

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1333 OF 2021**

Perizad Zorabian Irani

....Petitioner

V/s.

Principal Commissioner of Income-Tax
(Central)-1 Mumbai & Ors

...Respondents

Dr. K. Shivram, Sr. Advocate i/b Mr. Rahul K. Hakani for Petitioner
Mr. Suresh Kumar for Respondents

**CORAM : K.R. SHRIRAM &
N.J. JAMADAR, JJ
DATED : 9th MARCH 2022**

P.C. :

1 Petitioner is impugning an order dated 25th March 2021 passed by respondent no.1 u/s 264 of the Income Tax Act 1961 (the said Act), rejecting the revision application filed by petitioner challenging the order dated 25th February 2020 passed under Section 139(9) by respondent no.2 treating the return of income filed by petitioner for A.Y.-2017-2018 as invalid. The reason why return of income was treated as invalid was because according to respondent, petitioner failed to get her accounts audited u/s 44AB though her gross receipts / turnover after including remuneration received from partnership firm was more than the threshold limit of Rs.50,00,000/-.

2 Petitioner is an individual deriving her income under the heads salary, income from house property, business / profession and income from other sources. Petitioner is an Actor by profession. Petitioner also is a partner in

two partnership firms namely M/s Zorabian Sales and Marketing and M/s Zorabian Foods.

3 On or about 25th October 2017, petitioner filed her return of income for A.Y.-2017-2018 under Section 139(1) of the Act declaring total income of Rs.1,75,88,360/-. Out of this total income, a sum of Rs.1,09,65,411/- was declared under the heads of business and profession. Out of Rs.1,09,65,411/-, petitioner derived a sum of Rs.8,45,220 as net income from petitioner's acting profession and Rs.1,01,20,191/- as remuneration received as working partner from the firm M/s Zorabian Sales and Marketing.

4 On 27th June 2019, petitioner received a notice from respondent no.2 alleging defect in the return on the ground that petitioner failed to get her accounts audited in accordance with provisions of Section 44AB of the Act. Petitioner replied to the said notice and explained that she was not required to get her account audited under Section 44AB, by letter dated 3rd July 2019. This explanation of petitioner was rejected and order dated 25th February 2020 came to be passed by respondent no.2 treating the return of income filed by petitioner as invalid due to non auditing of accounts as required under Section 44AB of the Act.

5 On or about 3rd February 2021, petitioner filed revision application under Section 264 of the Act impugning the order passed by respondent no.2. Petitioner made detailed submissions with the application. Respondent No.1 issued a notice dated 17th March 2021 thereby calling

upon petitioner to show cause why revision application under Section 264 should not be rejected. By a letter dated 22nd March 2021, petitioner responded to the show cause notice. On 25th March 2021, respondent no.1 passed order dismissing the revision application, rejecting petitioner's submissions and upholding the order of respondent no.2. While doing so, respondent no.1 has relied upon decision of ITAT Kolkata in *Amal Ganguli Vs. DCI*, which had been reversed by the High Court in *Sagar Dutta Vs. CIT*, IT Appeal No.150 of 2009 dated 17th February 2014.

6 It is this order of respondent no.1, which is impugned in this petition.

7 Section 44AB of the Act reads as under:

"44AB. Every person:-

(a)

(b) carrying on profession shall, if his gross receipts in profession exceed fifty lakh rupees in any previous year; or

(d).....

(e).....

get his accounts of such previous year audited by an accountant before the specified date and furnish by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed."

8 Dr. Shivram submitted that the provisions of Section 44AB are not applicable to the facts of the present case because: (a) the business is carried on by the partnership firm and not the assessee, (b) becoming the partner of partnership cannot be construed as carrying on business, (c) partners' remuneration cannot be construed as total sales turn over or gross receipts in business, (d) partners' remuneration does not arise out of carrying on profession, (e) partners' remuneration cannot be construed as

gross receipts from profession and (f) Section 44AB is not applicable where assessee is carrying on a profession as well as business simultaneously in different field.

9 Mr. Suresh Kumar, per contra reiterated the finding of respondent no.1 and respondent no.2 and relied upon the order of ITAT in *Amal Ganguli*. Mr. Suresh Kumar submitted that the order of ITAT in *Amal Ganguli* has not been entirely reversed by the High Court and only the penalty order was set aside because the Assessing Officer had not obtained necessary approval before issuing penalty order. Mr. Suresh Kumar submitted that the Hon'ble Court remanded the matter to the Assessing Officer for passing the penalty order after obtaining necessary approval from the competent authority. Thus, the claim of petitioner that judgment of ITAT in *Amal Ganguli* has been reversed, is not correct.

10 The provision applicable to petitioner is clause (b) of Section 44AB which provides, every person carrying on profession shall, if his gross receipts in profession exceed fifty lakh rupees in any previous year, get his accounts of such previous year audited by an accountant before the specified date and furnish by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed. Profession is defined under Section 2(36) of the Act as under: "Profession includes vocation". The income earned by petitioner as remuneration received as working partner or partners' remuneration, cannot be held as carrying on profession as well as

business simultaneously in different field. That is because the provisions of Section 44AB(a) which says “every person carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds one crore rupees in any previous year” and clause (b) of Section 44AB which says “every person carrying on profession shall, if his gross receipts in profession exceed fifty lakh rupees in any previous year”, are mutually exclusive, i.e., the former dealing with the assessee carrying on business and later dealing with the profession. None of the clauses under Section 44AB envisages the situation where the assessee is carrying on both the profession as well as business. In a matter which is similar to this matter at hand, where the scope of Section 44AD of the Act came up for consideration, is the judgment of Madras High Court in ***Anandkumar Vs. Assistant Commissioner of Income Tax***¹. In that case, the assessee was an individual and a partner in some partnership firms. The assessee filed his return of income of assessment year under consideration admitting a total income of Rs.43,53,066/-. The assessment was selected for scrutiny and it was finalised under Section 143(3) of the Act, disallowing the claim made by the assessee under Section 44AD of the Act. While filing the return of income, the assessee had applied the presumptive rate of tax at 8% under Section 44AD and returned Rs.4,68,240/- as income from the remuneration and interest received from the partnership firm. The Assessing Officer did not agree with the assessee and opined that Section 44AD is available only

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for an eligible assessee engaged in an eligible business and that the assessee was not carrying on business independently but only as partner in the firm. The Assessing Officer further held that the assessee did not have any turnover and receipts on account of remuneration and interest from the firms cannot be construed as gross receipts mentioned in Section 44AD of the Act. This was challenged by the assessee before Commissioner of Income Tax (Appeals), who rejected the appeal and later before the ITAT, which also rejected the assessee's challenge to the findings of the Assessing Officer. Before the High Court, counsel for the Revenue submitted that the assessee was not doing any business but the firm was carrying on business in which the assessee is a partner and, therefore, the condition that it should arise from an eligible business was not satisfied. The submissions thereon of the Revenue are totally contrary to the submissions made in the case at hand where, the Revenue is wanting to add the income received as remuneration from the partnership firm as professional income. The Madras High Court while upholding the contentions of Revenue observed that the assessee should establish that he is an eligible assessee engaged in an eligible business and such business should have a total turn over or a gross receipt. Admittedly, the assessee who was an individual in that case was not carrying on any business and the remuneration and interest received by the assessee from the partnership firm cannot be termed to be a turn over of the assessee (individual). The court concluded that the Revenue was right in its contention that remuneration and interest from the partnership firm cannot

be treated as gross receipt of the assessee. We respectfully agree with the view expressed by the Hon'ble Madras High Court.

In fact, in the case at hand, petitioner's case is the same that petitioner's remuneration from the partnership cannot be treated as gross receipt in profession.

11 In the circumstances, in our view petitioner's stand that she was not required to get her accounts audited under Section 44AB, is correct.

12 Petition, therefore, is allowed in terms of prayer clauses (a) and (b) which read as under:

“(a) that this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of petitioner's case and after examining the legality and validity thereof quash and set aside the impugned orders dated 25th March 2021 (Exhibit A) and 25th February 2020 (Exhibit B) passed by respondent no.1 and respondent no.2 respectively and/or allow the claim of petitioner.

(b) that this Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing respondent no.2 to treat the return of income dated for A.Y.2017-2018 filed by petitioner as a valid return of income.”

13 Petition disposed.

(N. J. JAMADAR, J.)

(K.R. SHRIRAM, J.)