Applicability of Section 44ADA to Partner's Remuneration

The short question that is tried to be answered in this note is *'whether the provisions of Section 44ADA shall be applicable to the remuneration and other receipts by a partner from a professional services firm?*

Before going into specifics, it is important to understand the modus operandi of the partner and professional services firm and the provisions of Section 44ADA in light of such modus operandi.

An individual shall act in the capacity of partner in a professional services firm. Let us assume such firm is engaged in provision of chartered accountancy services. During the year, the firm earns income and such income is offered for income tax under the head 'Profits or Gains from Business or Profession'.

The Income Tax Act, 1961 vide Section 40(b) states the amounts which are deductible in the hands of the firm. Vide such section, the firm is eligible to claim remuneration as deduction to the extent specified therein and such remuneration is deductible in hands of the firm. The balance amounts are subjected to tax as profits in the hands of the firm. In other words, the eligible remuneration is deductible in the hands of firm and taxable in hands of partners, the remainder (profit) is taxable in hands of the firm and exempted in the hands of partners [Section 10(2A) of Income Tax Act, 1961].

Hence, in the hands of the partner, the following will be the impact:

1. Remuneration which was allowed as deduction in firm will be taxable
2. Profit which was taxed in the hands of the firm will be exempt.

Here, we are only concerned the taxability of such remuneration in the hands of the partner. The following are the various options available to the partner:

1. **Option A –** The partner will offer his entire remuneration as income and pay tax
2. **Option B –** Avail Section 44ADA and offer 50% of his remuneration as income and pay tax
3. **Option C –** If expenditure is more than 50%, get books of accounts audited and pay tax

Option A is plain vanilla situation and the partner can claim deduction of any expenditure which was incurred at his level. The nature of expenditures will be generally in the membership fee, training and travelling expenses and similar. However, appropriate care has to be taken to ensure that the same expenditure is not claimed at firm level. Further, it is also important to examine whether the provisions of Section 14A or Section 38 of Income Tax Act, 1961 would be applicable for any kind of expenditure to arrive at appropriate expenditure that is being claimed.

The challenge is Option B and Option C. If we conclude that Option B is possible, then Option C is inevitable, and partner can choose based on his expenditure and other criterion.

Analysis of Option B:
Avail Section 44ADA and offer 50% of his remuneration as income and pay tax:

The real challenge is whether the remuneration and other income received from the firm can be called as 'gross receipts' for the purposes of Section 44ADA. In other words, can it be interpreted that the provisions of Section 44ADA is applicable only if an individual is earning income in his individual capacity and not to applicable if the income is earned in the capacity of partner from a partnership firm.

We are of the opinion that the provisions of Section 44ADA is applicable either for an individual or partner in a profession firm. This is also supported by certain judicial pronouncements (though not directly on the said issue) in the case of Sagar Dutta vs DCIT Circle -54 (ITAT Kolkata) and Usha A Narayanan vs Deputy Commissioner of Income Tax (ITAT Kolkata) [judgments annexed]. The following is evident from the above judgments:

a. In both the judgments, the tax payers were chartered accountants in partner capacity in a firm.
b. Both of them have received remuneration, salary, interest on capital and others more than the threshold limit specified under Section 44AB.
c. The department is of the view that since the gross receipts (remuneration, salary, interest on capital and others) were in excess of threshold limits specified under Section 44AB, the tax payers would have got their books of accounts and audited.
d. Since the tax payers failed to do so, the department has levied penalty under Section 271B amounting to .5% of the receipts.
e. The tax payers contention was their were not carrying any profession in individual capacity but there were carrying as a partner and hence tax audit requirements does not attract.

Both the Tribunals relying on Amar Ganguly judgment, stated that the tax audit will be applicable despite the individual is receiving amounts from firm. Hence, such amounts being in excess of threshold limit, the books of accounts need to be audited and confirmed the penalty.

Our Inference from the above judgments:

Based on the ratio of the above judgments, the question that whether the salary, remuneration, profit, interest on capital and others received by partner from a partnership firm can be called as gross receipts for the purposes of 44ADA is answered in positive. If such amounts are not to be called as gross receipts, then there is no requirement for the Tribunals to state that such individuals would fall under ambit of Section 44AB.

In light of the above, the amounts received from the firm can be considered as gross receipts and accordingly provisions of Section 44ADA will be applicable. Hence, the benefit of 50% of gross receipts offering to income tax is possible.

Further, one more question that is to be answered is whether the provision of Section 44ADA is optional or mandatory, that is to say, is it mandatory for the partner whose gross receipts is less than 50 lakhs to apply the provisions of Section 44ADA or is it optional. Once the gross receipts are less than Rs 50 lakhs, the partner has to mandatorily offer 50% of such gross receipts for tax. In a case, where the partner thinks his expenditure is more than 50% or want to offer lower amounts of gross receipts for tax, he should then get his books of accounts audited as per provisions of sub-section (4) of Section 44ADA.

It is also important to note that once the partner opts for payment of tax under the provisions of Section 44ADA, all the expenditure incurred at partner level is deemed to be allowed and he cannot claim any more expenditure.

It is also important to note that once a partner has opted for provisions of Section 44ADA in one assessment year, that does not lock him to avail the same option for future assessment years, in absence of any stipulation in Section 44ADA unlike in Section 44AD.

Analysis of Option C:
If expenditure is more than 50%, get books of accounts audited and pay tax:

Once it can be concluded that the provisions of Section 44ADA are applicable, then the concept of claiming expenditure is certain. Hence, if any partner thinks that his expenditure is more than 50% then he need not choose the provision of Section 44ADA and get his books of accounts audited by a chartered accountant and claim additional expenditure.

Further, once the partner opts for tax audit, it is important to note that the provisions of Section 194H/194I/194J/194A/194C shall not be applicable for the first assessment year but will be applicable for future assessment years despite the non-requirement of Statutory Audit during such further assessment years.

Further, once the partner opts for tax audit, it is important to note that the provisions of Income Computation Disclosure Standards (ICDS) shall be applicable in light of Notification 87/2016 dated 29th September 2016. The said notification exempts individual or HUF who is not required to get his books of accounts audited in accordance with provisions of Section 44AB. Since the partner gets his books of accounts audited in this option, he shall also comply with ICDS.

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "C", KOLKATA
[Before Hon'ble Sri N.S.Saini AM & Hon'ble Sri Mahavir Singh, JM]
Sagar Dutta . D.C.I.T., Circle-54,
Kokata -versus- Kolkata
(PAN:ADMPD 1949 E)
For the Appellant: Shri Avra Mazumdar
For the Respondent: Shri Dilip Kr.Rakshit, Sr.DR
Date of Hearing : 02.05.2013
Date of Pronouncement : 03.05.2013.

___5/**ORDER**

Per Shri N.S.Saini, AM

This is an appeal filed by the assessee against the order of ld. CIT(A)-XXXVI, Kolkata confirming the levy of penalty u/s 271B of the IT Act imposed by the AO.

2. The brief facts of the case are that the AO observed from the return of income filed by the assesee that the assessee's income included income from salary from Price Water House of which he was a partner. Since income by way of salary or remuneration from a firm was to be assessed under the head profit and gains from business from profession in terms of section 28(v) of the Income tax Act and the receipts from the profession of the assessee was Rs.74,16,000/- i.e. exceeding Rs.10 lakhs, the assesee was required to get his accounts audited within the specified time and furnish the audit report before the specified date under the provision of section 44AB of the Act. Since the assessee failed to do so the AO imposed levying of penalty of Rs.37,080/- by invoking the provision of section 271B of the Act.

2.1. Being aggrieved against this order of the AO the assessee filed appeal before the ld. CIT(A), who confirmed the order of the AO by following the order of the Kolkata 'A' Bench of the Tribunal in the case of Amal Ganguli vs DCIT, Kolkata for A.Yr. 2003-04 passed on 20.02.2009 in ITA NO.2135/Kol/2008.

3. The ld. AR of the assessee fairly conceded that the issue was covered against the assesee and in favour of the Revenue by the order of the Tribunal in the case of Amal Ganguli vs DCIT (supra).

4. After considering the submissions of both the parties, we find that in the instant case penalty of Rs.37,080/- was imposed u/s 271B of the Act by the AO as the assessee failed to filed audit report u/s 44AB of the Act along with the return of income. It is not in dispute that the assessee received salary from M/s. Price Waterhouse which is a partnership firm and that the same was assessed to tax under the head profit an gains from business or profession. The total receipts from profession of the assessee was Rs.74,16,000/- which was exceeding Rs.10 lakhs and therefore in view of the provision of section 44AB the assessee was required to get his audit report u/s 44AB of the Act and file the same along with the return of income within the due date prescribed u/s 139(1) of the Act. The assessee failed to do so. Therefore, the assessee was laible to levying of penalty u/s 271B of the Act @0.5% on total professional receipts of the assessee. We find that in the similar facts and circumstances of the case the Kolkata 'A' Bench of the Tribunal in the case of Amal Ganguli vs DCIT (supra) has confirmed the levy of penalty by observing as under :-

"6. We have carefully considered the submissions of the ld. Representatives of the parties and the orders of the authorities below. We have also considered the provisions of section 44AB of the Act. There is no dispute to the fact that the assessee is a Chartered Accountant and is engaged in the profession. However, the assessee is a partner in the firm "Price Waterhouse" which is a firm of Chartered Accountants. We are of the considered view that the assessee is carrying on the profession of Chartered Accountant though not individual but as a partner. The assesee has received income by

way of salary, allowance, commission and interest on capital from the firm. During the course of hearing, the ld. A.R. in reply to a query from the Bench admitted that the assessee is holding a certificate of practice to carry on the profession. Therefore, the assessee has received the above amount from the firm as a partner and he is a partner only because he is engaged in the business of Chartered Accountants and is eligible to carry on the profession of Chartered Accountant. Thus we are of the considered view that the assesee has received the said amount as a professional fee as a partner from the firm. There is no dispute to the fact that the amount received by the assessee by way of salary, allowance, commission, interest from the firm is assessable under section 28(v) of the Act under the head "profits and gains of business or profession". Since the receipt of the assessee is more than Rs.10 lakhs, in the previous year relevant to the assessment year under consideration, we are of the considered view that the assessee is required to get his accounts audited as per section 44AB of the Act and to enclose a copy of the said report in the prescribed form before the specified date. The assessee has admittedly not got his accounts audited under section 44AB of the Act. Therefore, we hold that the ld. CIT(A) has rightly confirmed the action of the AO to impose penalty under section 271B of the Act of Rs.58,719/-. Hence, we uphold the order of the ld.CIT(A) and reject the grounds of appeal taken by the assessee."

4.1. We therefore do not find any good and justifiable reasons to interfere with the order of the ld. CIT(A). It is confirmed and the grounds of appeal of the assessee are dismissed.

5 . In the result the appeal of the assessee is dismissed.

2013 (12) TMI 1005 - ITAT KOLKATA

USHA A NARAYANAN VERSUS DEPUTY COMMISSIONER OF INCOME TAX

Penalty under section 271B – failure to get its accounts audited - Held that:- the professional income of the assessee received from partnership firm of Chartered Accountants is taxable under the head "income from business or profession" - the assessee ought to have got her accounts audited under section 44AB of the Act, the Assessing Officer imposed penalty under section 271B of the Act.- Decided against assessee.

No.- ITA No.703/Kol./2012
Dated.- March 25, 2013
Pramod Kumar And George Mathan, JJ.
For the Appellant : None
For the Respondent : Dilip Kr Rakshit, Sr. DR
ORDER:-
Per: Pramod Kumar, AM:

1. By way of this appeal, the assessee-appellant has challenged correctness of learned Commissioner of Income Tax (Appeals)'s order dated 16th March, 2012, in the matter of penalty under section 271B of the Income Tax Act, 1961, for the assessment year 2006-07, on the following grounds: -

(1) The ld. CIT(A) erred in confirming the penalty u/s. 271B imposed on appellant without considering the fact and circumstance of the case.

(2) The ld. CIT(A) erred in not distinguishing the income from profession by an individual professional and the income from profession by a partner of a professional firm (which consists partners salary, commission, share of profit as per Partnership Deed) in the light of provision of income Tax Act, 1961 vis-à-vis Indian Partnership Act, 1932.

2. When this appeal was called out for hearing, none appeared for the assessee nor there was any adjournment petition. Even on earlier occasions, the assessee was unrepresented. In this view of the matter and as pointed out by ld. Departmental Representative that the issue is a covered matter, we are proceeding the case ex-parte qua the assessee and disposing the matter on the basis of arguments of ld. D.R., material on record and binding judicial precedence on the issue.

3. The short issue in this appeal is whether or not penalty under sect ion 44AB will also be attracted in the case in which the professional income of the assessee received from partnership firm of Chartered Accountants is taxable under the head "income from business or profession". In the relevant previous year, the assessee, a Chartered Accountant, received Rs.32,76,000/ - from M/s. Lovelock & Lewes of which she was a partner. In terms of section 28(v), the said income was taxable under the head "Profits & Gains from Business or Profession". The Assessing Officer was of the view that the assessee ought to have obtained the audit report under sect ion 44AB of the Income Tax Act and her failure to do so, invited penalty under section 271B of the Act. The assessee's content ion, on the other hand, was that since the assessee was not carrying out any independent profession and the taxability of the said income received under the head "profits and gains from business or profession" was only due to technical requirement of section 28(v) of the Act the provisions of section 44AB are not attracted. The Assessing Officer rejected this plea of the assessee on the basis of a decision of this Tribunal in the case of Amal Ganguly (ITA No.2135/Kol./2008, Assessment Year 2003-04) vide order dated 20.02.2009. The Assessing Officer was of the view that since the plea raised by the assessee is not acceptable to the jurisdictional Tribunal, the same cannot be accepted

by him. Respectfully following the view of the Tribunal and thus holding that the assessee ought to have got her accounts audited under section 44AB of the Act, the Assessing Officer imposed penalty of Rs.16,380/ - under section 271B of the Act. Aggrieved, the assessee carried the matter in appeal before ld. CIT(Appeals) but without any success. Ld. CIT(Appeals) also took note of the decision of the Coordinate Bench of this Tribunal, which covered the issue against the assessee. The assessee is not satisfied and is in further appeal before us.

4. We see no reason to take any contrary view other than the view so taken by the Coordinate Bench of this Tribunal in the case of Amal Ganguly (supra). Respect fully following the said decision, we uphold the act ion of authorities below and decline to interfere in the matter.

5. In the result, the appeal is dismissed.

Order pronounced in the open Court on 25.3.2013.