IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR

(VIRTUAL COURT)

BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER

I.T.A. No. 259/Asr/2022
Assessment Year: 2018-19

Sh. Mohammad Sidiq Mushtaq Ahmed, Baran Pather Haft Chinar, Hazui Bagh, Srinagar, 190001 Jammu & Kashmir [PAN: AAHFM 6508Q]	**Vs.**	Additional Commissioner of Income Tax, Srinagar
(Appellant)		**(Respondent)**

Appellant by : Sh. Bashir Ahmad Lone, CA

Respondent by: Sh. Amit Jain, CIT DR

Date of Hearing: 03.07.2023

Date of Pronouncement: 10.07.2023

ORDER

Per Dr. M. L. Meena, AM:

This appeal has been filed by the assessee against the order of the Ld. CIT(A) National Faceless Appeal Centre (NFAC), Delhi dated 09.12.2022 in respect of Assessment Year: 2018-19.

2. The assessee has raised the following grounds of appeal:

> *"1. The order passed u/s 250 of the Act is bad in law, as the Ld. CIT(A) has not considered modified grounds of appeal and submission made.*
>
> *2. The assessment order passed by AO is bad in law, as the CIT(A) confirmed application of net profit rate of 5% without detecting any defect in book results nor the AO was able to reject book results.*
>
> *3. The Ld. CIT(A) erred in both facts and laws by confirming application of net profit rate of 5% in an arbitrary manner and without any logical basis, when the assessee submitted duly audited accounts and the AO has not even considered the nature of trade and past declared income of the assessee rather relied on section 44AD of the Act, which has no applicability in audit cases.*
>
> *4. The appellant craves leave to add amend, modify, withdraw any ground of appeal at the time of hearing and before the appeal is disposed off."*

3. The Assessing Officer (in short "the AO") passed order u/s 144, after considering the material on record. This case was selected for scrutiny under CASS criteria for 'Non furnishing of quantitative details'. Despite AO has given number of opportunities to assessee, the assessee did not comply with the notices issued by the AO which compelled to estimate income of the assessee at 8% of the turnover of Rs. 44,01,72,912/-. Accordingly, the AO assessed income of assessee at Rs. 3,52,13,832/-.

4. The assesse being aggrieved with the Assessment Order, went in appeal before the Ld. CIT(A) who has granted partly relief to the appellant by observing as under:

*"7. **DECISION:-** The order u/s 144, statement of facts and the submission furnished by the appellant have been considered.*
7.1 This case was selected for complete scrutiny under CASS criteria 'Non furnishing of quantitative details'. As mentioned in the assessment order, despite giving number of opportunities to assessee, the assessee did not comply with the notices issued by the AO. The AO estimated income of the assessee at 8% of the turnover of the assessee which is Rs. 44,01,72,912/-. Thus, AO arrived at income of assessee at Rs. 3,52,13,832/-."

"7.7 The assessee has not submitted any reason for not mentioning so quantitative details as required in the return of income. Neither it is clear whether the auditor has really audited the books of account of the assessee. The assessee has not submitted certified copies of monthly sales and purchases and closing stocks, the same should have been certified by the auditor who has submitted the audit report. The auditor should have mentioned why and under which circumstances in audit report, he has not mentioned quantitative details as required in audit report. Auditor should have submitted working papers file of the audit done by him of the appellant. In the absence of such details it is very difficult to accept correctness and completeness of books of account maintained by the appellant. In view of this, I upheld the action of AO to assess income of the assessee on estimated basis, since correctness and completeness of books of account maintained by the applicant cannot be accepted, the books of account needs to be rejected and estimation of the income of the assessee needs to be done.

7.8 It is true that under presumptive taxation scheme, rate of income tax is taken at 8% of the total turnover. However, assessee's case do not fit into scheme of presumptive taxation as his turnover is well above the turnover limit for presumptive taxation. It is also generally observed in business that, as turnover increases generally margin goes on decreasing because businessmen play the game of high turnover and low margin business model. Assessee's business is related to daily needs and groceries, my observation in case of high turnover and lower margin fit into nature of business carried by appellant. In view of this, I hold that it will be a fair estimation of income of the assessee if net income of the assessee is taken 5% of the turnover of the assessee instead of 8% as estimated by AO. The appellant has taken a plea that his net income percentage shown in earlier year is far less in the range of 0.09% or in the range of 0.26%. However, it is

> *not submitted by the assessee, that AY's of which net income percentage has been mentioned by assessee were scrutinized by AO earlier and net income percentage as claimed by the appellant is after such scrutiny by the department. In view of this, I direct the AO to adopt net profit percentage at 5% instead of 8% of total turnover. Accordingly, ground of appeal is* ***PARTLY ALLOWED."***

5. The Ld. AR submitted that the impugned order is bad in law, as the CIT(A) confirmed application of net profit rate of 5% as against 8% applied by the AO who invoked the provisions of section 44AD of the Act, without pointing out any defects in duly audited books of account and without rejecting book results declaring a turnover of Rs. 44,01,72,912/- and without appreciating the merits of the case, past history and comparable case of same line of business. He contended that the Ld. CIT(A) erred on both facts and laws by confirming application of net profit rate of 5% as against 8% of the AO in an arbitrary manner and without any logical basis, when the assessee submitted duly audited accounts before the AO. The Ld. AR contended that the matter may be restored to the AO to pass de novo assessment after considering the submission of the assessee and granting opportunity of being heard.

6. Per contra, the Ld. DR although supported the impugned order, however, he failed to rebut the contention of the counsel.

7. We have heard the rival contentions, perused the material on record, impugned order, written submission and case law cited.

8. Heard rival contentions, perused the material on record, impugned order, written submission and case law cited before us. Admittedly, the AO passed assessment order ex parte qua the assesse. The Ld. AR argued that the worthy CIT(A) has not appreciated the facts of the case and arbitrary partly confirmed the addition by restricting the profit @ 5% as against 8% adopted by AO under presumptive taxation scheme, of the total turnover. In our view, though, the CIT(A) has observed that assessee's case do not fit into scheme of presumptive taxation as his turnover is well above the turnover limit for presumptive taxation, however, he has restricted profit @ 5% without analyzing the business book results viz~a~viz past history and comparable case to justify the applicability of the correct net profit rate in the case of the appellant assessee. Merely, observing that it is also generally observed in business that, as turnover increases generally margin goes on decreasing because businessmen play the game of high turnover and low margin business model is not enough. In fact, he ought to have substantiate with corroborative evidence, either any

defect in the books of account or variation from the past history or comparable case.

9. From the above, it is evident that appellant's case do not fit into scheme of presumptive taxation as his turnover is well above the turnover limit for presumptive taxation. Further, the view taken by the ld. CIT(A) is held to be illogical, irrational and being taken in a mechanical manner in absence of any supporting material evidence which cannot be approved under the law. In view of the principles of natural justice, the authorities below ought to have disproved the claim of the assessed by way of rebutting appellants contentions raised with the support of written submission through e-portal in the form of synopsis, audit report, financial statements', Monthly purchases and sales, Bank statement and quantitative details by bringing on record corroborative documentary evidences on record after granting an adequate opportunity of being heard. The Hon'ble Supreme Court of India in the case of Tin Box Company vs. CIT reported in 249 ITR 216 in which their Lordships of Supreme Court of India observed as under:

> *"Assessment - Opportunity of being heard - Setting aside of assessment - Assessment order must be made after the assessee has been given reasonable opportunity of setting out his case - Same not done - Fact that*

the assessee could have placed evidence before the first appellate authority or before the Tribunal is really of no consequence for it is assessment order that counts — Assessment order set aside and matter remanded to assessing authority for fresh consideration."

10. The Hon'ble Delhi High Court in the case of "Bharat Aluminium Company Ltd. vs. Union of India", (Supra) has held as under:

21. This Court is further of the view that a quasi-judicial body must normally grant a personal hearing as no assessee or litigant should get a feeling that he never got an opportunity or was deprived of an opportunity to clarify the doubts of the assessing officer/decision maker. After all confidence and faith of the public in the justness of the decision making process which has serious civil consequences is very important and that too in an authority/forum that is the first point of contact between the assessee and the Income-tax Department. The identity of the assessing officer can be hidden/protected while granting personal hearing by either creating a blank screen or by decreasing the pixel/density/resolution.

22. Consequently, this Court is of the view that the word "may" in Section 144B(*viii*) should be read as "must" or "shall" and requirement of giving an assessee a reasonable opportunity of personal hearing is mandatory.

THE CLASSIFICATION MADE BY THE RESPONDENTS/REVENUE BY WAY OF A CIRCULAR DATED 23RD NOVEMBER, 2020 IS NOT LEGALLY SUSTAINABLE. AN ASSESSEE HAS A VESTED RIGHT TO PERSONAL HEARING AND THE SAME HAS TO BE GIVEN, IF AN ASSESSEE ASKS FOR IT.

23. The argument of the respondent/Revenue that personal hearing would be allowed only in such cases which involve disputed questions of fact is untenable as cases involving issues of law would also require a personal hearing. This Court is of the view that the classification made by the respondents/Revenue by way of the Circular dated 23rd November, 2020 is not legally sustainable as the classification between fact and law is not founded on intelligible differentia and the said differentia has no rational relation to the object sought to be achieved by Section 144B of the Act.

24. Also, if the argument of the respondent/Revenue is accepted, then this Court while hearing an appeal under section 260A (which only involves a substantial question of law) would not be obliged in law to grant a personal hearing to the counsel for the Revenue!

25. Consequently, this Court is of the opinion that an assessee has a vested right to personal hearing and the same has to be given, if an assessee asks for it. The right to personal hearing cannot depend upon the facts of each case.

11. In the instant case, the assessee could have placed evidences before the AO, if he has been provided adequate opportunity of being heard. The argument of the Ld. DR that personal hearing would be allowed only in such cases which involve disputed questions of fact is untenable as cases involving issues of law would also require a personal hearing. In our view, the classification made by the Revenue by way of the Circular dated 23rd November, 2020 is not legally sustainable as the classification between fact and law is not founded on intelligible differentia and the said differentia has no rational relation to the object sought to be achieved by Section 144B of the Act.

12. In view of the principles of natural justice, we consider it deem fit to restore back the matter to the file of the Ld. AO to pass *de novo* assessment after considering the written submission and evidences filed on record and may be filed before him during the fresh Assessment Proceedings after granting sufficient opportunity of being heard to the assesse with a direction that the AO shall issue a Show Cause Notice and thereafter pass a reasoned order in accordance with law. Accordingly, Assessment order set aside and matter remanded to assessing authority to pass *de novo* assessment as per law.

13. In the result, the appeal of the assesse is allowed for statistical purposes.

Order pronounced in the open court on 10.07.2023

Sd/-	**Sd/-**
(Anikesh Banerjee)	**(Dr. M. L. Meena)**
Judicial Member	**Accountant Member**

GP/Sr.PS

Copy of the order forwarded to:

(1) The Appellant:
(2) The Respondent:
(3) The CIT(Appeals)
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T.

True Copy
By Order