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CASE LAW UPDATE

[Perizad Zorabian Irani v. Pr. CIT (Bom High Court) WP. No.1333/2021 dated 09.03.2022]

❖ Summary

Remuneration received from partnership firm can not be treated as gross receipt and audit us 44AB(b) is not required.

❖ Facts of the Case

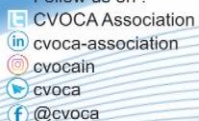
- Remuneration received from partnership firm can not be treated as gross receipt and audit us 44AB(b) is not required.
- The Assessee is also partner in two partnership firms
- Assessee had filed return of income for AY 2017-18 u/s 139(1), declaring total income of Rs. 1,75,88,360/-. Out of this total income, a sum of Rs.1,09,65,411/- was declared under the heads of business and profession out of which Rs. 1,01,20,191/- was shown as remuneration received as working partner from the firm "M/s Zorabian Sales and Marketing"
- Assessing officer considered the return invalid on the ground that assessee failed to get her accounts audited in accordance with provisions of Section 44AB of the Act.
- The Assessee filed revision application u/s 264 of the Act. Which was rejected by PCIT and therefore The assessee filed writ petition before Bombay High Court against the order of the PCIT.

❖ Tax Department's Arguments

Revenue relied upon the decision of ITAT Kolkata in Amal Ganguli vs DCI. In that case :

- Chartered accountant was holding Certificate of Practice and was partner in a firm, "Price Waterhouse".
- The assessee had received income by way of salary, allowance, commission and interest on capital from the firm.

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- It was held by revenue that assessee was carrying on the profession of Chartered Accountancy though not as an individual but as a partner. he had received the above income from the firm as a partner and he was a partner only because he was engaged in the business of Chartered Accountancy and was eligible to carry on the profession of Chartered Accountant
- Income received by way of salary, allowance, commission and interest on capital from the firm was taxable u/s 28(v) of the act and levied penalty u/s 271B for not getting accounts audited u/s 44AB.

Revenue submitted that in line of above judgment, petitioner is liable to get the accounts audited u/s 44AB(b).

❖ Tax Payer's Argument

- The petitioner assessee argues 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) Section 44AB is not applicable where assessee is carrying on a profession as well as business simultaneously in different field.
- That the provision of Section 44AB(a) and clause (b) of Section, are mutually exclusive, i.e. former is 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.



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- The petitioner relied upon the judgment of The Madras High Court [Anandkumar v. ACIT (2021) 430 ITR 391 (MAD)]. While upholding the contentions of Revenue, court observed that, for section 44AD, the assessee should establish that he is an eligible assessee engaged in an eligible business and such business should have a total turnover 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 turnover 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

❖ Judgment

In the instant case, Hon'ble Bombay High court agreeing with Hon'ble Madras high court, stated that, facts of the above case and the case in hand are similar and petitioner's remuneration from the partnership cannot be treated as gross receipt in profession. Therefore assessee petitioner's stand that she was not required to get audited u/s 44AB of the act is correct.

❖ Author's Comment

When business is carried on by partnership firm, being a partner of that firm can not be construed as carrying on business by partner himself. And therefore remuneration received should not be treated as Gross Receipt for the purpose of Audit u/s 44AB of IT Act.