

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC-B” BENCH : BANGALORE**

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT

ITA No.1683/Bang/2019
Assessment year : 2017-18

Shri Arthur Bernard Sebastine Pais, No.2C, 214, HRBR Layout, 3 rd Block, Bengaluru – 560 084. PAN : AAQPP 2199 B	Vs.	Deputy Commissioner of Income-tax, CPC, Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Ms. Lalitha B, CA
Revenue by	:	Shri. Ganesh R. Ghali, Advocate Standing Counsel to Department

Date of hearing	:	14.10.2019
Date of Pronouncement	:	16.10.2019

ORDER

Per N. V. Vasudevan, Vice President:

This is an appeal by Assessee directed against the order CIT(A), Bengaluru, dated 13.06.2019, relating to Assessment Year 2017-18.

2. Assessee is an individual. His only source of income is income from professional fees of Rs.15,00,000 received from Crest Advertising Ltd., besides income from other sources being interest income of Rs.14,228/- on Savings Bank Account. In his income tax return filed for AY 2017-18, he declared income from professional of Rs.1,20,000/- being 8% of the gross receipts from business u/s.44AD of the Income Tax Act, 1961 (Act). As per Sec.44AD of the Act, notwithstanding anything to the contrary contained in sections 28 to 43C of the

Act, 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 "Profits and gains of business or profession". Sec.44AD(6) provides that the provisions of section 44AD, shall not apply to—

- (i) *a person carrying on profession as referred to in sub-section (1) of section 44AA;*
- (ii) *a person earning income in the nature of commission or brokerage; or*
- (iii) *a person carrying on any agency business.*

Explanation to Sec.44AD provides that for the purposes of section 44AD,—

(a) *"eligible Assessee" means,—*

- (i) *an individual, Hindu undivided family or a partnership firm, who is a resident, but not a limited liability partnership firm as defined under clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009); and*
- (ii) *who has not claimed deduction under any of the sections 10A, 10AA, 10B, 10BA or deduction under any provisions of Chapter VIA under the heading "C. - Deductions in respect of certain incomes" in the relevant assessment year;*

(b) *"eligible business" means,—*

- (i) *any business except the business of plying, hiring or leasing goods carriages referred to in section 44AE; and*
- (ii) *whose total turnover or gross receipts in the previous year does not exceed an amount of ⁸⁷[two crore rupees].*

3. The return of income of the Assessee was processed by Centralized Processing Centre(CPC) electronically u/s.143(1)(a) of the Act. U/s.143(1)(a) of the Act, return of income shall be processed in the following manner:-

“(a) the total income or loss shall be computed after making the following adjustments, namely:—

- (i) any arithmetical error in the return; ¹³[***]*
- (ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;*
- (iii) disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139;*
- (iv) disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return;*
- (v) disallowance of deduction claimed under sections 10AA, 80-IA, 80-IAB, 80-IB, 80-IC, 80-ID or section 80-IE, if the return is furnished beyond the due date specified under sub-section (1) of section 139;
or*
- (vi) addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return:*

Provided that no such adjustments shall be made unless an intimation is given to the Assessee of such adjustments either in writing or in electronic mode:

Provided further that the response received from the Assessee, if any, shall be considered before making any adjustment, and in a case where no response is received within thirty days of the issue of such intimation, such adjustments shall be made;

4. The Tax deduction Certificate filed by the Assessee in Form No. 26AS in respect of professional income declared showed that tax had been deducted u/s.194J of the Act. The CPC, noticing that TDS was made u/s.194J of the Act and no income u/s.44ADA of the Act was declared in the return of income, proposed to add a sum of Rs.7,50,000/- (50% of the gross receipts of Rs.15 lacs) which was the presumptive income from profession as against Sec.44AD which applies to presumptive income from business. Sec.44ADA applies if the income is considered as income from profession. U/S.44AD, the presumptive income

chargeable to tax is 8% of the gross receipts while u/s.44ADA of the Act, the presumptive income chargeable to tax is 50% of the gross receipts.

5. U/s.44ADA notwithstanding anything contained in sections 28 to 43C, in the case of an Assessee, being a resident in India, who is engaged in a profession referred to in sub-section (1) of section 44AA and whose total gross receipts do not exceed fifty lakh rupees in a previous year, a sum equal to fifty per cent of the total gross receipts of the Assessee in the previous year on account of such profession or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the Assessee, shall be deemed to be the profits and gains of such profession chargeable to tax under the head "Profits and gains of business or profession".

6. Sec.44AA(1) of the Act applies to the following professionals:

“Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act.”

6. The CPC proposed to make the addition in the show cause notice by relying on the provisions of Sec.143(1)(a) (vi) of the Act which provides for addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return. In response to the above proposal, the Assessee submitted he was not covered by Sec.44AA(1) of the Act and therefore income was offered u/s.44AD of the Act.

7. This plea was rejected by the CPC and the CPC in the intimation u/s.143(1)(a) of the Act raised a demand for taxes payable on Rs.7,50,000 (50% of the gross receipts from profession of Rs.15,00,000 u/s.44ADA of the Act).

8. Before CIT(A), the Assessee submitted that the Central Processing Centre (CPC) has erred in processing the return of income on the assumption that income appearing in Form 26AS has not been included in computing the total income in the return as per section 143(1)(a)(vi). It was submitted that the Assessee had offered the gross receipts as reflecting in its 26AS in serial no.E1 of its return of income under section 44AD. Hence there was no mis match in income offered in the return of income of the Assessee vis-à-vis 26AS. Attention was drawn to the Instruction No.10/2017 [F.No.225/333/2017-ITA.111], dated 15-11-2017 issued by CBDT. Para 3.2 of the said Instruction clearly states that

"Further in ITR-4, wherever in the return form, presumptive income under both sections 44AD and 44AE is disclosed, it will be difficult to correlate the receipts in the return with the information in the three forms. Hence, any likely difference in the receipts under these items in the return with receipts in three Forms under this scenario would be excluded from the purview of section 143(1)(a)(vi)."

The para further states that

"However, where the presumptive income from business either u/s 44AD or profession u/s44ADA alone are reported in the return and the gross receipts from presumptive business or profession shown in return is less than the gross receipts as per the three Forms, intimation proposing adjustment would be issued".

It was also submitted that the Assessee had offered his gross receipts or income as appearing in 26AS completely u/s 44AD in his return of income and there was no mis match between the income appearing in its 26AS and the gross receipts reported u/s 44AD. CPC has completely ignored the income offered u/s 44AD in the return of income and made addition u/s 143(1)(a)(vi) in violation of the instruction issued by CBDT.

9. The Assessee reiterated that sec.44AD applies to his case and not Sec.44ADA of the Act. The Assessee submitted that from the plain reading of the

act that Section 44ADA is applicable if an Assessee carries on the profession specified in Section 44AA(1). Thus, if an Assessee does not carry on the specified profession he can offer his income/receipts on presumptive basis u/s 44AD. Moreover subsection 6 to Section 44AD also emphasis this fact by clearly excluding assesses carrying on the specified profession as per section 44AA(1) from the gambit of section 44AD. The Assessee is in the business of providing management consultancy services. During the previous year relevant to assessment year 2017-18, the Assessee received a gross amount of Rs.15,00,000/- as fees for providing such services. The Assessee enclosed Invoices and computation of income and 26AS of the Assessee. The customer of the Assessee deducted tax u/s 194J. The Central processing Centre made addition of 50% on total fees of Rs.15,00,000/- stating that there is inconsistency in the amount offered u/s 44ADA on presumptive basis of schedule BP and receipts available in form 26AS. TDS is deductible u/s 194J on payment towards professional services or technical services. Professional services has been defined in **194J** to have the same meaning as in section 44AA(1). Fees for technical services is defined to have the meaning as in Explanation 2 to clause (vii) of sub section (1) of section 9.

10. It is worthwhile to note here that though the deduction of tax on fees paid to Assessee has been done u/s 194J as mandated by the Act, the services rendered by the Assessee do not fall under section 44AA(1) which is a pre-condition to tax the receipts @ 50% on presumptive basis under section 44ADA. The Assessee cannot be said to be providing technical consultancy as mentioned in section 44AA(1) of the act. Fees of technical services as enumerated in section 194J is a very broad term which encompasses any services in the nature of managerial, technical or consultancy services. However technical consultancy referred in section 44AA(1) refers to any advise, consultancy, or scientific or technical assistance, rendered in any

manner, either directly or indirectly, by a scientist or technocrat, or any science or technology institution or organization in one or more discipline of science or technology. Hence the Assessee was correct in offering tax on presumptive basis under section 44AD of the Income Tax Act. It was submitted that there was an apparent error in the intimation u/s.143(1) order of the CPC. In addition to computing tax at 8% on gross receipts of Rs.15,00,000 which was offered by the Assessee in its return of income, CPC has added 50% on the total receipts of Rs. 15,00,000 amounting to Rs.7,50,000. Thus CPC has taxed the gross receipts of Rs.15,00,000/- at 8% u/s 44AD and as well as at 50% u/s 44ADA.

11. The CIT(A) did not agree with the Assessee that the Assessee falls within the ambit of Sec.44AD of the Act because Sec.44AA(1) of the Act is not applicable to the Assessee. The CIT(A) was of the view that the addition made in the intimation u/s.143(1)(a) was justified but held that the addition shall be only of the difference between 50% of Rs.15 lacs that ought to have been offered to tax by the Assessee u/s.44ADA of the Act and 8% of Rs.15 lacs that was offered to tax by the Assessee u/s.44AD of the Act. The following were the relevant observations of the CIT(A):

“From a conjoint reading of sections 44AA(1.), 44ADA and 194J, it is apparent that the case of the appellant is covered under the provisions of section 44ADA. Hence there is no infirmity in the action of the AO as far as invoking the provisions of section 44ADA is concerned. Further, the appellant's claim of being denied an opportunity of being heard is without basis as the AO had issued a intimation proposing the adjustment as mandated by Instruction no.10 of 2017. However, the appellant had already offered income u/s 44AD at the rate of 8% of gross receipts, hence the total addition exceeds the presumptive scheme of taxation u/s 44ADA. The AO is directed to take necessary rectificatory action to tax the gross receipts u/s 44ADA alone.”

12. Aggrieved by the order CIT(A), the Assessee is in appeal before Tribunal. The learned counsel for the Assessee reiterated submissions as were made before CIT(A). The learned DR submitted that the income of the Assessee is assessable u/s.44ADA of the Act.

13. I have given a careful consideration to the rival submissions. The disputed adjustment to the total income declared by the Assessee has been done by the CPC in exercise of powers under section 143(1)(a)(vi) of the Act. It is not in dispute before us that the income of Rs.15,00,000/- was offered to tax in the return of income. In the show cause notice issued by the CPC before making the adjustment, the CPC has proceeded on the basis that the sum of Rs.15,00,000/- offered under section 44AD of the Act ought to have been offered to tax under section 44ADA of the Act. Accordingly, the sum offered to tax under section 44ADA of the Act was taxed under section 44ADA of the Act. As we have already seen the presumptive income under section 44AD is only 8% of the gross receipts, whereas under section 44ADA, 50% of the gross receipts is the presumptive income. It is thus clear from the show cause notice that the AO has not found income appearing in Form 26AS not having been included in computing the total income declared in the return of income field by the Assessee. The adjustment under section 143(1)(a)(vi) of the Act can be resorted to only when the sum of Rs.15,00,000/- is not included in computing the total income declared in the return of income. The CBDT's instruction No.10/2017 dated 15.11.2017 has clearly laid down that only when receipts are completely omitted to be declared in the return of income can there be an addition for invoking 143(1)(a)(vi) of the Act. The submissions made by the Assessee in this regard have not been considered by the CIT(A) in the impugned order. The addition that the income appearing in Form 26AS not having been included in the return of income filed is sine qua non for invoking the provisions of section 143(1)(a)(vi) since the same is absent in the present case. We are of the view

that the CPC ought not to have made the impugned adjustment. The addition made is liable to be deleted on this basis alone. The issue whether income earned by the Assessee has to be taxed u/s.44AD or Sec.44ADA of the Act cannot be subject matter of decision in processing u/s.143(1) (a) of the Act. In view of the above conclusions, we are not going to the question whether the income of the Assessee is assessable under section 44ADA or 44AD of the Act. The issue is left open without any decision.

14. In the result, the appeal by the Assessee is allowed.

Order pronounced in the open court on this 16th day of October, 2019.

Sd/-
(N. V. VASUDEVAN)
Vice President

Bangalore.
Dated: 16th October, 2019.
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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.