IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH, BENGALURU
BEFORE SHRI CHANDRA POOJARI, AM

ITA No.1239/Bang/2019
Assessment Year: 2013-14

Shri Kokkarne Prabhakara, 103, Indira Prasta Apartment, Vivekanand Colony, Keshwapur, Hubli-580 023 PAN ACIPP 8430H	**Vs.**	Income Tax Officer, Ward 3(2), Hubballi.
(Assessee -Appellant)		**(Revenue-Respondent)**

Assessee by	Smt. Suman Lunkar, C.A.
Revenue by	Shri Ganesh R Ghale, Standing Counsel.

Date of hearing	10/09/2020
Date of pronouncement	11/09/2020

O R D E R

Per CHANDRA POOJARI, AM:

This appeal by the assessee is directed against the order of the CIT(A) dated 14/03/2019.

1.1 There was a delay of 3 days in filing the appeal before the Tribunal. The assessee filed condonation petition stating that the assessee sent the appeal papers through VRL courier on 24/05/2019. Further, the bus which was carrying the appeal papers met with an accident and it was delivered only on 28/05/2019 which resulted in delay of three days.

1.2 I have gone through the condonation petition. I find that there is good and sufficient cause for filing the appeal belatedly. Accordingly, I condone the delay of three days and admit the appeal for adjudication.

2. The assessee has raised the following grounds:

1. The learned Assessing officer has erred in passing the order in the manner passed by him and the learned Commissioner of Income Tax (Appeals) has erred in confirming the same. The impugned orders being bad in law, void ubinitio are required to be quashed.

2. The Assessing Officer has erred in adding the entire amount of receipts- being difference between the figures in return of Income and as per Form 26AS.

   2.1 The appellant has shown gross receipts of Rs: 4413413/- on which 8% income u/s 44 AD has been offered for tax.

   Gross receipts as per 26AS in Rs: 4646352/- the difference being Rs: 232932/- and not Rs: 505050/-. As per the provisions of Sec 44AD 8% of the difference of Rs: 232932/- to be added to Income.

   On the facts and circumstances of the case and the law applicable, addition of 8% on the difference of gross receipts of Rs: 232932/- is reasonable. The additions as confirmed by the CIT(A) to be deleted.

3. The Assessing Officer has added Rs: 300000/- as unexplained cash deposited in the bank. The Assessing Officer has not accepted the Appellant's explanation that out of the total deposits in bank Rs: 70000/- is reversal of ATM debits and the balance deposit is out of earlier withdrawals. The CIT(A) has erred in confirming the additions of Rs: 300000/-. On the facts and circumstances of the case and the law applicable, the addition u/s 68 is not warranted and is to be deleted.

4. In any case and without further prejudice the authorities below have erred in not appreciating the facts and circumstances. On proper appreciations of the facts and the law applicable, the additions made and confirmed by authorities below is not warranted.

5. Interest u/s 234A, B&C is charged. The provisions of sec 234A is not applicable since the return is filed within the due date of filing as per sec 139(1) of the IT Act, 1961.

   Interest u/s 234B & 234C is not applicable since the appellant has offered income u/s 44AD of the it Act, 1961. The appellant denies the liability to pay interest.

6. In view of the above and other grounds to be adduced at the time of hearing, It is requested that the impugned order be quashed and the Interest levied be deleted.

3. The facts of the case CIT(A) are that for the ay 2014-15, the assessee electronically filed the return of income on 24/09/2014 declaring income of Rs.8,46,017/- u/s. 44AD of the I.T. Act. Subsequently, the return was subject to scrutiny u/s. 143(3) of the I.T. Act. While going through the return of income, the AO observed that the turnover declared in Form No. 26AS was at Rs.46,46,352/- whereas the assessee declared turnover at Rs.41,41,302/-. Hence, there was difference of Rs.5,05,050/- . being payment received by Narasimha Construction. On account of this, the AO made the addition of Rs.5,05,050/-. Further, the AO after going through the Bank account found that there were deposit of Rs.3 lakhs into the Bank account which was not satisfactorily explained by the assessee. Hence, he made further addition of Rs.3 lakhs to the income declared by the assessee.

4. On appeal, the CIT(A) confirmed the order of the AO.

5. Against, this the assessee is in appeal before us. The Ld. AR submitted that the there was a difference between the turnover declared by the assessee and the turnover declared in form 26AS at Rs.5,05,050/-. It was submitted that it is on account of inclusion of certain advances received in the turnover. He submitted

that the entire amount of Rs.5,05,050/- cannot be considered as income of the assessee. At best, the income of 8% of the amount of Rs.5,05,050/- may be considered as income of the assessee since it is part of the business turnover of the assessee.

6. On the other hand, the Ld. DR submitted that the entire amount is to be considered as the income of the assessee since the undisclosed income u/s. 44AD of the Act cannot be offered.

7. I have heard the rival submissions and perused the record. Admittedly, there is difference in the turnover declared by the assessee and the turnover declared in Form 26AS which is at Rs.5,05,000/- and it is to be part of the business turnover of the assessee. Being so, it should be included in the total turnover of the assessee and income of 8% is to be estimated on it. In other words, the entire undisclosed turnover of Rs.5,05,050/- cannot be considered as income of the assessee. The AO is directed to consider 8% of the income of Rs.5,05,050/-. Thus, this ground of appeal of the assessee is partly allowed.

8. Coming to the addition of Rs.3 lakhs as unexplained income of the assessee, I am of the opinion that similar issue came up for consideration before the Co-ordinate Bench of the Tribunal in the case of Sri Girish V.Yalakkishettar vs. ITO in ITA Nos. 354 & 355/Bang/2019 dated 27/01/2020 wherein it was held as follows:

> *"7. I have heard the rival submissions and perused the material on record. The assessee has offered income u/s 44AD of the Act, being a small contractor and trader in shares and the turnover of the assessee is less than Rs.1 crore from the said business activity the income was offered u/s 44AD of the Act. The Assessing Officer not disbelieved the claim of the assessee to be assessed u/s 44AD of the Act. According to him, the assessee has not carried out any construction of building and Form No.26AS also have no details of contract receipts. According to him, the assessee has deposited cash into the*

bank account whenever there is a shortfall in cash for making payments towards share trading. This is a general observation made by the A.O. He had not brought on record any material to show that the assessee was not engaged in contract work and construction activities. In my opinion, when the assessee offered the income u/s 44AD of the Act, there is no necessity of maintaining any books of account by the assessee. It has given option to the assessee to offer the income under the presumptive basis and the same was opted by the assessee for the assessment year under consideration. The Assessing Officer is not entitled to make any guesswork and he has to make the assessment with reference to evidence and material brought on record. There must be something more than suspicion to support the assessment. A suspicion, however, strong may not take place for proof of evidence. The conclusion which are based on surmises and conjectures, cannot take place of proof. Therefore, the assessment made by the Assessing Officer, which are predominantly influenced by suspicion, cannot be upheld. In my opinion, mere surmises and conjectures that the assessee had deposited cash in bank account whenever there is cash shortage to make payment, cannot the basis for a predetermined approach without bringing any specific transactions or evidence brought on record by the Assessing Officer to support his version. If the Assessing Officer wants to assess the income of the assessee under normal procedure, heavy burden on him to bring on record necessary material to show that the assessee is not engaged in contract work of building construction. In the present case, there is only on the basis of suspicion, made an addition after accepting the income offered by the assessee on presumptive basis u/s 44AD of the Act, which cannot be upheld. Being so, the assessment of the assessee to be made u/s 44AD of the Act and the addition u/s 68 of the Act cannot be sustained. Section 44AD provides that where the assessee is engaged in eligible business as proprietor under that section, a sum equal to 8% of the gross receipts shall be deemed to be the profits and gains of such business. Section 44AD exempts the assessee from maintenance of books of accounts. Once the income of the assessee is accepted u/s. 44AD, now the question arises for our consideration is whether the Assessing Officer could make further additions towards various discrepancies in the books of accounts of the assessee.

7.1 Section 44AD of the Act gives an option to the assessee to offer income on presumptive basis. These are special provisions. The assessee has opted for the same and offered to tax income at the rate of 8% of his turnover. The issue is whether, the Assessing Officer can examine statement of accounts in such cases, make additions towards undisclosed purchases, undisclosed expenditure, under valuation of closing stock etc. In our considered opinion such additions go against the spirit of the Act. Section 44AD of the Act was introduced to help the small traders who have difficulties in maintaining books of account and other records. Tax is levied on presumptive basis. The Haryana High Court in the case of CIT vs. Surinder Pal Anand [2010] 192 taxmann 264), had held as follows:-

"7. Section 44AD of the Act was inserted by the Finance Act, 1994 with effect from 1-4-1994. Sub-section (1) of section 44AD clearly provides that where an assessee is engaged in the business of civil construction or supply of labour for civil construction, income shall be estimated at 8 per cent of the gross receipts paid or payable to the assessee in the previous year on account of such business or a sum higher than the aforesaid sum as may be declared by the assessee in his return of income notwithstanding anything to the contrary contained in sections 28 to 43C of the Act. This income is to be deemed to be the profits and gains of said business chargeable of tax under the head "profits and gains" of business. However, the said provisions are applicable where the gross receipts paid or payable does not exceed Rs. 40 lakhs.

8. Once under the special provision, exemption from maintaining of books of account has been provided and presumptive tax at the rate of 8 per cent of the gross receipt itself is the basis for determining the taxable income, the assessee was not under obligation to explain individual entry of cash deposit in the bank unless such entry had no nexus with the gross receipts. The stand of the assessee before the Commissioner of Income-tax (Appeals) and the Tribunal that the said amount of Rs.14,95,300 was on account of business receipts had been accepted. The Ld. AR with reference to any material on record, could not show that the cash deposits amounting to Rs.14,95,300 were unexplained or undisclosed income of the assessee.

9. In view of the above position, we are unable to hold that any substantial question of law arises in this appeal.

10. The appeal is dismissed."

7.2 The Chandigarh Bench of the Tribunal in the case of Nand Lal Popli vs. DC1T in ITA Nos. 1161 & 1162/Chd/2013, order dt. 14/06/2016, held as follows:-

"9. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. The issue to be decided by us is whether accepting the case of the assessee as taxable under the presumptive taxation as provided under section 44AD of the Act, the Assessing Officer can make addition under section 69C of the Act making the cash flow statement provided by the assessee the basis of his addition. 10. Section 44 AD of the Act reads as under:

"44AD (1) 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 "Profit and gains of business or profession".

(2) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of subsection (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed."

10. The provision of the above section are quite unambiguous to the effect that in case of an eligible business based on the gross receipts/total turnover, the income under the head 'profits & gains' of business shall be deemed to be @ 8% or any higher amount. The first important term here is 'deemed to be' which proves that in such cases there is no income to the extent of such percentage, however, to extent, income is deemed. It is undisputed that 'deemed' means presuming the existence of something which actually is not. Therefore, it is quite clear that though for the purpose of levy of income tax 8% or more may be considered as income, but actually this is not the actual income of the assessee. This is also the purport of all
provisions relating to presumptive taxation.

11. Putting the above analysis, in converse, it can be easily inferred that the same is also true for the expenditure of the assessee. If 8% of gross receipts are 'deemed' income of the assessee, the remaining1 92% are also 'deemed' expenditure of the assessee. Meaning thereby that actual expenditure may not be 92% of gross receipts, only for the purposes of taxation, it is considered to be so. To take it further, it can be said that the expenditure may be less than 92% or it may also be more than 92% of gross receipts.

12. Further, on the reading on the substantive part of the provision, it is quite clear that an assessee availing the benefit of such presumptive taxation can claim to have earned income @ 8% or above of the gross receipts. In that case, the provisions of sub-section (5) of the said section will be applicable to it, which reads as under:

"44AD (5) Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee who claims that his profits and gains from the eligible business are lower than the profits and gains specified in subsection (1) and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (2) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB."

13. From the combined reading of sub-section (1) and sub-section (5), it is apparent that the obligation to maintain the books of account and get them

audited is only on the assessee who opts to claim the income being less than 8% of the gross receipts."

7.3 Now coming to the argument of the learned D.R. that the addition has been made under section 68 of the Act, on which there is no bar even though income offered under section 44AD of the Act, I am quite in agreement with the same. The only fetter provided under section 44AD of the Act are the applicability of provisions of sections 30 to 38 of the Act. The provisions of section 68 of the Act reads as under:

"Cash credits.
68. *Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :*

Provided *that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—*

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and
(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:
Provided further *that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB)of section 10."*

7.4 The crucial words in the said section for the purposes of present appeal are 'any previous year' an A.O. has found any sum credited in the books of account of the assessee. But can I say on the facts and circumstances of the present case that the A.O. has found any sum credited in assessee's books of account. Therefore, in the present case, the provisions of section 68 of the Act cannot be applied. Asking the assessee to prove to the satisfaction of the Assessing Officer, the expenditure to the extent of 92% of gross receipts, would also defeat the purpose of presumptive taxation as provided under section 44AD of the Act or other such provision. Since the scheme of presumptive taxation has been formed in order to avoid the long drawn process of assessment in cases of small traders or in cases of those businesses where the incomes are almost of static quantum of all the businesses.

7.5 Applying the propositions of law laid down in the above case law cited supra to the facts of the case on hand, I delete the addition in question.

7.6 Even otherwise, in the present case, the Assessing Officer found certain deposits as unexplained in the bank account of the assessee with ICICI Bank, Dharwad branch at Rs.9.16 lakh. In my opinion, when moneys are deposited in the bank account, the relationship that is constituted between the banker and the customer is one of the debtor and creditor and not of trustee and beneficiary. Applying this principle, the bank statements supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not as if the bank statements are maintained bythe bank as the agent of the constituent, nor can it be said that the pass book is maintained by the bank under the instructions of the constituent. Therefore, the bank statements supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee, nor a book maintained by the assessee or under his instructions. As such, addition u/s 68 of the Act of the amount entered only in the bank statements was not justified. My this view is fortified by the judgment of the Hon'ble Bombay High Court in the case of CIT v. Bhaichand H.Gandhi [141 ITR 67 (Bom.)] and also the judgment of the Hon'ble Allahabad High Court in the case of Smt.Sarika Jain v.CIT (407 ITR 254). The Hon'ble Allahabad High Court held that the Tribunal is not competent to sustain the addition u/s 69A of the Act after deleting the said addition made by the A.O. and confirmed by the CIT(A) u/s 68 of the Act, the entire order of the Tribunal stands vitiated in law. Being so, the amount found credited in the bank account of the assessee cannot be made an addition u/s 68 of the Act. Accordingly, I am inclined to delete the addition made u/s 68 of the I.T.Act."

7.1 The same view was taken by the Chandigarh Bench of the Tribunal in the case of Nand Lal Popli vs. DC1T in ITA Nos. 1161 & 1162/Chd/2013, order dt. 14/06/2016, held as follows:-

"9. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. The issue to be decided by us is whether accepting the case of the assessee as taxable under the presumptive taxation as provided under section 44AD of the Act, the Assessing Officer can make addition under section 69C of the Act making the cash flow statement provided by the assessee the basis of his addition. 10. Section 44 AD of the Act reads as under:

"44AD (1) 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 "Profit and gains of business or profession".

(2) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of subsection (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed."

10. The provision of the above section are quite unambiguous to the effect that in case of an eligible business based on the gross receipts/total turnover, the income under the head 'profits & gains' of business shall be deemed to be @ 8% or any higher amount. The first important term here is 'deemed to be' which proves that in such cases there is no income to the extent of such percentage, however, to extent, income is deemed. It is undisputed that 'deemed' means presuming the existence of something which actually is not. Therefore, it is quite clear that though for the purpose of levy of income tax 8% or more may be considered as income, but actually this is not the actual income of the assessee. This is also the purport of all provisions relating to presumptive taxation.

11. Putting the above analysis, in converse, it can be easily inferred that the same is also true for the expenditure of the assessee. If 8% of gross receipts are 'deemed' income of the assessee, the remaining1 92% are also 'deemed' expenditure of the assessee. Meaning thereby that actual expenditure may not be 92% of gross receipts, only for the purposes of taxation, it is considered to be so. To take it further, it can be said that the expenditure may be less than 92% or it may also be more than 92% of gross receipts.

12. Further, on the reading on the substantive part of the provision, it is quite clear that an assessee availing the benefit of such presumptive taxation can claim to have earned income @ 8% or above of the gross receipts. In that case, the provisions of sub-section (5) of the said section will be applicable to it, which reads as under:

"44AD (5) Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee who claims that his profits and gains from the eligible business are lower than the profits and gains specified in subsection (1) and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and

maintain such books of account and other documents as required under sub-section (2) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB."

13. From the combined reading of sub-section (1) and sub-section (5), it is apparent that the obligation to maintain the books of account and get them audited is only on the assessee who opts to claim the income being less than 8% of the gross receipts."

7.3 Now coming to the argument of the learned D.R. that the addition has been made under section 68 of the Act, on which there is no bar even though income offered under section 44AD of the Act, I am quite in agreement with the same. The only fetter provided under section 44AD of the Act are the applicability of provisions of sections 30 to 38 of the Act. The provisions of section 68 of the Act reads as under:

"Cash credits.

68. *Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :*

Provided *that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—*

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further *that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB)of section 10."*

7.4 The crucial words in the said section for the purposes of present appeal are 'any previous year' an A.O. has found any sum credited in the books of account of the assessee. But can I say on the facts and circumstances of the present case that the A.O. has found any sum credited in assessee's books of account. Therefore, in the present case, the provisions of section

68 of the Act cannot be applied. Asking the assessee to prove to the satisfaction of the Assessing Officer, the expenditure to the extent of 92% of gross receipts, would also defeat the purpose of presumptive taxation as provided under section 44AD of the Act or other such provision. Since the scheme of presumptive taxation has been formed in order to avoid the long drawn process of assessment in cases of small traders or in cases of those businesses where the incomes are almost of static quantum of all the businesses.

7.5 Applying the propositions of law laid down in the above case law cited supra to the facts of the case on hand, I delete the addition in question.

7.6 Even otherwise, in the present case, the Assessing Officer found certain deposits as unexplained in the bank account of the assessee with ICICI Bank, Dharwad branch at Rs.9.16 lakh. In my opinion, when moneys are deposited in the bank account, the relationship that is constituted between the banker and the customer is one of the debtor and creditor and not of trustee and beneficiary. Applying this principle, the bank statements supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not as if the bank statements are maintained by the bank as the agent of the constituent, nor can it be said that the pass book is maintained by the bank under the instructions of the constituent. Therefore, the bank statements supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee, nor a book maintained by the assessee or under his instructions. As such, addition u/s 68 of the Act of the amount entered only in the bank statements was not justified. My this view is fortified by the judgment of the Hon'ble Bombay High Court in the case of CIT v. Bhaichand H.Gandhi [141 ITR 67 (Bom.)] and also the judgment of the Hon'ble Allahabad High Court in the case of Smt.Sarika Jain v.CIT (407 ITR 254). The Hon'ble Allahabad High Court held that the Tribunal is not competent to sustain the addition u/s 69A of the Act after deleting the said addition made by the A.O. and confirmed by the CIT(A) u/s 68 of the Act, the entire order of the Tribunal stands vitiated in law. Being so, the amount found credited in the bank account of the assessee cannot be made an addition u/s 68 of the Act. Accordingly, I am inclined to delete the addition made u/s 68 of the I.T.Act."

8.1 A similar issue also came up for consideration before the Cochin Bench of the Tribunal in the case of Thomas Eapen in ITA No. 451/Coch/2019 wherein it was held as follows:

9. We have heard the rival submissions ad perused the record. The assessee offered income u/s. 44AD, the assessee being a small trader in medicine. There is no dispute that the assessee falls under the provision of sec. 44AD since the turnover of the assessee is less than Rs. 1 crore from eligible business. The Assessing Officer also accepted that the assessee's case falls under the purview of section 44AD and computed the income declared by the assessee at Rs.3,37,160/- and thereafter made addition towards undisclosed profit u/s. 68 of the Act. In other words, the Assessing Officer has not at all rejected the books of accounts of the assessee. Section 44AD provides that where the assessee is engaged in eligible business as proprietor under that section, a sum equal to 8% of the gross receipts shall be deemed to be the profits and gains of such business. Section 44AD exempts the assessee from maintenance of books of accounts. Once the income of the assessee is accepted u/s. 44AD, now the question arises for our consideration is whether the Assessing Officer could make further additions towards various discrepancies in the books of accounts of the assessee.

9.1 . Section 44AD of the Act gives an option to the assessee to offer income on presumptive basis. These are special provisions. The assessee has opted for the same and offered to tax income at the rate of 8% of his turnover. The issue is whether, the Assessing Officer can examine statement of accounts in such cases, make additions towards undisclosed purchases, undisclosed expenditure, under valuation of closing stock etc., The turnover declared by the asscssee is accepted by the revenue. In our considered opinion such additions go against the spirit of the Act. Section 44AD of the Act was introduced to help the small traders who have difficulties in maintaining books of account and other records. Tax is levied on presumptive basis. The Haryana High Court in the case of CIT vs. Surinder Pal Anand [2010] 192 taxmann 264), under identical circumstances had held as follows'.-

> *"7. Section 44AD of the Act was inserted by the Finance Act, 1994 with effect from 1-4-1994. Sub-section (1) of section 44AD clearly provides that where an assessce is engaged in the business of civil construction or supply of labour for civil construction, income shall be estimated at 8 per cent of the gross receipts paid or payable to the assessee in the previous year on account of such business or a sum higher than the aforesaid sum as may be declared by the assessee in his return of income notwithstanding anything to the contrary contained in sections 28 to 43C of the Act. This income is to be deemed to be the profits and gains of said business chargeable of tax under the head "profits and gains" of business. However, the said provisions are applicable where the gross receipts paid or payable does not exceed Rs. 40 lakhs.*
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> *8. Once under the special provision, exemption from maintaining of books of account has been provided and presumptive tax at the rate of 8 per cent of the gross receipt itself is the basis for determining the taxable income, the assessee was not under obligation to explain individual entry of cash deposit in the bank unless such entry had no nexus with the gross receipts. The stand of the*

assessee before the Commissioner of Income-tax (Appeals) and the Tribunal that the said amount of Rs.14,95,300 was on account of business receipts had been accepted. The Ld. AR with reference to any material on record, could not show that the cash deposits amounting to Rs.14,95,300 were unexplained or undisclosed income of the assessee.

9. In view of the above position, we are unable to hold that any substantial question of law arises in this appeal.

10. The appeal is dismissed."

9.2 The Chandigarh Bench of the Tribunal in the case of Nand Lal Popli vs. DC1T in

ITA Nos. 1161 & 1162/Chd/2013, order dt. 14/06/2016, held as follows:-

"9. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. The issue to be decided by us is whether accepting the case of the assessee as taxable under the presumptive taxation as provided under section 44AD of the Act, the Assessing Officer can make addition under section 69C of the Act making the cash flow statement provided by the assessee the basis of his addition.

10. Section 44 AD of the Act reads as under:

"44AD (1) 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 "Profit and gains of business or profession".

(2) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of subsection (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed."

10. The provision of the above section are quite unambiguous to the effect that in case of an eligible business based on the gross receipts/total turnover, the income under the head 'profits & gains' of business shall be deemed to be @ 8% or any higher amount. The first important term here is 'deemed to be'

which proves that in such cases there is no income to the extent of such percentage, however, to extent, income is deemed. It is undisputed that 'deemed' means presuming the existence of something which actually is not. Therefore, it is quite clear that though for the purpose of levy of income tax 8% or more may be considered as income, but actually this is not the actual income of the assessee. This is also the purport of all provisions relating to presumptive taxation.

11. Putting the above analysis, in converse, it can be easily inferred that the same is also true for the expenditure of the assessee. If 8% of gross receipts are 'deemed' income of the assessee, the remaining[1] 92% are also 'deemed' expenditure of the assessee. Meaning thereby that actual expenditure may not be 92% of gross receipts, only for the purposes of taxation, it is considered to be so. To take it further, it can be said that the expenditure may be less than 92% or it may also be more than 92% of gross receipts.

12. Further, on the reading on the substantive part of the provision, it is quite clear that an assessee availing the benefit of such presumptive taxation can claim to have earned income @ 8% or above of the gross receipts. In that case, the provisions of sub-section (5) of the said section will be applicable to it, which reads as under:

> *"44AD (5) Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee who claims that his profits and gains from the eligible business are lower than the profits and gains specified in sub-section (1) and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (2) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB."*
>
> *13. From the combined reading of sub-section (1) and sub-section (5), it is apparent that the obligation to maintain the books of account and get them audited is only on the assessee who opts to claim the income being less than 8% of the gross receipts."*

9.3 . Now, applying the above to the facts of the present case, we observe that the Assessing Officer, for making the impugned addition has stated that there was total deposit of Rs.94,04,685/- and the assessee has only explained Rs.66,10,379/- and Rs.27,94,306/- , being balance unexplained, which is a totally wrong premise. If the income component is estimated, how the expenditure component on the basis of said income can be considered to have been 'actually incurred' and it is only presumption that an amount of 92% of

gross receipts was incurred by the assessee as expenditure. We must also observe here that this is not a case, where the Assessing Officer has doubted the gross receipts or gross turnover of the assessee. In fact, accepting the same, estimating income @ 8% on the same at presumptive rate, he preferred to make further addition under section 68/69A of the Act. The argument of the learned D.R. that the turnover of ihe assessee has been doubted by the Assessing Officer is totally ill-found, in view of the same.

9.4 Further, it is a fact on record that the assessee had not maintained books of account that is why he opted for 8% income as per section 44AD of the Act. The section also does not put obligation on the assessee to maintain books of account, more so, in view of the fact that his income has been assessed as per section 44AD of the Act, he cannot be punished for not maintaining the same.

9.5 Now coming to the argument of the learned D.R. that the addition has been made under section 69A of the Act, on which there is no bar under section 44AD of the Act, we are quite in agreement with the same. The only fetter provided under section 44AD of the Act are the applicability of provisions of sections 30 to 38 of the Act. The provisions of section 69A of the Act reads as under:
"Unexplained expenditure, etc.- Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explantation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assesses for such financial year;

Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income."

9.6 The crucial words in the said section for the purposes of present appeal are 'any financial year' an assessee has incurred any expenditure. But can we say on the facts and circumstances of the present case that the assessee has incurred any expenses. From an analysis of section 44AD of the Act contained hereinabove, we have already held that the assessee had not incurred the expenses to the extent of 92% of the gross receipts. Therefore, in the present case, the provisions of section 69A of the Act cannot be applied. Asking the assessee to prove to the satisfaction of the Assessing Officer, the expenditure to the extent of 92% of gross receipts, would also defeat the purpose of presumptive taxation as provided under section 44AD of the Act or other such provision. Since the scheme of presumptive taxation has been formed in order to avoid the long drawn process of assessment in cases of small traders or in cases of those businesses where the incomes are almost of static quantum of all the businesses, the Assessing Officer could have made the addition under section 69A of the Act, once he had carved out the case out of the glitches of

the provisions of section 44AD of the Act. No such exercise has been done by the Assessing Officer in this case.

9.7 Applying the propositions of law laid down in the above case law lo the facts of the case on hand, we delete the addition in question. The Assessing Officer nor the CIT(A) have given any reason as to why the provisions of Section 44AD of the Act are not applicable to this case. This ground of appeal of the assessee is allowed."

8.2 In view of the above decisions, I am of the opinion that once the assessment of the assessee was completed u/s. 44AD, there cannot be any application of sec. 68/69A of the I.T. Act. Being so, I direct the AO to delete the addition made by the AO and confirmed by the CIT(A) at Rs.3 lakhs. Thus, this ground of appeal of the assessee is partly allowed.

9. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 11th September, 2020.

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Bangalore.
Dated: 11th September, 2020

Reddy GP / GJ

Copy to:
1. The Appellant.
2. The Respondent.
3. The Commissioner of Income-tax(Appeals), Bengaluru.
4. The Pr. Commissioner of Income-tax, Bengaluru.
5. D.R., I.T.A.T., Bengaluru Bench, Bengaluru.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Bengaluru