IN THE INCOME TAX APPELLATE TRIBUNAL, JABALPUR BENCH, JABALPUR (SMC)
(through Virtual Hearing)

BEFORE SH. SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER

ITA Nos.187 & 188/JAB/2013
Assessment Years: 2002-03 & 2003-04

Ambika Transport Co. Patharia Phatak, Damoh (M.P.) [PAN:AAHFA 5325A]	vs.	Income Tax Officer Ward – Damoh (M.P.)
(Appellant)		(Respondent)

Appellant by	Sh. Abhijeet Shrivastava, Adv.
Respondent by	Sh. S.K.Halder, Sr. DR
Date of hearing	10/02/2022
Date of pronouncement	16/02/2022

ORDER

Per Sanjay Arora, AM

This is a set of two appeals by the Assesssee agitating the dismissal of its' appeals contesting its' assessments under section 143(3) (read with sections 147 & 263) of the Income Tax Act, 1961 ('the Act' hereinafter) for assessment years (AYs.) 2002-03 and 2003-04 by the Commissioner of Income Tax (Appeals), Jabalpur ('CIT(A)' for short) vide a common order dated 01/01/2013. The appeals raising a common issue, were heard together, and are being disposed of per a common order for the sake of convenience.

2. At the very outset, it was submitted by the ld. counsel for the assessee, Shri Srivastava, that the appeals under reference are covered against it by the common order by the Tribunal in its' own case for AYs. 1994-95 to 2001-02 (in ITA Nos. 47-54/Jab/2003, dated 19.6.2006), copy of which stands placed on record.

The assessee, a partnership firm, is engaged in business of plying trucks. The sole issue in the instant appeals, he continued, is whether the taxable income

of the assessee is to be taken at the presumptive rate of 8 (eight) per cent. (of turnover), as prescribed u/s. 44AE of the Act, or at the higher income disclosed per the assessee's regular accounts, which stand duly audited. On the Bench stating that the law in the matter (s.44AE) is crystal clear, prescribing adoption of the higher of the two, he would submit that there was ambiguity in the law at the relevant time and, besides, the Hon'ble jurisdictional High Court has admitted the assessee's appeals against the said order u/s. 260A of the Act, further requesting for the hearing to be therefore kept in abeyance till the same is adjudicated by it. The ld. Sr. DR, Shri Halder, would, on the other hand, rely on the orders by the Revenue authorities, whose stand, he would submit, has been upheld by the Tribunal, with there being in fact no ambiguity in law.

3. I have heard the parties, and perused the material on record, being the orders by the Revenue authorities for the relevant years, as well as the decision by the Tribunal in the assessee's own case cited supra.

3.1 That the statutory provisions are to be given effect cannot be disputed (also see, inter alia, *Northern Air Products (P.) Ltd. v. CIT* [2005] 274 ITR 225 (MP)). Section 44AE, which stands inserted on the statute book by Finance Act, 1994, and governs issue in hand, and on which aspect there is no dispute, reads as under:

Special provision for computing profits and gains of business of plying, hiring or leasing goods carriages.

(1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an assessee, who owns not more than ten goods carriages and who is engaged in the business of plying, hiring or leasing such goods carriages, the income of such business chargeable to tax under the head "Profits and gains of business or profession" shall be deemed to be the aggregate of the profits and gains, from all the goods carriages owned by him in the previous year, computed in accordance with the provisions of sub-section (2).

(2) For the purposes of sub-section (1), the profits and gains from each goods carriage shall be an amount equal to seven thousand five hundred rupees for every month or part of a month during which the goods vehicle is owned by the assessee in the previous year or an amount claimed to have been actually earned from such vehicle, *whichever is higher*.

(3) 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:

Provided that where the assessee is a firm, the salary and interest paid to its partners shall be deducted from the income computed under sub-section (1) subject to the conditions and limits specified in clause (b) of section 40.

(4) The written down value of any asset used for the purpose of the business referred to in sub-section (1) shall be deemed to have been calculated as if the assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

(5) The provisions of sections 44AA and 44AB *shall not apply* in so far as they relate to the business referred to in sub-section (1) and in computing the monetary limits under those sections, the gross receipts or, as the case may be, the income from the said business shall be excluded.

(6) Nothing contained in the foregoing provisions of this section shall apply, where the assessee claims and produces evidence to prove that the profits and gains from the aforesaid business during the previous year relevant to the assessment year commencing on the 1st day of April, 1997, or any earlier assessment year, are lower than the profits and gains specified in sub-sections (1) and (2), and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee and determine the sum payable by the assessee on the basis of assessment made under sub-section (3) of section 143.

(7) *Notwithstanding anything contained in the foregoing provisions of this section,* an assessee may claim lower profits and gains than the profits and gains specified in sub-sections (1) and (2), if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB.

Explanation.—For the purposes of this section,—

(a) the expressions "goods carriage", "gross vehicle weight" and "unladen weight" shall have the respective meanings assigned to them in section 2 of the Motor Vehicles Act, 1988 (59 of 1988);
(b) an assessee, who is in possession of a goods carriage, whether taken on hire-purchase or on instalments and for which the whole or part of the amount payable is still due, shall be deemed to be the owner of such goods carriage. (emphasis, supplied)

3.2 It is clear that sec. 44AE, *a non obstante clause*, represents a code in itself and, further, provides for exceptions thereto as well as a built-in mechanism to effectuate the same. The right to adopt a lower than the presumptive rate stands taken away by Finance Act, 1997 (s. 44AE(6)).

The order by the Tribunal, which is by its' Division Bench, relied upon by the Revenue, and against which appeal/s stands preferred before the Hon'ble High Court, reads as under in its relevant part:

'07. We have heard both the sides, considered materials on record as well as relevant provisions of law and the documentary evidence furnished before the lower authorities, copy of which are filed in the paper-book to which our attention was drawn. We find that the income as per audited accounts for all the years is much more than the income calculated on the basis of section 44 AE or than as returned. Since the provisions of Section 44 AE is to be applied as a whole, if a higher income is declared then the same is to be applied. The plea of the assessee is that it is the returned higher income (which) is to be considered and not (the) actual higher income depicted in the audited accounts. In our considered view such plea is untenable because the amounts, which are to be taken into account while determining the income of the assessee are as per audited accounts and not what is returned by the assessee. Therefore, plea of the assessee in this regard is rejected. As such while concurring (with) the finding and conclusion as drawn by the Id CIT(A), we uphold his order and dismiss this common ground of appeal of the assessee for all the years.'

The opinion of the Tribunal, as apparent, rests on the following premises:

(a). The *non obstante* provision of section 44AE, which is unambiguously clear, is to be read as a whole.

(b). The income to be returned and, in any case, assessed, is to be, except where on the basis of a presumptive rate, is to be based on audited accounts.

Both the issues, to my mind, admit of no debate. For the former, which involves the principle of interpretation of statutes, it is well-settled that where there is no ambiguity in law, the same is to be given effect, and on which the case law is legion, and reference, by way of example, is made to the decision in (*CIT v. Calcutta Knitwears* [2014] 362 ITR 673 (SC)). If not in the language in which the law is couched, where is the legislative intent to be found, so that where the law is clear, as it indeed is in the instant case, no other rule of interpretation is required (*Ajmera Housing Corporation v. CIT* [2010] 326 ITR 642 (SC); *CIT v. Tara Agencies* [2007] 292 ITR 444 (SC)). Not so doing would be to usurp the legislative function by the courts which is impermissible, as explained in (*Padmasundara Rao (Decd) v. State of Tamil Nadu* [2002] 255 ITR 147 (SC). Rather, taxing statutes, it is again well-settled, are to be strictly construed. Further still, as explained by the Apex Court in *CBI vs. Keshub Mahindra & Others* [in Curative Petition Nos. 39-42 of 2010 in Criminal Appeal Nos. 1672-1675 of 1996, dated 11/5/2011], that no decision by any court, including itself, can be read in the manner as to nullify the

express provisions of an Act. For the second aspect (b), it is again well-settled that the assessment of income under the Act is to be, subject to the provisions of the Act, of the real income, for which reference may be made to section 5 defining the scope of 'total income' under the Act (also see *Poona Electric Supply Co. Ltd. v. CIT* [1965] 57 ITR 521 (SC)). The argument of giving cognizance to the returned income *de hors* the audited accounts, which is admittedly higher than the presumptive rate u/s. 44AE, can hardly have the sanction of law.

3.3 I, therefore, have no hesitation in, notwithstanding that the appeals have been preferred by the assessee against the order by the Hon'ble jurisdictional High Court which, as explained, are yet to be decided, uphold the orders of the Revenue authority, finding the subject matter to be squarely covered by the Tribunal's decision in the assessee's own case. Sh. Shrivastava could not explain as to how the same was not in conformity with the extant law. His plea of keeping the matter in abeyance also cannot be accepted. The matter having been already decided by the Tribunal, the decision by the Hon'ble High Court would equally apply to this order as well. The proposition is well-settled, and for which I draw support from the decision in *K.N. Agarwal v. CIT* [1991] 189 ITR 769 (All). The law rather provides for avoidance of repetitive appeals, which procedure has not been adopted by the assessee.

4. In the result, both the appeals by the assessee are dismissed.

Order pronounced in the Open Court on February 16, 2022

Sd/-
(Sanjay Arora)
Accountant Member

Dated: 16/02/2022
Aks/Sr. PS

Copy of the Order forwarded to:

1. The Appellant: M/s Ambika Transport Co. Patharia Phatak, Damoh (M.P.)

2. The Respondent: Income Tax Officer, Ward –Damoh (M.P.)
3. The Principal CIT-1, Jabalpur
4. The CIT(Appeals), Jabalpur
5. The Sr. DR, ITAT, Jabalpur
6. Guard File

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