

**IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, COCHIN**

Before Shri George George K, Judicial Member

ITA No.150/Coch/2020 : Asst.Year 2011-2012

Sm.Honey Rahulan C/o.Swathy H.Prasad Advocates, Iyer & Iyer Rajaji Road Kochi – 682 035. PAN : AAMPH1713P.	Vs.	The Income Tax Officer Ward 3 Alappuzha.
(Appellant)		(Respondent)

Appellant by : Smt.Swathy H.Prasad

Respondent by : Sri.B.Sajjive, Sr.AR

Date of Hearing : 08.06.2020	Date of Pronouncement : 09.06.2020
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ORDER

This appeal at the instance of the assessee is directed against the order of the CIT(A), dated 23.01.2020. The relevant assessment year is 2011-2012.

2. The solitary issue that is raised is whether the CIT(A) is justified in confirming the addition of Rs.11,52,273 on account of unexplained investments made by the Assessing Officer.

3. Brief facts of the case are as follow:

The assessee is an individual, who is engaged in running a houseboat for tourists under the name and style of Aria Holidays and Resorts. For the assessment year 2011-2012, the return of income was filed on 31.12.2011 declaring total income of Rs.4,46,220, being 25% of the net profit u/s 44AD of the I.T.Act. The assessment was taken up for scrutiny by issuance of notice u/s 143(2) of the I.T.Act on 25.09.2012.

During the course of assessment, the Assessing Officer called for explanation for the debits and credit in the bank account of the assessee and directed to prepare a cash flow statement. Since there was no compliance for preparing the cash flow statement by the assessee, the Assessing Officer prepared the cash flow statement by including in application side may transactions. It was claimed by the assessee that these amounts included in application side of cash flow statements prepared by the A.O. are mainly business transaction / expenditure for which assessee had declared income u/s 44AD of the I.T.Act. However, cash deficiency of Rs.11,52,273 was calculated by the A.O. and the same was added to the total income disclosed by the assessee. The relevant finding of the A.O. in making the addition of Rs.11,52,273 reads as follow:-

"5. Considering the above sources / expenses /investments by the assessee during the year under consideration, a fund flow statement is extracted to arrive at the deficiency in cash, if any, in assessee's hands to meet all outgoings as tabulated under:

Para Ref.	Source	Rs.	Para Ref.	Application	Rs.
	Amount offered as income after all expenses	4,46,224	4.a	Investment in Multi Commodity Exchange	2,53,000
4.b	Amount received from Cochin Stock Exchange – share transaction	1,61,051	4.b	Investment in Cochin Stock Exchange	25,000
4.i	Depreciation on House boat	2,96,250	4.c	Amount given to Sri Sreekumar N	1,00,000
4.e	Fund transferred from account No.255 at ICICI Bank (Abhilash's)	75,000	4.d	Fund transferred to account CTN	5,60,000

			4.e	Fund transferred to account No.255 at ICICI Bank on 19.11.10 & 22.02.11 (Abhilash's)	25,000
			4.g	Fund transferred as detailed in para 4.g cited supra	2,20,000
			4.f	Loan repaid (SBT, Cherthala)	7,85,870
			4.h	Household expenses	1,50,000
				LIC	2,668
				Tax paid	9,260
	Cash deficiency	11,52,273			
		21,30,798			21,30,798

6. The above revised cash flow statement prepared from the known sources of the assessee shows a deficiency of Rs.11,52,273/- in the inflow side which represents assessee's unexplained expenses / investments.

As can be seen from the replied, the assessee went on arguing that since she had declared the income under the provisions of section 44AD and instead of declaring 8%, she had declared 25% of the gross receipts which is already on the higher side. In case of taxing both business income estimated u/s 44AD and unexplained investment/expenses, it is for the assessee to prove the sources for investment/ expenses from sources which has already been taxed. Deemed income of the nature covered u/s 69, 69A, 69B & 69C are treated separately since such income is not income from salary, house property, business, capital gains or income from other sources. The provisions of the above sections treat unexplained investments, unexplained money, bullion etc and unexplained expenditure as deemed income where the nature and source of investment/ expenditure have not been explained or satisfactorily explained. Section 44AD provides for estimation of business income under certain circumstances. The argument of the assessee that when income is estimated u/s 44AD as a prescribed percentage or at a higher percentage as offered by the assessee, provisions of section 69 to 69C cannot be invoked is not acceptable. Due weightage for income derived from business at the higher rate of estimation has been given in the inflow side of the cash flow statement along with other receipts/income. If the assessee fails to establish the nexus between the cash inflow and cash out flow, the excess cash out flow remains unexplained between the cash inflow and cash out flow, the excess cash out flow remains unexplained which attracts the provisions of sections

69 to 69C. If the assessee has actually earned profit in excess of 25% of the turnover and the assessee has other sources/ receipts for meeting her investments/expenses, then the assessee should establish the nexus between the cash inflow and cash out flow.

Intangible addition offered in the form of enhances business profit estimated cannot be as such treated as source of unexplained investment. [Reliance is placed on the ratio of decision of Prakash Tiwari Vs CIT (MP) 148 ITR 474 wherein it was held that additions is sustainable are made towards unexplained investments.] In this case, 25% of the turnover as net profit has been allowed which is a reasonable estimate.

While arriving at the above cash flow, all other cash as well as clearing debits ft credits in the banks are considered as pertaining to assessee's business and the net profit offered for taxation and the depreciation amount are considered in the inflow side. Though several opportunities were granted, the assessee failed to furnish cash flow statement and to substantiate with valid evidence the sources for these expenses/investments made during the year to the extent of Rs.11,52,273/-. Accordingly the sum of Rs.11,52,273/- expended / invested over and above receipts is treated as unexplained and the same is now brought to tax in assessee's hands."

4. Aggrieved by the addition of Rs.11,52,273, the assessee preferred an appeal to the first appellate authority. The CIT(A) called for remand report from the Assessing Officer and on receipt of the same, confirmed the addition made by the Assessing Officer amounting to Rs.11,52,273. The relevant finding of the CIT(A) reads as follow:-

"4.4 The facts of the case, the grounds of appeal and the arguments of the Appellant have been considered. From the assessment order, it is evident that the Appellant had done transactions through National Commodity Exchange and had not disclosed the said transactions in the return of income. Therefore, the hands of the Appellant are not clean and it is evident from the facts brought on record that the Appellant is suppressing these transactions under the guise of disclosing the income under section 44AD of the Act. Further, the decision of jurisdictional Tribunal in the case of Thomas

Eappen is on different facts and the same are not applicable to the case of the Appellant.

4.5 Further, it is for the Appellant to prove that the cash flow statement drawn by the Assessing Officer has been duly considered in the turnover considered for computation of income under section 44AD of the Act As the Appellant had failed to explain the relevant facts regarding the transactions made in commodity exchange, the Assessing Officer is right in computing the unexplained investment by drawing a cash flow statement. Hence, the addition of Rs.11,52,273 is confirmed and the grounds raised by the Appellant are dismissed."

5. Aggrieved by the order of the CIT(A), the assessee has preferred this appeal before the Tribunal. The learned Counsel for the assessee submitted that the Assessing Officer is not legally right in making the addition when the income is declared u/s 44AD of the I.T.Act. It was submitted that section 44AD of the I.T.Act is presumptive taxation scheme in order to ease the tax burden on small taxpayers and the assessee was eligible for declaring income u/s 44AD of the I.T.Act. Further it was submitted that the assessee was not maintaining any books of account as the same was not required when the income is declared u/s 44AD of the I.T.Act. It was contended that the A.O. called for the explanation for all the debits and credits in the bank account and had prepared the cash flow statement by including many business transactions in the debit side. Therefore, it was submitted that the A.O. wrongly arrived at the cash deficiency of Rs.11,52,273 especially when income was declared on presumptive basis u/s 44AD of the I.T.Act. It was further contended that the issue in question is squarely covered by the orders of the Tribunal in the case of *Nand lal Popil v. DCIT*

[ITA Nos.1161 and 1162/Chd/2013 – order dated 14.06.2016] and in the case of *Shri Thomas Eapen v. ITO [ITA No.451/Coch/2019 – order dated 19.11.2019]*. It was submitted that in view of the above two orders of the Tribunal, further additions are not required when income is declared u/s 44AD of the I.T.Act.

6. The learned Departmental Representative, on the other hand, strongly supported the orders passed by the Income-tax authorities.

7. I have heard the rival submissions and perused the material on record. The assessee is an individual, who is running a houseboat for tourists under the name and style of Aria Holidays and Resorts. The assessee filed return of income disclosing income of Rs.4,46,224 u/s 44AD of the I.T.Act. There is no dispute that the assessee falls under the provisions of section 44AD of the I.T.Act 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 of the I.T.Act and accepted the income declared by the assessee at Rs.4,46,224. However, the A.O. made addition u/s 69 of the I.T.Act. The Assessing Officer did not reject the books of account of the assessee. Section 44AD of the I.T.Act 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. (In the instant case the assessee has declared 25% of gross receipts). Section 44AD of the I.T.Act exempts the assessee from

maintenance of books of accounts. The question that arises for my consideration is whether the Assessing Officer could make further additions towards various discrepancies in the books of account of the assessee once the income of the assessee is accepted u/s 44AD of the I.T.Act. Section 44AD of the I.T.Act was introduced to help the small businessmen, 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 Taxman 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."

7.1 In the instant case, the A.O. had prepared cash flow statement by including on the application side many business outgoings / transfers and calculated the cash deficiency of Rs.11,52,273. On a careful perusal of the cash flow statement prepared by the Assessing Officer, except for investments in Multi Commodity Exchange, Cochin Stock Exchange and Household expenses of Rs.2,53,000, Rs.25,000 and Rs.1,50,000 respectively all other amounts considered as application, is directly or indirectly linked to the business of running houseboats. Therefore, the inclusion of the business transaction as unexplained investments / expenditure would go against the provisions of section 44AD of the I.T.Act. The Assessing Officer has also not considered the opening cash and bank balances as on 01.04.2010 and only the profits declared is considered as inflow in the cash flow prepared by him. The cash flow statement prepared by the A.O. is based on assumption and the same needs to be rejected. Moreover, in the cash flow statement, the A.O. has added household expenses to the tune of Rs.1,50,000 (This is apart from household expenses declared by the assessee to the tune of Rs.78,400). The Assessing Officer in the assessment order has stated as follows. - *"The assessee showed her household expenses as Rs.78,400. Considering her social status, standard of living etc, this is very low. Therefore, taking into account that an amount of Rs.2,50,000 has been considered as*

the household expenses of her husband Sri Sreekumar N in his scrutiny assessment proceedings, now Rs.1,50,000 is treated as assessee's household expenses." I am of the view that the estimation made by the A.O. for household expenses are totally arbitrary and without any supporting evidence especially when in hands of assessee's husband a sum of Rs.2,50,000 was estimated as household expenses.

7.2 The Chandigarh Bench of the Tribunal in the case of Nand Lal Popil v. DCIT (supra) has held that - *"The provisions 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 that 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. Putting the above analysis, in converse, it can be easily inferred that the same is also true for the expenditure of assessee. If 8% of gross receipts are 'deemed' income of the assessee, the remaining 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. 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 then audited is only on the assessee who opts to claim the income being less than 8% of the gross receipts."

7.3 Further, the Cochin Bench of the Tribunal in the case of Thomas Eapen v. ITO (supra), while dealing the case of an assessee who has declared the income of 8% under section 44AD of the I.T.Act by relying on the above Chandigarh Bench order, has held as follows. - *"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 DR that the turnover of the assessee has been doubted by the Assessing Officer is totally ill-found, in view of the same."*

7.4 As mentioned earlier, the Assessing Officer is not considered opening of cash balance as on 01.04.2010 and only the profits declared is considered as inflow in the cash flow prepared. Moreover, most of the applications of income is directly linked to the business of the assessee declared u/s 44AD of the I.T.Act. In such circumstances of the case, I am of the view that no addition is warranted. It is ordered accordingly.

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

Order pronounced on this 09th day of June, 2020.

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin, dated 09th June, 2020
Devadas G*

Copy to :

1. The Appellant
2. The Respondent
3. The CIT(A), Kottayam.
4. The Pr.CIT, Kottayam.
5. The DR, ITAT, Kochi
6. Guard File.

Asst.Registrar/ITAT/Kochi