

**HIGH COURT OF MADRAS**

**K. Kannan**

**v.**

**Assistant Commissioner of Income-tax, Circle-I**

**MRS. CHITRA VENKATARAMAN**

**AND T.S. SIVAGNANAM, JJ.**

**TAX CASE (APPEAL) NOS. 679 AND 680 OF 2013**

**M.P. NOS. 1, 1 AND 2 OF 2013**

**OCTOBER 1, 2013**

**Nithiyaesh Natraj** *for the Appellant.* **J. Narayanasamy** *for the Respondent.*

**JUDGMENT**

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**Mrs. Chitra Venkataraman, J. -** The assessee is on appeal as against the order of the Income Tax Appellate Tribunal dated 06.09.2012 in ITA No.370/Mds/2011 and ITA No.371/Mds/2011 relating to the assessment years 2006-2007 and 2007-2008 respectively, raising the following questions of law:

1. Whether in the impugned assessment year, income can be assessed at 8% rate on the gross contract receipts invoking S.44AD of the Act when the turnover of the assessee had exceeded the Rs.40 lakh limit prescribed in the Act? And whether the Tribunal can uphold such a patently erroneous assessment especially after making a specific finding in the beginning of para 7 of the impugned order that S.44AD of the Act has no application in the instant case as the turnover has exceeded Rs.40 lakhs.
2. Whether the Tribunal ought to have taken cognizance of the violation of natural justice principles by the AO while making the assessment u/s.143(3) because a best judgment assessment as per S.144 can only be made after providing reasonable opportunity of being heard to the Assessee (by issuing a show cause notice) in consonance with statutory procedural requirements mandated in S.145(3) and S.144 of the Act?
3. Whether the AO has unfettered discretionary powers to arbitrarily reject the audited books of accounts submitted by the assessee on improper/invalid grounds without proper understanding and due consideration of the ground realities/nature of the business and the prevailing circumstances of the case?
4. Whether the impugned order of the Tribunal upholding the assessment order of the AO (insofar as estimation of income is concerned) based on a mere presumption of facts without any material on record is tenable in law?

**2.** The assessee herein is a Civil Contractor. While computing the income for the assessment year 2006-07 and 2007-2008, the Assessing Officer pointed out that the assessee could produce only the books of accounts and vouchers in respect of bitumen expenses and hand made vouchers in respect of other expenses. When the assessee was asked to produce as to how the work in progress was worked out, it was noticed that the assessee did not show any bills/ receivables in the balance sheet. The assessee could not produce even a reconciliation statement with reference to the contract receipts and the bank account. In the absence of details and there being no proper books of account maintained, the Assessing Officer

estimated the income from contract business at 8% on the gross contract receipts admitted by the assessee of Rs.4,02,10,611/- and Rs.5,34,96,995/-respectively by invoking the provisions of Section 44 AD of the Income Tax Act, 1961. Apart from this there were other incomes for the assessee and those were assessed as per the regular procedure. It is a matter on record, the assessee was issued with a notice and the assessment was taken to scrutiny and notice under Section 143(2) of the Act was made and ultimately the assessment order was passed under Section 143(3) of the Act. Aggrieved by the assessment made under Section 44AD of the Act, taking the total receipt on Rs.4,02,10,611/- and Rs.5,34,96,995/- respectively on a presumptive basis, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), who ultimately held that the net profit of the assessee be assessed at 5%. Except for narrating the order of the Assessing Officer, we do not find any discussion as regards the claim of the assessee that the assessment under Section 44 AD of the Act was bad in law. Aggrieved by this, the assessee went on appeal before the Income Tax Appellate Tribunal. Simultaneously the assessee also filed an appeal relating to the assessment year 2007-2008. The Commissioner of Income Tax (Appeals) passed a common order for both the assessment years. The relief granted by the Commissioner of Income Tax (Appeals) in respect of the assessment year 2007-08 was on the same line as that of the assessment year 2006-07. Against this also, the Revenue went on appeal before the Income Tax Appellate Tribunal.

**3.** A reading of the order of the Income Tax Appellate Tribunal shows that the assessee had pointed out that its turnover for the assessment year 2006-07 did not exceed Rs.40 lakhs to be brought for assessment in presumptive basis under Section 44AD of the Income Tax Act, 1961. However, noting that the assessee had not filed profit and loss account or balance sheet for the years and that the returns and the vouchers produced were defective in nature, the Income Tax Appellate Tribunal confirmed the order of the assessment thereby taking the gross turnover at 8% as the income of the assessee.

**4.** Aggrieved by this, the present appeals have been preferred by the assessee before this Court.

**5.** Learned Counsel appearing for the assessee pointed out that on the admitted fact, for the assessment year 2006-07, the assessee's turnover exceeded Rs.40 lakhs, as prescribed under Section 44AD of the Act, the Section had no relevance at all for the purpose of taxing the assessee on presumptive basis. In any event, even while restoring the assessment, the assessee had not been put on notice as regards this aspect to proceed under Section 144 of the Act. In the circumstances, the order of the Income Tax Appellate Tribunal restoring the assessment is bad in law.

**6.** A reading of Section 44 AD of the Income Tax Act, 1961 shows that notwithstanding anything to the contrary contained in Sections 28 to 43C, in the case of eligible assessee having business with a gross receipts not exceeding Rs.40 lakhs, the assessee would be assessed on a presumptive basis, to be taxed at 8% on the total turnover gross receipts 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 amount under the head "profit and gain of the business or profession". Sub Section (2) states that any deduction allowable under the provisions of Sections 30 to 38, shall, for the purpose of Sub Section (1), be deemed to have been already given full effect to and no further deduction would be allowed under those Sections. In other words, considering the percentage of liability fixed as income on the eligible assessee who are defined under clause (a) Explanation and eligible business defined under Clause (b) Explanation, so long as the gross turnover does not exceed Rs.40 lakhs, the income would be assessed at the specified percentage of the gross turnover. There is no denial of the fact, as is evident from the order of assessment that the assessee's gross contract receipt was Rs.4,02,10,611/- for the assessment year 2006-2007 and Rs.5,34,96,995/- for the assessment year 2007-2008, which means, Section 44 AD of the Act has no relevance.

**7.** As far as this case is concerned, it is a matter of record and it is not disputed by the assessee that it had not filed any profit and loss account or the balance sheet for the assessment years under consideration along with the returns of income. Even the vouchers given by the assessee were found to be defective. It is pointed out in the Appeals filed by the assessee, the Commissioner of Income Tax (Appeals) mainly scaled down such estimate for the reason that in the earlier assessment year 2005-2006, 3.69% of turnover was considered to be appropriate for completing the assessment. The Income Tax Appellate Tribunal held that 8% of the gross receipts would be a justifiable assessment even by way of best of assessment. Thus, the Tribunal restored the order of the Assessing Officer. In so holding, the Tribunal further held that while so fixing the income at 8% of the gross receipts, the claim of the depreciation be allowed thereafter. However, after granting the depreciation if the income goes below, then the Assessing Officer shall assess the income at the returned level itself. With these directions, the appeals were disposed of. Thus on the admitted fact, that the assessee had no materials to produce in support of his income assessable under the provisions of the Act, the only ground thus available on which the assessee's income could be assessed would be a best of judgment assessment. It is no doubt true while passing the Assessment Order for the assessment year 2006-07, the Assessing Officer had adopted 8% based on Section 44AD of the Act. But in *stricto sensu*, one cannot take this as an assessment under Section 44AD of the Act for taxing the assessee on a presumptive basis. The Commissioner of Income Tax (Appeals) accepted the contention of the assessee that it was an assessment under Section 44 AD of the Act.

**8.** Before the Commissioner of Income Tax (Appeals), the assessee submitted that the total income of the assessee was not exceeding 4% at anytime in the preceding year when the turnover was low and that high percent of net profit in the assessment year 2006-07 was not possible when the turnover was high i.e. above Rs.4 Crores. It was further submitted by the assessee that the nature of business was such that they had to face lot of practical difficulties in maintaining the bills and vouchers and considering the quality maintenance in civil work, the assessee had to sacrifice the profit. Thus, taking note of these submissions and other materials on record and since the net profit was shown in the range of 1.26 to 3.69 per cent in the preceding year, assessing the income at high rate of 8% was not called for. In the circumstances, as a via-media the Commissioner of Income Tax (Appeals) fixed it at 5%.

**9.** Thus in the background of the facts considered by the Commissioner of Income Tax (Appeals) and in the context of the assessee not maintaining any books of accounts or filing profit and loss account and balance sheet, the assessee felt satisfied that the relief granted by the the Commissioner of Income Tax (Appeals) fixing the assessable income at 5% was acceptable to it. Consequently no appeal was filed thereafter by the assessee before the Tribunal.

**10.** In the background of the reasoning of the Tribunal, we do not agree with the assessee that the assessment suffers on account of the absence of any opportunity granted to it by the Assessing Officer before passing the order under Section 144 of the Act. As to the merits of the case herein is concerned, as already seen, the Commissioner of Income Tax (Appeals) considered the case of the assessee as regards the profit margin in the earlier years to refix the income at 5% of the gross turnover. Consequently, we do not find any justification in the Tribunal straightaway restoring the assessment at 8% of the gross turnover without any discussion on the merits of the Commissioner of Income Tax (Appeals) order. In the circumstances, after going through the order of the Commissioner of Income Tax (Appeals), we have no hesitation in restoring the order of the Commissioner of Income Tax (Appeals) and thereby set aside the order of the Tribunal.

**11.** Consequently, while partly allowing the appeals filed by the assessee, the Order of the Income Tax Appellate Tribunal is set aside and the order of the Commissioner of Income Tax (Appeals) is restored in fixing the income of the assessee at 5% on the gross turnover.

**12.** In the result, the Tax Case Appeals are partly allowed with the above observation. No costs. Consequently, the connected miscellaneous petitions are closed.