IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, CHANDIGARH

BEFORE SHRI H.L.KARWA, VICE PRESIDENT
AND MS. RANO JAIN, ACCOUNTANT MEMBER

ITA No.1161/Chd/2013
(Assessment Year : 2007-08)

&

ITA No.1162/Chd/2013
(Assessment Year : 2009-10)

Nand Lal Popli, Hemant Lodge, Murray Field Estate, Nav Bahar, Shimla. PAN: ABLPP3524A (Appellant)	Vs.	The D.C.I.T., Central Circle-II, Chandigarh. (Respondent)

Appellant by	:	Shri Vishal Mohan
Respondent by	:	Shri Sushil Kumar, DR
Date of hearing	:	26.05.2016
Date of Pronouncement	:	14.06.2016

O R D E R

PER RANO JAIN, A.M. :

These two appeals appeal filed by the assessee are directed against the separate orders of learned Commissioner of Income Tax (Appeals)(Central), Gurgaon, both dated 25.11.2013, relating to assessment years 2007-08 and 2009-10.

2. Since the facts and circumstances are identical in both the appeals, the same were heard together and are being disposed off by this consolidated order for the sake of convenience.

3. We first take up the appeal of the assessee in ITA No.1161/Chd/2013, relating to assessment year 2007-08.

ITA No.1161/Chd/2013 :

4. The ground No.1 raised by the assessee reads as under :

> *"1. That in the facts and circumstances of the case the Ld Commissioner of Income Tax (Appeals) is not justified in upholding the adding back of the sum of Rs.32,24,130/- as an unexplained expenditure under section 69 C of the Income Tax Act, 1961 . The said addition is unwarranted and not sustainable in the eyes of law as the profit from the execution of works contract @ 8% had been returned by the appellant under section 44 AD of the Income Tax Act, 1961.*

5. Briefly, the facts are that the assessee is a civil contractor and had declared its profits under section 44AD of the Income Tax Act, 1961 (in short 'the Act') amounting to Rs.3,02,050/- against the gross receipts of Rs.37,75,444/-. The Assessing Officer on the basis of these figures inferred that the assessee has incurred expenses to the tune of Rs.34,73,394/- (Rs.37,75,444 –

Rs.3,02,050/-). However, he observed that it is contrary to the expenses shown in the cash flow statement of Rs.18,49,264/-. The explanation of the assessee was that an amount of Rs.16,24,130/- was paid from the bank account on various dates which was not reflected in the cash flow statement. Since no documentary evidence was filed to prove that these payments were towards contract work, the Assessing Officer made an addition of Rs.32,24,130/- (Rs.34,73,394 - Rs.2,49,264/-).

6. Before the CIT (Appeals), the assessee stated that the profits were declared as per the scheme of presumptive taxation @ 8% which the Assessing Officer cannot disturb. The CIT (Appeals) dismissed this ground of appeal raised by the assessee stating that the assessee could not substantiate that the payments made through bank were all related to his contract business. It was imperative on the assessee's part to discharge the burden to substantiate his claim that Rs.34,73,394/- were actually expended solely towards his civil work. In this way, the issue was decided against the assessee.

7. Aggrieved by this, the assessee has come up in appeal before us. The learned counsel for the assessee reiterated the submissions made before the CIT (Appeals). The main argument put-forth by him was that the assessee having been taxed under the presumptive taxation under section 44AD of the Act, the Assessing Officer was not right in asking him to substantiate the

expenditure incurred by him. Reliance was placed on the judgment of Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Surinder Pal Anand in ITA No.156 of the Act 2010 dated 29.6.2010 and also on the order of the Jodhpur Bench of the I.T.A.T. in the case of Kangiri Contractor Vs. ITO in ITA No.428/JU/2010 dated 30.9.2010.

8. The learned D.R. relied on the order of the Assessing Officer as well as that of the CIT (Appeals) and placed reliance on the order of the I.T.A.T., Ahmedabad Bench in the case of Shivani Builders Vs. ITO, 108 ITD 520. He submitted that this case is squarely applicable to the assessee since there is clear finding by the Assessing Officer that the addition under section 69 of the Act is based on consideration of cash flow statement submitted by the assessee himself. This is also indicative of the fact that the assessee was maintaining books of accounts which reported a higher turnover, which deliberately was not considered by the assessee and which was taken at an amount below Rs.40 lacs so as to be covered under section 44AD of the Act. Further, it was stated that the provisions of section 69C of the Act are very clear that wherever the assessee fails to explain about the source of certain expenditure incurred during the year, the same may be deemed to be the income of the assessee.

9. We have heard the learned representatives of both the parties, perused the findings of the authorities

below and considered the material available on record. The issue to be decided by us is whether accepting the case of the assessee as taxable under the presumptive taxation as provided under section 44AD of the Act, the Assessing Officer can make addition under section 69C of the Act making the cash flow statement provided by the assessee the basis of his addition.

10. Section 44AD of the Act reads as under :

> *"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".*
>
> *(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 :"*

10. 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 it 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.

11. Putting the above analysis, in converse, it can be easily inferred that the same is also true for the expenditure of the 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.

12. Further, on the reading on the substantive part of the provision, it is quite clear that an assessee availing the benefit of such presumptive taxation can claim to have earned income @ 8% or above of the gross receipts. In that case, the provisions of sub-section (5) of the said section will be applicable to it, which reads as under :

> *"44AD (5) Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee who claims that his profits and gains from the eligible business are lower than the profits and gains specified in sub-section (1)*

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."

13. 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.

14. Now, applying the above to the facts of the present case, we observe that the Assessing Officer, for making the impugned addition has started with the presumption that an amount to the extent of 92% of the gross receipts is the expenditure incurred by the assessee, 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. 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 69C of the Act. The argument of the learned D.R. that the turnover of the assessee has been doubted by the Assessing Officer is totally ill-found, in view of the same.

15. Further, it is a fact on record that the assessee had not maintained books of account that is why he opted for 8% income as per section 44AD of the Act. The section also does not put obligation on the assessee to maintain books of account, more so, in view of the fact that his income has been assessed as per section 44AD of the Act, he cannot be punished for not maintaining the same. The argument of the learned D.R. that the assessee was in fact, maintaining books of account is untenable. Keeping or preparing a cash flow statement cannot be considered as keeping the books of account.

16. Now, coming to the argument of the learned D.R. that the addition has been made under section 69C of the Act, on which there is no bar under section 44AD of the Act, we are quite in agreement with the same. The only fetter provided under section 44ASD of the Act are the applicability of provisions of section 30 to 38 of the Act. The provisions of section 69C of the Act reads as under :

> ***"69C. Unexplained expenditure, etc.-*** *Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year :*

Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income."

17. The crucial words in the said section for the purposes of present appeal are 'any financial year an assessee has incurred any expenditure'. But can we say on the facts & circumstances of the present case that the assessee has 'incurred' any expenses. From an analysis of section 44AD of the Act contained hereinabove, we have already held that the assessee had not incurred the expenses to the extent of 92 % of the gross receipts. Therefore, in the present case, the provisions of section 69C of the Act cannot be applied. Asking the assessee to prove to the satisfaction of the Assessing Officer, the expenditure to the extent of 92% of gross receipts, would also defeat the purpose of presumptive taxation as provided under section 44AD of the Act or other such provision. Since the scheme of presumptive taxation has been formed in order to avoid the long drawn process of assessment in cases of small traders or in cases of those businesses where the incomes are almost of static quantum of all the businesses, the Assessing Officer could have made the addition under section 69C of the Act, once he had carved out the case out of the glitches of the provisions of section 44AD of the Act. No such exercise has been done by the Assessing Officer in this case.

Before parting we would like to deal with the case law relied on by the learned D.R.

18. The only case law relied on by the learned D.R. is that of Ahmedabad Bench of the Tribunal in the case of Shivani Builders (supra). On perusal of the said order, we observe that the basis of finding given in this order is mainly the fact that the assessee had failed to record its turnover correctly in its books. However, no such finding is there in the present case. As already held by us in the preceding paragraph, the Assessing Officer himself while computing the income of the assessee has made the business income to be taxable @ 8% of the gross receipts as provided under section 44AD of the Act. The ground No.1 is allowed in favour of the assessee.

19. The ground No.2 raised by the assessee reads as under :

> *"2. That in the facts and circumstances of the case the Ld Commissioner of Income Tax (Appeals) is not justified in upholding the addition of Rs 1,00,000/- on account of unexplained cash credits ."*

20. The facts of the case are that an amount of Rs.50,000/- each on 24.8.2006 and 16.9.2006 were found credited in assessee''s bank account, which as per the assessee, was amount of loan received back. The Assessing Officer made addition under section 68 of the

Act as further corroborations by way of bank statement and ITR requisitioned was not furnished by the assessee.

21. Before the CIT (Appeals), the stand of the assessee was that the addition was made despite filing of confirmation, which mention the PAN number of Shri Vijay Wadhwa, from whom the amounts were received. The CIT (Appeals) dismissed the ground of appeal raised by the assessee stating that the confirmation copy filed by the assessee does not bear any date. The assessee is stated to be the uncle of the wife of Shri Vijay Wadhwa. Further she stated that considering the close relationship, there is no reason not to supplement the confirmation with more supporting documents. In this way, the ground was dismissed by the CIT (Appeals).

22. Aggrieved by this, the assessee is in appeal before us. The learned counsel for the assessee reiterated the fact that the confirmation was duly filed before the Assessing Officer. Still the addition was made and was confirmed by the CIT (Appeals).

23. The learned D.R. relied on the order of the CIT (Appeals) and further drew our attention to Paper Book page 24, which is said to be the confirmation filed by Shri Vijay Wadhwa and stated that it is undated and no other corroborative evidence to prove the same has been filed by the assessee.

24. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. The findings of the CIT (Appeals) in this regard are at page 8 para 6, which are as under :

> *"On a perusal of the confirmation copy filed at page 24 of the PB, it is seen that it is has no date. The assessee is stated to be the uncle of the wife of Shri Vijay Wadwa. Considering the close relationship, there is no reason not to have supplemented the confirmation with more supporting documents at the time of filing written submissions in appeal, as categorically called for by the AO. Hence, 1 am afraid the assessee cannot be said to have discharged the onus of proving he genuineness of the transaction as well as the creditworthiness of Shri Wadhwa."*

25. On perusal of the same, we do not find any infirmity since it is a fact on record that inspite of stating the donor to be a close relation, the assessee did not file any evidence other than confirmation in order to corroborate the assertion contained therein. The ground raised by the assessee is dismissed.

26. The appeal of the assessee is partly allowed.

ITA No.1162/Chd/2013 :

27. The ground No.1 raised by the assessee is as under :

> *"1. That in the facts and circumstances of the case the Ld Commissioner of Income Tax (Appeals) is not justified in upholding the adding back of the sum of Rs17,04,706/- as an unexplained expenditure under section 69 C of the Income Tax Act, 1961 . The said addition is unwarranted and not sustainable in the eyes of law as the profit from the execution of works contract @8% had been returned by the appellant under section 44 AD of the Income Tax Act, 1961."*

28. It is relevant to observe here that the facts in ground No.1 of this appeal are similar to the facts in ground No.1 in ITA No.1161/Chd/2013 and the findings given in ITA No.1161/Chd/2013 shall apply to this case also with equal force.

29. The ground No.2 raised by the assessee reads as under :

> *"2. That in the facts and circumstances of the case the Ld Commissioner of Income Tax (Appeals) is not justified in upholding the addition of Rs 39, 87,148/- as/ undisclosed capital gains."*

30. Briefly, the facts are that the assessee had shown Long Term Capital Gain on sale of house No.B-419/2 at New Shimla. During the assessment proceedings, the assessee was asked to file copy of Sale Deed and documentary evidence in respect of cost of acquisition and cost of improvement as claimed in the return of income. The assessee filed a copy of office order

dated 3.10.2008 issued by the Himachal Pradesh Housing & Urban Development Authority had revealed that the plot was original allotted to Dr.Rajan Sushant on 28.4.1999 and was transferred in favour of the assessee as on 8.1.2003. The same plot was transferred as on 3.10.2008 in favour of Shri Prithvi Vikram Sen on the request of the assessee. Since the order reveals the transfer of plot only, the inference of the Assessing Officer was that no construction was done on the said plot. As far as the cost of acquisition of said plot shown at Rs.10 lacs by the assessee in the return of income is concerned, no evidence was brought in this regard. Therefore, the Assessing Officer considered the cost of acquisition as well as the cost of improvement of the said plot being nil and taxed the entire sale proceed of Rs.40 lacs in the hands of the assessee as Long Term Capital Gain. Since the assessee had already sown capital gain at Rs.12,852/- in his return, the difference of Rs.39,87,148/- was added in the hands o the assessee as undisclosed income.

31. Before the CIT (Appeals), it was stated that the plot was purchased from Dr.Rajan Sushant for consideration of Rs.10 lacs, which was made to him by cheque in assessment year 2002-03. thereafter, a sum of Rs.24 lacs in assessment year 2006-07, Rs.16 lacs in assessment year 2007-08 and Rs.4 lacs in assessment year 2008-09 were spent on construction. The confirmation filed by the assessee was not disputed by the

Assessing Officer and the transfer letter issued by the HIMUDA talks of plot does not make any difference as lease holder imposing penalty by SADA and copy of Completion Certificate was placed on record as additional evidence before the CIT (Appeals). The CIT (Appeals) after considering the submissions of the assessee observed that no document in support of his contention, be it cost of acquisition or improvement or construction of building or sale consideration has been produced. Further, the CIT (Appeals) dismissed the ground of assessee holding as under:

> *"Copy of statement of Prithvi Vikram Sen filed on page 24 of PB is not even dated and is without any address, proof of identity or supported by any other documents. Penalty letter placed at page 50 of the PB carries signature of the Member Secretary, SADA, New Shimla which is dated 22.12.2005, while the office letter bearing the file no.2808 dated 22.12.08. The compounding fee receipt is dated 9.8.2008 (page 51 of PB) and is for Rs.1,52,303/-. However the amount paid to Municipal Corp. Shimla for compounding charges from PNB New Shimla is not found reflected in the bank narration filed on pages 29-30 of the PB. Infact what is narrated is dated 11.8.2008 for Rs.77,856/-as paid. Assessee's attempt at corroboration to prove his case is found wanting. In such a backdrop, I am afraid the natural conclusion is that the assessee has not placed all the primary facts before the tax authorities, which if done would lead to drawing of adverse inferences. Thus, I have no reason not to confirm the action of the AO in treating the sum of*

Rs.39,87,148/- as undisclosed capital gains. Assessee fails on this ground of appeal."

32. Aggrieved by this the assessee has come up in appeal before us.

33. First we would like to observe that the whole amount of sale consideration has been taxed by the Assessing Officer as capital gains without giving assessee any benefit with regard to cost of acquisition or cost of construction. It can be nobody's case that the assessee had acquired the property without paying any cost. Some value for cost of acquisition has to be given to the assessee. We observe that even in cases of properties acquired through gifts, etc. the cost of acquisition as incurred by the previous owner is given to the assessee. The fact of acquiring the plot from Dr.Rajan Sushant is evident from the office order of Himachal Pradesh Housing & Urban Development Authority dated 8.1.2003. The Assessing Officer as well as the CIT (Appeals) asked for Sale Deed, however, we see that this order is as good as a Sale Deed. However, the amount of purchase consideration is not coming out from this office order. The assessee stated that he purchased the property for Rs.10 lacs and made the payments through account payee cheque. However, no evidence in this regard was shown to us. In view of this, we direct the Assessing Officer to give an opportunity to the assessee to produce the evidence in this regard and given resultant

benefit of cost of acquisition as per law.

34. With regard to the cost of construction, the assessee had filed evidences in the form of Completion Certificate, depositing the compounding fee, etc. for change in structure. These evidences are enough to show that definitely some construction work had been carried out on the said plot. We are not in agreement with the findings of the lower authorities to take the cost of construction as nil. The assessee has maintained that he has incurred an amount of Rs.4 lacs in the assessment year 2006-07, an amount of Rs.16 lacs in the assessment year 2007-08 and an amount of Rs.4 lacs in assessment year 2009-10. From the perusal of the assessment orders for these three assessment years, it is observed that in all the three years, while adjudicating another issue, the Assessing Officer himself has accepted the cost of construction in very clean terms. In the Assessing Officer's order for assessment year 2006-07, an amount at Rs.4 lacs as cost of construction has been accepted at page 4. Similarly, in assessment year 2007-08, at page 5 and in assessment year 2008-09 at page 4, the cost of construction at Rs.16 lacs and Rs.4 lacs respectively have been accepted by the Assessing Officer. Since the Assessing Officer himself has accepted these costs of construction, no different stand can be taken by him while

making the addition. In view of this, we direct the Assessing Officer to delete the addition made on account of construction cost being taken at nil and also direct him to consider the cost of construction at Rs.24 lacs while computing the capital gain.

35. The appeal of the assessee is partly allowed.

36. In the result, both the appeals of the assessee are partly allowed.

Order pronounced in the open court on this 14th day of June, 2016.

Sd/-	Sd/-
(H.L.KARWA)	**(RANO JAIN)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated : 14th June, 2016

Rati

Copy to: The Appellant/The Respondent/The CIT(A)/The CIT/The DR.

Assistant Registrar,
ITAT, Chandigarh