

आयकर अपीलीय अधिकरण, न्यायपीठ – ए ”, कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “A”, KOLKATA

(समक्ष)Before श्री महावीर सिंह, न्यायीक सदस्य, एवं/and
Shri Mahavir Singh, Judicial
Member.
श्री सी.डी.राव, लेखा सदस्य
Shri C.D.Rao, Accountant Member

सम्पत्ति अपील संख्या /

ITA No.602/Kol/2011

निर्धारण वर्ष/Assessment Year : 2007-08

	- वनाम -	
(अपीलार्थी/APPELLANT) I.T.O., Ward-28(1), Kolkata.	- Versus-	(प्रत्यर्थी/RESPONDENT) M/s.Mark Construction, Kolkata (PAN: AAHFM 4469 J)

क्रास आपत्ति/C.O. No.28/Kol/2011

आयकर अपील संख्या /

A/o ITA No.602/Kol/2011

निर्धारण वर्ष/Assessment Year : 2007-08

	- वनाम -	
(अपीलार्थी/APPELLANT) M/s.Mark Construction, Kolkata. (PAN:AAHFM 4469 J)	- Versus-	(प्रत्यर्थी/RESPONDENT) I.T.O., Ward-28(1), Kolkata.

अपीलार्थी की ओर से/ For the Department:

Shri Amitabha Roy

प्रत्यर्थी की ओर से/For the Assessee :

Shri S.Chakraborty

सुनवाई की तारीख/Date of Hearing : 03.05.2012.

घोषणा की तारीख/Date of Pronouncement : 11.05.2012.

आदेश/ORDER

(सी.डी.राव), लेखा सदस्य

Per Shri C.D.Rao, AM

The above two appeals one filed by the Revenue and the Cross Objection filed by the assessee are against order dated 04.08.2010 of the CIT(A)-XIV, Kolkata pertaining to A.Yr. 2007-08.

2. The only issue raised by the revenue is relating to deletion of addition of Rs.32,62,140/- made by AO u/s 40(a)(ia) of the IT Act.

3. The brief facts of this issue are that while doing the scrutiny assessment AO observed that

“the assessee firm was engaged in the business of developing and promoting. During the course of hearing, Sri Chakraborty, A/r of the firm, furnished various information as and when called for, however, he did not produce the books of accounts whenever called for. He was requested to produce books of accounts during the course of hearing on 14-10-09, 1611-09, 25-11-2009 and 14-12-09. But everytime he took the plea of producing the same at the time of next hearing. Finally, during the course of hearing on 22-12-09, he filed a letter stating that the firm was covered by the provisions of section 44AD of the I.T.Act and maintenance of books was not mandatory. It was specifically asked whether the firm was maintaining books. In reply, he stated that requisition of books from an assessee covered u/s 44AD was not necessary. Then he was asked as to wherefrom he had filed all the information and what was the basis of the information filed by him, if books of accounts were not maintained. He stated that the information was kept for smooth running of the business but as the firm as covered u/s 44AD, production of books was not compulsory.”

3.1. After analyzing the material filed by assessee he came to the conclusion that

“It is evident that originally the return was filed according to the books of accounts maintained, and later on when justifying certain actions became difficult, section 44AD was brought into the picture. It is not acceptable that the firm does not maintain any books of accounts when the A/r had furnished lots of information at the time of filing return as well as at the time of scrutiny proceedings. It is only to avoid the liability of deducting tax at source that the aspect of section 44AD has been brought into picture. So, keeping in view the discussion above and the facts and circumstances of the case, the contention of the A/r is not tenable, hence rejected.

Now, let us come to the findings in the case. The assessee firm had made certain payments to the following parties during the entire financial year against which tax was required to be deducted at source:

<u>Name</u>	<u>Amount</u>	<u>Nature of Business</u>
1. M/s,Aashirbad Developers	Rs.24,50,000/-	Labour Contract
2. M/s.OTIS	Rs.1,16,000/-	-do-
3. Sri Biprodas Banerjee	Rs.1,00,000/-	-do-
4. Shri Kabir Ali	Rs.1,18,000/-	-do-
5. Shri Abdul Kadir	Rs.65,000/-	-do-
6. Shri A.Bhuniya	Rs.70,000/-	-do-
7. M/s.C.Electric	Rs.50,000/-	-do-
8. Sri P.K.Sengupta	Rs.1,00,000/-	-do-
9. Sri Bapi Debnath	<u>Rs.93,140/-</u>	Professional fees
Total :	<u>Rs.32,62,140/-</u>	

The nature of transaction mentioned against the parties mentioned in SI. Nos. 1 to 8 is basically contractual in nature and TDS was required to be made u/s 194C and regarding payments made to Sri Bapi Debnath, who is an Advocate, TDS was required to be made u/s 194J. As the assessee firm had failed to deduct tax on the payments made as referred to above, provisions of section 40(a)(ia) are applied and the entire amount of Rs.32,62,140/- is being disallowed. “

3.2. On appeal the Id. CIT(A) has deleted the same by observing as under :-

“4. I have carefully considered all the facts and circumstances of this case. It is seen that the assessee is involved in the business of developing residential flats and also carrying out certain miscellaneous civil construction work. In the P & L A/c of the assessee for financial year 2006-07 on the receipt side following two entries are made.

By, bill collection for job contract 19,71,112.00

By, stock/work-in-progress 65,45,500.00

Thus the assessee is engaged in the business of civil construction as mentioned in section 44AD. Now the important question is whether the gross receipt paid or payable to the assessee in the previous year on account of such business is Rs.40,00,000/- or less or not. It is seen that the work-in-progress of Rs. 65,45,500/- has been shown by the assessee for the residential flats which are being constructed by it but which were not complete by the end of the previous year under consideration. The assessee has claimed that the construction of these flats was completed in the next financial year and thereafter only the possession was handed over to the buyers. Thus it can be accepted that the partly constructed flats were work-in-progress for the assessee and the money received from the buyers for these flats was an advance and not a receipt for the previous year under consideration. This fact has not been disputed by the A.O. also in the assessment order. Thus the amount of Rs. 65,45,500/- cannot be considered gross receipt paid or payable to the assessee for the previous year under consideration. Therefore, the gross receipt of the assessee for the previous year will be Rs. 19,71,112/- which is related to job contract receipts and which is less than Rs. 40,00,000/-. Since the assessee is engaged in the business of civil construction and its gross receipts for the previous year under consideration are less than Rs. 40,00,000/- therefore, its case is covered by provisions of Section 44AD.

If we consider from the angle of section 44AD the assessee has declared net profit of Rs. 1,64,814/- consisting of interest on capital paid to partners amounting to Rs. 37,536/-, partners salary of Rs. 1,16,000/- and net profit of Rs. 11,278/-. This comes to 8.4% of the gross receipt of Rs. 19,71,112/-. Since the assessee has shown net profit more than 8% of the gross receipt therefore, he has satisfied the special requirement laid down u/s 44AD and its income cannot be increased beyond this amount disclosed by it. The opening lines of section 44AD state as follows:

“Notwithstanding anything to the contrary contained in sections 28 to 43C, in the.....”

This means that while calculating 8% of the gross receipt of the assessee all the deductions to be allowed or disallowed as provided in section 28 to section 43C are considered to have been taken into consideration. If the assessee has shown more than this 8% in its return then that higher value is to be adopted. In the facts of the above case the 8% of gross receipts comes to Rs. 1,57,689/- and the profit declared by the assessee is Rs. 1,64,814/-. Therefore, the profit of Rs. 1,64,814/- declared by the assessee is to be adopted u/s 44AD and there will not be any scope for making addition u/s 40(a)(ia).

The argument of the A.O. that the assessee has got its account audited and has prepared proper P & L A/c and Balance Sheet therefore, its case will not be covered u/s 44AD is not acceptable. For the assessee covered by the provisions of Sec. 44AD the law does not require the assessee to maintain books of accounts u/s 44AA and audit its accounts u/s 44AB. However, if the assessee has done so it cannot be held against the assessee. Similarly, if the assessee has mentioned certain details about his financial transactions in the return of income on the basis of books of accounts maintained by it, it cannot be used as an evidence against the assessee.”

3.3. Aggrieved by this now the revenue is in appeal before us.

4. At the time of hearing the Id. DR appearing on behalf of the revenue relied on the orders of AO and submitted that since AO has derived information submitted by assessee himself though the provision of section 44AD of the Act is applicable in the present case. Assessee has violated the provision of section 194C of the Act to recover tax from nine parties as recorded by AO in the assessment order. Therefore addition made by AO u/s 40(a)(ia) of the IT Act is sustainable. The deletion made by Id. CIT(A) is not in accordance with law. Therefore he request to reverse the order of Id. CIT(A) and restore that of AO.

5. On the other hand, the Id. Counsel appearing on behalf of assessee has heavily relied on the order of Id. CIT(A) and further pointed out point-wise replies to the queries and observations made by AO which were incorporated by CIT(A) at pages 6,7 and 8 and finally concluded that since assessee is covered by the provision of section 44AD of the Act the law does not require to maintain books of accounts u/s 44AA of the Act and audit its accounts u/s 44AB of the Act. However, if the assessee has done so it cannot be held against the assessee. Similarly, if the assessee has mentioned certain details about his financial transactions in the return of income on the basis of the books of accounts which cannot be used as an evidence against the assessee. Therefore he requested to upheld the action of Id. CIT(A).

6. After hearing the rival submissions and on careful perusal of materials available on record, it is observed that the observations made by Id. CIT(A) in the impugned order which are incorporated in the preceding paragraphs, in our opinion, is

in accordance with law. In the case of CIT vs Surendra Paul reported in 242 CTR 61 (P&H) the Hon'ble Punjab and Haryana High Court has held that once under the special provision of section 44AD of the IT Act exemption from maintenance of books of accounts have been provided and the presumptive tax at 8% of the gross receipts itself is the basis for determining the taxable income, the assessee was not under obligation to explain individual entry of cash deposits in the bank unless such entries had no nexus with the gross receipts. In the present case though from the details filed by assessee the Id. AO observed that no TDS has been recovered, in our opinion, since assessee has disclosed the profits more than 8% of the gross receipts and there is no dispute in receipt of the gross receipts the addition made by Id. CIT(A) u/s 40(a)(ia) of the IT Act is not sustainable. Therefore we confirm the action of Id. CIT(A) and dismiss the appeal of the revenue.

7. In respect of Cross Objection raised by assessee we are of the view that since the Cross Objection is in support of the order of Id. CIT(A) and we have confirmed the order of Id.CIT(A) the cross objection of assessee becomes infructuous and the same is hereby dismissed as being infructuous.

8. In the result the appeal of the revenue as well as the Cross Objection are dismissed.

Order pronounced in the court on 11.05.2012.

Sd/-

महावीर सिंह, न्यायिक सदस्य
Mahavir Singh, Judicial Member

Sd/-

सी.डी.राव, लेखा सदस्य,
C.D.Rao, Accountant Member.

(तारीख)Date: 11.05.2012.

R.G.(P.S.)

आदेश की प्रतिलिपि अग्रेषित:-

Copy of the order forwarded to:

1. M/s.Mark Construction, 20, Purna Ch Mitra Lane, Kolkata-700033.
2. The I.T.O., Ward-28(1), Kolkata.
3. The CIT,
4. The CIT(A)-XIV, Kolkata.
5. DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches