

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI

BEFORE SHRI SANDEEP SINGH KARHAIL (JUDICIAL MEMBER)
AND
SHRI GAGAN GOYAL (ACCOUNTANT MEMBER)

I.T.A No.782/Mum/2021
(Assessment year: 2017-18)

Rashmi Subhash Jha B-601, Bliss CHSA Vasant Vihar LBS Marg, Mulund (W) Mumbai-400 082 PAN : AKJPJ7705L (Appellant)	vs	Income-tax Officer-29(3)(1) Mumbai (Respondent)
Assessee represented by	:	Shri Hitesh Dharmashi
Department represented by	:	Shri Chandra Vijay, CIT DR
Date of hearing	:	14/02/2022
Date of pronouncement	:	14/03/2022

ORDER

Per: Gagan Goyal (AM):

This appeal has been filed by the assessee against the order dated 31/03/2021 passed by the National Faceless Appeal Centre (NFAC), Delhi for the assessment year 2017-18.

2. The sole grievance of the assessee in this appeal is that the authorities below erred in not following computation of income under section 44AD of the Income-tax Act, 1961.

3. The facts of the case are that the assessee, an individual, is doing business/profession as consultant. Assessee is not **professionally qualified** and simply is a commerce graduate. Return of income for the assessment year under consideration was filed on 22/06/2017 declaring total income at Rs.13,11,310/-. The return was processed under section 143(1) at CPC, Bangalore determining the total income at Rs.32, 48,462/-. The assessee during the year under consideration declared her receipts at Rs.32, 40,000/- and offered to tax an income of Rs.14, 66,462/-. However, while processing the return under section 143(1) (a), the assessing officer at CPC, Bangalore computed the income at Rs.32, 48,462/-. Ignoring provisions as provided under section 44AD of the I.T. Act, 1961. The assessee contested the computation of income before the first appellate authority. The first appellate authority, however, upheld the order of the assessing officer.
4. Further aggrieved, the assessee is in appeal before the Tribunal.
5. The Ld.AR of the assessee before us disputed that the assessee was not a professional. The Ld.AR of the assessee pleaded that the income returned may be maintained, as the assessee is not a professional, hence entitled to file her return u/s. 44AD of the I.T. Act, 1961.
6. The Ld. DR, on the other hand, relied upon the order of authorities below.
7. We have considered the rival submissions and perused materials available on record. Provisions of section 143(1) (a) reads as below:-

“**143.** (1) where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—

- (a) the total income or loss shall be computed after making the following adjustments, namely:—
- (i) any arithmetical error in the return; [***]
 - (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:]

⁸⁴**Provided also** that no adjustment shall be made under sub-clause (vi) in relation to a return furnished for the assessment year commencing on or after the 1st day of April, 2018;]

- (b) the tax ⁸⁵[, *interest and fee*], if any, shall be computed on the basis of the total income computed under clause (a);
- (c) the sum payable by, or the amount of refund due to, the assessee shall be determined after adjustment of the tax ⁸⁵[, *interest and fee*], if any, computed under clause (b) by any tax deducted at source, any tax collected at source, any advance tax paid, any relief allowable under an agreement under section 90 or section 90A, or any relief allowable under section 91, any rebate allowable under Part A of Chapter VIII, any tax paid on self-assessment and any amount paid otherwise by way of tax ⁸⁶[, *interest or fee*];
- (d) an intimation shall be prepared or generated and sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee under clause (c); and
- (e) the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee:

Provided that an intimation shall also be sent to the assessee in a case where the loss declared in the return by the assessee is adjusted but no tax ⁸⁶[, *interest or fee*] is payable by, or no refund is due to, him:

Provided further that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the return is made.”

From the reading of the above section, it is very much clear that as per First Proviso to this section, it is imperative on the part of the assessing officer making the adjustment to give intimation to the assessee of such adjustments either in writing or in electronic mode. From the record before us it is not clear whether such intimation u/s. 143(1)(a) was passed after due opportunity of 30 days to the assessee or not. The assessing officer is under no obligation to accept the return of income filed by taking recourse to section 143(1)(a) as he is empowered to reject/modify the claim made in the return by resorting to the provisions of section 143(2) thereby leading to section 143(3) assessment.

8. The established legal view is that the Assessing Officer is not justified in insisting that the supporting evidence in respect of the assessee's claims of deduction/relief should be filed along with the return. That the assessee 's claims of deduction /relief cannot be disallowed by way of prima facie adjustments under section 143(1)(a) for want of evidence and that the assessee should be given an opportunity to produce the requisite evidence in support of his claims before such claims are adjudicated upon. Take a case in which the law does not require any evidence to be adduced for making a claim of deduction. In such a case, can the Assessing Officer assume that there is no evidence at all to substantiate the working given or to claim the relief or to grant exemption to the assessee? It appears that as per the scheme of the Act, he has no power to reject the claim without calling upon the assessee to explain or substantiate the claim. Section 143(1)(a) cannot be automatically invoked to deny the exemption or to

disallow the relief. As a consequence, if the Assessing Officer levies additional tax based on the presumption that there is no evidence, such levy of additional tax will not be legally sustainable.

9. In this context, in the decision of the Hon'ble Delhi High Court in *S.R.F. Charitable Trust v. Union of India* [1992] 193 ITR 95, it has been held that there is no power given to the ITO to disallow the claim for the reason that there is no proof in support of the claim made by the assessee. The Hon'ble High Court's view is that as per clause (iii) of the proviso to section 143(1)(a), the ITO can make an adjustment to the income or loss declared in the return, if *on the basis of the information available in such return, accounts or documents, the deduction, allowance or relief claim is prima facie inadmissible*. The logical fall-out of this judgment is that in cases where the Annexure to the return is not at all insisted upon, it can never form part of the record of the ITO and so it cannot be considered at all by the Assessing Officer. It follows that no disallowance can be made on the simple ground that the assessee has not adduced any evidence for making such a claim of deduction or allowance.

10. The Hon'ble Delhi High Court compared the language of section 154 with that of section 143(1)(a)(iii). The Court observed that there is only one option available to the Assessing Officer whereby he can require the assessee to furnish the proof by issuing a notice under section 143(2). Unless he is called upon to produce documents, books of account or other evidence in support of his claims by issuance of a notice to him, there is no statutory requirement for him to furnish the same.

Thus, in genuine cases, where the law does not require the furnishing of any evidence along with the return of income, the department should not invoke the provisions of section 143(1)(a) for disallowing a claim for want of evidence. So, in the light of discussion above we hold the action of A.O. /CPC u/s. 143(1) (a) bad in law and not sustainable.

10. We find that the case of the Revenue seems to be that since the clients had deducted tax at source u/s.194J of the Act while making payment of Consultancy fees to the assessee, the assessee is to be treated as one engaged in the profession of Consultancy and not in the business of rendering Consultancy. One more point of the Revenue to conclude that assessee is engaged only in profession and not in business is that Consultancy is covered in the expression “Technical Consultancy” as mentioned in Section 44AA of the Act. In this regard, we hold that at what rate of tax the clients deduct while making payments to the assessee is of absolutely no relevance to determine the character of receipt in the hands of the assessee recipient and for determining the status of the assessee as to whether he is engaged in business or profession. The assessee’s plea is that he is engaged in the business of rendering Consultancy services.

11. We find that the expression Consultancy“ does not form part of various professions mentioned in Section 44AA of the Act. For the sake of convenience, the provisions of Section 44AA(1) are reproduced hereunder:-

“(1) 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. From the reading of the aforesaid provision, it could be safely concluded that the expression "Technical Consultancy" would only mean rendering of technical services by assessee. In our considered opinion, the expression Consultancy" could not be brought within the ambit of consultancy".

12. The assessee has filed return her return of income u/s. 44AD of the act, considering her receipts from business and not of profession. For sake of clarity section 44AD is reproduced herein below:

Special provision for computing profits and gains of business on presumptive basis.

⁸⁵ **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 "Profits and gains of business or profession" :

⁸⁶ [**Provided** that this sub-section shall have effect as if for the words "eight per cent", the words "six per cent" had been substituted, in respect of the amount of total turnover or gross receipts which is received by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account ⁸⁷ [or through such other electronic mode as may be prescribed ⁸⁸] during the previous year or before the due date specified in sub-section (1) of [section 139](#) in respect of that previous year.]

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

[89](#)[***]

(3) The written down value of any asset of an eligible business shall be deemed to have been calculated as if the eligible assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

[90](#)[(4) Where an eligible assessee declares profit for any previous year in accordance with the provisions of this section and he declares profit for any of the five assessment years relevant to the previous year succeeding such previous year not in accordance with the provisions of sub-section (1), he shall not be eligible to claim the benefit of the provisions of this section for five assessment years subsequent to the assessment year relevant to the previous year in which the profit has not been declared in accordance with the provisions of sub-section (1).

(5) Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee to whom the provisions of sub-section (4) are applicable 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](#).]

[91](#)[(6) The provisions of this section, notwithstanding anything contained in the foregoing provisions, 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.—For the purposes of this section,—

(a) "eligible assessee" means,—

- (i) an individual, Hindu undivided family or a partnership firm, who is a resident, but not a ⁹²limited 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 ⁹³[two crore rupees].]

13. The assessee has declared an income of Rs Rs.14, 66,462/- out of total receipt of Rs.32, 40,000/- which works out to around 45% of the gross receipts which is fair enough. In this view of the matter, we set aside the orders of the authorities below. The assessing officer is directed to accept the income returned at Rs.14, 66,462/-.

14. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 14th March, 2022.

Sd/-

(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER
Mumbai, Dt : 14th March, 2022
Pavanan

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

/True copy/

Assistant Registrar / Senior Private Secretary
ITAT, Mumbai Benches