IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F', NEW DELHI

BEFORE SH. I.C. SUDHIR, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA No. 2473/Del/2015
Assessment Year: 2010-11

Pawa Industries Pvt. Ltd., 308-309, 3rd Floor, Essel House, Asaf Ali Road, Turkman Gate, New Delhi	**Vs.**	Income Tax Officer, Ward-14(2), New Delhi
PAN : AAACP0041M		
(Appellant)		**(Respondent)**

Appellant by	Sh. Salil Aggarwal, Advocate & Sh. Shailesh Gupta, CA
Respondent by	Sh. F.R. Meena, Sr.DR

Date of hearing	20.03.2017
Date of pronouncement	31.03.2017

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 02/02/2015 of Ld. Commissioner of Income-tax (Appeals)-7, Laxmi Nagar, Delhi (in short "the CIT-A") for assessment year 2010-11 raising following grounds:

"1. That thelearned Commissioner of Income Tax (Appeals) has erred both in law and on facts by upholding the order of assessment at an income so returned in the original return of income at Rs. 44, 90, 180/- as against the income returned in the revised return of income at Rs. 12, 84, 334/-, by failing to appreciate that the same was based on correct interpretation of statutory provisions, which

has all been arbitrarily brushed aside on mere subjective opinion which is wholly untenable in law.

2. That thelearned Commissioner of Income Tax (Appeals) has failed to appreciate the fact that once the revised return of income filed by assessee - appellant was rejected than the assessment so framed under section 143(3) of the Act could not have been so framed, as no noticed under section 143(2) was issued within the prescribed period of limitation i.e. six months from the end of the assessment year in which original return of income was filed and thus, the assessment so framed is without jurisdiction and should be quashed as such.

3. That thelearned Commissioner of Income Tax (Appeals) has ignored the basic fact that the assessee - appellant was carrying on the business of transportation and income declared in its revised return was at presumptive rates of tax as specified under section 44AE of the Act, which claim of the assessee - appellant had been arbitrarily rejected without understanding the legal mandate of the provisions of section 44AE of the Act and as such, the additions so made by learned AO and so sustained by learned CIT (A) should be deleted.

4. That the learned Commissioner of Income Tax (Appeals) has further grossly erred in relying on the judgments totally inapplicable to the facts of the case of the appellant company and has further, placed reliance on the provisions not applicable on the facts of the assessee - appellant.

5. That the learned Commissioner of Income Tax (Appeals) has erred in law and on facts in sustaining additions in the hands of assessee company, without giving any fair and proper opportunity of being heard to the appellant company. Thereby violating the principles of natural justice."

2. The facts in brief of the case are that the assessee company was engaged in business of plying of tankers and earned freight charges from its clients. For the year under consideration, the assessee filed return of income on 28/09/2010 declaring total income of Rs.44,90,180/-.

Subsequently, the assessee filed a revised return on 28/09/2011, in which the assessee declared the income from plying of tankers under presumptive scheme of taxation with reference to section 44AE (2) of the Act and total income was reduced to Rs.12,84,334/-. The case was selected for scrutiny and notice under section 143(2) of the income tax Act, 1961 (in short "the Act") was issued on 01/08/2012 and complied with. In assessment proceedings, the assessee found that the Assessing Officer was not agreed with the income declared in the revised return and thus the assessee sought directions under section 144A of the Act from the concerned Additional Commissioner of income tax. The Ld. Additional Commissioner of Income Tax directed the Assessing Officer vide order dated 31/01/2013 that the assessee was required to declare its true and full income, which in the case was Rs.44,90,180/- filed in the original return of income and under the circumstances, the revised return of income filed with assessee for the year under consideration on 28/09/2011 could not be accepted. Following the said directions, the Assessing Officer completed the assessment under section 143(3) of the Act on 26/03/2013 at total income of Rs.44,90,180/-. The Ld. CIT-A confirmed the action of the Assessing Officer in assessing the income as declared in the original return of income. Aggrieved, the assessee is in appeal before the Tribunal, raising the grounds as reproduced above.

3. Before us, Ld. counsel of the assessee filed paper book containing pages from 1 to 64 and submitted that the revised return of income filed by the assessee is a valid return and therefore the Revenue authorities were not justified in not accepting the income declared therein, following the presumptive scheme for computing income from plying of goods carriages as laid down in section 44AE(2) of the Act. Alternatively, it was also argued that notice under section 143(2) of the Act has been issued within the limitation available with reference to the revised return of

income and if same is not accepted than the notice issued under section 143(2) of the Act is barred by the limitation and no assessment could have been framed with reference to the original return of income. The learner counsel referred to the provisions of section 44AE of the Act, in existence during relevant period and submitted that in terms of the clause(ii) of section 44AE(2) of the Act, the assessee was required to declare profit equal to Rs.3,500/- per month per goods carriage owned by the assessee or an amount higher than aforesaid amount as declared by him in his return of income, and accordingly, the assessee chosen the profit at the rate of Rs.3500 per month per goods carriage and same was declared in the revised return of income. The Ld. counsel submitted that the assessee discovered error in the original return of income filed and accordingly he revised the return of income, in conformity with the provisions of section 139(5) of the Act. In view of the arguments, the Ld. counsel submitted that order of the lower authorities on the issue in dispute might be set-aside and the income as declared in the revised return of income might be accepted.

4. Ld. Senior DR, on the other hand, relying on the orders of the lower authorities submitted that the revised return filed by the assessee was not held as invalid and the Assessing Officer has not accepted the revised income reported in the revised return. He further submitted that the Assessing Officer has assessed the income is reported in the original return of income and in such circumstances the issue of completion of assessment beyond the period of limitation does not arise. He further submitted that the Assessing Officer has assessed the income following the clause (i) of section 44AE(2) of the Act, according to which if the profit reported in the return of income from goods carriage is higher than the profit estimated at the rate of Rs. 3,500/- per month, then the assessee is required to declare such higher amount. In view of the Ld.

Senior Departmental Representative , the profit declared by the assessee from goods carriages in the original return of income being higher than the profit computed at the rate of Rs. 3500 per month per goods carriage, the assessee was liable for assessment of income at such higher amount as per the provisions of section 44AE of the Act, and therefore action of the lower authorities are in accordance with law.

5. We have heard the rival submissions and perused the relevant material on record. The learner counsel in support to ground No. 2 of the appeal, submitted before us that notice issued under section 143(2) of the Act was beyond the prescribed period of limitation from the original return of income and therefore the assessment framed is without jurisdiction. We find that the original return of income under section 139 (1) of the Act was filed on 28/09/2010 and the revised return has been filed on 28/09/2011. According to the section 139 (5) of the Act, a person may furnish a revised return 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. In this case the assessment was not completed and a period of one year from the end of the assessment year was expiring on 31/03/2012 and therefore the revised return filed with assessee on 28/09/2011 was well within the limitation period. This revised return was not held to be a defective return in terms of the section 139(9) of the Act. The Tribunal in the case of R. Kasi Visvanathan & Bros. Versus assistant Commissioner of income tax (2014) 42 taxmann.com 176 (Cochin-Trib) held that where assessee filed a revised return in accordance with the provisions of section 139(5), the revenue authorities were not justified in rejecting said return without following procedure prescribed under section 139(9) by merely taking a view that the revised return was an afterthought and it was filed only to reduce assesses tax liability.

6. Further, the notice under section 143(2) of the Act has been issued on 01/08/2012 and duly served upon the assessee. As per the provisions of the Act, notice under section 143(2) was required to be served within a period of six months from the end of the financial year in which return is furnished. Thus, according to the provisions of section 143 , notice in the case of the assessee could have been served till 30/09/2012 . In the case of the assessee notice under section 143 (2) was issued on 01/08/2012 and was duly served upon the assessee. In view of these facts, the contention of the Ld. counsel that assessment was barred by limitation, is not acceptable due to the reason that the revised return of income was a valid return and notice under section 143 (2) of the Act was served upon the assessee within the limitation period available as per provisions of the Act. In our opinion merely mentioning by the Additional CIT in the direction issued under section 144A of the Act that the revised return cannot be accepted, cannot change otherwise validity of the assessment. The Ld. CIT-A has also discussed this issue in para-6.1 and 6.2 of the impugned order, which is extracted as under:

> *"6.1 In my view the AO has stated that the revised income cannot be accepted and has taken the income as per the original return filed. The AO was acting on the directions issued by the Addl. CIT u/s 144A. The Addl. CIT has made a minor mistake. She should have stated that the revised income shown cannot be accepted.*
>
> *6.2 Once a revised return has been field u/s 139(5) within time there is no provision in law which can declared the revised return as invalid. Therefore, the revised return filed u/s 139(5) by the appellant was within time and was a valid return and the Assessing Officer has only taken the income in the original return for determining the assessable income."*

7. In view of our discussion, the ground No. 2 of the appeal is dismissed.

8. In grounds No. 1, 3 and 4, the assessee has challenged assessing of income from plying of trucks as reported in the original return of income as against the income declared by the assessee in the revised return. The dispute in the case is related to the interpretation of clause (ii) of the section 44AE(2) of the Act. The learned CIT-A has analyzed the relevant provisions during the relevant period as well as amended provision w.e.f. assessment year 2011-12. The relevant part of section 44AE(2) of the Act, reads as under:

"Section 44AE(2) during relevant period:

(2) For the purposes of sub-section (1), the profits and gains from each goods carriage, --

(i) being a heavy goods vehicle, shall be an amount equal to three thousand rupees for every month or part of a month during which the heavy goods vehicle is owned by the assessee in the previous year or, as the case may be, an amount higher than the aforesaid amount as declared by him in his return of income;

(ii) other than a heavy goods vehicle, shall be an amount equal to three thousand one hundred rupees for every month or part of a month during which the goods carriage is' owned by the assessee in the previous year or, as the case may be, an amount higher than the aforesaid amount as declared by him in his return of income."

The amended provisions came into effect from 01.04.2011 and are as under:

"(2) For the purpose of sub-section (1), the profits and gains from each goods carriage:

(i) being a heavy goods vehicle, shall be an amount equal to five thousand rupees for every month or part of a month during which the heavy goods vehicle is owned by the assessee in the previous year or an amount claimed to have been actually earned from such vehicle, whichever is higher ;

(ii) other than a heavy goods vehicle, shall be an amount equal to four thousand five hundred rupees for every month or part of a month during which the goods carriage is owned by the assessee in the previous year or an amount claimed to have been actually earned from such vehicle, whichever is higher. "

9. Thus, clause (i) of section 44AE(2) of the Act the during relevant period , consists of two parts connected by the word ówrô The first part lays down computation of income on estimate basis of prescribed fixed sum per month per goods carriage. The second part refers the income declared in the return of income, which is higher than the estimated income. Both parts of the clause (i) are connected by the disjunctive ówrô The sentence, ówhichever is higherôof two, has been inserted w.e.f from A.Y.- 2011-12 only. Thus, during the relevant year, assessee was having option for choosing profit to be declared from the activity of plying goods carriages. The first option was to declare profit at the rate of a fixed prescribed sum per month per goods carriage. The second option was to offer the amount declared in the return of income, being higher than the first option. During relevant period, it was choice of the assessee to declare the income on estimate basis or to declare higher income from the business of plying of goods carriages. But w.e.f. assessment year 2011-12, the choice available with the assessee of choosing the option, has been taken away and now, the assessee is required to declare the income whichever is higher, out of estimated income or the amount claimed to have been actually earned from such vehicle. The CBDT circular No. 5 of 2010 dated 03/06/2010 has also clarified that this anti-avoidance clause was provided w.e.f . AY: 2011-12.

10. In the instant case, the contention of the assessee is that in the revised return of income, the assessee has chosen to declare profit from plying of the goods carriages at the rate of Rs. 3500 per month per

goods carriage as per the first option available. It is further submitted that even the income according to the second option would be of same amount as the income in the revised return of income, has been declared at the rate of Rs. 3500 per month per goods carriage, and thus, the income declared by the assessee should be accepted as according to section 44AE of the Act.

11. However, the contention of the Revenue is that the profit from plying of the goods carriages declared in the original return of income on the basis of the audited accounts is evidently higher than the amount of Rs. 3500 per month per carriage, and, therefore, the higher profit declared in the return of income, should be assessed in the case of the assessee.

12. In our view, the contention of the Revenue is not correct as during the relevant period, the assessee was having option of choosing a prescribed fixed sum towards profit from plying of goods carriages for declaration or higher amount declared in the return of income. The assessee has chosen the option of a prescribed fixed sum per month in the revised return of income, which has already been held by us as a valid return. The provision of assessing higher income out of two options has been made effective only from assessment year 2011-12 and not for the year under consideration.

13. Before us, the Ld. counsel relied on the decision of the Tribunal, Ahmedabad bench in the case of a Kesharbhai Ghamarbhai Choudhary Vs. ITO in ITA No. 1402/Ahd/2009. In said case, the AO did not accept the revised return on the ground that original return was not within the time. In the revised return the assessee claimed income on estimate basis as per section 44AE of the Act. The Tribunal directed the Assessing Officer to determine the income of the assessee as per section 44AE of the Act.

14. In view of above discussion, in our opinion, the Ld. CIT-A is not justified in directing the AO to assess income from plying of goods carriages as was declared in the original return of income. Accordingly, we direct the Assessing Officer to compute profit from goods carriages at the rate of fixed sum prescribed for relevant period under clause (i) of section 44AE(2) of the Act. The grounds Nos. 1, 3 and 4 of appeal of the assessee are allowed.

15. In the result, the appeal filed by the assessee is partly allowed.

The decision is pronounced in the open court on 31st March, 2017.

Sd/-	Sd/-
(I.C. SUDHIR)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 31st March, 2017.
RK/-(D.T.D)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi