

आयकर अपीलिय अधकरण, 'डी' यायपीठ, चे ई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

ी महावीर संह, उपा य एवं ी मनोज कुमार अ बाल, लेखा सदय के सम
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND SHRI
MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.: 211/CHNY/2009
िनधारण वष /Assessment Year: 2000-01

The ACIT,
Circle IX,
Chennai.

M/s. Vairam Constructions,
v. 58, Peters Road,
Royapettah,
Chennai – 600 014.

(अपीलाथ /Appellant)

PAN: AACFV 1410H यथ
(/Respondent)

&

C.O. No.: 80/CHNY/2009
(in I.T.A. No. 211/CHNY/2009)
िनधारण वष /Assessment Year: 2000-01

M/s. Vairam Constructions, 58,
Peters Road, Royapettah,
Chennai – 600 014.

The ACIT,
v. Circle IX,
Chennai.

PAN: AACFV 1410H

(अपीलाथ /Appellant)

(यथ /Respondent)

राज की ओर से/Revenue by नधा
रती क ओर से/Assessee by

: Smt. R. Anita, Addl.CIT
: Shri A. Suraj Nahar, CA

सनवाई क तार ख/Date of Hearing : 10.01.2022

घोषणा क तार ख/Date of Pronouncement : 18.01.2022

आदेश/ORDER**PER MAHAVIR SINGH, VP:**

This appeal by the Revenue and cross objection by the assessee is arising out of order of the order of Commissioner of Income Tax (Appeals)-IV, Chennai in Appeal No.CIT(A) IV/CHE/263/06-07, vide order dated 20.11.2018. The assessment was framed by the ACIT, Business Circle IX, Chennai for the assessment year 2000-01 vide order dated 18.03.2005 u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter the 'Act').

2. The only issue in this appeal of Revenue is as against the order of CIT(A) deleting addition made by the AO in respect of income from contract receipts by assessing less than 8% of the total contract receipts. For this, Revenue has raised following Ground Nos. 2.1 to 2.3 & 3:-

“2.1 The learned CIT(A) has erred in deleting the addition made in respect of income from contract receipt at 8% of the total contract receipts.

2.2 The CIT(A) failed to observe that the assessee admitted net profit of Rs.2,08,501/- which is less than 8% of the Total contract receipts and the assessee has not filed any report in Form 3CD as per the provisions of Sec.44AB at the time of filing the return of income.

2.3 The Ld.CIT(A) failed to note that the assessee ought to have submitted contract receipt of 8% of total contract receipts in the absence of furnishing of 44AB report along with the return of income.

3. The Ld.CIT(A) failed to observe that as per the provisions of sec.44AD where gross receipts are less than Rs.40 lakhs, Income from contract receipt has to be taken at 8% of such receipts. If the assessee claims that the income from contract is less than 8% it should be certified by a Chartered Accountant u/s.44 AB of the IT Act. The assessee failed to adhere to such requirements.”

3. Brief facts are that the assessee is engaged in the business of civil construction. The assessee filed its return of income for the assessment year 2000-01 on 06.06.2001. The return was processed u/s.143(1) of the Act and subsequently the AO issued notice u/s.148 of the Act and reopened the assessment u/s.147 of the Act on the reason that the assessee has declared profit rate less than 8% of the gross contract receipts despite the fact that assessee has not got its accounts audited. The charges levied by the AO was that the assessee can claim income from contract receipts at a lesser rate than 8% of the gross contract receipts in case the accounts of the assessee are audited u/s.44AB of the Act. The assessee filed a letter dated 20.12.2003 requesting that the return of income filed originally may be treated as return filed u/s.148 of the Act. Accordingly, the AO issued notice u/s.143(2) of the Act. In response to the said notice, the assessee replied and produced original of the covering letter addressed to DCIT, City Circle, Chennai with a tapal stamp dated 24.10.2000 filed with

Assistant Commissioner, Circle –IV(1), which clearly states that the tax audit report u/s.44AB of the Act is being filed. The AO doubted the evidentiary value or authenticity of the letter and stated that even if this letter is accepted, the audit report u/s.44AB of the Act is not filed with the jurisdictional AO. It was pointed out by the AO that even the letter of the assessee does not mention the officer before whom it should have been filed. Accordingly, the AO assessed the income at Rs.4,70,258/- as against return of income of the assessee at Rs.2,08,500/-. Aggrieved the assessee preferred appeal before CIT(A).

4. The CIT(A) noted that the assessee's gross receipt from civil construction are at Rs.39,47,319/- and admitted net profit of the assessee was only Rs.2,08,501/-. The CIT(A) has gone into the letter filed by the assessee before the DCIT, Central Circle, Chennai vide letter dated Nil but stamped by Department dated 24.10.2000. This letter mentions that the assessee has filed tax audit report in Form No.3CA and audited report is in original for the assessment year 2000-01. The assessee has also enclosed copy of audit report in Form No.3CB & 3CD as required u/s.44AB of the Act, which is dated 15.10.2000. The CIT(A) in view of the above evidences noted that there is no reason to doubt these evidences because these are

submitted before the Department and AO has not controverted the same. The CIT(A) going through the decision of Co-ordinate Bench in the case of M. Nandagopal vs. ITO in ITA No.1343/Mds/05, order dated 22.12.2006 and Cochin Bench in the case of Leyland Automobiles vs. ITO in ITA No.18/Coch/2005, order dated 07.04.2006 allowed the claim of assessee and deleted the addition made by the AO at Rs.2,61,758/-. Aggrieved, now the Revenue is in appeal before the Tribunal.

5. We have heard the rival contentions and perused the case records including the case laws cited before us. Admitted facts are that the assessee is a civil contractor having gross contract receipt of Rs.39,47,319/- and admitted net profit at Rs.2,08,500/- as against assessed by the AO at Rs.4,70,258/-. It is an admitted fact that the assessee has filed Form No.3CB & 3 CD for the assessment year 2000-01 as required u/s.44AB of the Act with the Department on 24.10.2000. The due date for filing of this audit report is 31. 10.2000 and return of income is also 31.10.2000. The assessee has filed this evidence i.e., the audit report was filed with the Department and audit was carried out u/s.44AB of the Act on 15. 10.2000. All these shows that these events are prior to due date of filing of audit report as well as return of income. Even now,

before us the Id.senior DR could not controvert the above evidences filed or the authenticity of the same are not doubted. The Id.AR for the assessee before us placed reliance on the Co-ordinate Bench decision in the case of M.Nandagopal supra wherein the Tribunal has considered exactly identical aspect as under:-

“11. In our opinion, non submission of section 44AB report in cases like this does not render the assessee’s claim of a lower profit void ab initio. Failure to comply with section 44AB has to be dealt with under the provisions of section 271B. Here, the exposition emanating out of Hon’ble jurisdictional High Court decision and the Tribunal decision cited supra are germane. Just that initial assessment has been done u/s 143(1), the Revenue cannot invoke provisions of re-assessment on any ground they can pick up from thin air. The Revenue can also not interpolate consequences of no compliance of provisions of the Act other than what has been expressly provided in the statute.”

6 Further, we noted that similar view is taken in the case of Leyland Automobiles, supra wherein the Co-ordinate Bench of Cochin has considered this issue and even gone to the extent that even if audit report is filed beyond the due date specified as per Section 44AB of the Act only consequence of failure is levy of penalty u/s.271B of the Act. The Tribunal held as under:-

“8. Now we have to look into the consequences that would follow if the assessee maintains such accounts and gets the same audited but files the said audit report beyond the due date specified in Section 44AB. There is nothing mentioned in Section 44AB as to what is the consequence if such audit report is not filed within the specified date mentioned therein. However, in Section 271B of the IT Act, 1961 the consequences of failure to get the accounts audited are mentioned, which reads as under:

271B. If any person fails to get his accounts audited in respect of any previous year or years relevant to an assessment year or furnish a report of such audit as required under Section 44AB, the AO may direct that such person shall pay, by way of penalty, a sum equal to one-half per cent of the total sales turnover or gross receipts, as the case may be, in business or of the gross receipts in profession, in such previous year or years or a sum of one hundred thousand rupees, whichever is less.

A combined reading of Sections 44AF(5), 44AB and 27 IB leads to the conclusion that if the assessee fails to furnish the audit report as required under Section 44AB [which has been incorporated in Sub-section (5) of Section 44AF] it may be liable to levy of penalty as mentioned in Section 271B of the IT Act, 1961. Nowhere in Section 44AF [right from Sub-section (1) to Sub-section (5)] it is mentioned that the assessee will be denied the benefit of claiming lower profits and gains than the profit and gains as specified in Sub-section (1) of Section 44AF, if it furnishes the audit report beyond the due date as mentioned in Section 44AB. Thus, it is clear that it is not the intention of the legislature to altogether deny the benefit of lower profits if the assessee maintains books of account and gets them audited and furnishes a report as required under Section 44AB though belatedly. Otherwise, it would have specified/mentioned in the section itself to that effect. Further on many occasions the various Courts have held that filing of audit report is only procedural in nature and the assessee cannot be denied the benefit of exemption claimed by it; to quote an example is the decision in the case of CIT v. A.N. Arunachalam (1994) 122 CTR (Mad) 87 : (1994) 75 Taxman 529 (Mad).”

7. In view of the admitted facts, we are of the view that the CIT(A) has rightly accepted the contention of the assessee and estimated the profit at a lower rate than 8% of the gross contract receipts. Therefore, we uphold the order of CIT(A).

8. Coming to assessee’s Cross Objection in C.O. No.80/Chny/2009, the Department has carried the matter before

the Hon'ble Madras High Court in TCA No.1232 & 1233 of 2010,
order dated 15.03.2021, wherein the issue of reopening is
adjudicated and decided against the assessee because the assessee
has given up the grounds raised before the Tribunal. The Hon'ble
High Court has recorded its finding in Para 5 as under:-

“5. When the assessee themselves have given up the ground, the Income
Tax Appellate Tribunal should not have taken into consideration the said
ground and given a finding as against the Revenue. The common ground
passed by the Tribunal cannot be sustained on this ground alone.”

In view of the above, the Cross Objection of the assessee is dismissed.

9. In the result, the appeal of the Revenue as well as the cross
objection of the assessee are dismissed.

Order pronounced in the open court on 18th January, 2022 at Chennai.

Sd/-

(मनोज कु मारअ वाल)
(MANOJ KUMAR AGGARWAL)
लेखा सदय /ACCOUNTANT MEMBER

Sd/-

(महावीर सह)
(MAHAVIR SINGH)
उपा य /VICE PRESIDENT

चे ई/Chennai,
दनांक/Dated, the 18th January, 2022

RSR

आदेश क ितिलिप अ ेषित/Copy to:

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|----------------------|---------------------------|---------------------------|
| 1. िनधा रती/Assessee | 2. राज व/Revenue | 3. आयकर आयु (अपील)/CIT(A) |
| 4. आयकर आयु /CIT | 5. िवभागीय
ित्तिनिध/DR | 6. गाड फाईल/GF. |