IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.03.2021

CORAM :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Ms.Justice R.N.MANJULA

Tax Case Appeal Nos.417 & 419 of 2019
and
C.M.P.Nos.21373 & 21375 of 2019

R.Mathaiyan ... Appellant in both cases

Vs

Assistant Commissioner of Income Tax,
Circle-2, No.3, Gandhi Road,
Salem. ... Respondent in both cases

COMMON PRAYER: Appeals under Section 260A of the Income Tax Act, 1961 against the order dated 09.05.2019 made in ITA.No.2879/Chny/2018 and C.O.No.06/Chny/2019 in ITA.No.2879/Chny/2018 for the assessment year 2013-14 on the file of the Income Tax Appellate Tribunal, 'D' Bench, Chennai preferred against the order of the Office of the Commissioner of Income Tax(Appeals) No.3, Gandhi Road, Salem-7, made in ITA.No.76/2016-17, dated 31/07/2018, PAN/GIR No./TAN : AEDPM7305K, Assessment year : 2013-14 and date of order : 31/07/2018

and

against the order of the Office of the Assistant Commissioner of Income Tax, Circle-2, Salem, made in PAN/GIR No. AEDPM7305K, Ward/Circle/Range Circle-2, Salem, Status : Individual, Assessment year : 2013-14 and date of order : 23/03/2016.

For Appellant : Mr.G.Baskar
For Respondent : Mrs.S.Premalatha, Jr.SC

COMMON JUDGMENT
(Delivered by T.S.Sivagnanam,J)

These appeals filed by the assessee under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity) is directed against the common order dated 09.05.2019 made in ITA.No.2879/Chny/2018 and C.O.No.06/Chny/2019 in ITA.No.2879/Chny/2018 for the assessment year 2013-14 on the file of the Income Tax Appellate Tribunal, 'D' Bench, Chennai ('the Tribunal' for brevity).

2. The assessee has raised the following substantial questions of law for consideration:

> "1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in perversely finding that earlier and subsequent returns filed by the Assessee would not give true and clear picture of the income of the Appellant since there are multiple variables, such as, turnover, expenditure and location of the business of the Appellant, more particularly, in spite of the fact that there is no change in nature of business and scrutiny assessment for A.Y. 2012-13 had computed the net profit at 3.21% of the Gross receipts? and
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> 2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in perversely upholding the rejection of books of accounts maintained by the Appellant when there is no specific sustainable finding or reason for such rejection?"

3. We have elaborately heard Mr.G.Baskar, learned counsel for the appellant and Mrs.S.Premalatha, learned Junior Standing Counsel appearing for the respondent-Revenue.

4. The short which falls for consideration is whether the Tribunal was justified in restoring the best judgment assessment made by the assessment order in fixing the net profit at 8% of the total receipts. The reason for doing so is by placing reliance on the decision of the Division Bench of this Court in the case of Commissioner of Gift Tax Vs. A.Vajjiram & Bros. [(2010) 326 ITR 551].

5. Admittedly, the assessee did not cooperate in the assessment by producing certain labour registers, which was called for by the Assessing Officer and therefore, the Assessing Officer, taking note of Section 44AD of the Act, which is a special provision for computing profits and gains of business on presumptive basis, applied the decision in A.Vajjiram & Bros. (supra) and estimated the profit at 8% of the total receipts.

6. The assessee carried the matter by way of appeal before the Commissioner of Income Tax (Appeals), Salem [CIT(A)]. Before the First Appellate Authority, the assessee filed copies of the assessment order passed for the assessment year 2012-13 and also a comparative chart for the assessment years 2010-11, 2011-12, 2012-13 and 2013-14. After taking note of the facts and figures placed before him, the CIT(A) took note of the decision of the Tribunal in M/s.V M Kumar Vs. Income Tax Officer, Ward I (3), Trichy in ITA.No.1703/Mds/2009 and also took note of the assessment orders passed for the earlier years and fixed the gross profit at 3.5%, holding the same to be reasonable.

7. The Revenue filed appeal before the Tribunal and the assessee also filed a cross objection. The Tribunal, applied the decision in A.Vajjiram & Bros., and fixed the gross profit at 8%.

8. On a reading of paragraph 6 of the impugned order, we find that the Tribunal did not find fault with the finding of the CIT(A) as to why he was of the opinion that 3.5% of the Gross Contract Receipts will be reasonable. The finding rendered by the CIT(A) is based on facts and by examining the trend for the previous assessment year. As rightly pointed out by the learned counsel for the appellant, the decision in A.Vajjiram & Bros. was taken note of and the applicability of Section 44AD of the Act was considered by the Division Bench of this Court in K.Kannan Vs. Assistant Commissioner of Income-Tax, Circle-I [(2013) 39 taxmann.com 10 (Madras)]. The operative portion of the judgment reads as follows:

> "6. A reading of Section 44 AD of the Income Tax Act, 1961 shows that notwithstanding anything to the contrary contained in Section 28 to 43C, in the case of eligible assessee having business with a gross receipts not exceeding Rs.40 lakhs, the assessee would be assesed on a presumptive basis, to be taxed at 8% on the total turnover gross receipts 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 amount under the head "profit and gain of the business or profession". Sub Section (2) states that any deduction allowable under the provisions of Sections 30 to 38, shall, for the purpose of Sub Section (1), be deemed to have been already given full effect to and no further deduction would be allowed under those Sections. In other words, considering the percentage of liability fixed as income on the eligible

assessees who are defined under clause (a) Explanation and eligible business defined under Clause (b) Explanation, so long as the gross turnover does not exceed Rs.40 lakhs, the income would be assessed at the specified percentage of the gross turnover. There is no denial of the fact, as is evident from the order of assessment that the assessee's gross contract receipt was Rs.4,02,10,611/- for the assessment year 2006-2007 and Rs.5,34,96,995/- for the assessment year 2007-2008, which means, Section 44 AD of the Act has no relevance.

7. As far as this case is concerned, it is a matter of record and it is not disputed by the assessee that it had not filed any profit and loss account or the balance sheet for the assessment years under consideration along with the returns of income. Even the vouchers given by the assessee were found to be defective. It is pointed out in the Appeals filed by the assessee, the Commissioner of Income Tax (Appeals) mainly scaled down such estimate for the reason that in the earlier assessment year 2005-2006, 3.69% of turnover was considered to be appropriate for completing the assessment. The Income Tax Appellate Tribunal held that 8% of the gross receipts would be a justifiable assessment even by way of best of assessment. Thus, the Tribunal restored the order of the Assessing Officer. In so holding, the Tribunal further held that while so fixing the income at 8% of the gross receipts, the claim of the depreciation be allowed thereafter. However, after granting the depreciation if the income goes below, then the Assessing Officer shall assess the income at the returned level itself. With these directions, the appeals were disposed of. Thus on the admitted fact, that the assessee had no materials to produce in support of his income assessable under the provisions of the Act, the only ground thus available on which the assessee's income could be assessed would be a best of judgment assessment. It is no doubt true while passing the Assessment Order for the assessment year 2006-07, the Assessing Officer had adopted 8% based on Section 44AD of the Act. But in

stricto sensu, one cannot take this as an assessment under Section 44AD of the Act for taxing the assessee on a presumptive basis. The Commissioner of Income Tax (Appeals) accepted the contention of the assesseee that it was an assessment under Section 44 AD of the Act.

8. Before the Commissioner of Income Tax (Appeals), the assessee submitted that the total income of the assessee was not exceeding 4% at anytime in the preceding year when the turnover was low and that high percent of net profit in the assessment year 2006-07 was not possible when the turnover was high i.e. above Rs.4 Crores. It was further submitted by the assessee that the nature of business was such that they had to face lot of practical difficulties in maintaining the bills and vouchers and considering the quality maintenance in civil work, the assessee had to sacrifice the profit. Thus, taking note of these submissions and other materials on record and since the net profit was shown in the range of 1.26 to 3.69 per cent in the preceding year, assessing the income at high rate of 8% was not called for. In the circumstances, as a via-media the Commissioner of Income Tax (Appeals) fixed it at 5%.

9. Thus in the background of the facts considered by the Commissioner of Income Tax (Appeals) and in the context of the assessee not maintaining any books of accounts or filing profit and loss account and balance sheet, the assessee felt satisfied that the relief granted by the the Commissioner of Income Tax (Appeals) fixing the assessable income at 5% was acceptable to it. Consequently no appeal was filed thereafter by the assessee before the Tribunal."

9. Before us, the appellant has filed a chart showing a comparison of the figures for the assessment years 2012-13 to 2019-20 and we find that the net profit ratio to turnover in percentage ranges between 2.86% and 3.42%. Further, from the

assessment order for the year 2017-18, it is seen that the Assessing Officer adopted 3.16% and held the same to be reasonable and completed the assessment by order dated 21.12.2019. Thus, we find that the Tribunal committed an error in reversing the order passed by the CIT(A) and restoring the order of the Assessing Officer.

10. For the above reasons, the tax case appeals are allowed and the order passed by the Tribunal is set aside and the substantial questions of law are answered in favour of the appellant/assessee. Consequently, the order passed by the CIT(A) is restored. No costs. Connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

HVK

To

1. The Income Tax Appellate Tribunal,
   Madras 'D' Bench, Chennai.

2. The Assistant Commissioner of Income Tax,
   Circle-2, No.3, Gandhi Road,
   Salem.

3. The Commissioner of Income Tax,
   (Appeals) No.3, Salem-7

+1cc to Mr.S.Baskar, Advocate SR.No.20417
+1cc to Mr.M.Swaminathan, Senior Standing Counsel SR.No.20961

TCA.Nos.417 & 419 of 2019 and
C.M.P.Nos.21373 & 21375 of 2019

JP-II(CO)
TE (30/04/2021)