

**IN THE INCOME TAX APPELLATE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD
BEFORE SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER
ITA Nos.52, 53 & 54/ALLD/2024
A.Ys. 2009-10 & 2011-12**

Dilshad Husain, 178, Salreha Pacchim, Sirathu, Allahabad, U.P.	vs.	CIT(Appeal), National Faceless Appeal Centre
PAN:ACBPH7430G		
(Appellant)		(Respondent)

Assessee by:	Sh. S.K. Yogeshwar, Advocate
Revenue by:	Sh. A.K. Singh, Sr. DR
Date of hearing:	22.08.2024
Date of pronouncement:	25.10.2024

ORDER

PER SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER:

These appeals have been filed against the orders of the Id. CIT(A), NFAC under section 250 r.w.s. 254 of the Income Tax Act on 22.09.2022, wherein the Id. CIT(A), upon restoration of the appeals against assessments orders under section 144 for the A.Y. 2009-10, 143(3) for the A.Y. 2011-12 and the penalty order under section 271(1)(c) for the A.Y. 2009-10, has dismissed the appeals filed by the assessee.

2. Aggrieved with the dismissal of the said appeals, the assessee has come before us in appeal yet again. The grounds of appeal preferred by the assessee are as under:-

A.Y. 2009-10; ITA no 52/Alld/2024

1. *Because on the facts and circumstances of the case, the authority below is not justified in repeating the same order passed by the AO in spite of filling reply on portal.*
2. *Because in high demand cases opportunity of hearing should be given to the appellant for heavy demand of Rs.5100490.00.*
3. *Because the appellant is a petty dealer and his Income for the last several years were ranging 3 to 5 lacs only.”*

A.Y. 2009-10 ; ITA no 53/Alld/2024

- “1. *Because on the facts and circumstances of the case, penalty order u/s 271 (1) (C) has been imposed at Rs.3850000.00 without considering the merit of the case and without giving proper opportunity.*
2. *Because the appellant is a petty Transport dealer and his Income for the last several years are ranging below 500000.00.*
3. *Because in high demand cases opportunity of hearing should have been given to the appellant for heavy penalty impose Rs.3850000.00.”*

A.Y. 2011-12:ITA no 54/Alld/2024

- “1. *Because on the facts and circumstances of the case, the authority below is not justified in repeating the same order passed by AO without giving proper opportunity to the appellant.*
 2. *Because the order passed by the authority below is without giving proper opportunity.*
 3. *Because in high demand cases opportunity of hearing should has been given to the appellant for demand of Rs.4587860.00.*
 4. *Because the appellant is petty dealer and his Income for the last several years were below 500000.00 only.”*
3. As all the assessments and penalties are arising out of the same issue, the appeals are being disposed of by a common order.

4. Taking up the appeals relating to Assessment year 2009-10 first , the facts of the case are that the assessee filed an income tax return in Form ITR-4 on 23.07.2009 showing returned income of Rs.2,00,150/-. The case was picked up for scrutiny through CASS on account of the fact that the AIR information suggested that the assessee had deposited cash to the tune of Rs.1,14,10,112/- in his bank account. The ld. AO made several attempts to serve notice and elicit a response from the assessee, but upon failure to receive any response, he assessed the entire amount of Rs.1,14,10,112/- as the income of the assessee and initiated penalty proceedings under section 271(1)(c). Subsequently, an appeal was filed against the order after a gap of nearly two and a half years. In view of the same the ld. CIT(A), Allahabad dismissed the appeal. On dismissal of the said appeal, the ld. AO also levied a penalty under section 271(1)(c). This penalty order was also passed *ex parte* and was subsequently dismissed by the first appellate authority. The assessee subsequently filed appeals against the summary dismissal of his appeals and the Hon'ble ITAT observed, that the ld. CIT(A) had dismissed the appeal without giving sufficient opportunity to the assessee. Therefore, in the interest of justice, the Hon'ble ITAT restored the appeals, on both the quantum and the penalty, to the file of the Commissioner of Income Tax (Appeals) to decide the issue afresh, in accordance with law, after providing adequate opportunity to the assessee.

5. In his order dated 22.09.2022, the ld. CIT(A) records that the appellant was given sufficient opportunities and the case was fixed for hearing on three occasions i.e. 20.03.2022, 3.04.2022 and 13.07.2022 to submit a documents/evidences. He further records that the appellant did not submit any single evidence except one page written submission in which it was submitted as under:-

"1. That the turnover / bank deposits during F.Y. 2008-09 was Rs.1,14,10,112/- as per AIR.

2. That the appellant has two trucks and the details of income shown in return is as under:-

	<i>Income Shown</i>	<i>Gross Receipt</i>
<i>Truck Income u/s 44AE</i>	<i>84000.00</i>	<i>75,38,450.00</i>
<i>Transport Commission</i>	<i><u>116150.00</u></i>	<i><u>38,71,660.00</u></i>
	<i>200150.00</i>	<i>1,14,10,110.00</i>

3. Section 44AE provides for computing profits and gains of business of plying, hiring or leasing goods carriers who has not more than 10 goods carriers. This section is silent on the Gross Receipt of the Truck and also provisions of Section 44AA and 44AB shall not apply. The appellant who is in possession of 2 trucks whether taken or hired shall be deemed to be owner of such trucks.

4. Thus the appellant has shown his truck income out of gross receipt of the truck u/s 44AE.

5. That the transport commission income of Rs.116150/- is also out of gross receipt where Net Profit of 3% has been shown. In transport commission Income the appellant has also paid the diesel expenses and traveling expenses of driver and repairs of truck. That is why net profit has been shown at Rs. 116150/-. The commission was received 5% but after claiming expenses profit from this head was reduced.

6. That except truck income and transport commission there is no other income. Truck freight was paid in cash reflected in bank account. Considering the above and also after a lapse of 14 years, providing complete details is not possible.

That AO has added total deposit in bank Rs. 1,14,10,110/- without considering the expenses. How can total deposit will be appellant's income. The appellant spent on diesel, driver's salary, repairs and maintenance of truck, new tires etc. All the receipts from freight of truck and transport commission were deposited in bank and on same day there were withdrawal from bank for expense resulting in closing balance of bank was only Rs.30534/-. All the expenses were withdrawn for Truck expenses only. The trucks were running regularly without rest to cover many cities like Alwar, Agra, Delhi, Sitapur, etc hence the Gross Receipts were increased. Thus the deposit of Rs. 1,14,10,110/- were the freight and transport commission only and there was no any other receipt except truck freight."

6. The Id. CIT(A) recounted the history of the non compliance of the assessee and pointed out that the assessee had not submitted any bill, books of accounts or audit report in support of his submission. He concluded that seeing the turnover as claimed by the assessee, the business was liable for audit under section 44AB. No other explanation, regarding a single amount credited, had been offered by the appellant despite many opportunities. He also observed in his appellate order, that the Id. AO had also observed, that the assessee had failed to maintain books under

section 44AA and get his accounts audited under section 44AB. Regarding commission income, the Id. CIT(A) submitted that it was not supported by any evidence of business activity, like who gave the commission, copy of contract through which commission was payable to the appellant, what services he was providing, list of clients to whom service was being provided etc.,. The Id. CIT(A) pointed out that if the assessee was earning commission, then he was liable for TDS on commission income. But no such TDS had been claimed by him. In the absence of any relevant lists of clients, audit report or TDS certificates, the commission income could not be accepted. Furthermore, the assessee had not submitted copy of registration paper of vehicles, copy of contract of commission income, samples of transportation order, receipts of loading/unloading, copy of previous returns filed or identity of business providers in transportation and commission. Therefore, the Id. CIT(A), after recounting history of non-compliance by the assessee over time, felt it appropriate to dismiss the appeal of the assessee against the quantum. In the appeal against the penalty, he listed out the number of opportunities that he had given to the assessee to furnish a reply, but pointed out that no response had been received till the passing of the order and therefore, he also dismissed the appeal against the penalty.

7. Aggrieved with the dismissal of the assessment and penalty, the assessee has again come in appeal before us. It is seen that both the appeals against the quantum and the penalty are delayed by nearly 500 days. The condonation petition accompanied by an affidavit have been filed, in which it has been submitted that the ex parte appellate order dated 22.09.2022 passed by the Id. CIT(A) could not be served upon the deponent. It has further been submitted that in response to the notices issued by the Id. CIT(A) for the A.Y. 2009-10, compliance was made within time and no further notice was served upon the assessee. It is submitted that the assessee was awaiting the orders passed by the Id. CIT(A), but it was only when recovery proceedings were initiated on 13.03.2024, that the assessee became aware

that an *ex parte* appellate order had been passed for assessment years 2009-10 and 2011-12. It was further submitted that the assessee moved an application for the release of the bank account and then, with the help of his lawyer traced the order on the portal on 28.03.2024. Thereafter, the deponent had filed the appeal on 5.04.2024. Since, there was delay in tracing the order on the portal, it was submitted that there was a delay of 500 days, due to no fault of the assessee. Accordingly it was prayed that the delay may kindly be condoned.

8. We have duly considered the said condonation petition. While we observe that the assessee should have been vigilant to his affairs and checked his portal / designated email on a regular basis, we acknowledge the fact that the notices placed on the portal or served through email, could escape the knowledge of an assessee. Therefore, considering the circumstances enumerated in the petition, we condone the delay and admit the appeal in the interest of justice.

9. Shri S.K. Yogeshwar, Advocate appeared on behalf of the assessee. At the very outset, a query was posed from the Bench as to why the assessee had been non-compliant to the Id. CIT(A) in the second round of appeals after having himself requested for a restoration of those appeals, on account of lack of opportunity on previous occasions. In response, it was submitted that due compliance had been made to the Id. CIT(A) in the quantum appeal for the assessment year 2009-10. The Id. AR took our attention to the replies filed by the assessee on 10.05.2022 and 19.07.2022, for the assessment year 2009-10, that were contained on pages 10 to 19 of the paper book and the reply filed on 13.08.2022, that was contained on page 20. It was submitted that it had been quite clearly explained to the Id. CIT(A), that the assessee had two trucks of his own, for which gross receipts were to the extent of Rs.75,38,450/- and the income had been shown as per the provisions of section 44AE at Rs.84,000/-. It was further submitted that the provisions of section 44AE, provided for computing the profits & gains of business of plying, hiring or leasing of

goods carrier and states that the provisions of section 44AA and 44AB would not apply to such income. It was further submitted that besides earning income from trucks, the assessee had earned a commission of Rs. 1,16,150/- which was 3% of the gross receipts of Rs.38,71,660/-. It was further submitted that the commission had been received @ 5%, but after claiming expenses of driver and diesel and repairs, net profit of 3% had been shown on the same. It was further submitted that except this, the assessee had no other income and it was only the truck freight, which was paid in cash, that was reflected in the bank account. Considering the above and also after lapse of 14 years, the assessee was unable to provide the complete details. In support of the claim of receipts from truck plying business, the assessee drew our attention to the registration certificates of two trucks owned by him, bearing Registration Nos. U.P. 70 AT 5316 and U.P. 70 AT 4346. The ld. AR also drew our attention to the e-proceedings response acknowledgment filed on 13.08.2022, in which copies of his earlier income tax returns and the registration certificates had been attached along with his supplementary written statement. He therefore, prayed that the ld. CIT(A) was not justified in expecting the kind of documentation that he desired from the assessee and dismissing the appeal of the assessee on this account. With regard to the failure to make compliance during the penalty proceedings, the ld. AR submitted that since the proceedings were taken up simultaneously, the assessee was under the impression that compliance made in the quantum proceedings, constituted sufficient compliance to explain the facts involved in the penalty also.

10. On the other hand, Shri A.K. Singh, ld. Sr. DR (hereinafter referred to as the "ld. DR") pointed to the history of non-compliance by the assessee and submitted that in the absence of evidences, the submissions of the assessee were merely a story and ought not to be accepted.

11. We have duly considered the facts and circumstances of the case. We observe that the assessee had submitted before the Id. CIT(A), copies of registration certificates of his Trucks bearing Registration Nos. U.P. 70 AT 5316 and U.P. 70 AT 4346, as proof of having earned income from the plying of trucks. We also notice that the assessee has offered the income from these two trucks at the rate prevailing under section 44AE at the time (Rs.3,500/- for every month or part of a month during which the heavy goods vehicle is owned by him). We further observe that the Id. AO and the Id. CIT(A) are incorrect in their assumption, that the assessee was required to maintain any books of accounts under section 44AA or get the accounts audited under section 44AB, in view of the specific exemption to the same provided under section 44AE. Therefore, with regard to the income from plying of trucks, we do not see any merit in sustaining the addition, by ignoring the provisions of law under which the assessee was entitled to seek shelter. However, with regard to the issue of transportation commission, we find merit in the contention of the Id. CIT(A) that any person paying commission to the assessee was liable to deduct tax at source unless the commission was less than Rs. 2,500/- during the course of the financial year. There is no presumptive taxation scheme for commission income that was prescribed in the Act during the said assessment year. Therefore, for such transport commission, the assessee was obliged to produce details before the lower authorities, to justify the commission on the rate of profit claimed by him. This has evidently not been furnished by the assessee. Therefore, the claim of transport commission of Rs. 1,16,150/- cannot be accepted at face value, without receipt of any information regarding the source of such income. The assessee has submitted that it is difficult to produce this information after a gap of so many years, but the assessee was obliged to maintain documents, on the basis of which his returns were being filed, if it was not being filed under the presumptive tax scheme. It is pertinent to note that commission income @ 5% of gross receipts was not covered under any presumptive tax scheme such as 44AE, 44AF or 44AD. Therefore, if the assessee

wished to demonstrate that the amount of Rs.38,71,660/-, stated to be credited to his bank account relating to transport commission, was in fact, the turnover of the said business, rather than the income from the same, then he would be obliged to produce material to establish the existence of the business. It is observed that the provisions of section 44AA as they stood during the assessment year in question, required an assessee having any business or profession, the turnover of which exceeded Rs. 10,00,000/-, to maintain such books of accounts and other documents as may enable the Id. AO to compute his total income in accordance with the provisions of the Act. In the circumstances, unless the assessee furnishes evidences of the fact that the receipt in his account constitute the turnover of his transport commission business and the actual income from the same was only 5% of those receipts, the Id. AO would be justified in bringing the entire deposit on this account to tax. In the interest of justice, we deem it fit to allow the assessee one more opportunity to produce the necessary evidence regarding the existence of transport commission business before the Id. AO and we order that, in case the assessee is able to produce such evidence that shows that his income from such deposits was only to the extent of 5% of such deposits, the Id. AO may grant the relief to him. However, if the assessee is not able to demonstrate that he was running a transport commission business with reference to any documents or books of accounts, the Id. AO would be justified in taxing the entire amount of deposits as unexplained money within the meaning of the Income Tax Act. Accordingly, we restore the matter to the file of the Id. AO for re-examination of this issue, while allowing relief in respect of the deposits to the extent of Rs.75,38,450/- on account of total turnover from truck business which had been offered for tax under section 44AE.

12. In the result, ITA No. 52/Alld/2024 is partly allowed.

13. Since the matter relating to the income from transport commission has been restored back to the file of the Id. AO for a fresh decision, we deem it

appropriate too also restore back the appeal against the penalty (ITA No. 54/Alld/2024) to the file of the ld. AO for a decision, after a final decision is arrived at with regard to the quantum appeal. Needless to say, that the addition on account of turnover of truck income offered under section 44AE having been allowed, no penalty would be leviable by the ld. AO on account of such deposits. The ITA No. 53/Alld/2024 is also held to be partly allowed.

ITA No.54/Alld/2024

A.Y. 2011-12

14. The facts of the case in Assessment Year 2011-12 are more or less similar. It is seen that during the year, the assessee did not file a return and therefore was served with a notice under section 148, in respect of which he filed a return showing a total income of Rs.2,02,000/-, of which a sum of Rs.1,08,000/- was shown as income from plying of two trucks and a sum of Rs.94,000/- were shown as income from transport commission. Before the ld. AO, the assessee submitted that the turnover from transport commission business was Rs. 9,50,000/- while the turnover from transportation business was Rs.13,12,130/-. The ld. AO asked the assessee to furnish proof of the transport commission, which the assessee could not do. Therefore, he declined to accept Rs.94,000/- as the income from such business and made an addition of Rs.1,06,000/- on this account. With regard to the transportation business, the ld. AO did not make any addition. However, he noted that a total deposits in the bank account were Rs.1,24,7,930/- of which only Rs. 13,12,130/- had been claimed as turnover from the business of transportation. Therefore, he treated the remaining amount as the unexplained, in the absence of any explanation from the assessee and made addition of Rs.1,10,95,930/-, on this account. The assessee went before the ld. CIT(A) and submitted that, in fact, the entire deposits belong to truck freight from Rajasthan, Madhya Pradesh and Uttar Pradesh and there was no cash balance on 22.03.2011. It was submitted that the

trucks go to Alwar and from there to other places in Rajasthan, Madhya Pradesh and Uttar Pradesh and therefore, the turnover is on the higher side and the expenses were also on the higher side. It was submitted that the gross receipts of the truck were Rs.1,14,57,930/- and the income of Rs.1,08,000/- had been offered under section 44AE. The ld. CIT(A) observed that the assessee had also submitted that besides the two trucks, he owned, the assessee had also hired the other trucks. It was submitted that since the assessee was taking shelter under the provisions of section 44AE, he was not required to maintain books of accounts nor get accounts audited. The ld. CIT(A) considered this plea of the assessee. He observed that before the ld. AO, the assessee had made a submission that his turnover was only Rs.5,48,000/- and now wished ld. CIT(A) to believe that it was Rs.1,14,57,930/-. From this, he drew the inference that the assessee had been doing transportation business not only through his own trucks but also by hiring trucks from others. He observed that since there were credits as well as debits in the said bank account, the ld. AO was not correct in adding the entire receipt as the income of the assessee. Therefore, he estimated a net profit of 10% from the business and sustained an addition of Rs. 11,09,593/- out of the additions made by the ld. AO. He also directed the ld. AO to initiate proceedings under section 271B of the Act. The Department went in appeal before the Hon'ble Tribunal stating that the ld. CIT(A) had simply accepted the submission of the assessee and allowed relief to the assessee by restricting the addition to 10% of the gross receipts. The Hon'ble ITAT held that since the ld. CIT(A) had not filed a speaking order, it was remitting the matter back to the file of the ld. CIT(A) for the passing of a speaking order. In the second round of appeal, the ld. CIT(A) records that despite being served with notices on four occasions, the assessee did not file any documents or evidence. Therefore, he proceeded to decide the appeal based on the material available on the record. Once again the ld. CIT(A) has recorded his belief, that the turnover claimed by the assessee for transportation business was liable for audit. Therefore, citing the non-

cooperation exhibited by the assessee during the course of the appeal, he dismissed the appeal of the assessee and restored the orders of the ld. AO. The assessee is aggrieved with regard to this order and has accordingly come before us in appeal.

15. It is observed from the records, that in this assessment year also, the assessee is plying two trucks of his own, the income from which has been offered under section 44AE. However, the submissions filed by the assessee before the ld. AO and subsequently by the ld. CIT(A) in the first round had created an ambiguity as to what is the actual turnover from the business of plying of trucks. The ld. CIT(A), in the first round of appeals has pointed out, that there are credit and debit entries in the bank account, which would not justify the adding of the entire amount as income. Before him, the assessee had submitted that all the deposits in the account belonged to truck freight from Madhya Pradesh, Rajasthan and Uttar Pradesh and that there was no cash balance. Therefore, in order to arrive at the true fact of the turnover from truck business which has been offered for tax under section 44AE, an examination of the bank account is required. We observe that the assessee had obtained a copy of the account during the appeal proceedings before the ld. CIT(A) and had submitted his reply on that basis. We, therefore, restore the matter back to the file of the ld. AO and direct the assessee to produce the said bank accounts before the ld. AO and explain the deposits in the said bank account with reference to its truck business and order, that in case the assessee is able to do that, the ld. AO may assess the income of the assessee under the provisions of section 44AE. If however, the assessee is unable to explain the receipts in his bank account with reference to the transportation business, the ld. AO would be free to consider the deposits as unexplained.

16. With regard to the deposits of Rs. 9,50,000/- stated to be on account of transport commission, as already observed by us while deciding appeal in ITA No.52/Alld/2024, transport commission does not fall under any scheme of

presumptive taxation. Therefore, the assessee is obliged to produce some documentation to establish the existence of business. We notice that in this particular year, the turnover disclosed by the assessee for this kind of business does not exceed the amount that would require him to maintain books of accounts as per section 44AA. However, the fact of the existence of business must be established before the Id. AO can consider the income from the same as true and correct. Accordingly, we restore the matter to the file of the Id. AO for enquiry and decision on both these issues. ITA No. 54/Alld/2024 is therefore, allowed for statistical purposes.

17. In the result, the appeal of the assessee in ITA Nos. 52 & 53/Alld/2024 is partly allowed while the appeal of the assessee in ITA No. 54/Alld/2024 is allowed for statistical purposes.

Order pronounced on 25.10.2024 at Allahabad U.P.

Sd/-

**[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER**

DATED:25/10/2024

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Copy forwarded to:

1. Appellant –
2. Respondent –
3. CIT DR, ITAT,
4. CIT,
5. The CIT(A)

Sd/-

**[NIKHIL CHOUDHARY]
ACCOUNTANT MEMBER**

By order
Sr. P.S.