstances of the case and in law, the learned CIT(A) did not appreciate the fact that no officer of the Department can travel beyond the provisions contained in the Income Tax Act, 1961, by ignoring section 44AD sub section 6 explanation (b)(ii) where eligible business is defined. The total turnover for the year under appeal is much beyond the limit of Rs. 40 Lakhs*

prescribed u/s. 44AD and therefore, the assessment itself by application of section 44AD is bad in law and, therefore, requires to be annulled.

iv) On the facts and in the circumstances of the case and in law, the mistake committed in any Assessment Year cannot become base for reopening of the assessment as each assessment year is an independent assessment year and, therefore, on this ground only the order passed by the learned A.O. should be quashed. On the ground that the assessment could not have been reopened on mere change of opinion.

v) The learned A.O. and the learned C.I.T.(A) do not have power to travel beyond the provisions contained in the Income Tax Law in respect of section 44AD. Therefore, the assessment order passed by the learned A.O. requires to be quashed, on the ground that the learned AO's action in reopening the assessment is ultra virus of the Income Tax Law.

vi) On the facts and in the circumstances of the case and in law, without considering the fact that the appellant has challenged the application of section 44AD, as applicant's turnover for the year under consideration was Rs.24,68,91,424/- which is 41 times higher than the limit of turnover prescribed u/s. 44AD. It is further submitted that the AO, ignored the Tax Audit Report in Form No. 3CD and 3CB duly certified by the C.A. M/s. S.A. More and Co., without discussing the issue involved in this appeal.

vii) On the facts and in the circumstances of the case and in law, the issue of notice u/s. 143(2), of the Act is mandatory when the order is passed u/s. 143(3). This submission of the appellant has not been discussed or dealt with by the CIT(A) while discussing the appeal.

viii) On the facts and in the circumstances of the case and in law, the learned A.O. did not issue the notice u/s. 143(2) of the I.T. Act 1961, during the course of assessment proceedings and the learned C.I.T.(A) had ignored this fact while passing the appellate order and, therefore, on this ground itself the assessment order requires to be quashed.

ix) On the facts and in the circumstances of the case and in law, learned A.O. as well as the learned C.I.T.(A) ignored the submissions made during the course

*of assessment vide letters dated 09.03.2016, 14.12.2021 & 23.01.2024 submitted to the CIT(A). The appellate order is passed without considering the submission.*

*x) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in relying the assessment order & appellate Order for the Assessment years 2001-2002 To 2003-2004 as the facts of these assessment years are totally different from the facts of the current assessment year.*

*xi) All the above grounds are without prejudice to each other.*

*xii) The appellant craves leave to add, alter, amend or delete any ground(s) of appeal either before or during the course of hearing of the appeal.”*

3. The brief facts of the case are that the assessee is a civil contractor and trader of ready-mix concrete, running the business under proprietorship name, 'Tirupati Ready-mix Concrete'. During the impugned assessment year, the assessee declared the net profit amount @1.51% on the total turnover amount of Rs.24,68,91,424/- which works out net profit amount of R.28,27,150/-. The assessee filed the return accompanied by tax audit report U/s 44AB with requisite form Nos. 3CB & 3CD. During the assessment proceedings, the assessee is asked to produce the books of account before the Ld.AO. But in all 4 years, the assessee was unable to submit the books of account maintenance as per the provision of section 44AA of the Act. Considering the tax audit report, the assessee is bound to maintain the books of account under section 44AA of the Act. The turnover is calculated by the Id. AO during the assessment in the following manners. The turnover declared by the assessee amount of Rs. 24,68,91,424/- add direct income amount to Rs. 31,59,125/- which works out total amount Rs. 25,00,50,549/-. Accordingly, Id.AO estimated the net profit @8% on turnover and

added back the total income. The Id. AO calculated the net profit@8% on the enhanced turnover amount to Rs.25,00,50,549/- which works out net profit amount of Rs.2,00,04,043/-. The entire net profit of Rs.2,00,04,043/- is added back with the total income of the assessee. The aggrieved assessee filed an appeal before the Id. CIT(A); but was unable to submit the books of account before the authority. The Ld.CIT(A) considering the submission of the assessee upheld the net profit percentage @8% but deducted the declared net profit of amount to Rs.29,27,154/- from the estimated net profit calculated by the Ld.AO. Accordingly, the addition is restricted to Rs.1,70,76,889/- (Rs.2,00,04,043/- (-) Rs.29,27,154/-). Being aggrieved on the appeal order, assessee filed an appeal before us.

4. The Ld.AR argued and placed that the addition was made @8% net profit on the turnover which is arbitrary. The net profit @8% is applicable only for specified business entity U/s 44AD of the Act. The Id.AO cannot apply the net profit @8% for the assessee whose turnover is far above the turnover mentioned in section 44AD of the Act. The relevant part of the assessment order is duly reproduced as below: -

*“The contention putforth by the authorized representative of the assessee is duly considered and the same is not acceptable. Further as per order sheet noting dated 05.03.2014, the authorized representative of the assessee was asked to produce books of accounts. However, as stated in the order sheet on 12.03.2014, the representative of the assessee was unable to produce the books of accounts for the relevant assessment year.*

*Therefore, in view of the above, Rs.2,00,04,043/- i.e. 8% of Rs. 25,00,50,549/- (Rs. 24,68,91,424 + Rs. 31,59,125) is hereby added to the total income of the assessee presuming 8% profit on the gross receipts and other direct incomes of the assessee during the relevant assessment year. Penalty u/s.271(1)(c) is initiated separately for concealment of income and furnishing inaccurate particulars.”*

5. The Ld.AR further argued that the profit percentage of the assessee's business varies from 1.97% to 1.51% year to year due to the increase of turnover of the assessee. The Ld.AR prayed for further opportunity for submission of books of account before the authority and explaining the net profit of the assessee.

6. The Ld.DR argued and fully relied on the order of the revenue authorities. The relevant part of the appeal order is reproduced as below: -

*“7.7 Furthermore/it is also observed from the assessment orders for the AYs 2001-2002, 2002-2003 & 2003-2004 that the appellant had accepted the application of 8% net profit on the turnover. Also, the appellant himself had agreed for the application of 8% net profit on the turnover in the AY 2009-10. In view of the above facts & circumstances, considering the volume of the turnover I'm of the considered opinion that without producing the books of accounts the AO doesn't have any other alternative apart from estimating of net profit at 8% of the turnover unless the appellant shows with proper documentary evidence that estimation is palpably arbitrary or perverse.*

*7.8 Be that as it may, normally in civil contracts where turnover is of such high magnitude, the net profit realised is much more. Even in the case of small-time contractors, whose assessments are completed u/s.44AD of the Act, the net income is assessed at 8% of the turnover. Therefore, in the case of the appellant, the assessment is completed by estimating the income at 8% of the turnover in*

*the absence of the books of accounts. In this regard, I'm of the considered opinion that the AO conclusion of estimating the net profit at 8% of the turnover is in line with the trend of profit in that industry.*

*7.9 During the course of appellate proceedings, the appellant has submitted that the AO has wrongly made addition of Rs. 2,00,04,043/- to the returned income since the net profit arrived by the AO by estimating at 8% of the total turnover already includes the net profit declared by the appellant in the ITR for the impugned AY 2011-12. On perusal of the assessment order, it is seen that there is a merit in the contention of the appellant. Accordingly, the AO is directed to restrict the addition to the extent of Rs.1,70,76,889/- (Rs.2,00,04,043/- minus Rs.29,27,154/-) and recomputed the tax liability. Accordingly, the grounds of appeal nos. 2, 3 & 4 are partly allowed.”*

7. We heard the rival submission and considered the documents available in the record. The assessee is bound to submit tax audit U/s 44AB of the Act with the return of income. As per the Act, the assessee is bound to maintain the audited books of account under section 44AA of the Act. The books of accounts are duly audited by the certified Chartered Accountant and filed the tax audit report in Form Nos-3CB & 3CD with return of income. The assessee failed to submit the books of account before any of the revenue authorities. But @8% profit is too high for the assessee as per the claim of the Ld.AR which is applicable for section 44AD of the Act under specified business conditions. The assessee has the turnover amount of Rs.25 crores. In our considered view, the assessee should get another opportunity for submitting the books of account before the Id. AO. Accordingly, we remit back the matter to the file of the Ld.AO for verification of books of accounts of the assessee maintain U/s 44AA of the Act. We are not

expressing any view on merit of the case which will impair the assessment proceedings. Needless to say, the assessee should get a reasonable opportunity of hearing for set aside proceedings. On the other hand, the assessee should be diligent and co-operative with the assessing authority for quick disposal of the assessment.

8. In the result, appeal in **ITA No.2011/Mum/2024** is allowed for statistical purposes.

**ITAs 2013, 2014 & 2015/Mum/2024 (AYs 2010-11, 2009-10 & 2008-09)**

9. Since the facts and circumstances in these appeals are identical to that of the facts and circumstances in ITA No.2011/Mum/2024 are identical, the decision arrived at above shall apply mutatis mutandis to these appeals also. As a result, appeals in ITAs 2013, 2014 & 2015/Mum/2024 are allowed for statistical purpose.

10. In the result, all the appeals of the assessee in **ITA Nos, 2011, 2013, 2014 & 2015/Mum/2024** are allowed for statistical purposes.

Order pronounced in the open court on 12<sup>th</sup> day of July, 2024.

Sd/-

(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 12/07/2024  
Pavanan

sd/-

(ANIKESH BANERJEE)  
JUDICIAL MEMBER



**Copy of the Order forwarded to:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
5. गार्डफाइल/Guard file.

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BY ORDER,

(Asstt. Registrar), ITAT, Mumbai