



IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "E" Bench, Mumbai.

Before Smt. Kavitha Rajagopal (JM) & Shri Omkareshwar Chidara (AM)

ITA No. 4516/MUM/2024 (Assessment Year : 2018-19)

Hemant M. Shah HUF 5/B Madhu Sagar Kemps Corner Cumballa Hill Road S.O. Mumbai-400026.	Vs.	ITO Ward 19(1)(5) Piramal Chamber Lower Parel Mumbai-400 012.
PAN : AACHH3772C		
Appellant		Respondent

Assessee by	:	Shri R.M. Jain
Revenue by	:	Shri Krishna Kumar
Date of Hearing	:	21/03/2025
Date of pronouncement	:	30/04/2025

O R D E R

Per Omkareshwar Chidara (AM) :-

In the above appellant's appeal, the following grounds are raised :

- a) On the facts and circumstances of the case in Law, Ld. CIT (A) erred in confirming addition when assessee following taxation as presumptive taxation.
- b) On the facts and circumstances of the case in Law, Ld. CIT (A) erred in confirming assessment without applying his mind.
- c) On the facts and circumstances of the case in Law, Ld. CIT (A) erred in confirming stand of A.O. for deduction of Rs, 3,54,288/- on account of GP difference on account of 44AD business with alleged supplier.
- d) On the facts and circumstances of the case in Law, Ld. CIT (A) erred in confirming stand of A.O. for invoking section 68 of the Act which is not applicable in facts applicable in assessee's ease.
- e) On the facts and circumstances of the ease in Law, Ld. CIT (A) erred in confirming addition of Rs. 53,09,550/- on account of alleged purchases.

- f) The appellant keep its right reserve to add/modify/delete any grounds of appeal during the appellant proceedings.

2. The main issue agitated by the appellant is that when the income is admitted under section 44AD of the Income Tax Act, under presumptive taxation, no other additions can be made under other sections of Act, including section 68 of the Act, because section 44AD starts with a non-obstante clause. The second issue raised is section 68 cannot be invoked in the present facts of the case.

3. In the present case, Ld. AO made an addition of Rs. 53,09,550/- under section 68 of the Act in the assessment order for A.Y. 2018-19 because of the following reasons :

- a) The Ld. AO received information uploaded by Dy. Director of Income Tax (Investigation-3) Surat on the “Insight Portal” of Income Tax Department which was flagged under “Risk Management Strategy” formulated by Central Board of Direct Taxes, New Delhi under the head “Suspicious Transactions Report- STR” in the case of “Antique Exim Pvt. Ltd.”. In this case, the Directorate of Revenue Intelligence (DRI) did an investigation for importing cheap diamonds at inflated rate and thereby sending large outward remittances outside India, which drains our forex reserves. During the investigation into the affairs of the above company, it was found from the GST data that “Namo Diamonds Pvt. Ltd.” was being utilised as one of the conduit company/accommodation entry provider.
- b) Accordingly, a notice under section 148 of the Act was issued by the Ld. AO to reopen the case and proceeded further. In pursuance of notice issued by Ld. AO, the appellant filed a Return of Income admitting the same income as Rs. 8,61,450/- (as admitted in original return of income). Five opportunities were provided to the appellant to submit information including appearance through video conference to

the Ld. AR of the appellant, Mr. Kantilal Jain. During the proceedings before the Ld. AO, the appellant has produced all invoices, books of account, bank accounts etc. It was pleaded before the Ld. AO that the Revenue cannot make additions to the Returned Income as he was offering income under “presumptive taxation” u/s. 44AD of the Act which does not require any maintenance of books. It was further mentioned in the assessment order that, the Ld. AO wanted to examine/record a statement from M/s. Namo Diamond Co.(P) Ltd., but there is no such company in the two addresses given by the appellant. The Ld. AO has sent an Inspector to serve summons u/s. 131 of the Act on the above said company, which appellant claims to have purchased the diamonds. The Income Tax Inspector went to the addresses furnished by the appellant, and submitted a report to Ld. AO stating that there is no such company in the given addresses. The Income Tax Inspector (ITI) enquired from caretaker of the building where the company is said to have been located and the caretaker said that there is no such company, by name Namo Diamonds (P) Ltd. The adjacent shop owners also informed the ITI that there is no such company in that address. So, the ITI affixed the summons on the given address and gave a report to the Ld. AO. The concerned “Panchnama” was also mentioned in the assessment order. As the company was not doing any business in the given address, the same was treated as paper company by the Ld. AO. Even though, the appellant has filed all tax invoices, transactions in his books etc., the Ld. AO treated the “purchase” as fictitious and only accommodation entry, and held that it is a planned conspiracy of providing entries to each other and camouflaged the transactions to look as genuine. Before the Ld. AO, the appellant relied on certain cases-law for the proposition that no addition can be made under section 68 of the I.T. Act, where the appellant opts for presumptive taxation under section 44AD of the Act. Finally, disregarding all the submissions of the appellant, an addition

of Rs. 53,09,550/- was made by the Ld. AO under section 68 of the Act while completing the assessment.

4. Aggrieved by the addition made by the Ld. AO, an appeal was filed by the appellant before Ld. CIT(A) who has confirmed the addition made by the Ld. AO by adjudicating that section 68 of the Act can be invoked even in the case of presumptive taxation opted by the appellant because the entire transaction is a sham one, and the proper investigation was done by DRI, Income Tax Department (by deputing an Inspector). The Ld. CIT(A) has also quoted several decisions for the proposition that in the facts and circumstances mentioned in the assessment order, addition under section 68 of the Act is sustainable.

5. Aggrieved by the decision of Ld. AO and Ld. CIT(A), further appeal was instituted by the appellant before the ITAT with the grounds of appeal mentioned in page No. 1 of this order.

6. During the hearing proceedings before the Bench, the Ld. AR of the appellant has focused all the arguments on various cases-law for the proposition that an addition u/s. 68 of the Act cannot be made, where the appellant opts for “presumptive taxation” under section 44AD of the Act. The Ld. AR of the appellant has also filed a paper book containing the details of “Namo Diamonds (P) Ltd.” and the ledger account copy of the appellant to demonstrate that diamonds were purchased from the above company.

7. The Ld. DR relied on the orders of the Ld. AO and Ld. CIT(A) and the cases-law mentioned by them in their orders.

8. After hearing the rival submissions, it is observed that the cases-law relied upon by the appellant are distinguishable except (a) on facts as follows:

a) Nandlal Papli Vs. DCIT (ITA No. 1162/Chd/2013, A.Y. 2009-10).

In this case relied on by the appellant, the Ld. AO made an addition of Rs. 1 Lakh towards unexplained cash credit under section 68 of the

Act (page 10 of ITAT ORDER). In fact, in this case the ITAT upheld the addition under section 68 of the Act, where appellant opted for presumptive taxation scheme.

b) Opal Diamonds (144 Taxman.com 184)(Mum-Trib):

This case deals with the industry average profit which is being earned by businessmen and estimation of income. Hence, facts are different.

c) Mahesh Subhash Shukla (ITA No. 3919/Mum/2024 :

In this case, the case of appellant is that no books of account are maintained and hence where appellant opted for presumptive taxation under section 44AD, the addition cannot be made under section 68 of the Act. The Hon'ble ITAT came to the conclusion after placing reliance on SOP issued by CBDT which states that for invoking section 68 of the Act, the Department should see the appellant maintains books of account and there should be a credit entry. In this case relied upon by appellant, the appellant did not maintain books of account and hence the Hon'ble ITAT has correctly come to the conclusion whereas, in the impugned case, the appellant has maintained all books of account, ledger accounts, bank statements, purchase and sale invoices etc., which was clearly mentioned by the Ld. AO and Ld. CIT(A) in their orders. In fact, the appellant filed a paper book before this ITAT which contains all the details of ledger accounts, trading accounts, profit and loss account and himself argued that all books of account are maintained. Hence, the case is distinguishable.

d) CIT(A) Vs. Surinder Pal Anand (192 Taxamn 264) (P&H).

This case relates to the issue whether appellant had to explain each entry of cash deposit where he opts for presumptive taxation, and hence facts are different from the present case.

e) ITO Vs. Mark Construction 23 Taxamn.com 338 (Kol) and Bipin Chandra 124 taxman.com 236.

These cases deal with section 40a(ia) r.w.s. 44AD and hence the facts are different.

f) Surinder Pal Nayyar Vs. Ld. CIT(A) 177 taxman.com 207(P&H).

This case deals with whether appellant is entitled to depreciation separately where appellant is opting for presumptive tax u/s. 44AD and hence not applicable to the facts of case.

g) Thomas Eapen (ITA No. 451/Coch/2019).

In this case, addition under section 69A was upheld because the ITAT held that appellant has not incurred expenses to the extent of 92% of gross receipts. In our case, the facts are entirely different and this case cannot come to the rescue of appellant.

9. After going through the cases-law relied upon by the appellant and hearing the arguments of both the parties, the issues are decided as follows :

- a) In the case of Nandlal Popli ITA No. 1161/Chd/2013, it was held that even where appellant opts for presumptive taxation scheme, the addition u/s. 68 can be made.
- b) Neither in section 68, nor in section 44AD, there is an express prohibition that an addition relating to cash credit cannot be made where appellant opts for presumptive taxation method.
- c) On 21.3.2025, during the hearing proceedings before the ITAT, the Ld. AR of the appellant has pleaded that the purchase transaction is genuine and they can prove the same before the Ld. AO if an opportunity is given, as the payment for purchase of these diamonds in question was made through banking channel in subsequent year and the same was not examined by any authority.
- d) In view of the above detailed discussion and cases-law, it is decided by the Bench that the issue of payment through banking channels

in subsequent year may be verified and genuineness of payment is to be examined by the Ld. AO. As the issue was not examined by the Ld. AO, on these lines, the same is remanded to the file of the Ld. AO and accordingly, the Ld. AO is directed to pass the order after giving an opportunity to the appellant. If the transaction is found to be fictitious and its only an accommodation entry, the recent decision of Hon'ble Bombay High Court in the case of PCIT Vs. Buniyad Chemicals Ltd. dated 19.3.2025, rendered by Hon'ble Justice Shri M.S. Sonak and Justice Jitendra Jain may be taken into consideration by the Ld. AO. Secondly, the purchases made through the entity "Namo Diamonds" and corresponding sales of these diamonds may be thoroughly investigated to find out the genuineness of the transaction.

10. With these observations, the issue is remitted to the file of the Ld. AO.
11. The appeal of appellant is allowed as above for statistical purposes.

Order pronounced in the open Court on 30/04/2025.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(OMKARESHWAR CHIDARA)
ACCOUNTANT MEMBER

Mumbai; Dated: 30/04/2025

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai