

**IN THE INCOME TAX APPELLATE TRIBUNAL
ALLAHABAD'SMC' BENCH, ALLAHABAD**

**BEFORE SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER**

ITA No.58/ALLD/2024
A.Y. 2017-18

Itaili Sadhan Sahkari Samiti Limited Fatehpur PO Itaili, Block Hathgam, Fatehpur-212652 PAN:AADFI7669A (Appellant)	vs.	Income Tax Officer-2(4), Fatehpur (Respondent)
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Assessee by:	Sh. Mayank Arora, Advocate
Revenue by:	Sh. A.K. Singh, Sr. DR
Date of hearing:	22.10.2024
Date of pronouncement:	27.12.2024

ORDER

PER NIKHIL CHOUDHARY, A.M.:

This is an appeal against the order under section 250 of the Income Tax Act, 1961 passed by the Id. CIT(A), NFAC on 28.07.2022 dismissing the appeal of the assessee. The grounds of appeal preferred by the assessee are as under:-

- "1. Because the Learned Commissioner of Income Tax (Appeals), NFAC has erred to pass ex-parte Appellate order without considering the facts and circumstances of the case and has simply confirmed the order passed by the Ld. Assessing Authority.*
- 2. Because the appellant was not given proper opportunity of being heard since the Secretary of the appellant Co-operative Society was not aware of the online service of notices. He was totally dependent upon his previous Counsel at Fatehpur for such legal obligations and now on the advice of its present Counsel at Prayagraj, the appellant is filing this appeal.*
- 3. Because the Ld. Assessing Authority has made the assessment U/s 144 dated 26-09-2019 in the status of the 'Firm' whereas the status of the appellant is Co-operative Society, i.e. it should be 'AOP'. The Ld. Appellate Authority has also simply confirmed the same which is highly erroneous since the appellant is a Co-operative*

Society and its name also prima facie suggest that it is a Co-operative Society as the name ends with 'Sahakari Samiti Limited.'

4. Because the Ld. Assessing Authority has erred in applying provisions of Sec 44AD on Co-operative Society and Learned Commissioner of Income Tax (Appeals), NFAC has simply confirmed it without application of judicial mind.

5. Because the Ld. Assessing Authority and Learned Commissioner of Income Tax (Appeals), NFAC have erred to ignore the fact that the appellant is a Co-operative Society and to assess its income @ 8% by applying Sec 44AD is illegal and against the provisions of the Act.

6. Because the Ld. Assessing Authority and Learned Commissioner of Income Tax (Appeals), NFAC have erred to ignore the fact that the presumptive taxation scheme of Section 44AD applies only to resident assessee who is an individual, Hindu Undivided Family and partnership firm but not Limited Liability Partnership (LLP) firm. Thus, both Ld. Assessing Authority and Ld. Appellate Authority have made reckless assessment and erroneous confirmation of the same without considering the fact that the appellant is having status of Co-operative Society.

7. Because the finding given by the Ld. Commissioner of Income Tax (Appeals), NFAC that the Assessing Authority has merely quoted Sec 44AD for taking certain percentage of profit is wrong and against the provisions of the Act, since the profit of AOP can be determined according to books of accounts and not by applying provisions of Sec 44AD. The Assessing Authority has made proper use of provision of Sec 44AD as mentioned in the second page of the Assessment Order passed U/s 144.

8. Because the Ld. Assessing Authority has itself accepted the facts that the appellant has provided the copy of ITR, Trading & P/L A/c, Balance Sheet, etc. for the AY 2017-18 in its assessment order, but has acted against the provisions of the Act by not considering the accounts and has simply applied profit @ 8% as per Sec 44AD.

9. Because the Ld. Assessing Authority has not considered the Income Tax Return wherein P/L A/c has been filled by the appellant whereas assessment has been made on the basis of bank deposits for Rs. 74,61,342-00 which is baseless and against the provisions of the Act.

10. Because the income of the appellant for the AY 2017-18 is Rs. 54,980-00 on which no tax is payable.

11. Because the Ld. Assessing Authority has erred in believing in wrong information and has arbitrarily assessed income in haste merely on conjectures and surmises.

12. Because the initiation of penalty U/s 270 A & 272A (1) (d) is wrong and illegal.

13. Because the order passed U/s 144 by the Ld. Assessing Authority and the order passed U/s 250 by the Ld. First Appellate Authority is bad in law and against the facts.”

2. Ongoing through the case, it was observed that the appeal was delayed by 560 days. An application and affidavit for condonation of delay was filed by the Secretary of the Samiti, Sh. Pramod Singh. It was submitted that the *ex parte* appellate order under section 250 was passed on 28.07.2022 and on 28.07.2022, the Secretary of the assessee met its' then counsel and handed over all the documents to him for the purposes of filing of appeal before the ITAT. But the file containing such documents was misplaced in the office of the counsel and was not traceable in spite of the best efforts of the counsel and his staff. On 5.04.2024, the file of the appellant was located, to have been kept in some other file and it was only then that the Secretary of the assessee came to know that the appeal had not been filed. Thereafter, the assessee had changed its counsel and immediately filed the appeal through the new counsel. The assessee prayed that the delay may kindly be condoned because there was no intentional default on the part of the assessee, but rather it was totally dependent on its previous counsel who had not attended to the matter. Placing reliance on the judgment of the Hon'ble ITAT Delhi Bench 'SMC' in the case of ***Ashok Kumar Singh vs. ITO, Ward-1(1), Ghaziabad*** (ITA No.5515/Del/2019), the assessee pointed out that the Hon'ble ITAT in that case had condoned the delay on account of the failure of the counsel to file the appeal on time. The assessee also placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Improvement Trust, Ludhiana vs. Ujagar Singh and Others*** in Civil Appeal No.2395 of 2008, wherein it had been held that unless mala fides were writ large on the conduct of the party, generally, as a rule, delay should be condoned and an attempt should always be made to allow the matter to be contested on merits rather than throw it out on technicalities. Finally, the assessee placed reliance on the

judgment of Hon'ble Supreme Court in the case of ***Collector Land Acquisition vs. M.S.T. Katiji & Others*** 1987 AIR 1353 wherein the Hon'ble Supreme Court had, while laying down the guidelines for consideration of delay, pointed out that refusing to condone the delay could result in a meritorious matter being thrown out at the very threshold and the cause of justice being defeated, as against which when the delay was condoned, the highest that could happen was that a cause may be decided on merits after hearing the parties. In view of the judgments of the Hon'ble Courts, it was prayed that in view of circumstances, the delay may kindly be condoned.

3. We have duly considered the matter. We observe that while there is a considerable delay in the filing of the appeal, there is no apparent benefit to the assessee in not filing the appeal and no apparent judicial pronouncement subsequently pronounced on the grounds under dispute, that would allow us to infer that the assessee filed the appeal as an afterthought. Thus, the delay does not seem to be occasioned by mala fide. Given the peculiar circumstances outlined by the assessee, in the interest of justice, we admit the appeal to be heard on its merits.

4. The facts of the case are that the assessee deposited a sum of Rs.16,44,100/- in its bank account during the demonetization period, but did not file its return of income for the concerned assessment year. Accordingly, a notice under section 142(1) was issued on the assessee to file the return of income. However, no compliance was made and therefore, a show cause notice under section 144 was issued to the assessee. In response to this notice, counsel for the assessee appeared and submitted a written reply accompanied by a copy of ITR, trading, profit and loss account, balance-sheet and computation of income. He was asked to submit the proof for claiming exemption from total income, audit report, details of gross turnover and produce books of accounts for verification but subsequently,

compliance was not made. The Id. AO then went through the bank statement of A/c No.48250100002903 maintained at Bank of Baroda, Itauli, Fatehpur and found that the total amount credit during the year was Rs.74,61,342/-. In the absence of proper replies to his queries, he treated the entire amount deposited as the turnover of the assessee and thereafter applied the provisions of section 44AD to determine the income of the assessee at Rs.5,96,910/-. The assessee was assessed at this income, charged interest under section 234A and 234B and penalty proceedings under section 270A were separately initiated.

5. Aggrieved with these additions, the assessee filed an appeal before the Id. CIT(A), Allahabad. Subsequently, this appeal was migrated to the National Faceless Assessment Centre. The Id. CIT(A) records that he issued three notices to the assessee on 8.03.2022, 12.05.2022 and 31.05.2022, fixing the date for filing of online submissions, but the assessee did not file any written submissions or documentary evidence in response to the said notices. Thereafter, the Id. CIT(A), considered the appeal filed by the assessee and observed the assessee's submission that it was a society that sold seeds and fertilizers to its Members at a subsidized rate and the books of accounts were regularly maintained and audited by the Sahkar and Panchayat Lekha Pariksha Sangthan, Lucknow, Uttar Pradesh. He also observed that the assessee had submitted that all the cash deposits during the demonetization periods were sourced out of sale proceeds and the deposits were within its financial limits. However, he observed that the details of such sales purchases and other expenses were not produced before the Id. AO with documentary evidences at the time of assessment proceedings or before him at the time of appeal proceedings. Pointing out that the onus was on the assessee to produce the bills and vouchers to disprove the additions made by the Id. AO, he held that relief could not be allowed solely on account of grounds of appeal or the statement of facts and therefore, he upheld the decision of the Id. AO to apply the provisions of section 44AD and

estimate the income at 8% of receipts. He also observed that during the course of appeal, the assessee had not produced the reconciliation of cash deposits with necessary bills and vouchers and since no such compliance had been made before the Id. AO also, the Id. AO's actions under section 144 were justified. He accordingly, dismissed the appeal of the assessee.

6. The assessee is aggrieved at this dismissal of its appeal and has accordingly come before us. Shri. Mayank Arora, Advocate (hereinafter referred to as the 'Id. AR') appeared on behalf of the assessee. It was submitted that the assessee was a Cooperative Society registered under the Uttar Pradesh Cooperative Society Act, 1965 in the name and style of M/s Itaili Sadhan Sahkari Samiti Limited, Fatehpur having its registered office at Itaili, Block Hathgam, Fatehpur- 212652. He drew our attention to the rules and byelaws of the appellant cooperative society which were placed from pages 24 to 44 of the appeal memo. The Id. AR submitted that the assessee had replied to the notice under section 142(1) and filed a return with a total income of Rs.54,980/-. A copy of ITR-V for the said filing was submitted on page 45 of the appeal memo as proof of the same and it was submitted, that since the appellant was a cooperative society, it had filed its income tax returns on the basis of computing its' income under the regular method and not by applying section 44AD, because the provisions of section 44AD did not apply to the assessee. It was submitted that the Id. AO and the Id. CIT(A) had ignored this fact and thereby erred in assessing the income of the society at 8%, by applying section 44AD of the Act. It was further submitted that the Id. AO had made the assessment under the status of a firm, whereas the status of the assessee was a cooperative society i.e. it should have been assessed as an AOP. It was further submitted that the presumptive taxation scheme of section 44AD applies only to individuals, Hindu undivided family and partnership firm but not to cooperative societies. Thus, the addition made by the Id. AO and confirmed by the Id. CIT(A), was reckless because it had failed to take

this into account. It was further submitted that the income tax return filed by the assessee had not been taken into account and the net profit rate of 8% had simply been applied by taking queue from section 44AD. Accordingly, it was prayed that considering the facts of the assessee's case, the additions made may be deleted.

7. We have duly considered the facts and circumstances of the case. We observe that the assessee was issued a notice on 24.03.2018 and asked to file a return by 31.03.2018. The assessee did not make compliance to this notice. As per the provisions of section 139(4) as it existed prior to Assessment Year 2017-18, the assessee who did not furnish a return within the time allowed to him under sub section 1 of section 139 or within the time allowed under a notice under sub section 1 of section 142, could furnish a return for any previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of assessment whichever is earlier. This provision was amended with effect from 1.04.2017 to provide that a return under section 139(4) had to be furnished within three months before the end of the assessment year. In the instant case, the assessee has furnished the return which is outside period allowable, and therefore there is no legal necessity to regard the same as a valid return for the purposes of the Income tax and all the consequences that are liable to be visited upon an assessee for not filing of a return, are liable to be visited upon the assessee. However, the return filed, was still a piece of relevant information / submission of the assessee, that was in the possession of the Ld AO before the finalization of the assessment. Therefore, it ought to have been considered while determining the income of the assessee. We are conscious of the fact that the failure to consider this return has primarily been due to the failure of assessee to make proper compliance before the ld. AO, but we note that this return was before the ld. AO and therefore, ought to have been considered by him while determining the assessee's income. Observing that the provisions of section 44AD are not applicable to cooperative

society claiming any deduction under any of the provisions of Chapter VIA, we hold that the assessment made by the Id. AO can therefore, not be sustained. However, in the interest of justice, we feel it is appropriate to refer the matter back to the file of the Id. AO, so that the Id. AO may have occasion to examine the cash deposits made by the assessee during the demonetization period and the assessee may have another opportunity to present the necessary evidences to demonstrate before the Id. AO ,that the said deposits were made out of sales of fertilizers and seeds as per its rules and byelaws. Accordingly, the assessment is set aside and restored back to the file of the Id. AO for a *de novo* assessment. We would also like to caution the assessee, that its failure to make compliance could be viewed against it and the impugned deposits in its bank accounts could be held to be unexplained, if not explained with reference to documentary evidences. As the matter has been restored to the file of the Id. AO, the appeal of the assessee is held to be allowed for statistical purposes.

8. In the result, the appeal is allowed for statistical purposes.

Orders pronounced on 27.12.2024 at Lucknow U.P.

Sd/-

**[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER**

DATED: 27/12/2024

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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.