A 360° approach to

PRESUMPTIVE TAXATION

CA R.S. KALRA

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The views contained in this book are the personal views of the author and do not necessarily represent the views of the Income-tax Department or of any other department or authority. Before reaching to any conclusion in respect of the matters stated/views expressed herein, readers are advised to consult the concerned provisions of the related law. The author shall not be responsible for any loss—financial or otherwise— to the readers. While every effort has been made to not allow any errors or omissions to crepe in the book. If you notice any errors or glaring omissions, please let me know. Better an errata than never.

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ABOUT THE AUTHOR

Breaking the cliche of not indulging in family business, Ravinder moved the steering wheel of his life towards chartered accountancy profession after graduating from Bachelors of Commerce from DAV College, Jalandhar. And simultaneously done his Masters of Commerce from Himachal Pradesh University. Fulfilling his innate desire for knowledge he moved on to add another feather in his hat by doing Bachelors of Law.

Ravinder won various accolades of success to his name but all this was not built overnight, these laurels were achieved by sleepless nights and rigorous efforts and on his journey of acquiring and sharing of knowledge he contributed to the profession being chairman of Jalandhar Branch of NIRC of ICAI from 1995-1998, Chairman Jalandhar branch of NIRC of ICAI for the year 2008-2009, Member Regional Tax Advisory Committee of CBDT, New Delhi, Member Direct Tax Committee of ICAI for the Year 2011-2012, Special Invitee Direct Tax Committee of ICAI for the Year 2012-2013,Member Indirect Tax Committee of ICAI for the Year 2013-2014,Member Board of Studies of ICAI of 2014-15,Senate Member of Guru Nanak Dev University, Amritsar from 01.07.2014 to 30.06.2016, Special Invitee of Committee on Economic, Commercial Laws & WTO, and Economic Advisory of ICAI for the Year 2017-2018..At present he is on the panel of authors of Tax Guru.

Pandemic had stopped the world in unimaginable way but it could not halt Ravinder from sharing, he wrote three books i.e. “Know When to say No to Cash Transactions”, “Practical Approach to Presumptive Taxation” and “TDS: A 3-Dee System” and gave the professionals and other readers the much needed clarity on various topics on direct taxes.

Acknowledgment

First and foremost I would like to thank God. In the process of putting this book together I realized how true this gift of writing is for me. You have given me the power to believe in my passion and pursue my dreams. I could never have done this without the faith I have in you, the Almighty. I express my gratitude to **Mahamandleshwar Swami Shanta Nand Ji** for their ever showering blessings and inspiration.

Secondly I express heartfelt gratitude to my readers even if an ounce adds to their knowledge it makes all the efforts worthwhile.

Thirdly, this book would have been a dream without the continuing contribution of CA Jasmeet Singh and Ritik Chopra.

Lastly, this revised edition of the book, would not have been possible without the valuable inputs and concerted efforts of my dear friends and well-wishers, especially CA J.P. Bhatia, CA S.S.Kalra, CA Dalvinder Singh, CA Rajesh Anand, CA Arvind Tuli (Chandigarh), CA H.S.Makkar, CA Gagandeep Kaur, and my team members Shubham Beri, Pratham Verma, S.Karanjot Singh, Rohit Rana, and Deepak.

Last but not least, without the cheerful support of family and friends; this book would not have materialized . Thank you!

CA R.S. KALRA

FOREWORD BY CA (Dr.) GIRISH AHUJA

I am very happy to know that our professional colleague, CA R.S. Kalra is publishing an E- book on presumptive Taxation Titled "A 360° approach to Presumptive Taxation". It is heartening to note that moving with times, our professionals are making such concrete efforts in the direction of dissemination of knowledge and also making available e-editions of books on various online platforms which ensure a much wider reach. I have gone through with interest the book "A 360° approach to Presumptive Taxation" to be published and find that it is a very well complied guide covering various aspects of the presumptive taxation. It will surely prove to be very helpful to advocates, chartered accounts, tax consultants and also the members of the public.

The book will certainly benefit the readers about the intricacies of presumptive taxation and will play a pivotal role in shaping and guiding the tax practitioners in their day to day proceedings. I must congratulate CA Kalra for his excellent work of explaining the law and sometimes knotty points relating to presumptive taxation aptly and lucidly. The book in itself reflects the effort, dedication and skill of CA Kalra in the specialised field of law. I wish my heartiest congratulations to him and wish that this book turns out to be for the benefit of the lay-persons as well as the specialists in the field, for a progressive and responsive future ahead.

New Delhi
06.08.2021

MESSAGE

Income Tax has never been a stagnant subject. Therefore, its provisions and rules keep on amending quite frequently. Presumptive Taxation Scheme is one of the most widely-followed Scheme of Income Tax. For the purpose of methodically appreciating the Scheme, my dearest friend CA. R.S. Kalra of Jalandhar has written a specialised E- book entitled "A 360° approach to Presumptive Taxation". The E-book has been divided into 16 Chapters. Each Chapter contains relevant statutory provisions in italics, followed by lucid commentary by the Author with the help of examples, bullet points, flow charts, underlines and judicial pronouncements. In order to enable the readers to have interesting and rewarding reading experience, certain headings and sub-headings have been marked in colour. A careful reading of the book shall certainly impart greater understanding of the Presumptive Taxation Scheme. The Author has left no stone unturned in making the E-book as user-friendly as possible by commendably utilising his 34 years plus rich and diverse experience in taxation matters. The E-book is equally useful for the tax professionals and tax administrators.

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06.08.2021

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MESSAGE

Presumptive Taxation is one of the most sought for provision by the layman and it comprises of integral part of the Income Tax Act with capacious and pragmatic practical applications, which makes it vital for both Taxman and Professional Consultants to have a comprehensive understanding of this crucial topic. In order to facilitate the understanding of a broad gauge of professionals and representatives, my cherished friend CA. R. S. Kalra has penned a book on "A 360^0 approach to Presumptive Taxation". The book is a reflection on the author's vast professional experience spanning over three decades, where the author has examined and simplified the provisions of Presumptive Taxation under Income Tax Act, using judicial pronouncements, examples, visual representations and solutions to some of the most intricate issues faced by the practicing professionals in their practice due to implications of constant amendments to the Act. I would like to congratulate the author for this alluring book and wish him the best for his future.

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Message by Koffee Group

Keeping in view his continuous efforts to keep the tax professionals updated in law, CA R.S. Kalra has again come out with a unique book titled as “A 360° approach to Presumptive Taxation”. The effort needs to be commended. Publication of this book is not the beginning. Rather it is part of the continuous efforts being made by our professional colleague. He already has 3 publications to his credit, which are of immense use to the professionals and the students. Despite his busy schedule, he spares time to share his vast knowledge and experience with the coming generation in the field of taxation. We congratulate our coffee group member on his enormous efforts while bringing out this book. We are quite confident, like earlier, this publication would be of immense help to one and all.

Adv. Dinesh Sarna	CA Rajeev Makol	CA (Dr.) Ashwani Gupta
CA Ashwani Randeva	CA Ashwani Jindal	CA Manoj Soni
CA Gurleen Singh Sahni	CA Parampreet Kaur	CA Snigdha Sarna

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CHAPTER 1

Introduction

A. Concept of Presumptive Taxation

The word 'Presumptive' in simple terms means 'pre-assumption' by the Income Tax Department to compute the income of the assessee. Presumptive taxation involves the use of indirect methods to calculate tax liability, which differ from the usual rules based on the taxpayer's books of account. Under presumptive taxation, the business entity is required to declare a given percentage of his business turnover as his income and has to pay at fixed percentage of it as tax.

A good definition for presumptive taxation comes from Ehtisham Ahmad & Nicholas Stern. According to them, "The term presumptive taxation covers a number of procedures under which the `desired' base for taxation (direct or indirect) is not itself measured but is inferred from some simple indicators which are more easily measured than the base itself."

The principle of presumptive taxation is usually imposed on those whose income is low or those who are not covered under usual tax coverage and at the same time have taxable capacity. They are aimed to bring small and medium businesses that are sometimes outside the tax net. The scheme asks individuals and businesses to pay tax for their income and makes tax procedure in a quite simple manner.

B. Objectives of Presumptive Taxation

Post-Independence, India adopted Mixed Economy policy and realized that Small Scale Businesses (SSB) will help the Economy to boost rapidly as it will provide employment to a large number of people than Large Industries. Industrial Policy Resolution of 1948 and 1956 helped SSB to lay deep roots in the Indian Economy. Presumptive taxation was levied to overcome avoidance; tax evasion because of involvement of high information costs for verifying the self-declaration of Income; and difficulty in compliance with the then Income Tax laws, difficulty of book-keeping or establishing a well-designed accounting system for certain business houses.

Presumptive taxation is being introduced having following objectives:

- Under Income Tax Act provisions, a person engaged in business or profession is required to maintain regular books of account and further, he has to get his accounts audited.
- To give relief to small taxpayers from this tedious work.

- A person adopting the presumptive taxation scheme can declare income at a prescribed rate and, in turn, is relieved from tedious job of maintenance of books of account and also from getting the Accounts audited etc.

C. Advantages of Presumptive Taxation

Presumptive taxation technique has certain advantages. One is simplification, particularly in the case of taxpayers with very low turnover. Secondly, presumptive methods of taxation are effective in reducing tax avoidance. Small and medium businesses can be brought into the tax base through presumptive taxation. The term "presumptive" is used to indicate that there is a legal presumption that the taxpayer's income is no less than the amount resulting from application of the indirect method. Presumptive techniques may be employed for a variety of reasons. One is simplification, particularly in relation to the compliance burden on taxpayers with very low turnover.

D. Presumptive Taxation System in India

A dream of every tax assessee is to have a simpler and fair tax regime. The Tax Reforms Committee led by Dr. Raja Chelliah had recommended an "Estimated Income Method" for small taxpayers in order to facilitate better tax compliance giving a window to convert the said dream into reality. In our country, where small businesses, unorganized sectors and services are hard-to-tax, it is imperative that there exist presumptive schemes for such sectors wherein maintaining books of accounts are a gargantuan task. The outcome of the recommendation led to the birth of presumptive taxation schemes in Direct tax. One of the key provisions in the presumptive taxation is Section 44AD of the Income Tax Act, 1961 ('the Act') - Special Provisions for computing business income on a presumptive basis, which was introduced by virtue of Finance Act 1994, wherein the concept of taxing an assessee by a method of estimating income from its business was introduced especially for small businesses, contractors and goods carriers.

As per the amendments through Finance (No. 2) Act 2009 with effect from 01-04-2011, the scope is yet widened and a large number of assessees are covered under the net of presumptive income. As per this Act, Sec. 44AF is deleted and Sec. 44AD has been amended and is recast. In the Memorandum Explaining the Provisions of the Finance (No.2) Bill, 2009, while amending provisions of Sec. 44AD, it has been stated as under:-

(a) There has been a substantial increase in small business.

(b) A large number of business and service providers in rural and urban areas who earn substantial income are outside tax net.

(c) Introduction of presumptive tax provisions would help a number of small businesses to comply with the taxation provisions.

(d) A presumptive income scheme lowers the compliance cost and also reduces the burden on the tax machinery.

In India there is need of consolidated tax system where Direct Tax, Indirect Tax and Property Tax are collected in a single window. With introduction of GST, it is time to encourage assesses in small and unorganized sectors to pay their fair share of taxes, a combined tax system factoring both GST and Direct Tax would be the need of the hour as it will indeed live up to "One Nation, One Tax" slogan. Alternatively a separate chapter for taxing presumptive incomes may be introduced under the Act, so as to avoid any interpretation issues. With the focus of the current Government being to promote Ease of doing business in India and also to bring lot of small time assesses into the tax bracket for the first time, presumptive taxation scheme is a wonderful tool which caters to the needs of the Government.

E. History of Presumptive Income

The presumptive taxation in India was first introduced by the Finance Act.1988.The presumption of income is not new to the Income Tax Act and the presumptive taxation system has travelled to different situations since last 33 years. During the period of last 33 years, various sections have been inserted for taxation of income on presumptive basis .This journey has passed through following stations:

1. The Finance Act, 1988 had inserted section 44AC dealing with presumption of income in case of purchase of liquor, timber and forest produce through auction or tender. This was omitted by the Finance Act, 1992;

2.The Finance Act, 1994 had inserted section 44AD which was amended from time to time, as on today this section lays down the presumption of income at 8% of the total turnover or gross receipts provided its below 2 crores in case of all businesses with certain exceptions;

3. The Finance Act, 1994 has also inserted section 44AE dealing with presumption of income in case of business of plying, hiring or leasing of goods carriages;

4.The Finance Act, 1998 had inserted section 44AF dealing with presumption of income in case of retail business but was made redundant by Finance (No.2) Act, 2009 as the retail business category covered under this section was included under section 44AD by amendment.

5. The Finance Act, 2016 inserted a new section 44ADA providing for taxation of professionals income on presumptive basis

F. Presumptive Taxation Scheme

This is a system to calculate your tax on an estimated income or profit. It gets very difficult for a small taxpayer to keep a track and maintain a copy of all invoices of his sales and expenses. Some of the

taxpayers are also required to maintain the books of accounts and get their accounts audited. Moreover, it is very difficult for a small taxpayer to do so many things for the purpose of computation of Income. So as to ease the process of computation of Income, the system of Presumptive Taxation wherein the Income would be computed as certain percentage of turnover, sales or percentage.

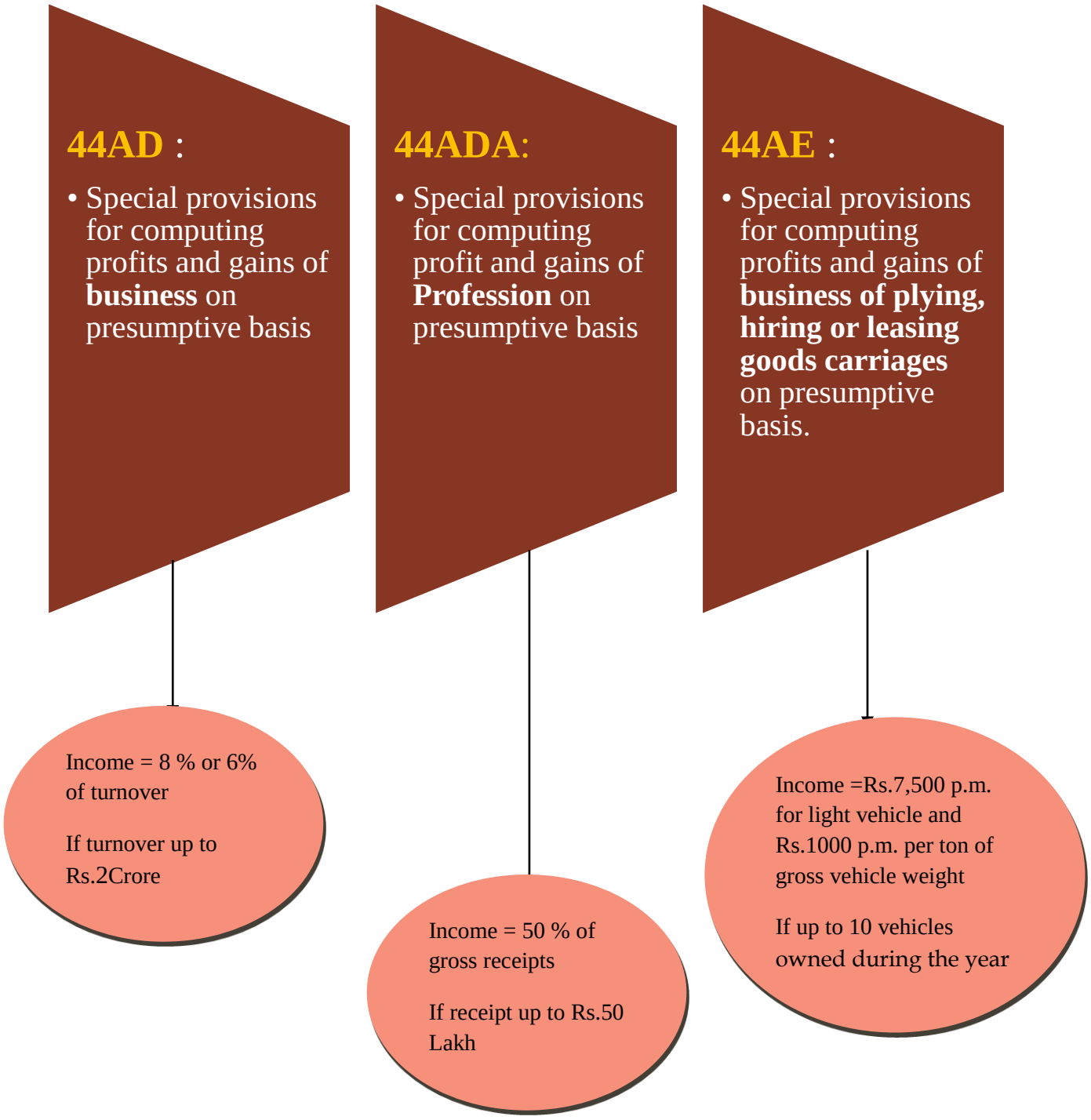
Presumptive taxation system reduces the compliance cost and the administrative burden. However, it is important to note that whether the taxpayer opts for the Presumptive Scheme of Taxation or for the normal scheme of Taxation, the rates of tax applicable would remain on the same. It is only the manner of computation of Income on which the tax is levied and several legal compliances will change depending on the scheme opted for. Moreover, the taxpayer is free to decide whether he intends to opt for the Scheme of Presumptive Taxation or opt for the Scheme of Normal Taxation. The taxpayer can opt for any scheme as per his wish.

In presumptive system of taxation, the important term is 'deemed to be', which proves that in such cases there is no income to the extent of such percentage, however, to that extent, income is deemed. It is undisputed that 'deemed' means presuming the existence of something which actually is not. Therefore, it quite clear that though for the purpose of levy of income tax 8% or more may be considered as income, but actually this is not the actual income of the assessee. If the actual income of the assessee is higher, then the actual income is to shown in the return of income. It is to be noted that the provisions of presumptive taxation are enacted to facilitate computation of total income and filing of return of income. It does not give a license to the assessee to declare lower income despite the assessee having a higher income. The assessee is legally bound to return higher income if the same is higher than the benchmark given.

Deeming provisions are important part of statutes in general and Income Tax Act ('Act') in particular. Without deeming provisions modern tax legislation cannot think of implementing effective tax administration. Considering the recent trend, one gets amused how much legislature has got creative in imagining tax fictions to collect revenue and plug loopholes; sometimes travelling much beyond their initial purpose. However, interpretation of deeming provision in the Income Tax Act is always a vexed issue with insurmountable complexity and litigation. Thus, it is of paramount importance to understand intricacies involved in interpretation of deeming provisions in order to better guide ourselves while analysing deeming tax fictions.

Details of Presumptive Taxation Scheme

For small taxpayers the Income Tax Act has framed three presumptive taxation schemes as given below:



CHAPTER 2

Provisions of Sec 44AB

Audit of accounts of certain persons carrying on business or profession.

44AB. *Every person,—*

(a) 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 [7][***]:

*[**Provided** that in the case of a person whose—*

(a) Aggregate of all amounts received including amount received for sales, turnover or gross receipts during the previous year, in cash, does not exceed five per cent of the said amount; and

(b) Aggregate of all payments made including amount incurred for expenditure, in cash, during the previous year does not exceed five per cent of the said payment:

*[9]**[Provided further** that for the purposes of this clause, the payment or receipt, as the case may be, by a cheque drawn on a bank or by a bank draft, which is not account payee, shall be deemed to be the payment or receipt, as the case may be, in cash,**]***

*this clause shall have effect as if for the words "one crore rupees", the words "**[**ten**]** crore rupees" had been substituted; or]*

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

(c) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AE or section 44BB or section 44BBB, as the case may be, and he has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, in any previous year; or

(d) carrying on the profession shall, if the profits and gains from the profession are deemed to be the profits and gains of such person under section 44ADA and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his profession and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year; or

(e) carrying on the business shall, if the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds the maximum amount which is not chargeable to income-tax 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 :

Provided *that this section shall not apply to the person, who declares profits and gains for the previous year in accordance with the provisions of sub-section (1) of section 44AD and his total sales, turnover or gross receipts, as the case may be, in business does not exceed two crore rupees in such previous year:*

Provided further *that this section shall not apply to the person, who derives income of the nature referred to in section 44B or section 44BBA, on and from the 1st day of April, 1985 or, as the case may be, the date on which the relevant section came into force, whichever is later :*

Provided also *that in a case where such person is required by or under any other law to get his accounts audited, it shall be sufficient compliance with the provisions of this section if such person gets the accounts of such business or profession audited under such law before the specified date and furnishes by that date the report of the audit as required under such other law and a further report by an accountant in the form prescribed under this section.*

Explanation.—For the purposes of this section,—

(i) "Accountant" shall have the same meaning as in the Explanation below sub-section (2) of section 288;

(ii) "specified date", in relation to the accounts of the assessee of the previous year relevant to an assessment year, means [11][date one month prior to] the due date for furnishing the return of income under sub-section (1) of section 139.

Audit of accounts of certain persons carrying on business or profession. 44AB.

Every person –

(a) 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

Following proviso is inserted after clause (a) of section 44AB by the Finance Act, 2021, w.e.f. 1-4-2021:

[Provided that in the case of a person whose—

(a) aggregate of all amounts received including amount received for sales, turnover or gross receipts during the previous year,

in cash,

does not exceed five per cent of the said amount; and

(b) aggregate of all payments made including amount incurred for expenditure,

in cash,

During the previous year does not exceed five per cent of the said payment,

this clause shall have effect as if for the words "one crore rupees",

the words "ten crore rupees" had been substituted; or]

It has been provided further *that for the purposes of this clause, the payment or receipt, as the case may be, by a cheque drawn on a bank or by a bank draft, which is not account payee, shall be deemed to be the payment or receipt, as the case may be, in cash*

44AB(b)

carrying on profession shall,

- if his gross receipts in profession
- Exceed fifty lacs rupees
- in any previous year; or

44AB(c)

carrying on the business shall,

- if the profits and gains from the business are deemed to be the profits and gains of such person
- under section 44AE or section 44BB or section 44BBB,
- as the case may be,
- and he has claimed his income to be lower than the profits or gains
- so deemed to be the profits and gains of his business,
- as the case may be,
- in any previous year; or

44AB(d)

carrying on the profession shall,

- if the profits and gains from the profession are deemed to be the profits and gains of such person under section 44ADA and
- he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his profession and
- his income exceeds the maximum amount
- which is not chargeable to income-tax in any previous year; or

44AB(e)

carrying on the business shall,

- if the provisions of sub-section (4) of section 44AD are applicable in his case and
- his income exceeds the maximum amount which is not chargeable to income-tax 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 :

Provided that this section shall not apply to the person,

- who declares profits and gains for the previous year in accordance with the provisions of sub-section (1) of section 44AD and
- his total sales, turnover or gross receipts,
- as the case may be,
- in business does not exceed two crore rupees in such previous year:
- Provided further that this section shall not apply to the person,
- who derives income of the nature referred to in section 44B or section 44BBA,
- on and from the 1st day of April, 1985 or,
- as the case may be,
- the date on which the relevant section came into force,
- whichever is later :

Provided also that in a case,

- where such person is required by or under any other law to get his accounts audited,
- it shall be sufficient compliance with the provisions of this section
- if such person gets the accounts of such business or profession audited under such law
- before the specified date and
- furnishes by that date the report of the audit as required under such other law and
- further report by an accountant in the form prescribed under this section.

Amendment in Tax Audit Provisions

Finance Act, 2020 has introduced a proviso to sec 44AB(a) to encourage less-cash economy and to encourage digital transactions. If the turnover of the assessee is up to Rs.5 crores and his cash receipts are up to 5% of total receipts and the cash payments are up to 5 % of total payments, then the assessee would not be required to get his books of accounts audited.

The Finance Act, 2021 has increased the threshold limit of turnover for tax audit u/s 44AB from Rs.5 crores to Rs.10 crores where cash transactions do not exceed 5% of total transactions. This amendment will take effect from 1st April 2021 and will, accordingly, apply in relation to the assessment year 2021-22. Thus, the higher limit of turnover will take effect from F.Y. 2020-21 itself.

The Finance Act, 2021 has added a new second proviso to section 44AB(a) which is reproduced below-

"Provided further that for the purposes of this clause, the payment or receipt, as the case may be, by a cheque drawn on a bank or by a bank draft, which is not account payee, shall be deemed to be the payment or receipt, as the case may be, in cash."

As per provisions of section 44AB, turnover limit for tax audit has been increased from 1 crore to 10 crore if receipts and payment are within the permissible cash limit. The Finance Act, 2021 has introduced new proviso to section 44AB(a) wherein it has been stated that transactions through non account payee cheques shall be considered as deemed cash for this clause. This point is very important because large chunk of audit shall be governed on interpretation and adoption of this proviso. Here it is interesting to state that deeming provisions is with respect to only cheques and not for E-Payment or digital payment hence RTGS/NEFT etc. shall always be treated as non-cash. Now most important question is how to prove receipt and payment of cheque through account payee mode is a burning issue as assessee does not possess any documentary evidence thereof and only option left with the assessee to collect scanned copies of all cheques from the bank. After introduction of CTS clearing

system, scanned copies all receipts and issued cheques remain with the banks but it is very cumbersome to get scanned copies of cheques from the bank looking to the magnitude of cheques. Though intention of the legislature is to ease the compliance burden of small assessee if they are dealing mostly through banking channel accordingly threshold limit for tax audit shall be 10 crore but This will lead to a situation where the assessee has to prove that the transactions are indeed carried on through account payee cheques. In the case of RTGS, NEFT or other digital modes of receipts or payments, there will not be any problem in proving that those transactions are carried on digitally in non-cash mode. The problem will be there in case of transactions carried on through cheques. Both the bearer/crossed and account payee cheques will be reflected as 'cheque transactions' in the bank statements. Thus it will not be possible for the assessee to prove that such cheque transactions are indeed account-payee cheque. Remember, one needs to prove it for both the receipts of cheques and payments by cheques.

Following observations can be made regarding the increased threshold limit for Tax Audit under section 44AB –

a) The amendment is carried out only in section 44AB and no amendment has been made in section 44AD. Thus, the turnover limit of 2 crores for opting Section 44AD shall continue.

b) The term aggregate of all receipts and aggregate of all payments" is very wide and covers not only receipts and payments on account of sale and purchase but also all other business transactions.

All the payments or receipts including capital introduction, drawings, receipt and repayment of loans, purchase of fixed assets, etc. shall be considered. Even taxes paid in cash shall be included for the calculation.

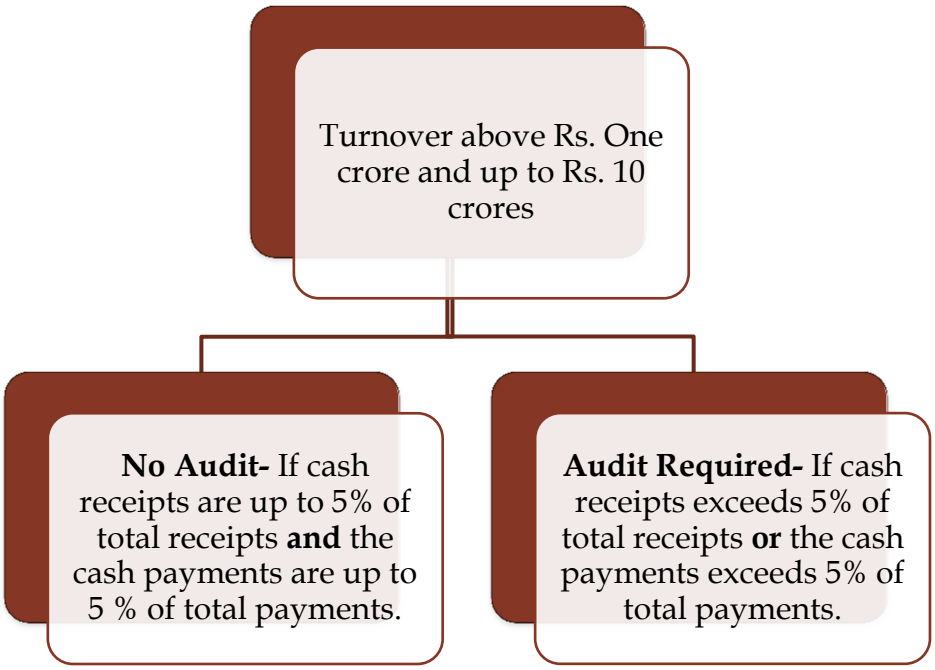
In other words, all the receipts and payments made by the entity shall be considered for calculating total value of receipts and payments as well as the aggregate value of receipts or payments made in cash.

c) It is not pointed out who will certify the margin of transactions in cash mode of 5%. It appears that assessee himself shall declare the percentage of receipts in cash and non-cash mode.

d) This increased threshold limit for Tax Audit is applicable for a business entity only and the threshold limit for Tax Audit for a professional shall continue to be at Rs.50 lacs even if more than 95% of the transactions are in digital mode.

e) Any assessee whose turnover exceeds Rs.10 crores (5 crores for A.Y. 2020-21), is required to get the books of accounts audited. The rate of profits declared, or method of receipt and payment is irrelevant.

Discussion on new proviso on the subject matter of Deemed Cash for turnover purpose:



It is to be noted that cash receipts are to be compared with total receipts and cash payments are to be compared with total payments separately. Cash Receipts/Payments are not to be compared with aggregate of receipts and payments.

The expression "**aggregate of all amounts received**" denotes the **Total Receipts** of the assessee in cash and through banking channels. Total receipts invariably include receipt from sales or turnover of the business of the assessee. The words '**in cash**' only includes receipts in cash mode only. In other words, the assessee must have received the amount in cash.

The words 'said amount' refers to "aggregate of all amounts received" (Total Receipts) and not to the turnover or sales amount.

Similarly, the expression "aggregate of all payments" denotes the Total Payments of the assessee in cash and through banking channels. Similarly, the words 'said payment' refer to the total payment which is invariably the "aggregate of all payments".

In certain provisions, the law has used the words "*an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed"* and not the 'cash'.

Hence transactions in the following modes will be regarded as transactions not carried on in cash-

(i) Account Payee Cheques

(ii) Demand Draft/Pay Order

(iii) Credit Card

(iv) Debit Card
(v) Net Banking
(vi) IMPS (Immediate Payment Service)
(vii) UPI (Unified Payment Interface)
(viii) RTGS (Real Time Gross Settlement)
(ix) NEFT (National Electronic Funds Transfer)
(x) BHIM (Bharat Interface for Money) Aadhaar Pay

CBDT has notified the '*other electronic mode of payments*' by Notification No. 08/2020 dated 29.01.2020.

The limit of 5% receipt in cash or payments in cash is not limited to sale or purchase transactions. It rather covers all receipts and payments in cash including sales and purchases. In general receipts in cash of the following nature are included-

- Receipt on Sale of goods and services
- Receipt from debtors for the current year sales/outstanding receivables from earlier years
- Sale of fixed assets
- Sale of scrap
- Receipt of Loans and Advances
- Trade advances
- Receipt of deposits
- Sale of investments

Some typical payments in cash of a business concern included are-

- Payments for Purchases
- Payment to Creditors for current year purchases/outstanding creditors
- Purchase of Fixed Assets and other Capital Expenditure
- Payments for salary, electricity, telephone charges, and other revenue expenditure
- Payments for Insurance
- Repayment of Loans and Advances
- Loans given
- Trade Advances given
- Deposits made, etc.

Issues while Computing the Limit of 5% Cash Transactions

Some of the issues in computing the limit of 5% cash transactions (receipts and payments) for the purpose of applicability of higher turnover limit of Rs.5 crore u/s 44AB are discussed below-

1. Capital Contribution: When an Individual/sole proprietor introduces capital in his business in cash, then the same shall not be included in the total receipts in cash of the assessee. This is for the simple reason that one cannot transact with himself.

However, the notified ITR forms do not follow this principle. It requires that all the cash receipt of the business including capital contribution should be considered in determining the 5% cash transactions limit.
However, in case of partnership firms, the situation is different since a firm is assessed as a separate person under income tax law and is considered distinct from its partners. To clarify, if a firm receives any capital contribution in cash from any partner, it shall be counted towards the limit of 5%.

2. Direct cash deposit into bank account by customers: In this case, it will be included in cash transactions. Even if the assessee debits the bank account in his books, it will be regarded as a cash transaction since the account is ultimately settled in cash. The Allahabad high Court has held in the case of Ajai Kumar Singh KhaldelialTS-35-HC-2020(ALL) that cash deposit in the bank account of supplier is disallowed u/s 40A(3) of the Act**.** The court held that depositing cash directly in the bank account of the supplier / beneficiary cannot be referred to as payment made through electronic clearing system, covered as an exception under Rule 6DD(c)(v); Observes that the term use of electronic clearing system through bank account" as stipulated in Rule 6DD(c)(v) would necessarily include the transaction of funds by electronic mode through clearing system i.e. through electronic mode of transfer such as NEFT, RTGS, IMPS, etc.; Opines that, Such transaction by depositing cash directly in the bank account of the beneficiary is not routed through any clearing house nor is the money send through electronic mode and therefore such a transaction in my considered opinion cannot be covered by Rule 6DD(c)(v) "; Moreover notes that the assessee failed to provide any evidence to show that he had deposited the amount on the instructions of the beneficiary or due to any business exigency, thus holds that, In absence of such evidence, the assessing authority rightly denied the benefit of exemption to the petitioner.", cites SC ruling in Attar Singh Gurmukh Singh.

3. Direct Cash deposit in creditors account: It will be included in computing cash payments of the assessee since the account is ultimately settled in cash.

4. Receipts/Payments in bearer cheques: In case the amount is received by a 'bearer cheque' and the same is used for withdrawing cash from the payer's account, it will amount to a cash transaction.

5. Capital Expenditure: All the payments in cash are included whether it is paid for revenue expenditure or capital expenditure. There is no differentiation provided in the law.

6. Capital Receipt/Exempt Income- All receipts include receipts of capital nature and also the exempt income for e.g. Agricultural Income.

7. Adjustment by book entry: In a case where a person is a customer as well as vendor of the assessee. The debtors' amount is set-off with the amount payable to the same person/vendor. Since no cash is involved in settling the due amount, this will be considered as non-cash transactions.

8. Cash deposited and Cash Withdrawals from bank account: Cash deposit and the cash withdrawals from the bank account amounts to contra entry or transactions with self and hence are excluded for computing the 5% cash limit.

Thus, any receipt of advance, receipt and repayment of loan, direct and indirect expenses, etc. - every transaction is covered in calculating the limit of 5% transactions in cash.
In order to compute the limit, the assessee should aggregate all the receipts from his cash ledger and bank ledger and then find out the percentage of cash receipts.
Similarly, the assessee should aggregate all the payments from his cash ledger and bank ledger and then find out the percentage of cash payments.

If both the cash receipts and cash payments is 5% or less, he shall get the benefit of higher turnover limit of Rs.5 crore for tax audit. Otherwise, the limit of turnover for applicability of tax audit shall be Rs.1 crore.

Conditions for the Applicability of New provisions of tax audit

Limit of Rs.10 crore applicable when following conditions are satisfied:
(a) aggregate of all amounts received in cash does not exceed 5% of the said amount;
AND
(b) aggregate of all payments made in cash does not exceed 5% of the said payment

Example: Mr. X, is into business and has turnover of less than Rs.10 crores during the financial year 2020-21. The following transactions in FY 2020-21 are hereunder:

A. Calculation of Total Receipts:

Particulars	CASH	CHEQUE	TOTAL
Cash Sales	100	380	480
Receipt from debtors	20	1300	1320
Loan receipts	-	200	200
Total	120	1880	2000

B. Calculation of Total Payments:

Particulars	CASH	CHEQUE	TOTAL
Payment of expenses	81	519	600
Payment to creditors	-	1080	1080
Loan payments	-	120	120
Total	81	1719	1800

C. Computation of percentage of cash receipts & payments

Particulars	TOTAL (A)	CASH (B)	% in cash (B/A *100)
Receipts	2000	120	6
Payments	1800	81	4.5%

In the given case, Mr. X isn't entitled to the benefit of the increased threshold limit of Rs.10 crores for the tax audit. In his case, though the payment made in cash during the year does not exceed 5% of total payments, the percentage of cash receipts exceeds the limit of 5%. In this case Mr. X is fulfilling only one condition of payments and the condition in case of receipts is not fulfilled. To take the benefit of this section he has to follow both the conditions.

Whether Mr. X is entitle to get benefit of threshold, if he into the profession?

Clause (a) of Section 44AB talks about a person carrying on business whereas clause (b) talks about a person carrying on a profession. The new proviso to section 44AB providing the enhanced turnover limit of Rs.10 crores for the tax audit is inserted to clause (a) to section 44AB. Thus, the persons engaged in the profession aren't entitled to claim enhanced turnover limit of Rs.10 crore for the tax audit.

Whether the Amendment brought by FA 2020 is applicable retrospectively?

Yes, it is trite law that where a provision is curative or merely declaratory / clarificatory of provisions of law shall be applied retrospectively.

- Allied Motors Pvt Ltd Vs. ITO (1997) 224 ITR 677 (SC).
- CIT Vs. Gold Coin Health Food Pvt Ltd (2008) 304 ITR 308 (SC).
- CIT Vs. Calcutta Export Co (2018) 404 ITR 654 (SC).
- CIT Vs. Ansal Landmark Township Pvt Ltd (2015) 377 ITR 635 (Del.HC).

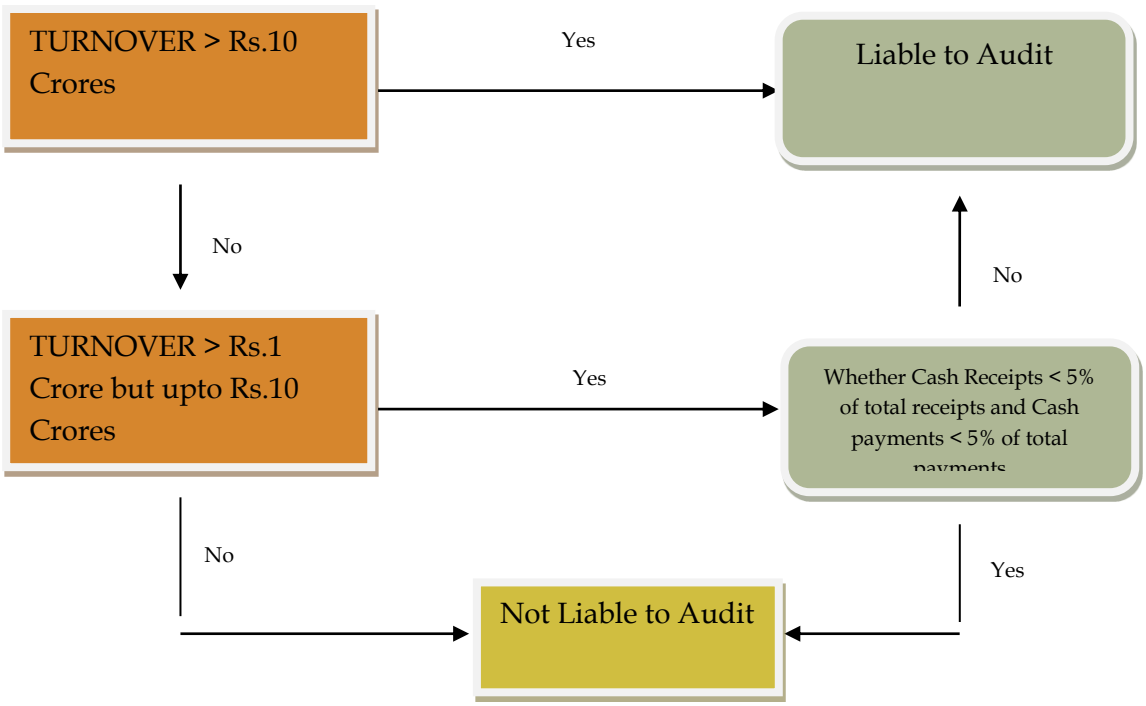
The following table shows the different situations under which the books of accounts are to be audited under section 44AB of the Act.

Sr. No.	*Person*	*When required to get accounts audited in terms of section 44AB*	*Clause of section 44AB*
1.	Every person carrying on profession referred to in section 44AA(1) profits from which are assessable on presumptive basis under section 44ADA	If he claims his profits and gains from such profession are lower than 50% of his gross receipts for the previous year in question and his total income exceeds the maximum amount which is not chargeable to income-tax in any previous year	Clause (*d*)
2.	Every person carrying on profession [other than those covered by clause (*d*) of section 44AB]	If his total gross receipts from profession exceed Rs.50 lacss in any previous year	Clause (*b*)
3.	Every person who derives income of the nature referred to in section 44B or section 44BBA	Section 44AB does not apply to such person & hence no need to get accounts audited u/s 44AB	2nd proviso to section 44AB
4.	Every person carrying on business profits of which are assessable on presumptive basis under section 44AE or section 44BB or section 44BBB	If he claims his profits and gains from such business are lower than the amount deemed to be profits and gains under the said section	Clause (*c*)
5.	Every person carrying on business where the provisions of section 44AD(4) are applicable in his case	If his total income exceeds the maximum amount which is not chargeable to income-tax in any previous year Section 44AB shall not apply to the person who declares profits and gains for the previous year in accordance with section 44AD(1) and his total sales, turnover or gross receipts, as the case may be,	Clause (*e*) first proviso

		in business does not exceed Rs.2 crore [first proviso to section 44AB]	
6.	Every person carrying on any agency business	If his total sales, turnover or gross receipts , as the case may be, in business exceed or exceeds Rs.1 crore in any previous year	Clause (*a*)
7.	Every person carrying on business who is earning income in the nature or commission or brokerage	If his total sales, turnover or gross receipts , as the case may be, in business exceed or exceeds Rs.1 crore in any previous year	Clause (*a*)
8.	Every person carrying on profession referred to in section 44AA(1) who is also carrying on any business	Gross receipts of profession and business not to be clubbed for computing the limits of Rs.1 crore [clause (*a*)] and/or Rs.50 lacss [clause (*b*)]. Account of profession to be audited if clause (*b*) or (*d*) of section 44AB applies. Accounts of business to be audited if total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds Rs.1 crore in any previous year since section 44AD is not applicable to person carrying on profession referred to in section 44AA(1)	Clause (*a*)
9.	Every "eligible assessee" (as defined in section 44AD) carrying on "any eligible business" (as defined in section 44AD) turnover of which exceeds Rs.2 crores in any previous year, and proviso	Assessee not eligible to opt for section 44AD. Therefore, he must get his accounts audited in terms of section 44AB(a) since his turnover exceeds Rs.2 crores and thus exceeds Rs.1 crore limit in clause (*a*)	Clause (*a*)
	to sec 44AB(a) not applicable. Both payment and receipt in	Audit u/s 44AD not applicable if	

	cash does not exceed 5% of the total receipts and payment respectively Either payment or receipt in cash exceeds 5% of the total receipts and payment respectively	total sales, turnover or gross receipt from business during the previous year does not exceed Rs.10 crore If total sales, turnover or gross receipt from business during the previous year exceeds Rs.1 crore	Proviso to Clause (*a*) Clause (*a*)
10.	Every assessee who is not an "eligible assessee" as defined in section 44AD *i.e.* LLPs, companies, AOPs, BOIs, AJPs	If total sales, turnover or gross receipts , as the case may be, in business exceed or exceeds Rs.1 crore in any previous year	Clause (*a*)
11.	Every non-resident assessee not covered by section 44AE or 44B or 44BB or 44BBA or 44BBB	If total sales, turnover or gross receipts , as the case may be, in business exceed or exceeds Rs.1 crore in any previous year	Clause (*a*)

Audit of entities engaged in Commission, Brokerage and Agency Business



a) Where accounts are audited under companies Act: Then it will be sufficient if the accounts are audited under such law before the specified date and assessee obtains a report from a chartered accountant in the prescribed form under Income Tax Act, 1961.

Under section 141 of Companies Act, 2013, only a Chartered Accountant is qualified to conduct audit of companies. A question often arises whether the audit under section 44AB is required to be conducted by the statutory auditor? In this connection, it may be stated that Section 44AB stipulates that only Chartered Accountants should perform the tax audit. This section does not stipulate that only the statutory auditor appointed under the Companies Act, 2013 or other similar Statute should perform the tax audit. As such the tax audit can be conducted either by the statutory auditor or by any other chartered accountant in full time practice. In a case where statutory auditor is not appointed, where such appointment is required by a statute the chartered accountant appointed to conduct audit under section 44AB can commence and complete his audit without waiting for the appointment of statutory auditor and report on the accounts audited by the statutory auditors. The tax auditor in such cases will, however, have to conduct the financial audit as well in order to enable him to certify whether or not the accounts reported upon by him give a true and fair view of the state of affairs of the assessee whose accounts are audited by him under section 44AB. And, the tax auditor provides his report in Form No. 3CB and to furnishes/certifies the relevant particulars in Form No.3CD.

b) Where accounts are audited under any other provisions of the Income Tax Act 1961: Where a person is required to get his accounts audited under any other law, then it shall be sufficient compliance with the provisions of this section if such person gets the accounts audited under such other law before the specified date and furnish by that date the report of the audit as required under such other law and a further report by an accountant in the form prescribed under this section.

c) Report of audit of accounts to be furnished under section 44AB.

Rule 6G.

(1) The report of audit of the accounts of a person required to be furnished under section 44AB shall,

(a) in the case of a person who carries on business or profession and who is required by or under any other law to get his accounts audited, be in Form No. 3CA:

(b) in the case of a person who carries on business or profession, but not being a person referred to in clause (a), be in Form No.3CB.

Submission of Audit Report in Form 3CB instead of Form 3CA along with Form 3CD is sufficient compliance of Tax Audit u/s 44AB hence no penalty u/s 44AB.

SPA Lifestyle (P) Ltd Vs. ACIT (2014) 46 taxmann.com 347 (Del.Trib)

M/s PMC Rubber Chemicals India Pvt Ltd Vs. ACIT. ITA NO: 2065 / KOL / 2018. Order Dated 28/06/2019.

(2) The particulars which are required to be furnished under section 44AB shall be in Form No. 3CD. Tax auditor shall furnish tax audit report online by using his login details in the capacity of 'chartered accountant'. Taxpayer shall also add CA details in their login portal. Once audit report is uploaded by tax auditor, same should either be accepted/rejected by taxpayer in their login portal. If rejected for any reason, all the procedures need to be followed again till the audit report is accepted by the taxpayer.

In case of LLP should reporting for Tax Audit be in Form 3CA or 3CB?

In case of company, which follows April-March period as its financial year, the Tax Audit report would in Form No. 3CA, if the Tax Audit is applicable to it. However, in case of partnership firm or proprietary concern, which is not required to get their accounts audited under any other Law, Tax Audit report would be in Form No. 3CB.

In case of LLP following April-March as its financial year and if it is required to get its account audited under the **LLP Rules, 2009**, then the Tax Audit report would be in Form No. 3CA. However, if it is not required to get its accounts audited under the LLP Rules, 2009 then Form No. 3CB would be applicable. It may be noted that under r 24 of the LLP Act, audit is mandatory in case the LLP whose turnover in the relevant financial year exceeds Rs.40 lacs or whose contribution exceeds Rs.25 lacs.

Points to be considered by the Tax Auditor

1. The tax auditor should obtain from the assessee a letter of appointment for conducting the audit as mentioned in section 44AB.

2. The tax auditor is required to upload the tax audit report directly in the e-filing portal. In case of joint auditors, management representation has to be obtained about responsibility of uploading Tax Audit Report & ITR by particular auditor.

3. The appointment of the auditor for tax audit in the case of a company need not be made at the general meeting of the members. It can be made by the Board of Directors or even by any officer, if so authorised by the Board in this behalf.

4. The appointment in the case of an assessee, being a firm or a proprietary concern, can be made by a partner or a person authorized by the assessee in the case of a firm or by the proprietor himself or a person authorised by him in the case of the assessee being a proprietary concern.

5. It is possible for the assessee to appoint two or more chartered accountants as joint auditors for carrying out the tax audit, in which case, the audit report will have to be signed by all such chartered accountants. In case of disagreement, they can give their reports separately. (Refer: Para 12 of the SA 299 "Responsibility of Joint Auditors" issued by ICAI)

6. The Act prohibits a relative or an employee of the assessee being appointed as a tax auditor under section 44AB, besides ICAI has also laid in the code of ethics that a chartered accountant should not express his opinion on financial statements of any business or enterprise in which he, his firm or a partner in his firm has a substantial interest.

7. A chartered accountant who is responsible for writing or maintenance of the books of account of the assessee should not audit such accounts (including tax audits). This principle will apply and extend to any partner of such a chartered accountant as well as to the firm in which he is a partner.

8. The audit of accounts of a Firm of chartered accountants, under section 44AB, cannot be conducted by any partner or employee of such a firm. Similarly, where such a firm is a proprietary one, the said audit cannot be conducted by the proprietor or his employee.

9. A chartered accountant/ firm of chartered accountants, who is appointed as tax consultant of the assessee, can conduct tax audit under section 44AB. But an internal auditor of the assessee cannot conduct tax audit if he is an employee of the assessee.

10. The tax auditor cannot be removed on the ground that he has given an adverse audit report or the assessee has an apprehension that the tax auditor is likely to give an adverse audit report. If there is any unjustified removal of tax auditors, the Ethical Standards Board constituted by the Council of the Institute if approached, may intervene in such cases. No chartered accountant should accept the audit assignment if the removal of his predecessor is not on valid grounds.

How many tax audit reports a Chartered accountant can Sign?

Specified Number of Tax Audit Assignments It is to be noted that a Chartered Accountant in practice can conduct 60 tax audits relating to an assessment year. The ICAI had clarified that audit prescribed under any statute which requires the assessee to furnish an audit report in the form as prescribed under section 44AB of the Income-tax Act, shall not be considered for the purpose of reckoning the specified number of tax audit assignments if the turnover of the assessee is below the turnover limit specified in section 44AB of the Income-tax Act. The ICAI has modified the guidelines on August 23, 2018 to provide that the audits conducted under Section 44AD, 44ADA and 44AE of

the Income-tax Act(Presumptive Taxation Schemes) shall not be considered for the purpose of reckoning the 'specified number of tax audit assignments'

Before accepting a tax audit, the chartered accountant should ensure that taking such audit will not exceed the specified number of tax audits assignments, which at present are 60 in a given financial year. This said specified number of 60 Needless to mention, a chartered accountant in practice, is deemed to be guilty of professional misconduct if, he accepts more than 60 tax audit assignments relating to an assessment year.

In case, a member is a partner in a firm of chartered accountants in practice, the ceiling of 60 tax audit assignments shall be computed with reference to each of the partners in the said firm. Where any partner of the firm of chartered accountants in practice is also a partner of any other firm or firms of chartered accountants in practice, the ceiling limit of 60 shall apply with reference to all the firms together in relation to such a partner. Similarly, where any partner accepts one or more tax audit assignments in his individual capacity, the total number of such assignments under section 44AB which may be accepted by him whether directly in his individual capacity or as partner in one or more firms of chartered accountants in practice shall not exceed 60 tax audit assignments. If two chartered accountants already in practice or two of such chartered accountants are appointed as joint tax auditors, then the assignment will have to be included in the case of both the members and firms separately. It is, however, clarified that the audit of an assessee head office and branch offices shall be regarded as one tax audit assignment. The audit of one or more branches of the same concern by one chartered accountant in practice shall be construed as only one tax audit assignment.

Example: A firm has 4 partners. Each partner already has 4 Tax Audit assignments in their personal capacity. Now a question arises that how many tax audit assignments can the firm undertake? ⎪ Maximum number of audits that a firm can take in an assessment year => 60 x 4 = 240 ⎪ Since, the partners each have 4 Tax Audit assignments engaged in personal capacity, the number of total assignments to be deducted as a partner's capacity => 4 x 4 = 16 ⎪ Total number of Tax Assignments that can be taken up by the firm =>240-16 = 224

Question: If there are 10 partners in a firm of Chartered Accountants, then how many tax audits reports can each partner sign in a financial year?

Answer: As per amended Chapter VI of Council General Guidelines, 2008, Tax Audit Assignments under Section 44AB of the Income Tax Act, 1961, A member of the Institute in practice shall not accept, in a financial year, more than the specified number of tax audit assignments as prescribed under Section 44AB of the Income Tax Act, 1961. The specified number of tax audit assignments under Section 44AB of the Income Tax Act, 1961 is 60.

It is further provided in amended Chapter VI of Council General Guidelines, 2008 that in case of firm of Chartered Accountants in practice, specified number of tax audit assignments means 60 tax audit assignments per partner of the firm, in a financial year.

Therefore, if there are 10 partners in a firm of Chartered Accountants in practice, then all the partners of the firm can collectively sign 600 tax audit reports. This maximum limit of 600 tax audit assignments may be distributed between the partners in any manner whatsoever. For instance, 1 partner can individually sign 600 tax audit reports in case remaining 9 partners are not signing any tax audit report.

Code of Ethics and Eligibility

The Tax Auditor has to follow the following code of ethics--

a) Tax Auditor is required to communicate with the previous Tax Auditor.
b) No need to communicate with Statutory Auditor.
c) A person is disqualified u/s. 288 from being appointment as an auditor if he or his relative is :
   - ➢indebted to the Assessee. (Relative may be indebted up to Rs.1,00,000/-)
   - ➢ Holds security (Relative can hold up to Rs.1,00,000/-)
   - ➢ gives guarantee on behalf of third person (Relative can give guarantee up to Rs.1,00,000/-)

A. X is appointed as Tax Auditor for the March 31,2021, whether it is necessary to communicate with previous Tax auditors / statutory auditors? What if the firm was not subject to Tax audit in the previous year but was subject to Tax audit a year before?

Communicating with previous auditor being a CA in practice would apply to all types of audit viz., statutory audit, tax audit, internal audit, concurrent audit or any other kind of audit. Mandatory communication with previous auditor being a CA required even if previous auditor happens to be an auditor for a year other than the immediately preceding year.

B. If he has communicated with previous tax auditor Y and who has objected that he cannot accept the tax audit as Y's professional fee for consultancy is outstanding. Should X accept the audit?

In case of an undisputed audit fees for carrying out the statutory audit under Companies Act, 1956 or various other statutes having not been paid, incoming auditor should not accept the appointment unless such fees are paid. In respect of other dues, the incoming auditor should in appropriate circumstances use his influence in favour of his predecessor to have the dispute as regards the fees settled.

What is the specified date up to which the report under Section 44AB of the Income Tax Act1961 should be furnished? (Analysis of Explanation (ii) of Section 44AB of the Income Tax Act, 1961)

In terms of section 44AB, report of audit is required to be furnished by the specified date. In terms of the Explanation (ii) to the said section, specified date meant the due date for furnishing the return of

income under sub-section (1) of section 139. The said Explanation has been amended, w.e.f. 01-04-2020 by the Act No.12 of 2020. The amended Explanation provides that "specified date", in relation to the accounts of the assessee of the previous year relevant to an assessment year, means [date one month prior to] the due date for furnishing the return of income under sub-section (1) of section 139 [inserted]. In terms of sub-section (1) of section 139, Explanation 2, 31st day of October of an assessment year is the due date (in cases other than an assessee required to furnish a reported referred to in section 92E). Accordingly, 30th September (of and in relation to an assessment year) would be the specified date by which report of audit under section 44AB is required to be furnished.

Applicability of Tax Audit in following cases:

Such cases may cover those assessees who are wholly outside the preview of income-tax law as well as those whose income is otherwise exempt under the Act. It is felt that neither section 44AB nor any other provisions of the Act stipulate exemption from the compulsory tax audit to any person whose income is exempt from tax. This section makes it mandatory for every person carrying on any business or profession to get his accounts audited where conditions laid down in the section are satisfied and to furnish the report of such audit in the prescribed form.

A trust/association/institution carrying on business may enjoy exemptions as the case may be under sections 10(21), 10(23A), 10(23B) or section 10(23BB) or section 10(23C) or section 11. A co-operative society carrying on business may enjoy deduction under section 80P. Such institutions/associations of persons will have to get their accounts audited and to furnish such audit report for purposes of section 44AB if their turnover in business exceeds the prescribed limit (Presently Rs.100 lacss w.e.f. A.Y. 2013-14).

Only Agriculture Income (Tax Audit Not Applicable) But an agriculturist, who does not have any income under the head "Profits and gains of business or profession" chargeable to tax under the Act and who is not required to file any return under the said Act, need not get his accounts audited for purposes of section 44AB even though his total sales of agricultural products may exceed the prescribed limit (Presently Rs.100 lacss w. e. f. A.Y. 2013-14)

Non-Residents: -

The case of non-residents may be considered separately.

Section 44AB does not make any distinction between a resident or non-resident. Therefore, a non-resident assessee is also required to get his accounts audited and to furnish such report under section 44AB if his turnover/sales/gross receipts exceed the prescribed limits. This audit, however, would be confined only to the Indian operations carried out by the non-resident assessee since he is chargeable to income-tax in India only in respect of income accruing or arising or received in India

Income below Taxable Limit: - It may be appreciated that the object of audit under section 44AB is only to assist the Assessing Officer in computing the total income of an assessee in accordance with different provisions of the Act. Therefore, even if the income of a person is below the taxable limit laid down in the relevant Finance Act of a particular year, he will have to get his accounts audited and to furnish such report under section 44AB, if his turnover in business exceeds the prescribed limit (Presently Rs.100 lacss w. e. f. A.Y. 2013-14).

Whether a tax audit report can be revised?

In certain cases, members are called upon to report on the accounts reopened and revised by the board of directors. The accounts of a company once adopted at its annual general meeting should not normally be reopened and revised. The Institute and the Ministry of Corporate Affairs have affirmed this position. In case of revision, the audit report should be given in the manner as required by the Institute in SA-560 (Revised), Subsequent Events. The Ministry of Corporate Affairs had also clarified that accounts can be revised to comply with technical requirements.

It may be pointed out that report under section 44AB should not normally be revised.
However, sometimes a member may be required to revise his tax audit report on grounds such as:
(i) revision of accounts of a company after its adoption in annual general meeting.
(ii) change of law e.g., retrospective amendment.
(iii) change in interpretation, e.g. CBDT Circular, judgments, etc.

CHAPTER 3

Concept & Meaning of Turnover

How to calculate the gross receipt or turnover?

'Turnover', 'Gross Receipts' and 'Sales' are the buzzwords during this Tax Audit season. Incidentally, they are the very starting point of a Tax Audit. They form the qualifying criteria, determine whether a taxpayer is liable to tax audit during a given year. Sec. 44AB of the Income Tax Act 1961 lays down limits of turnover beyond which taxpayers are liable to get their accounts audited by a Chartered Accountant and present a Tax Audit Report in Form No. 3CD. The deciding basis, i.e., 'turnover' is not defined in the Act, thereby leading to different interpretations. As per 'Guidance Note on Terms Used in Financial Statement' published by the ICAI, the meaning of 'Turnover' shall be the aggregate amount for which sales are affected by an enterprise.

Meaning of turnover

The term "turnover" has been understood for the purpose of Section 44AB to mean:

a. The aggregate amount for which sales are effected or services rendered by an enterprise. In case the assessee has opted for inclusive method of accounting and the sales price are inclusive of sales tax and excise duty, then no adjustment in respect thereof should be made for considering the quantum of turnover.

b. Trade discounts can be deducted from sales but not the commission allowed to third parties. In case assessee is following the practice of crediting the Excise duty and / or sales tax recovered separately to Excise duty or Sales tax Account (being separate accounts) and payments to the authority are debited in the same account, then the same will not be included in the turnover.

c. Sales of scrap shown separately under the heading 'miscellaneous income' will form part of turnover.

d. Further, the words "Sales", "Turnover" and "Gross receipts" are commercial terms. They should be understood in view of provisions of Section 145(1), which provide that income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" should be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. And as such the method of accounting

followed by the assessee is also relevant for the determination of sales, turnover or gross receipts.

Applying the above generally accepted accounting principles, a few typical cases may be considered:

(i) Discount allowed in the sales invoice will reduce the sale price and, therefore, the same can be deducted from the turnover.

(ii) Cash discount otherwise than that allowed in a cash memo/sales invoice is in the nature of a financing charge and is not related to turnover. The same should not be deducted from the figure of turnover.

(iii) Turnover discount is normally allowed to a customer if the sales made to him exceed a particular quantity. This being dependent on the turnover, as per trade practice, it is in the nature of trade discount and should be deducted from the figure of turnover even if the same is allowed at periodical intervals by separate credit notes.

(iv) Special rebate allowed to a customer can be deducted from the sales if it is in the nature of trade discount. If it is in the nature of commission on sales, the same cannot be deducted from the figure of turnover.

(v) Price of goods returned should be deducted from the figure of turnover even if the returns are from the sales made in the earlier year.

Example: M/s. X & co. achieved a turnover of Rs.103 lacs during the financial year 2020-21.It has sales return of Rs.3.5 lacs.Out of the sales returns of Rs.3.5 lacs, Rs.3.25 lacs represents the return out of sales made during the earlier financial year i.e. 2019-20.Whether tax audit is applicable?

Ans: In this case, the assessee has rightly debited the sales returns in the financial year 2020-21.Sales returns of earlier financial year are to be deducted from the sales of the current year. It is to be noted that the sales of earlier years are not a prior period item. In this case the turnover of the assessee shall be taken as 99.5 lacs which is less than 1crore the assessee is not required for audit u/s 44AB.

(vi) Sale proceeds of fixed assets would not form part of turnover since these are not held for resale.

Example: M/s. ABC Pvt Ltd Carry on business of trading in cloth. During the FY 2019-20, its turnover from business was Rs.98 Lacs. Also, the company sold its car for Rs.4 lacs during the year. The sale of car was shown as turnover for the purpose of GST returns. Whether Sec 44AB is applicable in this case?

Every Person,

(a) 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. In the present case, the turnover of

M/s. ABC Pvt Ltd from Business is Rs.98 lacss only and the amount received towards sale of car will not form part of turnover for considering the threshold limit of Rs.1 Crore u/s. 44AB.

(vii) Sale proceeds of property held as investment property will not form part of turnover.

(viii) Sale proceeds of any shares, securities, debentures, etc., held as investment will not form part of turnover. However if the shares, securities, debentures etc., are held as stock-in-trade, the sale proceeds thereof will form part of turnover. In case of share brokers or sub broker, only brokerage is to be taken into account for determining the quantum of turnover. If, however, the broker is undertaking share transaction on his personal account, the sale value should also be taken into account for the purpose of limit under section 44AB

A question may also arise as to whether the sales by a commission agent or by a person on consignment basis form part of the turnover of the commission agent and/or consignee as the case may be. In such cases, it will be necessary to find out, whether the property in the goods or all significant risks, reward of ownership of goods belongs to the commission agent or the consignee immediately before the transfer by him to third person. If the property in the goods or all significant risks and rewards of ownership of goods continue to belong to the principal, the relevant sale price shall not form part of the sales/turnover of the commission agent and/or the consignee as the case may be. If, however, the property in the goods, significant risks and reward of ownership belongs to the commission agent and/or the consignee, as the case may be, the sale price received/receivable by him shall form part of his sales/turnover.

In this context, it would be useful to refer to the CBDT Circular No.452 dated 17th March, 1986, where the Board has clarified the question of applicability of section 44AB in the cases of Commission Agents, Arhatias.

Q. Whether the provision of Section 44AB is applicable to commission agents, Arahtias, etc.?

Ans. Circular: No. 452 [F. No. 201/3/85-IT(A-II)], dated 17-3-1986.- The contents of the said Circular are reproduced below : [for Circular Please refer Annexure III] “1. Section 44AB, as inserted by the Finance Act, 1984, casts an obligation on every person carrying on business to get his accounts audited, if his total sales, turnover or gross receipts, as the case may be, exceed Rs.40 lacs in any previous year relevant to the assessment year commencing on 1-4- 1985 or any subsequent assessment year. The Board have received representations from various persons, trade associations, etc., to clarify whether in cases where an agent effects sales/turnover on behalf of his principal, such sales/turnover have to be treated as the sales/turnover of the agent for the purpose of section 44AB.The matter was examined in consultation with the Ministry of Law. There are various trade practices prevalent in the country in regard to agency business and no uniform pattern is followed by the commission agents, consignment agents, brokers, Kachha arahtias and Pacca arahtias dealing in different commodities in different parts of the country. The primary necessity in each instance is to ascertain with precision

what are the express terms of the particular contracts under consideration. Each transaction, therefore, requires to be examined with reference to its terms and conditions and no hard and fast rule can be laid down as to whether the agent is acting only as an agent or also as a principal.

The Board is advised that so far as Kachha arahtias are concerned, the turnover does not include the sales effected on behalf of the principals and only the gross commission has to be considered for the purpose of section 44AB. But the position is different with regard to Pacca arahtias. A Pacca arahtia is not, in the proper sense of the word, an agent or even Del Credere agent. The relation between him and his constituent is substantially that between the two principals. On the basis of various Court pronouncements, following principals of distinction can be laid down between a kachha arahtia and a pacca arahtia:

(1) A kachha arahtia acts only as an agent of his constituent and never acts as a principal. A pacca arahtia, on the other hand, is entitled to substitute his own goods towards the contract made for the constituent and buy the constituent's goods on his personal account and thus he acts as regards his constituent.

(2) A kachha arahtia brings a privity contract between his constituent and the third party so that each becomes liable to the other. The pacca arahtia, on the other hand, makes himself liable upon the contract not only to the third party but also to his constituent.

(3) Though the kachha arahtia does not communicate the name of his constituent to the third party, he does communicate the name of the third party to the constituent. In other words, he is an agent for an unnamed principal. The pacca arahtia, on the other hand, does not inform his constituent as to the third party with whom he has entered into a contract on his behalf.

(4) The remuneration of a kachha arahtia consists solely of commission and he is not interested in the profits and losses made by his constituent as is not the case with the pacca arahtia.

(5) The kachha arahtia, unlike the pacca arahtia, does not have any dominion over the goods.

(6) The kachha arahtia has no personal interest of his own when he enters into transaction and his interest is limited to the commission agent's charges and certain out of pocket expenses whereas a pacca arahtia has a personal interest of his own when he enters into a transaction.

(7) In the event of any loss, the kachha arahtia is entitled to be indemnified by his principal as is not the case with pacca arahtia.

The above distinction between a kachha arahtia and pacca arahtia may also be relevant for determining the applicability of section 44AB in cases of other types of agents. In the case of agents whose position is similar to that of kachha arahtia, the turnover is only the commission and does not include the sales on behalf of the principals. In the case of agents of the type of pacca arahtia, on the other hand, the total sales/turnover of the business should be taken into consideration for determining the applicability of the provisions of section 44AB.

The term "gross receipts" is also not defined in the Act. It will include all receipts whether in cash or in kind arising from carrying on of the business which will normally be assessable as business income under the Act. Broadly speaking, the following items of income and/or receipts would be covered by the term "gross receipts" in business.

i) Cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India.
ii) Any duty of customs or excise or service tax re-paid or repayable as drawback to any person against exports under the Customs and Central Excise Duties and Service tax Drawback Rules, 1995;
iii) The aggregate of gross income by way of interest received by the money lender.
iv) Commission, brokerage, service and other incidental charges received in the business of chit funds;
v) Reimbursement of expenses incurred (e.g. packing, forwarding, freight, insurance, travelling etc.) and if the same is credited to a separate account in the books, only the net surplus on this account should be added to the turnover for the purposes of Section 44AB;
vi) The net exchange rate difference on export sales during the year on the basis of the principle explained in (v) above will have to be added;
vii) Hire charges of cold storage
viii) Liquidated damages
ix) Insurance claims - except for fixed assets;
x) Sale proceeds of scrap, wastage etc. unless treated as part of sale or turnover, whether or not credited to miscellaneous income account.
xi) Gross receipts including lease rent in the business of operating lease.
xii) Finance income to reimburse and reward the lessor for his investment and services;
xiii) Hire charges and installments received in the course of hire purchase;
xiv) Advance received and forfeited from customers.
xv) Value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession.

The following items would not form part of "gross receipts in business" for purposes of section 44AB.

(i) Sale proceeds of fixed assets including advance forfeited, if any;

(ii) Sale proceeds of assets held as investments.

(iii) Rental income unless the same is assessable as business income.

(iv) Dividends on shares except in the case of an assessee dealing in shares.

(v) Income by way of interest unless assessable as business income.

(vi) Reimbursement of customs duty and other charges collected by a clearing agent.

(vii) In the case of a recruiting agent, the advertisement charges received by him by way of reimbursement of expenses incurred by him.

(viii) In the case of a travelling agent, the amount received from the clients for payment to the airlines, railways etc. Where such amounts are received by way of reimbursement of expenses incurred on behalf of the client. If, however the travel agent is conducting a package tour and charges a consolidated sum for transportation, boarding and lodging and other facilities, then the amount received from the members of group tour should form part of gross receipts.

(ix) In the case of an advertising agent, the amount of advertising charges recovered by him from his clients provided these are by way of reimbursement. But if the advertising agent books the advertisement space in bulk and recovers the charges from different clients, the amount received by him from the clients will not be the same as the charges paid by him and in such a case the amount recovered by him will form part of his gross receipts.

(x) Share of profit of a partner of a firm in the total income of the firm excluded from his total income under section 10(2A) of the Income-tax Act.

The guidance note issued by the Institute of Chartered Accountants of India on tax audit explains that in case of gross receipts of the business it will include all receipts whether in cash or in kind arising from carrying on of the business and it specially provides that for the purposes of section 44AB it would exclude partners share of profit which is exempt under section 10(2A).

The same view has been taken in the case of ITAT h *ACIT v. India Magnum Fund (Mum ITAT) - 74 TTJ 620, 81 ITD 295*. It was held that for section 44AB to be operational in first place there should be computation of profits and gains of business or profession i.e. computation of total income as per section 4, the income exempt under section 10 are those which do not form part of total income. Hence, the exempt income cannot be subjected to the provisions of section 44AB. Thus implying the share of partners profit which is exempt under section 10(2A) would not be considered for the purposes of the gross receipts.

(xi) Write back of amounts payable to creditors and/or provisions for expenses or taxes no longer required.

(xii) Advance received for services to be rendered is not to be included in gross receipts. As per ICAI view, such receipts are liabilities and not a part of gross receipts until services are rendered.

However, ITAT (Lucknow) in case of Gopal Krishan Builders [2004] 91 ITD 124 upheld a contrary view and held that the scope of the word “gross receipts” is quite wide to include advances also.

In the case of a professional, the expression "gross receipts" in profession would include all receipts arising from carrying on of the profession. A question may, however, arise as to whether the out of pocket expenses received by him should form part of his gross receipts for purposes of this section. Normally, in the case of solicitors, advocates or chartered accountants, such out of pocket expenses received in advance are credited in a separate client's account and utilised for making payments for stamp duties, registration fees, counsel's fees, travelling expenses etc. on behalf of the clients. These amounts, if collected separately either in advance or otherwise, should not form part of the "gross receipts". If, however, such out of pocket expenses are not specifically collected but are included/collected by way of a consolidated fee, the whole of the amount so collected shall form part of gross receipts and no adjustment should be made in respect of actual expenses paid by the professional person for and/or on behalf of his clients out of the gross fees so collected. However, the amount received by way of advance for which services are yet to be rendered will not form part of the receipts, as such advances are the liabilities of the assessee and cannot be treated as his receipts till the services are rendered.

Alleged undisclosed turnover not to be considered while determining prescribed limit of audit under section 44AB

Addition made by AO during the assessment proceedings on the basis of unaccounted sales cannot be regarded as the turnover for the purpose of section 44AB of the Act because the documents relied upon by AO are neither the part of books of account nor would substitute the books of account or constitute the books of account of the assessee regularly maintained.

In the case of instant appeal before Tribunal assessee challenged the order of CIT(A), wherein penalty under section 271B was upheld. Assessee contended that the turnover declared by assessee was below the limit prescribed under section 44AB. Case of assessee was that a certain sum alleging the same as undisclosed turnover, was included to determine the limit prescribed under section 44AB. Assessee contended that the said amount was not recorded in regular books of account thus could not be considered for levy of penalty under section 44AB.

It is held that Addition made by AO during the assessment proceedings on the basis of unaccounted sales cannot be regarded as the turnover for the purpose of section 44AB of the Act because the documents relied upon by AO are neither the part of books of account nor would substitute the books of account or constitute the books of account of the assessee regularly maintained. Therefore, the books of account maintained by the assessee in regular course of business cannot be substituted by

the material gathered by the AO in the course of some survey in the case of third party though the said material may be relevant evidence for making the addition to the income of the assessee.

(Nirmal Kumar Joshi v. ITO [ITA Nos. 73 & 74/JP/2018, dt. 27-3-2018] : 2018 TaxPub(DT) 2252 (Jp-Trib).IN THE ITAT, JAIPUR BENCH VIJAY PAL RAO, J.M. & VIKRAM SINGH YADAV, A.M.Satya Prakash Mundra v. ITO ITA No. 754/JP/2016)

Turnover in Speculative Transactions

Determination of Turnover In Respect Of Speculative Transaction

a. In a speculative transaction, the contract for sale or purchase which is entered into is not completed by giving or receiving delivery so as to result in the sale as per value of contract note.
b. The contract is settled otherwise and squared up by paying out the difference which may be positive or negative. As such, in such transaction the *difference amount is 'turnover'.*
c. In the case of an assessee undertaking speculative transactions there can be both positive and negative differences arising by settlement of various such contracts during the year. Each transaction resulting into whether a positive or negative difference is an independent transaction.
d. Further, amount paid on account of negative difference paid is not related to the amount received on account of positive difference. In such transactions though the contract notes are issued for full value of the purchased or sold asset the entries in the books of account are made only for the differences.
e. Accordingly, the aggregate of both positive and negative differences is to be considered as the turnover of such transactions for determining the liability to audit vides section 44AB, whether the differences are positive or negative.

Determination Of turnover in for Non-Speculative transactions

Determination of turnover in case of F&O is one of the important factors for every individual for the Income Tax purpose. F&O is also considered as non-speculative as these instruments are used for hedging and also for taking/giving delivery of underlying contract. Turnover must be firstly calculated, in the manner explained below:

1. The total of positive and negative or favorable and unfavorable differences shall be taken as turnover.

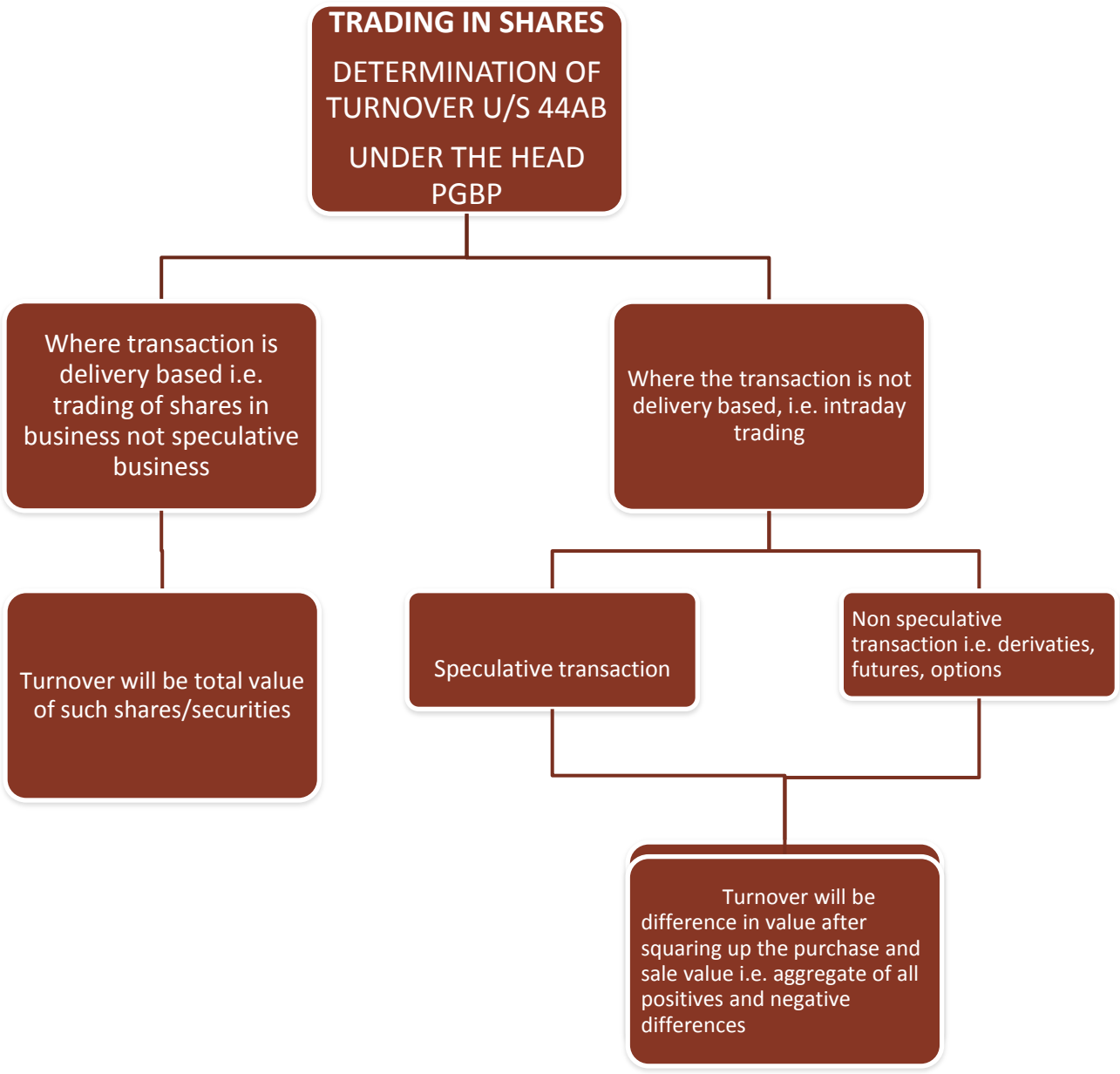
2. Premium received on sale of options is to be included in turnover.

3. In respect of any reverse trades entered, the difference thereon shall also form part of the turnover.

Here, it makes no difference, whether the difference is positive or negative. All the differences, whether positive or negative are aggregated and the turnover is calculated.

Determination of Turnover In Respect Of Delivery Based Transaction:

Where the transaction for the purchase or sale of any commodity including stocks and shares is delivery based whether intended or by default, the total value of the sales is to be considered as turnover.



The value of the sale transactions of commodity carried out through MCX without taking delivery could not be considered as "Turnover" for the purpose of section 44AB

Where share broker does not sell goods of its constituents as his own and only charges commission for bringing two parties together to transactions of sale and purchase of shares, such transactions cannot amount to 'sale, 'turnover' or 'receipt' of share broker himself within meaning of Sec. 44AB.

Cases	Remarks
In case of speculative transactions	Aggregate of both positive and negative differences – considered as turnover
In case of derivatives, F&O	Total of favourable and unfavourable differences is taken as turnover. Premium received on sale of options is also to be included in Turnover
In case of Delivery based transactions	Depends on whether transaction undertaken in the course of business or as investment. Also depends on facts and circumstances of each case considering nature of transaction, frequency and volume of transaction, etc.

Examples on Meaning of Turnover Or Gross Receipts

i. **Commission earned from Advertising agency** was to be Turnover and not the entire value of service. Sale on principal to principal basis: Gas Cylinders Agency, - "the agreement clearly indicated that the appellant was appointed as a distributor on principal to principal basis for sale of gas cylinders to consumers. Consequently, the sale of gas cylinders was liable to be included on the turnover of the appellant.

ii. **Treatment of discounts :** Trade discount should be excluded from 'sales' or 'turnover' for purpose of qualifying limit u/s. 44AB that discounts are allowed in sales bills themselves or at the time when payment were made by the parties to the assessee and the discount amounts are properly recorded in the assessee accounts.

iii. **Receipts from Job Work :**"It may be noticed that "sales", "turnover" or "gross receipts" are not words of art used in relation to any individual transaction independently, but have been used as "sales",

"turnover" or "gross receipts". The expression 'total' qualifies all the other three expressions viz. 'sales', 'turnover' and 'gross receipts'." So, job work receipts have to be clubbed to the total turnover.

iv. **Turnover for a chit fund:** Subscription amount collected by the foreman of a chit fund from subscribers is on capital account and thus not part of turnover/ gross receipts/ sales for the purpose of Sec. 44AB.

v. **Income of a nursing home, whether professional or business income:** Activities of a nursing home constitute business and not profession – "activities of the nursing home"...constitute business activity, and ITAT Rejects Revenue's contention that activities of assessee-firm constitute a vocation/ profession.

vi. **For Leasing transactions:** Value of lease rentals or interest on lease financing should be forming part of receipts for computation of limits.

vii. **For Hire purchase transactions:** The sale on hire purchase is completed when the borrower exercises his option to purchase. When the option is exercised, the price of the equipment sold will be considered as turnover. During the hire purchase period, the hire charges received shall form part of gross receipts. Installments towards principal repayment to be excluded.

viii. **A clearing and forwarding agent**: Not to include reimbursement of customs duty and other charges collected by an agent.

ix. **Travel agent**: Where no commission is payable by airlines. Amount received from clients for payment to airlines is reimbursement of expenses and not turnover.

x. **Advertising agency booking space:** Advertising charges recovered – not turnover, provided by way of reimbursement. ITAT decision in ABP(P)Ltd. v. ACIT [23 SOT 28(Kol)]

Q. An educational institution not for profit motive having Rs.100 Lacs of Gross Receipts is whether liable for tax audit? What will be the situation if the Gross Receipts exceed Rs.100 Lacs?

A. It is found that the provision of section **44AB** shall be applicable only to certain persons who fulfill the following conditions:

i. must be a person under the Income Tax Act.
ii. must carry on business or profession.
iii. must maintain books of account.
iv. whose profits or gains are from business or profession.

v. whose profits or gains are computable under Chapter IV.
vi. whose objects are to earn profit/gain from business/profession and income is taxable or loss allowable under the Act.
vii. whose income to be lower than the profits or gains so deemed under sections 44AD, 44AE and 44AF.

Where income of assessee is exempt under section 10, then it is not required to obtain audit report under section 44AB and is thus not liable for penalty under section 271B as was held in Asstt. CIT vs. India Magnum Ltd. (2002) 81 ITD 295 (Mum-Trib). In Case the Gross Receipts exceed Rs.100 Lacs the institution needs to obtain registration either under section 12A of the Income Tax Act or under section 10(23)(c)(vi). In case the institution is registered u/s 12A then audit report in Form 10B has to be filed and in case the institution is registered u/s 10(23C)(vi) then audit report in Form 10BB has to be filed.

Q. Mr. A is running a business and his sale for the F.Y. 2020-21 is Rs.96 Lacs. He had interest income of Rs.3.00 Lacs and Rental receipts of Rs.2.00 Lacs and Dividend income of Rs.1Lac. During the year there was a sale of fixed assets for Rs.5 Lacs. Is he liable for the tax audit?

Ans: As per Guidance note on tax audit issued by the ICAI, the term "gross receipts" is also not defined in the Act. It will include all receipts whether in cash or in kind arising from carrying on of the business which will normally be assessable as business income under the Act. However, following observations of the ICAI are noteworthy.

Items of income not forming part of the term "gross receipts in business"

(a) Sale proceeds of fixed assets.

(b) Sale proceeds of assets held as investments.

(c) Rental income unless the same is assessable as business income.

(d) Dividends on shares except in the case of an assessee dealing in shares.

(e) Income by way of interest unless assessable as business income.

(f) Reimbursement of customs duty and other charges collected by a clearing agent.

(g) In the case of a travelling agent, the amount received from the clients for payment to the airlines, railways, etc. where such amounts are received by way of reimbursement of expenses incurred on behalf of the client. If, however, the travel agent is conducting a package tour and charges a consolidated sum for transportation, boarding and lodging and other facilities, then the amount received from the members of group tour should form part of gross receipts. Similar is the case in respect of advertising agent.

Thus the principle to be applied is that if the assessee is merely reimbursed for certain expenses incurred, the same will not form part of his gross receipts. But in the case of charges recovered, which are not by way of reimbursement of the actual expenses incurred, they will form part of his gross receipts.

In view of the above, Mr. A is not liable for tax audit as his turnover has not reached Rs.100 Lacs.

Q. Whether GST amount needs to be included or excluded for the purpose of section 44AD, 44ADA or 44AB?

Ans: It is to be noted that section 44AD says about offering the income at prescribed percentage on the basis of its "Sales, turnover or gross receipts". Now a question arises Whether GST amount needs to be included or excluded for the purpose of section 44AD, 44ADA or 44AB?

Suppose Mr. X has a sold a goods of Rs.1.50 Cr in the FY 2019-20. The GST rate was 18% on his goods and so effectively the billing was done for Rs.1.77 Cr after including the GST of Rs.27 Lacs. He want to opt for the presumptive scheme of taxation and wish to offer the income @ 8% or 6% as the case may u/s 44AD. Question now is, whether the presumptive rate of taxation of 8% or 6% would be on Rs.1.77 Cr or Rs.1.50 Cr?

The Question now needs to be examined is whether GST shall be included while calculating the gross turnover or receipt?

First school of thought

It may be noted that Income-tax Act 1961 contains section 145A which provides for inclusion of taxes, cess, etc. in the value of sale, purchase and inventory. But, the purpose of this provision u/s 145A is limited to calculation of income taxable under the head 'Profits and Gains from Business or Profession'.
In case of a person who has opted for Composition Scheme under GST Act 2017, the tax is not separately charged in the bill from the customer and the amount is debited to the profit & loss as an indirect expense and so in such cases GST may not at all form part of the turnover

However, in case of other assessees, as GST is charged from the customer and it is recognized separately in the books of account. GST Collection & payment is done by the assessee as an agent of the Government in such cases and logically, cannot be treated as part of the assessee turnover.

Second school of Thought

As per Section 145A for the purpose of determining the **income chargeable** under the head "Profits and gains of business or profession", the **valuation of purchase and sale of goods or services** and of

inventory shall be adjusted to include the amount of any **tax, duty, cess or fee** (by whatever name called) actually paid or incurred by the assessee to bring the goods or services to the place of its location and condition as on the date of valuation.

Provisions of Section 44AD have overruling effect over the provisions of Section 28 to 43C. However Section 44AD does not over rule Section 145A hence the Section 44AD has to be read with Section 145A in order to do harmonious interpretation according to which the 8 %/6% is to be applied on the turnover inclusive of GST.

The other issue is whether the GST portion is included in determining the ceiling of 2 crore?

As per Section 145A, GST is required to be included in the valuation of turnover for the limited purpose of determining income chargeable to tax and not for the purpose of determining turnover. Hence assume a case where the eligible assessee has achieved turnover of Rs.1.90 Crore (without GST) and rate of GST is 18%. In this scenario, the eligible assessee shall be eligible to opt for Section 44AD subject to satisfaction of the other conditions of Section 44AD as the turnover does not exceed ceiling of Rs.2 Crorer however presumptive rate of 8 %/6% would be applicable not on 1.90 Cr but on 2.242 Crore being 118% of 1.90Crore.

From the above discussion, it can be concluded that the amount of GST in such cases need to be ignored for the following reason:

a) While collecting the GST, Assessee is acting as an agent of the Government and not on his own account.

b) Section 145A begins with the word “For the purpose of determining the income chargeable under the head “Profits and gains of business or profession” which makes this provision inapplicable for other purposes. In short, for the purpose of section 44AD, 44AB, 44ADA, this treatment is not relevant.

(c) The amount of GST is debited / credited to altogether different accounts which are now forming the part of the Credit side of Profit & Loss Account.

The issue is controversial for the simple reason that section 145A provides for its inclusions. Unless the CBDT clarifies the meaning of the word “turnover”, the issue would remain controversial and disputable.

Q. Does ICDS apply to non-corporate taxpayers who are not required to main books of accounts and/or those who are covered by presumptive scheme of taxation like section 44AD, 44AE, 44ADA, 44B44BB, 44BBA, etc. of the Act?

Answer : The captioned issue has been clarified by the CBDT VIDE the Circular No. 10/2017 dated March 23, 2017 regarding the applicability of ICDS on determination of turnover by non-corporate

taxpayers covered under presumptive taxation like Sections 44AD, 44AE, 44ADA, 44B, 44BB, 44BBA, etc. In this regard, in response to Question 3 on this topic, it has been clarified that ICDS shall also apply to persons computing income under presumptive taxation schemes. To illustrate this position, it is clarified that in case of taxation of a partnership firm under Section 44AD of the Act provision of ICDS on construction contract or revenue recognition shall apply for determination of its receipt or turnover.

Section 44AD of the Act provides that *"Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an eligible assessee engaged in an eligible business, a sum equal to eight per cent of the total turnover or gross receipts of the assessee in the previous year on account of such business or, … shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".* Thus, it mandates taxation of specified assessees @ 8% of the turnover or gross receipt. In this regard, the only variable is the amount of turnover i.e. whether the turnover should be considered as per the accounts or any adjustment can be made to it before applying presumptive tax rate of 8% on it. For instance, where a taxpayer covered within the ambit of Section 44AD is engaged in the construction business, which requires determination of turnover as per Percentage of Completion Method (POCM) both under accounts and ICDS. However, under ICDS III, retention money is included in contract revenue while under AS 7 this may not be the case. Thus, the revenue recognised as per books of accounts and ICDS would vary. In this context, it has been clarified that revenue as per ICDS III would be considered for the purpose of applying presumptive tax rate under Section 44AD of the Act. However, whether same principle would apply for determining turnover in other provisions such as for maintenance of books of account under section 44AA or applicability of audit under Section 44AB, is yet to be seen.

CHAPTER 4

Maintenance of Books of Accounts

Maintenance of accounts by certain persons carrying on profession or business.

44AA. *(1) Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act.*

(2) Every person carrying on business or profession [not being a profession referred to in sub-section (1)] shall,—

(i) if his income from business or profession exceeds one lacs twenty thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds ten lacs rupees in any one of the three years immediately preceding the previous year; or

(ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceed one lacs twenty thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession are or is likely to exceed ten lacs rupees, during such previous year; or

(iii) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AE or section 44BB or section 44BBB, as the case may be, and the assessee has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, during such previous year; or

(iv) where the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year,

keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act:

Provided *that in the case of a person being an individual or a Hindu undivided family, the provisions of clause (i) and clause (ii) shall have effect, as if for the words "one lacs twenty thousand rupees", the words "two lacs fifty thousand rupees" had been substituted :*

Provided further *that in the case of a person being an individual or a Hindu undivided family, the provisions of clause (i) and clause (ii) shall have effect, as if for the words "ten lacs rupees", the words "twenty-five lacs rupees" had been substituted.*

(3) The Board may, having regard to the nature of the business or profession carried on by any class of persons, prescribe[5], by rules, the books of account and other documents (including inventories, wherever necessary) to be kept and maintained under sub-section (1) or sub-section (2), the particulars

to be contained therein and the form and the manner in which and the place at which they shall be kept and maintained.

(4) Without prejudice to the provisions of sub-section (3), the Board may prescribe, by rules, the period for which the books of account and other documents to be kept and maintained under sub-section (1) or sub-section (2) shall be retained.

From the perusal of the provisions of sec 44AA of the Act, we can divide the section in following parts: The provisions of section 44AA can be summarized as under-

(A) Maintenance of books of account by 'specified (including notified) professionals'

Section 44AA(1) prescribes for compulsory maintenance of such books of accounts and other documents which will enable the Assessing Officer to compute his total income in accordance with the provisions of this Act. sub-section (1) applies to the followings-

1. A person carrying on a legal profession.
2. A person carrying on a medical profession.
3. A person carrying on engineering or architectural profession.
4. A person carrying on the profession of accountancy.
5. A person carrying on the profession of technical consultancy.
6. A person carrying on the profession of interior decoration.
7. Any other profession as notified by the Board. The CBDT has notified the following professions u/s 44AA(1) of the Act.

(1) A person carrying on the profession of an authorised representative or film artist. [Notification No. SO 17(E) dated 12-1-1977]

"Authorised representative" means a person who represents any other person, on payment of any fee or remuneration, before any tribunal or authority constituted or appointed by or under any law for the time being in force, but does not include an employee of the person so represented or a person carrying on a legal profession or a person carrying on the profession of accountancy.

"Film artist" means any person engaged in his professional capacity in the production of a cinematograph film, whether produced by him or by any other person, as -

i) an actor ;
ii) a cameraman ;
iii) a director, including an assistant director ;
iv) a music director, including an assistant music director ;
v) an art director, including an assistant art director ;
vi) a dance director, including an assistant dance director ;

vii) an editor ;
viii) a singer ;
ix) a lyricist ;
x) a story writer ;
xi) a screen-play writer ;
xii) a dialogue writer; and
xiii) a dress designer.

2. The profession of company secretary [Notification No. SO 2675 dated 25-9-1992]

"Company Secretary" means a person who is a member of the Institute of Company Secretaries of India in practice within the meaning of sub-section (2) of section 2 of the Company Secretaries Act, 1980 (56 of 1980).

3. The profession of information technology [Notification No. SO 385(E) dated 4-5-2001]

It may be noted that in the case of persons carrying on professions listed above or professions notified by the Board, the requirement of maintenance of accounts is applicable irrespective of the income or gross receipts of the person. In other words, a person carrying on specified or notified profession shall have to compulsorily maintain books of account and other documents. No monetary limit is specified in section 44AA(1). Hence, every person carrying on specified or notified profession has to compulsory maintain books of account and other documents. Certain relaxation is provided in the Rule 6F to professionals specified in the section 44AA itself and for notified persons in the profession of authorized representative and film artists.

In this regard, the Board has prescribed Rule 6F in The Income Tax Rules,1962 which prescribes for books of account and other documents to be kept and maintained under section 44AA(3) by persons carrying on certain professions.

It should be noted that Rule 6F has prescribed books of account and other documents only for specified professionals and certain notified professionals and not for persons carrying business. Hence, the rule does not specify any particular books of account or documents to be kept and maintained by the following persons-

1. A person carrying on business, or
2. Professions not specified under section 44AA(1), or
3. Notified professions under section 44AA(1) being the profession of company secretary and information technology.

Prescribed books of account and documents to be kept and maintained under section 44AA(3) read with Rule 6F

Rule 6F(1) states that any person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or authorised

representative or film artist is required to maintain books of account and documents as prescribed in Rule 6F(2).

The prescribed books of account and other documents under Rule 6F(2) are as follows:

a) a cash book;
b) a journal, if the accounts are maintained according to the mercantile system of accounting;
c) a ledger;
d) carbon copies of bills, whether machine numbered or otherwise serially numbered wherever such bills are issued by the person and carbon copies or counterfoils of machine numbered or otherwise serially numbered receipts issued by him. However, an exception is provided where the amount of the bill or receipts is less than Rs.25; and
e) original bills wherever issued to the person and receipts in respect of expenditure incurred by the person or, where such bills and receipts are not issued and the expenditure incurred does not exceed Rs.50, payment vouchers prepared and signed by the person. However, the requirements as to the preparation and signing of payment vouchers shall not apply in a case where the cash book maintained by the person contains adequate particulars in respect of the expenditure incurred by him.

Section 44AA provides for compulsory maintenance of accounts by certain categories of taxpayers. It provides that all taxpayers carrying on the profession of law, medicine, engineering, architecture, accountancy, technical consultancy or interior decoration or any other profession that may be notified by the Board shall maintain such books of account and other documents as may enable the Income-tax Officer to compute their total income, under the Income-tax Act, 1961.

It may be noted that every person carrying on specified or notified profession has to compulsory maintain books of account and other documents. Certain relaxation is provided in the Rule 6F to professionals specified in the section 44AA itself and for notified persons in the profession of authorized representative and film artists.

Sub-section (3) to section 44AA provides that the Board shall prescribe rules regarding the books of account and other documents (including inventories, wherever necessary) to be kept and maintained under sub-section (1) or sub-section (2), the particulars to be contained therein and the form and the manner in which and the place at which they shall be kept and maintained.

In this regard, the Board has prescribed Rule 6F in the Income Tax Rules, 1962 which prescribes for books of account and other documents to be kept and maintained under section 44AA(3) by persons carrying on certain professions.

Conditions for maintenance of prescribed books of account

Section 44AA(1) and section 44AA(2) prescribes for conditions when a person carrying business and/or profession is required to maintain the books of accounts and other documents.

Conditions for specified professions u/s 44AA(1)

As stated above, section 44AA(1), which deals with specified professions and notified professions, do not prescribe for any conditions for maintenance of books of account and other documents. Therefore, every person carrying on specified and/or notified profession shall be required to keep and maintain the prescribed books of account and other documents as per Rule 6F(1).

Rule 6F(1) has provided the following exception when the prescribed books of account and other documents are not required to be maintained-

(a) Where the profession has been newly set up by a person in the previous year, his total gross receipts in the profession for that year are not likely to exceed Rs.1,50,000.

(b) In any other case, if the total gross receipts in the profession do not exceed Rs.1,50,000 in any one of 3 years immediately preceding the previous year.

A plain reading of the proviso to Sub-rule (1) is that a person is not required to maintain books of account if the total gross receipts from the profession did not exceed Rs.150,000 in any one of the three years immediately preceding the previous year . The proviso states that nothing in Sub-rule (1) would apply if the income does not exceed Rs.150,000 in any one of the three years immediately preceding the previous year.

Therefore, if the gross receipts in all the three preceding previous years do not exceed Rs.1,50,000, in that case, no books of accounts and other records shall be required to be kept and maintained by the person carrying on the specified profession.

It should be noted that Rule 6F(1) covers all the specified professions and only authorised representative or film artist notified professions. Hence, the exception of monetary limit from non-maintenance of books of accounts for other notified professions viz. the profession of company secretary and information technology is not applicable. These professionals have to keep and maintain books of accounts and other documents irrespective of their quantum of income.

Conditions for non-specified professions and business u/s 44AA(2)

Section 44AA(2), which deals with non-specified professions and business, prescribes the following conditions for maintenance of books of account and other documents-

If the business or profession is newly set up in the previous year-

In case of Individual or HUF	(i) if income from the business or profession likely to exceed Rs.2,50,000 in the previous year, or
	(ii) if total sales, turnover or gross receipts from the business or profession likely to exceed Rs.25,00,000 in the previous year
In case of other persons	(i) if income from the business or profession likely to exceed Rs.1,20,000 in the previous year, or
	(ii) if total sales, turnover or gross receipts from the business or profession likely to exceed Rs.10,00,000 in the previous year.

In any other case-

In case of Individual or HUF	(i) if income from the business or profession exceeds Rs.2,50,000 in any one of 3 years immediately preceding the previous year or
	(ii) if total sales or gross receipts from the business or profession exceed Rs.25,00,000 in any one of 3 years immediately preceding the previous year.
In case of other persons	(i) if income from the business or profession exceeds Rs.1,20,000 in any one of 3 years immediately preceding the previous year or
	(ii) if total sales or gross receipts from the business or profession exceed Rs.10,00,000 in any one of 3 years immediately preceding the previous year.

Section 44AA(1)/Rule 6F(1) provides that the monetary limit of Rs.1,50,000 do not exceed in any one of 3 years immediately preceding the previous year for the applicability of Rule 6F(1). It means in all the last three years the gross receipts from the profession must exceed Rs.1,50,000.
Section 44AA(2) worded the conditions differently. It provides that the monetary limit of Rs.1,20,000 or Rs.10,00,000, as the case may be, exceeds in any one of 3 years immediately preceding the previous year for the applicability of section 44AA(2). It means if in any one year out of the last three years the income from the business or profession exceeds Rs.1,20,000 or Rs.1,50,000 or total sales, turnover or gross receipts from the business or profession exceeds Rs.10,00,000 or Rs.25,00,000, section 44AA\(2) will apply.

4. A profession not specified or notified under section 44AA(1) is covered under section 44AA(2).
The above rule is illustrated as follows-

- A “Chartered Accountant” (specified profession u/s 44AA(1) and is covered under Rule 6F(1)) is required to keep and maintain books of accounts and other documents as prescribed in Rule 6F(2) if gross receipts from the profession exceeds Rs.1,50,000/-.

- A “Doctor” (a notified profession u/s 44AA(1) and is covered under Rule 6F(1)) is required to keep and maintain books of accounts and other documents as prescribed in Rule 6F(2) if gross receipts from the profession exceeds Rs.1,50,000/-.
- A “Company Secretary” (a notified profession u/s 44AA(1) but is not covered under Rule 6F(1)) is required to keep and maintain books of accounts and other documents as prescribed in Rule 6F(2) for any amount gross receipts from the profession.
- A “Teacher” (non-specified profession u/s 44AA(1) is covered u/s 44AA(2)) is required to keep and maintain books of accounts and other documents if the income from profession exceeds Rs.2,50,000/- or gross receipts from the profession exceeds Rs.25,00,000/-. Further, no books of accounts or other documents are prescribed but are required to maintain such books of account and other documents as may enable the Assessing Officer to compute his total income.

5. A person carrying on business is always covered under section 44AA(2). No books of accounts or other documents are prescribed for a person carrying on business but is required to maintain such books of account and other documents as may enable the Assessing Officer to compute his total income.

6. Though no books of accounts and other documents have been prescribed for section 44AA(2), the prescribed books of accounts in Rule 6F(1) are the minimum or basic requirements for any person carrying on business or profession and hence also applies to section 44AA(2). Since books are prescribed for professionals they are not required to maintain any other books or documents over and above the prescribed ones. But for persons carrying on business, the AO may ask for any books or documents which will enable him to compute his total income.

Once the Board in respect of the particular nature of the profession prescribed maintenance of certain books of account, it is not open to the assessing authority to desire some other books of account to be maintained over and above the books of account required by Rule 6F. Any view to the contrary will defeat the very purpose of introducing Section 44AA and Rule 6F. [CIT vs Rajni Kant Dave (2006) 281 ITR 6 (All.-HC)]

This decision was rendered in respect of section 44AA(1) read with Rule 6F(1) for a profession covered u/s 44AA(1).

Mr. X is an chartered accountant. He gives the details of his gross receipts from profession:

FY 2017-18: Rs.1,05,000

FY 2018-19: Rs.1,40,000

FY 2019-20: Rs.2,00,000

Is he required to maintain any books of account u/s. 44AA in FY 2020-21?

Mr. X is carrying on the profession of chartered accountant which is a profession covered by Rule 6F(1) and the proviso thereto.

Since the gross receipts from the profession does not exceed Rs.1,50,000 in all the three previous years immediately preceding the financial year 2020-21, he is not required to maintain any specified books of accounts in FY 2020-21. However, he has to maintain minimum documents to prove his gross receipts from the profession like copies of bills, bank statements, etc.

Will the answer be the same if Mr. X is a qualified Company Secretary?

Profession of CS & IT are not covered under rule 6F(1), therefore they are not required to maintain books of account as prescribed under rule 6F(2). However, they have to maintain books of Account as prescribed under the definition of "Books or Books of Account u/s 2(12A).
The profession of Company Secretary is notified by CBDT and hence covered under section 44AA(1) but does not find a place in Rule 6F(1). Hence, the proviso to Rule 6F(1) will not apply. The monetary limit of Rs.1,50,000 will not apply to him. In this case, he has to maintain such books of accounts and other documents which will enable AO to compute his total income as stated in section 44AA(1).

7. Certain Sports personnel (Sports Persons, Umpires and Referees, Coaches and Trainers, Team Physicians and Physiotherapists, Event Managers, Commentators, Anchors and Sports Columnists) were notified as professionals by CBDT vide Notification No. 88/2008 dated 21-08-2008. However, this is notified under section 194J of the Income Tax Act, 1961 and not under section 44AA(1). Hence, for the purpose of section 44AA, they will be covered under section 44AA Place of keeping prescribed books of account and other documents

As per Rule 6F(4) the books of account and other document specified in Rule 6F(2) and (3) (other than those relating to a previous year which has come to an end) shall be kept and maintained by the person at the place where he is carrying on the profession or, where the profession is carried on in more places than one, at the principal place of his profession.
However, where the person keeps and maintains separate books of account in respect of each place where the profession is carried on, such books of account and other documents may be kept and maintained at the respective, places at which the profession is carried on.

Analysis Of the provisions of Sec 44AA(2) Of The Act

Sec 44AA(2) requires persons carrying on business to maintain books of accounts in certain cases. If a person is carrying on business, he is required to maintain books if his turnover exceeds Rs.10,00,000 or his profits from business exceeds Rs.1,20,000 in any of the three preceding years. Either of the condition satisfied will require person to maintain books because the word 'or' is used between the conditions. If any condition is satisfied in one or more years out of the three years preceding the previous year shall be required to maintain the books.

In case a new business is started during the previous year, if the turnover is likely to exceed Rs. 10,00,000 or profit is likely to exceed Rs.1,20,000 in such previous year, assessee is required to maintain books of accounts for that previous year. It is to be noted that the limit of Rs.1,20,000/- for Total Income & Rs.10,00,000/- for total sale receipts enhanced to Rs.2,50,000/- & Rs.25,00,000/- respectively in respect of Individuals/ HUF.

In respect of sec 44AA(2)(iv) of the Act, w.e.f. AY 2017-18, the assessee shall keep/maintain such books of account & other documents, if the provisions of Sec. 44AD(4) are applicable It means that if an assessee has declared profits as per sec 44AD(1) in any previous year and in the next 5 years he has failed to opt sec 44AD, then the assessee is not allowed to opt sec 44AD in the subsequent 5 years after the year in which he failed to opt sec 44AD. The assessee will be required to maintain books if sec 44AD(4) is applicable and his income exceeds the basic exemption limit.
From the reading od sec 44AA(2)(iv) of the Act, we draw following two conditions:

a) The assessee is not eligible for presumptive taxation u/s 44AD for subsequent 5 years, due to opting of presumptive taxation u/s 44AD in any previous year and not opting sec 44AD in any of subsequent 5 consecutive Assessment years.
b) His income exceeds the basic exemption limit.

Period for which prescribed books of account and other documents needs to be kept

As per Rule 6F(5), the books of account and other documents specified in Rule 6F(2) and Rule 6F(3) shall be kept and maintained for a period of six years from the end of the relevant assessment year.
Example: For the Financial Year 2018-19, the relevant assessment year is AY 2019-20. Thus, the specified books of account and other documents shall be kept up to March 31, 2026. In other words, the specified books of account and other documents of a financial year shall be kept and maintained for the next 7 financial years.
An exception is provided for the above period of six years rule. Where the assessment in relation to any assessment year has been reopened under section 147 of the Act within the period specified in section 149, all the books of account and other documents which were kept and maintained at the time of reopening of the assessment shall continue to be so kept and maintained till the assessment so reopened has been completed.
However, one should keep in mind that the above period so specified for retaining the books of accounts and other documents is the maximum statutory period for which one should keep these records. A person may keep the records for a longer period if he so wishes.

Maintenance of books of accounts and other documents, period for which and place where such books are required to be maintained for non-specified profession and business

No books of account and other documents have been prescribed for persons carrying on business or profession covered u/s 44AA(2). This does not mean that they are not required to maintain the books of accounts and other documents. They are also required to maintain the books of accounts and other documents. Actually, the purview for this category of persons is wider than the persons covered by section 44AA(1). In this case, the Assessing Officer can ask for any records which are reasonable for computing the total income of the person.

Penalty for non-maintenance and non-retention of books of accounts

Section 271A provides for penalty for failure to keep, maintain or retain books of account, documents, etc. as required under section 44AA or the rules framed thereunder. The penalty is fixed at Rs.25,000 and shall be imposed by the Assessing Officer or CIT(A).

Nature of Business or profession	Category of Taxpayer	Threshold limit for Income	Threshold limit for Gross Turnover or Receipt
Specified Profession	Any	-	Mandatory in every case except when presumptive taxation scheme under Sec. 44ADA is opted by the assessee.
Non-Specified Professions	Individual or HUF	Rs.2,50,000	Rs.25 Lakh in any of the 3 year immediately preceding the previous year.
Non-Specified Professions	Others	Rs.1,20,000	Rs.10 lakh in any of the of the 3 years immediately preceding the previous year.
Business	Individual or HUF	Rs.2,50,000	Rs.25 lakh in any of the 3 years immediately preceding the previous years.
Business	Other	Rs.1,20,000	Rs.10 lakh in any of the 3 years immediately preceding the previous years.
Presumptive Tax Scheme Under Sec.44AD	Resident Individual or HUF	Rs.2,50,000	Taxpayer opted for scheme in any of last 5 previous year but not opt for in current year.
Presumptive tax scheme under section 44ADA	Resident Assessee	-	Taxpayer claims that his profits computed under Section 44ADA and total income exceeds the maximum exemption limit.

Penalty under Section 271A:

Rs.25,000 if the assessee does not confirm to the conditions of the said section.

Auditors reporting requirement in Tax Audit Report

Clause No. 11 (a) to (c).

(a) Whether books of account are prescribed under section 44AA, if yes, list of books so prescribed.
(b) List of books of account maintained and the address at which the books of account are kept. (In case books of account are maintained in a computer system, mention the books of account generated by such computer system. If the books of accounts are not kept at one location, please furnish the addresses of locations along with the details of books of accounts maintained at each location.)
(c) List of books of account and nature of relevant documents examined.

Points for Consideration

• Under this clause, list of books of account maintained and the address at which the books of account are kept, are to be reported.

• The tax auditor should obtain from the assessee a complete list of books of account and other documents maintained by him (financial and non- financial records).

• The tax auditor exercising his due diligence and professional acumen has to verify that the assessee has maintained such books of accounts and documents as may enable the Assessing Officer to compute the total income of the assessee in accordance with the provisions of the Act.

• Assessee whose accounts of the business or profession have been audited under any other law, the requirement for maintenance of books of account is contained in the relevant statutes.

• In the case of other assessees, normal books of account to be maintained will be cash book/bank book, sales/purchase, journal or register and ledger.

• Assessees engaged in trading/manufacturing activities should also maintain quantitative details of principal items of stores, raw materials and finished goods.

• In case of any discrepancy in the maintenance of required books of account is observed, the tax auditor considering the materiality effect and practicality should give particulars in Form No. 3CD.

• In case books of account are maintained over computer system, the list of books of account so maintained on computer system is to be given. As per section 2(12A) of the Income-tax Act, 1961, “books or books of account” includes ledgers, day-books, cash books, account books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device. Similarly, where the books of accounts are maintained in electronic or digital form and stored in cloud based storage system for the ease of access to them anytime and anywhere, the tax auditor should make a related observation in his report.

• From AY 2014-15, the address at which the books so maintained are kept is also required to be mentioned under clause (b), ‘address at which the books of account are kept’ having been inserted

under the said sub-clause vide Notification No.33 dated 25th July, 2014. In case the books of accounts are kept at more than one location, then the auditor is required to furnish the details of address of each such location along with the detail of books of account maintained at such locations.

• Section 4 of the Information Technology Act, 2000 states that "where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then notwithstanding, anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is – i. rendered or made available in an electronic form; and ii. accessible so as to be usable for a subsequent reference. Issues

• Whether the tax auditor is required to mention the address

Where books of account were kept during the year or at the time of tax audit?

• Information in respect of location at which books of account are kept during the year has to be mentioned, however management representation may be taken if at the time of tax audit the books are made available for verification at place other than the one they are normally kept at.

• Whether the tax auditor is required to visit all the locations wherever books of account are kept by the 155 assessee including where the books of account are maintained in computerized system?

• Whether the tax auditor should maintain documentary evidence to support/substantiate his visit to location(s) where books of account are kept.

• Ordinarily, there would be no need to personally visit the premises where books of account are kept, however verification of place/location in existence must be obtained by the Auditor. Further, if and where there arises any caution, the tax auditor may visit such place(s) as well. * In terms of the provisions of Section 128 of the Companies Act, 2013, the books of account are mandatorily required to be kept at the registered office of the company. In case the books of accounts are sought to be maintained at a place other than the registered office, the related resolution of the Board of Director is necessitated and upon passing of such resolution, the full address of such person is required to be intimated to the ROC within 7 days. However, books relating to transactions effected at the level of a branch office, the related books are kept at the branch office itself, subject to summarized returns etc. need to be sent to the registered office or the other place intimated to the ROC, as stated above, at regular intervals.

Disclosure in tax audit report when Profit including profit on Presumptive basis

To report under clause 12 of tax audit report, the tax auditor keep in mind the following points :

• In case profits and gains of the business are assessable on presumptive basis under any provision of the Act, reporting has to be of an amount included in Profit & Loss account

• It is not necessary to indicate whether such amount corresponds to the amount assessable under the relevant section relating to presumptive taxation

• The tax auditor may clarify by way of a note that the amount mentioned under this clause is not necessarily the actual amount of profits and gains chargeable to tax under the relevant section

Where the assessee carries on more than one business, the following 3 situations could arise –

- The assessee maintains separate set of books of accounts – in such a situation there will be no issue whatsoever
- The assessee maintains same set of books of accounts for more than one businesses – profits of some of which are taxable on presumptive basis and the profits of the others are not covered by presumptive taxation – in such a situation the auditor will have to ask the assessee to provide him and justify the basis on which expenses have been apportioned to various business. The auditor will have to arrive at a fair and reasonable estimate of such expenditure on the basis of evidence in his possession. The basis of apportionment of common expenditure should also be checked. If the auditor is not satisfied with the correctness of such apportionment, he should indicate such fact under this clause by way of a suitable note.
- The assessee maintains books of accounts for his regular business but does not maintain any books for business covered by presumptive tax provisions. In such cases, the auditor will be unable to satisfy himself about the correctness of the net income from the presumptive business credited to the profit and loss account. He should, state the amount of income appearing in the profit and loss account with a suitable note expressing his inability to verify the said figure. He may have to consider qualifying his report in Form 3CB.

CHAPTER-5

Presumptive Taxation Scheme Section 44AD

Special provision for computing profits and gains of business on presumptive basis.

44AD. (1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an eligible assessee engaged in an eligible business, a sum equal to eight per cent of the total turnover or gross receipts of the assessee 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 assessee, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession" :

Provided that this sub-section shall have effect as if for the words "eight percent", the words "six per-cent" had been substituted, in respect of the amount of total turnover or gross receipts which is received by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed] during the previous year or before the due date specified in sub-section (1) of section 139 in respect of that previous year.

(2) 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.

(3) The written down value of any asset of an eligible business shall be deemed to have been calculated as if the eligible assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

(4) Where an eligible assessee declares profit for any previous year in accordance with the provisions of this section and he declares profit for any of the five assessment years relevant to the previous year succeeding such previous year not in accordance with the provisions of sub-section (1), he shall not be eligible to claim the benefit of the provisions of this section for five assessment years subsequent to the assessment year relevant to the previous year in which the profit has not been declared in accordance with the provisions of sub-section (1).

(5) Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee to whom the provisions of sub-section (4) are applicable and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (2) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB.

(6) The provisions of this section, notwithstanding anything contained in the foregoing provisions, shall not apply to—

(i) a person carrying on profession as referred to in sub-section (1) of section 44AA;

(ii) a person earning income in the nature of commission or brokerage; or

(iii) a person carrying on any agency business.

Explanation.—For the purposes of this section,—

(a) "eligible assessee" means,—

(i) an individual, Hindu undivided family or a partnership firm, who is a resident, but not a limited liability partnership firm as defined under clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009); and

(ii) who has not claimed deduction under any of the sections 10A, 10AA, 10B, 10BA or deduction under any provisions of Chapter VIA under the heading "C. - Deductions in respect of certain incomes" in the relevant assessment year;

(b) "eligible business" means,—

(i) any business except the business of plying, hiring or leasing goods carriages referred to in section 44AE; and

(ii) whose total turnover or gross receipts in the previous year does not exceed an amount of two crore rupees.

We can decode the provisions of section 44AD(1) of the Act, by dividing the said section into following parts:

A) Notwithstanding anything to the contrary contained in sections 28 to 43C…

Section 44AD of the Act begins with a non-obstante clause "(1) Notwithstanding anything to the contrary contained in sections 28 to 43C"… Therefore by virtue of the non-obstante clause, Section 44AD of the Act has a superior position vis-à-vis the other provisions of the Income Tax Act 1961. Nevertheless, Section 44AD(2) of the Act also specifically mentions that any deductions allowable under Section 30 to 38 shall be deemed to have been given full effect. Therefore, there are no specific deductions available for the assessee opting for presumptive taxation under Section 44AD of the Act.

Therefore, Section 44AD (1) determines the taxability by invoking a deeming clause. Further, the section is titled as "Special provision for computing profits and gains of business on presumptive basis". Hence one may infer that Section 44AD is a self-contained code by its own means devoid of Section 28 to 43C as both chargeability and computation are embedded in it. Having inferred that Section 44AD(1) is a separate code by itself wherein it determines the profit computation without referring to Section 29 of the Act. Section 44AD(2) of the Act specifically mentions that the deduction allowable under Section 30 to 38 of the Act are deemed to have been allowed. Such a provision, prima facie appears unnecessary especially considering that Section 44AD (1) begins with a non-obstante

clause "(1) Notwithstanding anything to the contrary contained in sections 28 to 43C" which on a literal reading specifies that Section 44AD will override all the other provisions relevant for computing profits and gains from business i.e., Sections 28 to 43C of the Act, even if the same are contrary.

It is to be noted here that the non-obstante clause stresses on the term **contrary**. However, a similar non-obstante clause employed in the newly inserted Section 44ADA of the Act (Special provision for computing profits and gains of profession on presumptive basis), mentions "Section 44ADA. (1) Notwithstanding anything contained in sections 28 to 43C". On a comparison of Section 44AD and Section 44ADA of the Act, the term 'contrary' is absent in the latter section. Now, a question arises that whether the term 'contrary' used in Section 44AD is superfluous. However it does not appear to be superfluous since the proviso to Section 44AD(2) prior to Finance Act 2016 amendment, specifically mentioned that while determining the income deemed to be profits and gains of business under Section 44AD of the Act, deduction under Section 40(b) shall be allowed subject to the limits specified.
Therefore, Section 44AD of the Act which appears to be a separate self-contained code, specifically uses the term contrary in its non-obstante clause so as to enable the eligible assessee to avail the deduction under Section 40(b) of the Act prior to Finance Act 2016.
The new Section 44ADA of the Act does not provide for any deduction while determining the presumptive profits and this may be considered the reason for the absence of the word contrary in the non obstante clause.

It means section 28 to 43C of Income Tax Act, 1961 is not applicable on eligible assessee carrying on eligible business. Hence, no disallowance / no deemed income under Section 40(a), 40A, 40A(3), 40A(3A), 41 can be made. It has been specifically provided that if the taxable income is to be calculated at eight percent or six percent of turnover or gross receipts, then in that case provisions of section 28 to 43C are not to be taken into consideration for the purpose of computing taxable income. It is pertinent to note whether any adverse inference can be drawn by which any amount that would have been added, while calculating taxable income, such amount can be added while calculating income on presumptive basis. By exclusion clause in respect of section 28 to 43C it seems that no disturbance can be made on account of provisions of sec 28 to 43C if the total income is arrived at on the presumptive basis.

Example: Mr. X has paid Rs.15,000 for purchase of goods in cash. Can disallowance be made u/s. 40A(3).
Ans- No disallowance can be made under section 40A(3) for the same.

Example: Mr. X has paid Rs.38,000 to transporter for freight in cash. Can disallowance be made u/s. 40A(3)?
Ans- No disallowance can be made under Section 40A(3).

Example: Mr. X has contributed certain sum to national Laboratory which qualifies for deduction under section 35(2)(AA). Can deduction be claimed u/s. 35(2)(AA)?
Ans- No, if he chooses section 44AD he will not eligible for benefit of this section.

Example: Mr. Y has claimed bad debts written off of Rs.50,000 in year 2014-15. In P.Y. 2019-20 he has recovered Rs.30,000.

Ans- Separate addition of bad debts recovered may not be made if the profits are declared under presumptive taxation scheme.

Example: A Firm engaged in the business of warehousing as mentioned u/s 35AD & total receipts doesn't exceed Rs.200. Can he opt for Claim u/s 44AD?

Ans- Yes, the assessee who engaged in the business of warehousing u/s35AD can claim the benefits of Section 44AD. Since restrictions put via explanation to Section 44AD doesn't apply to Section 35AD business. However, it is interesting to note that such person can't claim the deductions u/s35AD since section 44AD overrides Section 35AD.

Issue on Disallowance U/S 43B

A very interesting issue on the disallowance u/s 43B of the Income Tax Act,1961 has been considered by Panaji Tribunal in case of Good Luck Kinetic v. ITO (2015) 58. The Tribunal held that 44AD starts with "notwithstanding anything to the contrary contained in Sec. 28 to 43C" whereas section 43B starts with the words "notwithstanding anything contained in any other provisions of this Act". The non-obstante clause in Sec. 43B has far wider amplitude. Hence, disallowance could be made by invoking the provisions of Sec. 43B.

This is because the said provisions u/s 28 to 43C are provisions relating to the computation of business income of the Assessee. However, a perusal of the provisions of Sec. 43B shows that the said provision is a "restriction" on the allowance of a particular expenditure representing statutory liability and such other expenses, claimed in the profit and loss account unless the same has been paid before the due date of filing the return.

Further, the non-obstante clause in Sec. 43B has far wider amplitude because it uses the words "notwithstanding anything contained in any other provisions of this Act". Therefore, even assuming that the deduction is permissible or the deduction is deemed to have been allowed under any other provisions of this Act, still the control placed by the provisions of Sec. 43B in respect of the statutory liabilities still holds precedence over such allowance. This is because the dues to the crown has no limitation and has precedence over all other allowances and claims. The disallowance made by the AO by invoking the provisions of Sec. 43B of the Act in respect of the statutory liabilities are in order even though the Assessee income has been offered and assessed under the provisions of Sec. 44AF of the Act.

Therefore, considering the view held by the aforesaid Tribunal, addition/ disallowance can be made u/s 43B even though the income has been declared u/s 44AD, 44ADA or 44AE

Example: Mr. X, having turnover of Rs.70,00,000 declared profit at 8% amounting to Rs.5,60,000. He has not deposited employer share of EPF of Rs.25,000 up to due date of return filing. Also, he has not paid bonus amounting to Rs.40,000 to his employees. Whether addition can be made u/s 43B if Mr. X opts for sec 44AD?

Yes, addition can be made u/s 43B even if income is declared u/s 44AD. In this case the income will be assessed as:

Profits declared u/s 44AD	**Rs.5,60,000**
Add-Disallowances u/s 43 B	
EPF not deposited up to due date of return filing	Rs.25,000
Bonus not paid up to due date of return filing	Rs.40,000
Assessed Income	Rs.6,25,000

An important Issue X & Co. a partnership firm opts for Section 44AD during the Previous Year 2019-20 fails to pay interest of Rs.5 Lacs to the scheduled Bank. Assessing Officer while making the Assessment U/s 143(3) enhanced the assessment by Rs.4 Lacs by invoking the disallowances U/s 43B be a Non-Obstante Clause. The Firm paid such interest during the Previous Year 2020-21 & claim allowances of such Interest while filing the ROI. Assessing Officer disallows the Interest contending that Section 44AD(2) restricts the assessee claims of any expenditure U/s 30 to 38 & Interest Expenditure is governed as per Section 36. Comment on the action of the Assessing Officer.

The Action of the Assessing Officer is not as per the law. Once the disallowances of interest were attracted U/s 43B the same will be allowed as per Section 43B itself. It means normally interest expenditure is allowed U/s 36 read with Section 43B on the payment basis if it is payable to the scheduled Bank. If Assessee fails to pay the interest then such interest will be disallowed as per Section 43B. Further, the proviso to Section 43B allows such expenditure during the Previous Year in which it is paid. Therefore, in the given case the Assessee firm is eligible to claim the Deduction of the Interest since such allowances are as per Section 43B & not as per Section 36. If Interest paid is further disallowed it will tantamount to Double Taxation.

Issue of disallowance u/s 40

Sec 40 begins with "Notwithstanding anything to the contrary in sections 30 to 38" It is to be noted that Section 40 is clothed in a negative language and it says that certain amounts shall not be deducted while computing income under the head "profits &gains of business or profession whereas section 44AD begins with "notwithstanding anything to the contrary contained in sec 28 to 43C". On analysis of both the sections, the amplitude of non-obstante clause of section 44AD is higher than the non-obstante clause of section 40. Section 40 relates to disallowance of certain expenses due to non-deduction of TDS or non-deduction/ non-payment of equalisation levy, remuneration/ interest by firm to partners in excess of allowed etc.

Therefore, these expenses would not be disallowed even if TDS has not been deducted. However, the assessee may be deemed as assessee in default as per section 201 as sec 44AD override provisions of section 28 to 43C but not the provisions of TDS.

Example: Mr. X declaring income u/s 44AD has made payment of interest to non-resident. However, no TDS has been deducted. Whether the expense will be disallowed u/s 40(a)?

The interest expense will not be disallowed as sec 44AD overrides sec 40(a). The assessee was required to deduct TDS as per sec 195. Although, he has not deducted the TDS, expense will not be disallowed. However, he may be considered as assessee in default as per sec 201 and other penal provisions may be applicable as sec 44AD does not override TDS provisions.

SECTION 44AD/ 44ADA r.w. SECTION. 40(a)(ia)

In ITO v. Mark Construction [2012] 23 taxmann.com 398 (Kolkata) the assessee engaged in civil construction disclosed profits exceeding 8% by opting for section 44AD provisions. In the assessment, the Assessing Officer called for books of account of the assessee and the assessee took a plea that the income was offered under section 44AD and hence maintenance / production of books of account was not compulsory. The Assessing Officer made addition of Rs.32,62,140 by invoking section 40(a)(ia). The tribunal held that since the assessee has disclosed profits more than 8% of the gross receipts, no disallowance under section 40(a)(ia) could be made.

No TDS default disallowance u/s. 40(a)(ia) for assessee opting presumptive basis taxation u/s 44AD

Surat ITAT in the case of Shri Bipinchandra Hiralal Thakkar

[TS-539-ITAT-2020(SUR)]rules in favour of assessee-individual [who offered income to tax on presumptive basis u/s. 44AD @ 8% on gross turnover), deletes TDS default disallowance u/s 40(a)(ia) for AY 2013-14; Noting that assessee made interest payments on unsecured loans and job work expenses without deducting TDS u/s 194A/194C, AO made disallowance u/s. 40(a)(ia); However, ITAT

refers to the non-obstante" clause at the beginning of section 44AD overriding the provisions of sections 28 to 43C; Relies on the judgement of SMS Bench Kolkata in the case of Jaharlal Mukherjee, wherein it was held ..the provisions of section 44AD of the Act overrides all other provisions contained in section 28 to 43C. Admittedly, the provisions of section 40(a)(ia)of the Act falls within this range of sections 28 to 43C of Chapter-XVII B of the I.T. Act." ; Rejects Revenue's stand that the dues to the crown has no limitation and has precedence over all other allowance and claims", opines that provisions of section 44AD have been enacted by the Legislature/Crown to provide benefit to small businessmen in terms of cost savings.

Issue of disallowance u/s 40A

Sec 40A relates to disallowance related to excess payment of related party, cash payment to a person in excess of Rs.10,000 in a day, payment to unapproved fund, mark to market losses etc. The comparison of sec 44AD and 40A is very interesting and different from sec 43B and sec 40. Sec 40A overrides all the other provisions of PGBP. The section begins with "The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other provisions of this Act relating to the computation of income under the head "Profits and gains of business or profession". The non-obstante clause of this section seems to override provisions of sec 44AD. However, the Panaji Tribunal in case of Good Luck Kinetic v. ITO (2015) 58 relating to disallowance u/s 43B have considered two points:

i) Amplitude of non-obstante clause

ii) Payment to crown i.e. statutory dues

The provisions of sec 40A are not related to statutory dues and such other dues. It just imposes restrictions on payments and disallows amount which is not paid as per the provisions of the Act. It is also to be noted that provisions of sec 40A of the Act are with regard to allowability of expenditure which has been actually incurred and claimed by the assessee from sec 30 to 38 of the Act. Therefore, if the assessee declares income as per the provisions of sec 44AD of the Act, no disallowance shall be made u/s 40A of the Act.

Interplay of Section 43CA vs. Section 44AD

It is a very special case which also tries to disturb the scope of sec 44AD of the Act. To understand this concept, we must see the sec 43CA of the Act, which reads as under:

43CA. *(1) Where the consideration received or accruing as a result of the transfer by an assessee of an asset (other than a capital asset), being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp*

duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration received or accruing as a result of such transfer:

***Provided** that where the value adopted or assessed or assessable by the authority for the purpose of payment of stamp duty does not exceed one hundred and [ten] per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of computing profits and gains from transfer of such asset, be deemed to be the full value of the consideration:*

***[Provided further** that in case of transfer of an asset, being a residential unit, the provisions of this proviso shall have the effect as if for the words "one hundred and ten per cent", the words "one hundred and twenty per cent" had been substituted, if the following conditions are satisfied, namely:—*

(i) the transfer of such residential unit takes place during the period beginning from the 12th day of November, 2020 and ending on the 30th day of June, 2021;

(ii) such transfer is by way of first time allotment of the residential unit to any person; and

*(iii) the consideration received or accruing as a result of such transfer does not exceed two crore rupees.**]***

(2) The provisions of sub-section (2) and sub-section (3) of section 50C shall, so far as may be, apply in relation to determination of the value adopted or assessed or assessable under sub-section (1).

(3) Where the date of agreement fixing the value of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement.

(4) The provisions of sub-section (3) shall apply only in a case where the amount of consideration or a part thereof has been received by way of an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account [93][or through such other electronic mode as may be prescribed[94]] on or before the date of agreement for transfer of the asset.

*[95]**[**Explanation.—For the purposes of this section, "residential unit" means an independent housing unit with separate facilities for living, cooking and sanitary requirement, distinctly separated from other residential units within the building, which is directly accessible from an outer door or through an interior door in a shared hallway and not by walking through the living space of another household.**]***

It is to be noted that section 44AD starts with "Notwithstanding anything to the contrary contained in sections 28 to 43C…." meaning thereby, indirectly, section 44AD is subject to section 43CA. This is not correct position of law. It is to be noted that the open ended coverage of section 44AD(1) is puzzling since sale of immovable property held as stock in trade governed by section 43CA is not brought

within the provisions of section 44AD. Section 44AD starts with non-obstante clause by saying that the provisions would prevail over sections 28 to 43C of the Act. The applicability of the section is however optional. Only when the taxpayer opts for the provisions of section 44AD, it would prevail over the provisions of sections 28 to 43C. Now a question arises, whether the provisions of sec 43CA of the Act are applicable in case of presumptive tax. In this connection it is to be noted that both these sections i.e.44AD and 43CA of the Act are deeming sections. A legal fiction is created only for a definite purpose and is limited to that purpose and should not be extended beyond it. It should be within the framework of the purpose for which it is created. Deemed to be is not an admission that it is in reality, rather it is an admission that it is not in reality what it is deemed to be.

'The meaning of total turnover/ gross receipts has not been defined u/s 44AD of the Act. But if we carefully read the provisions of sec 44AD(1), the words used are total turnover of such business. This means the assessee has to take actual turnover or gross receipts' and not the deemed turnover or receipts. Further, the terms 'total sales, turnover or gross receipts' are fiscal facts and cannot include deeming fiction created by section 43CA which categorically apply only 'for the purpose of computing profits and gains from transfer of asset' and is meant for taxing sale of immovable assets held as stock in trade where value adopted for stamp duty purposes by State Government authorities is more than 110% of the consideration. Similarly, new provision of section 43CA should not apply in cases governed by section 44AD for assessment of presumptive profits on sale of land/building.

Example: Mr. X is engaged in business of sale and purchase of property. He sells a property for Rs.10,00,000. The stamp duty value of the same is Rs.15,00,000. His total turnover other than is property is Rs.60,00,000. What will be his total turnover?

The stamp duty value of the property is more than 110% of consideration i.e. Rs.11,00,000 (110% of 10,00,000). If Mr. X opts for sec 44AD Rs.10,00,000 will be added in turnover as sec 43CA is not applicable in case income is declared u/s 44AD. The total turnover will be Rs.70,00,000.

If Mr. X not opts for sec 44AD, Rs.15,00,000 will be added in turnover. His total turnover will be considered as Rs.75,00,000.

In the case of an eligible assessee engaged in an eligible business

1) To claim the benefits of Section 44AD twin requirements must be satisfied. First, the assessee must be an Eligible Assessee who runs the eligible business. If Assessee is eligible one but who runs the business which is ineligible the benefits of Section 44AD couldn't opt for such ineligible business.
2) The definition of the eligible business is given in explanation (ii) to Section 44AD. Which includes all business whose total turnover/ gross receipts during the previous year doesn't exceed Rs.2 Crores as an eligible business except the business of Plying/hiring/ leasing goods carriages as referred to in Section 44AE

3) It means even if the turnover of Business of Plying/Hiring/Leasing of Goods carriage etc. is below Rs.2 Crores it will not cover U/s 44AD at any cost.

Meaning of Eligible assessee:

1) Resident Individual

2) Resident Hindu Undivided Family

3) Resident Partnership Firm (Except an Limited Liability Partnership Firm as defined under LLP Act, 2008)

Note: While explaining the meaning of eligible assessee, a rider also provided in *Explanation (a) to Sec. 44AD* for eligibility i.e.

Non Eligible Assessee under Sec.44AD of the Act

Explanation (a) to sec. 44AD provides the following are not covered under these provisions:

• An Individual / HUF / Partnership Firm who is a resident and claiming deduction under chapter III of the Act section10A, 10AA, 10B, 10BA relating to units located in FREE Trade Zone, Hardware & Software Technology Park etc. OR

• Claiming deduction under Chapter VI-A Part-C (deductions in respect of certain Incomes) i.e. Sections80HH to 80RRB.

The following are not covered u/s 44AD

- Individual /HUF who is not Resident
- Association of Person
- Firm having non-resident Status.
- A local Authority
- A co-operative Society
- LLP both Indian as well as Foreign
- Companies both Domestic and Foreign company
- Every Artificial Juridical Person

Example: A Partnership Firm X & CO. is involving in manufacturing of leather and it is offering income u/s 44AD each year. Now, it converts its business to LLP. Whether it can continue to offer income u/s 44AD?

The Presumptive Taxation scheme of Section 44AD provides that it can be adopted only by Individual, HUF and Partnership Firm and not LLP. So, it cannot offer presumptive income u/s 44AD since it has converted into LLP.

Example: Mr. X an Individual, who is offering income u/s 44AD each year, became a non-resident in the previous year 2018-19 relevant to assessment year 2019-20. Whether he can continue to offer presumptive income u/s 44AD?

The Presumptive Income u/s 44AD will be applicable only to the resident individual. Non-Resident cannot avail the benefit u/s.44AD.

Can income be offered under 44AD when one Partner is Non Resident?

As per Provision of Section 44AD, only a Resident Partnership Firm is an eligible assessee u/s 44AD partnership firm is a resident in India if then control and management of its affairs wholly or partly situated within India during the relevant previous year. Thus, the firm can opt for taxation u/s 44AD provided control and management of its affairs wholly or partly situated within India during the relevant previous year.

It is noteworthy that an assessee except resident individual/HUF/ Partnership Firm eligible u/s 44AD, such as company or a LLP shall not be required to get its accounts audited u/s 44AB of the act, even if :

1. his gross receipts during the year do not exceed Rs.1 Crore.
2. he reports income lower than the deemed profit under the presumptive rate of tax at 6 per cent or 8 per cent as the case may be, and
3. his taxable income exceeds maximum amount of taxable income not chargeable to tax.

Meaning of Eligible Business

The term has been defined under Explanation to subsection 6 of Section 44AD as under; "eligible business" means,—

- Any business except the business of plying, hiring or leasing goods carriages referred to in section 44AE; and
- Whose total turnover or gross receipts in the previous year does not exceed an amount of two crore rupees.'

The presumptive taxation scheme under section 44AD covers all small businesses with total turnover/ gross receipts of up to 2crores (except the business of plying, hiring and leasing goods carriages covered under section 44AE).

Restrictions to opt the provisions of presumptive taxation u/s 44AD (6) of the Act

The provisions of this section, notwithstanding anything contained in the foregoing provisions, Shall not apply to—

(i) a person carrying on profession as referred to in sub-section (1) of section 44AA;

(ii) a person earning income in the nature of commission or brokerage; or

(iii) a person carrying on any agency business.

As per the provisions of sub-section 6 of section 44AD, if an assessee has earned any income from specified activities such as commission, then provisions of section 44AD shall have no bearing on such assessee.

It is to be noted that meaning of words **"Commission or brokerage"** is same as given for the purpose of section 194H of the Act. Commission or brokerage includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person:

1. for services rendered (not being professional services), or
2. for any services in the course of buying or selling of goods, or
3. in relation to any transaction relating to any asset, valuable article or thing, not being securities.

Thus an assessee can't opt the provisions of sec 44AD.

So Eligible Business includes:

- Manufacturing
- Trading
- Wholesale
- Retail
- Job Work
- Service business
- Speculative/ Non speculative.

Assessee and Several Businesses

The provisions of Sec. 44AD of the Act apply to an 'Assessee'. Hence when a person carries on several businesses, viz. wholesale and/or retail and or manufacture, the turnover or gross receipts of all the businesses are to be considered for the purposes of this section. Whether separate books or combined books are maintained by the assessee is not material. Combined turnover or gross receipts of all the businesses would form the basis for calculation of presumptive income.

Example: Mr. X A Resident individual, is carrying on three eligible businesses, the turnover of which is as under –

Business A (Rs.145 Lac)

Business B (Rs.35 Lac)

Business C (Rs.25 Lac)

Whether he can opt for sec 44AD?

The Answer is **NO** because turnover of eligible business exceeds Rs.2 Crores. It is to be noted that when we take when we take combined turnover of three businesses, it exceeds Rs.2 crore. Hence, the assessee is not eligible for sec 44AD of the Act.

Example: A Person doing brokerage business who have received brokerage for Rs.90,00,000 and declaring income @ 5% of Rs.4,50,000. Should his books of Accounts be audit u/s 44AB since he is offering income less than 8%?

Ans. Audit u/s 44AB is applicable if he is declaring income lower than thereafter specified u/s 44AD. But, section 44AD is not applicable to Agency, Commission and Brokerage. Hence, he can declare income less than 8%.

Example: An Eligible Assessee is engaged in trading business of goods both in his own name and also as a consignee for another person. The Total Sales amount to Rs.1.30 Crores, Turnover Details are as follows:

Own Business Turnover = Rs.90 Lacss

Consignment Sales Turnover = Rs.40 Lacss

Whether Assessee can opt for Presumptive income computation or not?

For computing Turnover for 44AD, the turnover of sale of goods on his own name should alone to be considered i.e. Rs.90 Lacss. Here, the commission received on Consignment sales is liable for Tax Audit

only when such commission exceeds the limit of Rs.1 Crore. Consignment Commission can be offered at any rate (Even below 8%), provisions of Sec.44AD will not govern the commission income.

Can assessee opt for Sec. 44AD and Sec. 44AE together?

Now a question arises that whether an assessee can take the benefit of sec 44AD and sec 44AE together. To resolve this issue when we have to see the provisions of sec 44AD which reads –"…an eligible assessee engaged in an eligible business… sum equal to eight per cent of the total turnover or gross receipts of the assessee in the previous year on account of such business…"It clearly lays down that sec 44AE is not eligible business and it does not make the assessee ineligible to take the benefit of sec 44AD.The business covered under 44AE is not mentioned in 44AD(6), but only excluded from definition of "Eligible Business". So these two provisions can be claimed simultaneously

Example: Mr. X a Resident individual, is carrying on two businesses, the turnover of which is as under –

Business A (Eligible Business) Rs.70 Lacss
Business B (Transport u/s 44 AE) Rs.8 Lacss
Section 44AD and 44AE both are applicable. In the above said case, turnover of both the business shall not be clubbed and both the business shall be chargeable to tax u/s 44AD and 44AE of the Act respectively.

***B) A sum equal to eight percent of the total turnover or gross receipts of the assessee in the previous year on account of* such business…**

The minimum rate of the profit is 8% on Total Turnover or Gross Receipts of the Assessee. Now, the question arises what does Total Turnover or Gross Receipts means?

For the calculation of Total Turnover or gross receipts reference of section 145 & Section 145A must be given. Section 145 of the Income Tax Act, 1961 deals with the method of accounting to be followed by the assessee. It gives an option to the assessee that while calculating the income under the head Business/Profession assessee may opt for Cash system or accrual system of accounting. This is the reason Section 44AD also gives reference to the word Gross Receipts with intent to cover those cases where assessee follows the cash system of accounting. Gross Turnover means without including any purchase cost & any other direct or indirect cost. It should be the Gross revenue which is received or to be received by the assessee from the sale of goods or services.

Therefore where the Purchase of Goods or services & other expenditures are inclusive of taxes or not is not a matter of concern for the assessee who is covered by Section 44AD. However, whether tax, duties, cess, etc. which is collected by the Assessee covered u/s 44AD should be part of turnover or not is a matter of consideration. As per Section 145A(ii), the valuation of goods or services shall be

adjusted including the amount of any tax, duty, cess, or fess by whatever name called….. It means CGST/SGST/IGST etc. collected from the buyer by the assessee should also become part of the Gross Turnover. There are divergent views on this point.

C). ….as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the eligible assessee, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession"…

It is to be noted that in Section 44AD, the assessee must have to declare a minimum of 8% of the Gross turnover or gross receipts as his deemed income. However, Section 44AD(1) further gives an option to the assessee to claim more than 8% in his return of Income. It means it is the option given to the assessee & not to the Revenue to presume higher income of the assessee while making an assessment.

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•The ld. A/R of the assessee has submitted that the case of the assessee is covered under section 44AD of the Act as the turnover of the assessee is Rs.85 lacs which is not exceeding the limit provided under section 44AD. The ld. A/R further submitted that the assessee has declared profit of Rs.7.64 lacs which is 8.99% of the turnover. Therefore, even if there is a payment in cash which is hit by the provisions of section 40A(3), once the case of the assessee is covered under section 44AD and assessee has declared more than 8% of profit on the said turnover, then no further disallowance is called for.

•The ld. D/R has submitted that the assessee has not filed the return of income under section 44AD of the Act but the income declared in the return of income as per the books of account maintained by the assessee. Therefore, the assessee cannot take the plea of section 44AD even if the turnover of the assessee is less than the limit provided under the said provision.

•Tribunal held -Once the assessee has filed the return of income declaring the income based on the business results shown in the books of account then the AO is required to examine the correctness of the return of income and claim of the assessee in the context of business results shown as per the books of account.

•Merely because the turnover of the assessee for the year under consideration is less than the limit provided under section 44AD, would not preclude the ld. PCIT to exercise his jurisdiction under section 263 regarding violation of provisions of section 40A(3) of the Act. Thus 44AD has to be 'claimed'.

•Once income declared as per books of accounts, assessee cannot claim that since turnover is within limits of 44AD, therefore disallowances u/s 40A (or others) would not apply.

Meaning of words 'claimed to have been earned by the eligible assessee'

The section has been amended for the benefit of the assessee and the words claimed to have been earned by the eligible assessee. By the introduction of these words in section 44AD(1), the legislature shows his intention to accept specified income as returned income even if higher sum is earned by eligible assessee unless it is claimed by assessee in his Income Tax Return. The word "Claim" signifies the right of assessee to the extent to opt between actual profits and presumptive profits. It is further to be noted that to claim the profits upto presumptive rate is the right of the assessee and if the actual profits are more than the presumptive profits then it is an obligation of assessee to declare the actual profits to the department. In other words, the scheme of presumptive taxation provides both right- to the extent of presumptive profits and obligation to the extent of actual profits. It cannot be said that if an assessee who has opted for presumptive taxation is not liable to produce the evidence of the actual profits shown by him. The distinction between Right and obligation is very necessary here. The language of section 44AD(1) requires claims to have been made by an assessee for returning higher income. If there is no claim made by assessee in return for higher income, there is no higher income. The assessee, who has opted presumptive taxation system, is under no obligation to explain individual entry of cash deposit in bank unless such entry has no nexus with gross receipts

Example– Mr. Sham is carrying on business. The Turnover is Rs.90 Lacs. The profit as per his books or calculation is Rs.9 Lacs. However, he opts to return the income under section 44AD @ 8% i.e. Rs.7.20 lacs. Now a question arises regarding the power of AO to assess the difference of Rs.1.8 lacs as undisclosed income. In this case Mr. Sham has claimed the income of Rs.7.20 lac as in his return of income as his claim. The assessee is free to exercise this option at his will. Legally he is given the option by the statute and such an option cannot be equated with obligation cast upon the assessee. There is a definite difference between OPTION and OBLIGATION and an Option granted to the assessee cannot be construed to be his obligation when his actual income is more than 8% of Turnover. The AO cannot make any addition on this count as there is no provision under the Act permitting to make such addition. Further, the words used are "higher income claimed to have been earned by the assessee". It means that if the assessee has not made a claim in the return of Income regarding any higher income, it implies there is no claim for higher Income made by assessee. AO cannot claim that the assessee has earned higher income, because under the statue, he is not entitled to do so. Another pertinent point is that if 8% of profits have been declared, then 92% of the receipts have been expended. This amount is neither saved nor invested. AO can make addition if he is having sufficient evidence that the difference between actual profits and presumptive profits have been invested. In other words, the assessee cannot invest the difference between the actual profits and declared profits in any asset.

D). …….Provided that this sub-section shall affect as if for the words "eight percent", the words "six percent" had been substituted, in respect of the amount of total turnover or gross receipts which is received by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed] during the previous year or before the due date specified in sub-section (1) of section 139 in respect of that previous year…….

The presumptive rate of income would be 8% of total turnover or gross receipts. However, Proviso to sub-section (1) provides that the presumptive rate of 6% of total turnover or gross receipts will be applicable in respect of amount which is received

- By an account payee cheque or
- By an account payee bank draft
- By use of electronic clearing system through a bank account OR through such other electronic mode as may be prescribed.

During the previous year or before the due date of filing of return under section 139(1) in respect of the previous year. It is to be noted that the payment should have been received by an account payee cheque or an account payee bank draft. The payment received by crossed cheque shall be treated as cash payment received. In this connection it is to be noted that the difference between crossed cheque and account payee cheque is that the crossed cheque is being endorsed in favour of a person other than the drawee making it difficult to trace the constituent of the money. Keeping this idea in mind, the crossed cheques are not being considered payment as other than cash. This payment will be treated as cash.

However the assessee can declare in his return an amount higher than presumptive income so calculated, claimed to have been actually earned by him.Therefore here we can see that instead of adopting the accrual method, we have to focus on **actual receipt** of the sum.

✓ **Other Electronic Prescribed by CBDT**: The Central Board of Direct Taxes has prescribed other electronic modes to provide for the followings as an acceptable electronic mode of payments-

(a) Credit Card;

(b) Debit Card;

(c) Net Banking;

(d) IMPS (Immediate Payment Service);

(e) UPI (Unified Payment Interface);

(f) RTGS (Real Time Gross Settlement);

(g) NEFT (National Electronic Funds Transfer), and

(h) BHIM (Bharat Interface for Money) Aadhaar Pay".

For this purpose, a new Rule 6ABBA with the heading '**Other electronic modes'** is introduced in the Income Tax Rules, 1962. This rule has been given a retrospective effect and will come into force from 01- 09-2019 even though the notification was issued on 29-01-2020.

This proviso to sub-section (1) has been inserted w.e.f. 01/04/2017 to promote digital transactions. The government has offered incentive to the seller for accepting payment by banking channels or digital means by allowing lower rate of income. This was particularly necessary to encourage digital transactions after demonetization.

Assessee accepting payment through account payee cheque/ account payee draft or ECS through bank or other electronic mode can declare income at 6 % of turnover/ sales or gross receipts. However, the payment must be received before the due date of filing of return.

Example: M/s ABC, a partnership firm, is engaged in the trading business of readymade garments. Its turnover for the previous year 2020-21 is Rs.1,10,00,000. It follows mercantile system of accounting. It has received the amount of its turnover in the following manner

Amount of turnover	Mode of Receipt	Period of receipt of payment
70,00,000	Account payee cheques	01.04.2020-31.03.2021
15,00,000	Crossed cheques	01.04.2020-31.03.2021
10,00,000	RTGS (2,00,000 received on 25.5.2021)	
10,00,000	Cash (whole amount received during the P.Y. 2020-21)	01.04.2020-31.03.2021

Rs.5,00,000 is not received by the firm till the due date of filing return of income for the current previous year. The profits and gains as per the books of account maintained as per section 44AA is RS.6,80,000. What would be the total income of the firm for A.Y.2021-22, if it wishes to make maximum tax savings without getting its books of accounts audited?

Solution:

M/s ABC is eligible for presumptive taxation as per Sec 44AD, since his turnover is upto 2Cr.
Presumptive PGBP income = Turnover/ Gross Receipt x 8% but if turnover or gross receipt is received by account payee cheque/DD/ECS upto due date of return of return filing u/s 139(1)

and the PGBP Income = Turnover/ Gross Receipts x 6%.
M/s ABC have not got the books of a/c audited so they can opt for presumptive taxation.
Income 7,20,000 i.e. [(6% of 80,00,000) +(8% of 30,00,000)]

Amount received through account payee cheque or ECS before the due date of filing

= 70,00,000+10,00,000

= 80,00,000

Profit chargeable to tax under presumptive taxation

PARTICULAR	AMOUNT
8% of Rs.30,00,000 (10 Lacs + 15 Lacs+ 5 Lacs)	4,80,000
6% of Rs.80 Lacs (70 Lacs + 10 Lacs)	2,40,000
Total income from PGBP	**7,20,000**

Note: It is to be noted that amount received through crossed cheque will be treated as cash.

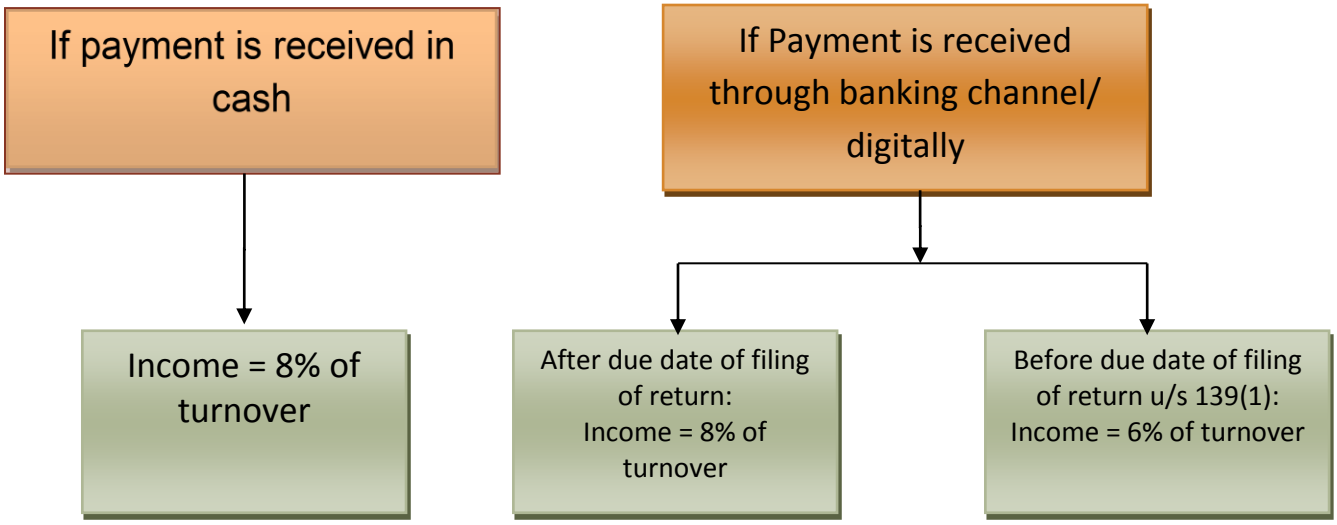
Example: Mr. X, an individual carrying business of laptop Turnover of Rs.80 Lacs during the F.Y. 19-20. He has received the payments as:

Rs.60 Lacs in cash
Rs.10 Lacs by account payee cheque during the previous year
Rs.4 Lacs by ECS through bank account upto 31st July 2019
Rs.6 Lacs has not been received yet.

Now, since the Turnover is below Rs.2 Cr, he has the option of availing benefits of section 44AD. Mr. X can exercise this option and declare income as

PARTICULAR	AMOUNT
8% of Rs.66,00,000 (60 Lacs + 6 Lacs)	5,28,000
6% of Rs.14 Lacs (10 Lacs + 4 Lacs)	84,000
Total income from PGBP	**6,12,000**

Computation of Income under Section 44AD



Benefit of the reduction of deemed profit rate under Section 44AD of the Income Tax Act, 1961 to taxpayers who will accept digital payments

Section 44AD of the Income Tax Act, 1961 provides that if taxpayer is engaged in the any eligible business and having a turnover of Rs.2 crore or less, its profits are deemed to be 8 per cent of the total turnover or gross receipts.

In order to achieve the government mission of moving towards a cash-less economy and to provide incentive small traders/businesses to proactively accept payments by digital means, it has been decided to reduce the existing rate of deemed profit of 8 per cent under Section 44AD of the Act to 6 percent in respect of the amount of total turnover or gross receipts received through banking channels digital means.

However, the existing rate of deemed profit of 8 per cent referred to in Section 44AD of the Act, shall continue to apply in respect of the total turnover or gross receipts received in cash.

The benefit to traders and small businesses is explained in following different scenarios considering FY 2020-21:

Particular	100% Cash Turnover	80% Digital Turnover	100% Digital Turnover
Total Turnover	1.90 Crore	1.90 Crore	1.90 Crore
Cash Turnover	1.90 Crore	38 Lacs	NIL
Digital Turnover	NIL	1.52 Crore	1.90 Crore
Profit on Cash Turnover @ 8%	15.20 Lacs	3.04 Lacs	NIL
Profit on Digital Turnover @ 6%	NIL	9.12 lacs	11.40 Lacs
Total Profit	15.20 Lacs	12.16 Lacs	11.40 Lacs
Tax Payable under New Regime	201240	122928	107120
Tax Saving	NIL	78312	94120

From the above table, it is clear that if an assessee makes his transactions in cash on a turnover of Rs.1.90 crore, then his income under the presumptive scheme will be presumed to be Rs.15.20 Lacs at the rate of 8 per cent of turnover, his total Tax Liability under new tax regime will be Rs.2,01,240. However, if an assessee shifts to 100 percent digital transactions and his profit will be presumed to be Rs.11.40 Lacs at the rate of 6 per cent of turnover, his total Tax Liability under new tax regime will be Rs.107120. It is to be noted that by adopting digital system i.e. non cash system. He will save income tax of Rs.94,120

Lower Rate of Income in Different Scenarios

As per the proviso to 44AD(1), income can be declared as 6% of the turnover if the payment is received digitally or through banking channel before the due date of return filing u/s 139(1). However, many a times due date for return filing is extended or sometimes it may happen that assessee files his return after due date or he has filed return earlier than the due date. We shall discuss here whether the assessee can claim 6% of turnover as his income under these scenarios.

Case 1- Due date of return filing is extended

The due date of return filing u/s 139(1) is extended by the Income Tax Department due to different reasons such as natural calamities, pandemic, technical glitches etc. The extended date becomes the due date u/s 139(1) of the Act for that assessment year. Therefore, any payment received through banking channel/digitally up to the extended due date u/s 139(1) of the Act shall be eligible for claiming 6% of turnover as income.

Example: Suppose the due date for filing return u/s 139(1) for the A.Y. 2020-21 has been extended to August 31, 2020. An eligible assessee who has received payment through account payee cheque,

account payee draft, ECS through banking channel or other prescribed modes up to 31/08/2020 shall be eligible for declaring profits at the rate of 6% of turnover.

Case 2- If the assessee files his return after the due date of return.

The proviso to sec 44AD(1) of the Act requires payment to be received up to due date of return filing. Any payment received even digitally/ through banking channel after the due date of return filing shall not be eligible for lower rate of income i.e. 8% of turnover or higher shall be assumed as income.

Example: Suppose the due date for filing return u/s 139(1) for the A.Y. 2020-21 is July 31, 2020 and the assessee files his return on Dec 26, 2020. Whether receipts through banking channel/ digitally up to Dec 26, 2020 will be eligible for claiming 6% of turnover as profits?

The receipts through banking channel/ digitally up to July 31, 2020 shall be eligible for claiming 6% of turnover as profits. The payments received after the due date i.e. 31/07/2020 shall not be eligible for lower rates and these payments received after the due date of filing return will not be given the benefit of 6% of turnover .

Case 3- If the assessee files his return before the due date of return.

When the assessee files his return before the due date u/s 139(1) of the Act, he would have considered the facts on the date of filing of return and not assumed the facts beyond that date. The receipts through banking channel/ digitally up to date of return filing are considered for lower rate of income and the amount not received yet shall be considered for 8% of turnover as profits. The interesting issue here is what about the payments received through banking channel/ digitally after the date of return filing but before the due date of return filing. Whether these will be considered for 8 % of turnover or 6% of turnover as profits? If 6% is to be considered whether the return can be revised? Let us understand this with help of an example.

Example: Mr. X has a turnover of Rs.80 Lacs for the A.Y. 2020-21. The due date of return filing is July 31, 2020. He files his return on May 15, 2020. He has received the following payments by account payee cheque:

Up to 31/03/2020 = Rs.50,00,000

Up to 15/05/2020 = Rs.15,00,000

From 16/05/2020 to 31/07/2020 =Rs.10,00,000

Received after 31/07/2020 =Rs.5,00,000

Mr. X has filed return on 15/05/2020. Till that date, payments to the extent of Rs.65,00,000 has been received by account payee cheque. Mr. X can declare profit from business as:

6% of Rs.65,00,000 = Rs.3,90,000

8% of Rs.15,00,000 (80L – 65L) = Rs.1,20,000

Total profits = Rs.5,10,000

Mr. X has received Rs.10,00,000 after date of return filing but before due date of return filing. Mr. X can claim 6% of Rs.10,00,000 as profits by revising the return. There is no doubt that the return can be revised u/s 139(5) before the end of assessment year or up to completion of assessment whichever is earlier. ITAT Delhi has held in the case of PAWA INDUSTRIES PVT LTD. VS. ITO, ITAT DELHI, 2017 it was held that if an assessee who was eligible for opting the scheme of presumption forgets to take the benefit of same can apply for revising the return to declare a lesser income and therefore file a revised return cannot be denied the benefit available to him.

The assessee has to maintain complete records about the receipts from customers, whether they are received in cash or through banking channel/ digitally and whether they are received up to due date of return filing or not. Further, the record maintenance is for two financial years. Maintenance of all these records is a cumbersome task for a small business person. It is also against the basic object of presumptive taxation which is to make the taxation system simple, easy and hassle-free for small taxpayers. There is a need to create a balance between the object of less-cash economy and creating 'ease of doing' business environment.

No further deduction would be allowed:

Section 44AD (2)-All deductions allowable under sections 30 to 38 shall be deemed to have been allowed in full and no further deduction shall be allowed. However, Deduction u/s 80C to 80U will be given from GTI of the assessee even from the deemed income included in the GTI.

Illustration: Mr. X is running a Printing Press. His gross receipts from this business during year is Rs.85,00,000 and declared income as per the provisions of section 44AD. After computing the income @ 8% of such gross receipts, he wants to claim further deduction on account of depreciation on the press building. Can he do so as per the provisions of section 44AD?

As per the provisions of section 44AD, from the net income computed at the prescribed rate, i.e., 8% of sales or gross receipts from the eligible business during the previous year, an assessee is not permitted to claim any deduction or any business expense from such income. Thus, in this case Mr. Shan cannot claim any further deduction from the net income of Rs.6,80,000 i.e., @ 8% of gross receipts of Rs.85,00,000.

Written down value of asset: ***Section 44AD (3):***The WDV of any asset of such business shall be deemed to have been calculated as if the assessee has claimed and had been actually allowed the deduction in respect of depreciation for each of the relevant assessment years.

It is to be noted that if an assessee who has opted for presumptive taxation system, then any deduction allowable under sections 30 to 38 shall be deemed to have been already given effect to and no further deduction under those sections shall be allowed. It is to be noted that deduction for depreciation which is allowed u/s 32 shall be deemed to be allowed. Therefore, current year depreciation as well as **unabsorbed depreciation** i.e. brought forward depreciation shall not be allowed. However, WDV of the block of assets shall be calculated as if the depreciation has been allowed.

Sec 44AD overrides sec 28 to 43C but does not override chapter VI. Therefore, current year losses & brought forward losses can be set off against deemed income. Unabsorbed depreciation cannot be adjusted u/s 32(2) from business profit computed u/s 44AD, however assessee is entitled to set off Brought Forward Business Loss u/s 72.

The same was held by ITAT, Pune in the case of DCIT v. Sunil M. Kankariya [2008].

Current year losses and brought forward losses can be set off against deemed income, because it's under Sec72. It was held in this case. In this case, the assessee was Transporter and 44AE was applicable. He had claimed benefit of unabsorbed depreciation.

Held - Unabsorbed depreciation carry forward having been provided in Section 32(2) in different manner and Section 72 deals with losses other than losses due to depreciation.

The area of operation and the manner of carry forward of these two types of losses in these two provisions are different and distinct

Example: A partnership firm consisting of three partners X, Y and Z is engaged in the business of manufacturing and selling toys.

Turnover of the business for the year ended 31st March, 2021 amounts to ₹ 95 lacs (received in cash). Bad debts written off in the books are ₹ 75,000. Interest at 12% is provided to partner Z on his capital of ₹ 6 lacs as authorized by the partnership deed.

The firm had business loss of ₹ 50,000 and unabsorbed depreciation of ₹ 1,50,000 carried forward from Assessment Year 2020-21. The firm did not pay tax under presumptive tax system in assessment year 2020-21. The firm opts for presumptive taxation under section 44AD for Assessment Year 2021-22.

Compute the income of the firm chargeable under the head "Profits and gains of business or profession."

Answer :

Computation of income of the firm chargeable under the head "Profits and Gains of business or profession" Particulars	₹
Presumptive income under section 44AD (8% of ₹ 95 lacs) **[See Note 1]**	7,60,000
Less: Brought forward business loss under section 72 **[See Note 3]**	50,000
Income of the firm chargeable under the head **"Profits and Gains of business or profession"**	**7,10,000**

Notes: -

(1) A partnership firm falls within the definition of "eligible assessee" under section 44AD. The threshold limit of turnover for applicability of presumptive taxation scheme under section 44AD is ₹ 200 lacs. In this case, since the turnover of the business of the firm is ₹ 95 lacs, it falls within the definition of "eligible business" and therefore, the firm is eligible to opt for presumptive taxation under section 44AD. 8% of the total turnover would be deemed to be the business income of the firm.

(2) As per section 44AD(2), all deductions allowable under sections 30 to 38 shall be deemed to have been allowed in full and no further deduction shall be allowed Accordingly, no deduction shall be allowed for bad debts since the same is deductible under section 36(1)(vii) and similarly unabsorbed depreciation is not deductible since the same is deductible under section 32(2).

(3) Further, business loss can be set-off against current year business income as per section 72.

Example:

Mr. X has turnover of Rs.50,00,000 for the P.Y. 2019-20. He has declared profits at the rate of 8% amounting to Rs.4,00,000. He has bought machinery worth Rs.12,00,000 on 15/04/2019. He has loss from house property of Rs.75,000. Can he deduct depreciation of Rs.1,80,000 (15% of Rs.12,00,000) and set off loss from the above profit of Rs.4,00,000?

No, depreciation shall not be reduced from the above profits. It is deemed that depreciation has been already claimed and allowed. The closing WDV as on 31/03/2020 shall be Rs.10,20,000 (12,00,000 – 1,80,000).

Mr. X shall be allowed to set off the loss of Rs.75,000. The total income will be Rs.3,25,000 (4,00,000 – 75,000).

EXAMPLE:

Mr. X is engaged in the business of Civil Construction undertakes small government projects. He received the following amounts by way of contract receipts:

Particulars	₹
Towards contract work for supply of labour	80,00,000
Value of materials supplied by Government	15,00,000
Gross receipts	95,00,000

Mr. X paid Rs.40,00,000 to labour in cash. He has brought forward loss and unabsorbed depreciation of the discontinued business Rs.55,000 and Rs.25,000 respectively. Compute income under the head "PGBP" assuming that he opts for section 44AD.

Solution:

Particulars	₹
Presumptive income under section 44AD [Rs.80,00,000 x 8%]	6,40,000
Less: unabsorbed depreciation	Nil
Less: Business loss brought forward u/s 72	(55,000)
Business Income	5,85,000

Notes:(1) As per para 31.1 of the circular no. 684 of CBDT dated 10-06-1994, gross receipts are the amount received from the clients for contract and will not include the value of material supplied by the client.

(2) Once assessee opts for section 44AD, deduction under section 30 to 38 shall be deemed to have been allowed. Therefore, question of disallowance in respect of labour payment of Rs.40,00,000 in cash under section 40 A(3) does not arise.

(3) Once assessee opts for section 44AD, deduction under section 30 to 38 shall be deemed to have been allowed. Since depreciation is governed by section 32(2), it cannot be adjusted while computing income under section 44AD of the Act. But brought forward business loss is governed by section 72, same shall be adjusted against presumptive income computed under section 44AD.

EXAMPLE: RSK & Co. a partnership firm engaged in the manufacturing business has a gross receipt of Rs.59,00,000 from such business. The partnership deed provides for payment of salary of Rs.20,000 p.m. to each of the partners i.e. C and K. The firm uses machinery for the purpose of its business and the WDV of the machinery as on 1.04.2019 is Rs.2,00,000. The machinery is eligible for depreciation @15%. Compute the profits from the business for the assessment year 2020-21, if firm opts for the scheme under section 44AD and has received the following amount by account payee cheques:

1. Rs.25,00,000 till 31.3.2020
2. Rs.6,00,000 between 01.04.2020 and 31.7.2020
3. Rs.5,00,000 after 31.07.2020

Solution: As per section 44 AD the profits will be computed as under:

	Particular	₹
1.	6% of gross receipts of ₹31,00,000	₹1,86,000
	i.e. the amount received till the due date of filing the return u/s 139(1)	
2.	8% of gross receipts of ₹28,00,000	₹2,24,000
	TOTAL	₹4,10,000

No deduction will be allowed on account of depreciation.

The WDV of the machinery for next year shall be taken as ₹1,70,000 (2,00,000 – 15% of ₹2,00,000) assuming as if depreciation has been allowed.

***Section 44AD (4):* Consequences of opting out of the section 44AD(1):**

Where an eligible assessee declares profit for any previous year in accordance with the provisions of this section and the declares profit for any of the 5 assessment years relevant to the previous year succeeding such previous year not in accordance with the provisions of sub-section (1), he shall not be eligible to claim the benefit of the provisions of this section for five assessment years subsequent to the assessment year relevant to the previous year in which the profit has not been declared in accordance with the provisions of sub-section(1).

The above provision postulates as the following:
a. The assessee should have declared profit as per section 44AD for any previous year; and

b. The assessee should have declared profit not in accordance with section 44AD in any of the five assessment years succeeding the previous year in which profit was declared as per section 44AD as per condition (a).

If above two conditions are satisfied, such assessee shall not be eligible to claim the benefits of Section 44AD for five assessment years subsequent to the assessment year in which profit was not declared as per section 44AD as given in condition (b) above.

It means that if a person has opted for a presumptive scheme of taxation u/s 44AD in any one year then he has to remain in the umbrella of section 44AD for the next 5 years. If he goes out of the umbrella of section 44AD in any one of the subsequent 5 years then such person cannot take the shelter in the umbrella of section 44AD for next 5 years thereafter (i.e., such person has to remain out of Section 44AD for 6 years in continuation).

Section 44AD (5): Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee to whom the provisions of sub-section (4) are applicable and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (2) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB.

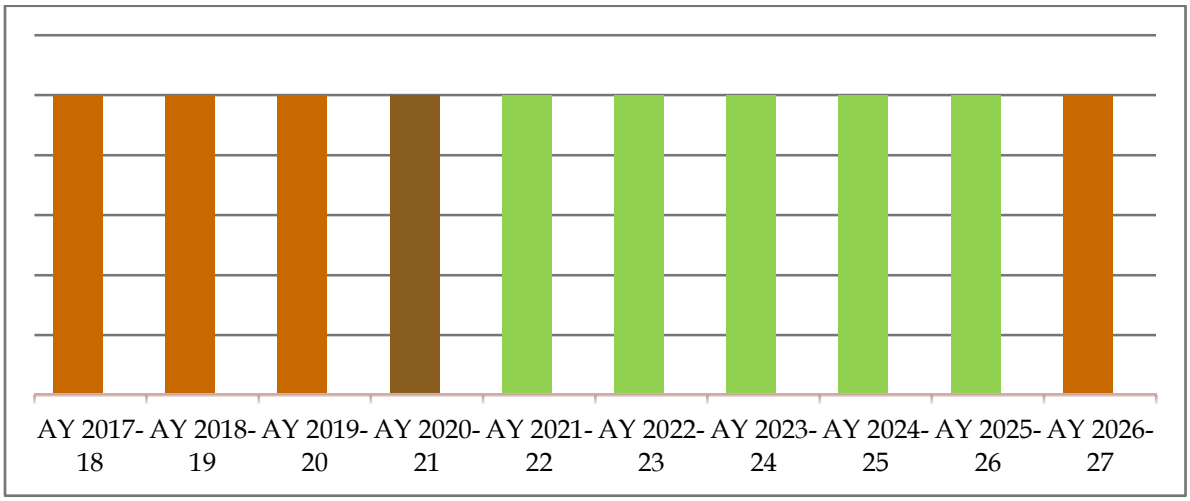
It is to be noted that the basic exemption limit of Rs.2,50,000 is to be considered in case of an assessee who has not attained the age of 60 years during the previous year and Rs.3,00,000 is basic exemption limit for senior citizens and Rs.5,00,000 is for super senior citizens who are of 80 years or above. In this connection it is to be noted that rebate u/s 87 A is the tax rebate and it comes into play once the tax liability after the basic exemption limit is computed. Hence for the purposes of section 44AD(5) is of no relevance. Since the relevance of rebate u/s 87A will arise only when the total income of the assessee increased beyond Rs.2,50,000. If the case of the assessee is covered u/s 44AD(5) & his total income exceeds the maximum amount not chargeable to the Income Tax he is subject to Tax Audit.

Sub Section 5 will be applicable if following conditions are satisfied.
a. An eligible assessee to whom the provisions of sub-section (4) are applicable; and

b. The total income of that assessee has exceeded the maximum amount which is not chargeable to income-tax.

In other words, sub-sections (4) and (5) are mutually inclusive. Provisions of sub-section (4) shall not be applicable to an assessee who never opted for the scheme in any of the earlier previous years, as it provides that the eligible assessee should have declared profits as per section 44AD for any previous year. Under this situation, assessee who have never ever opted for the scheme till the AY 2016-17 can enjoy the benefits by showing lesser profits for the subsequent assessment years.

The working of the above provisions can be explained with the help of the following diagram:



Example: Mr. X commenced his business during FY 2019-20 relevant to AY 2020-21. He was engaged in a business of trading of goods. He reported total turnover of the business during the year as Rs.85 Lacss, entire sales were in cash. Mr. X computed profit from the aforesaid business to be Rs.2.30 Lacs which was his sole income during the year. Whether Mr. X is required to maintain books of accounts in accordance with provisions of section 44AA and whether he has to get his accounts audited u/s 44AB?

Firstly, Mr. X is not required to get his accounts audited u/s 44AB of the Act his total income for the FY 2019-20 is less than maximum amount not chargeable to tax even if he had claimed profit from business less than deemed income u/s 44AD i.e., actual income of Rs.2.30 Lacs is less than deemed income of Rs.6.8 Lacss (8% of 85 Lacs). (Section 44AD(5)]

However, Mr. X is required to maintain such books of account and other documents as may enable the AO to compute his total income in accordance with Second proviso to section 44AA(2) of I.T. Act, 1961 as his total turnover is more than limit of Rs.25 Lacs.

Example: Mr. X commenced his business during F.Y. 2019-20 relevant to AY 2020-21. He was engaged in a business of trading of goods. He reported total turnover of the business during the year as Rs.85

Lacss, the entire sales were made in cash. Mr. X computed profit from the aforesaid business to be Rs. 2.90 Lacs which was his sole income during the year. Whether Mr. X is required to maintain books of accounts in accordance with provisions of section 44AA and whether he has to get his accounts audited u/s 44AB?

Firstly, Mr. X is not required to get his accounts audited u/s 44AB of the Act as he had claimed profit from business less than deemed income u/s 44AD i.e. actual income of Rs.2.90 Lacs is less than deemed income of Rs.6.8 Lacs (8% of 85 Lacs). However the provision of section 44AD(4) shall not be applicable as this is his first year of business. [Section 44AD(4)]

Also, Mr. X is required to maintain such books of account and other documents as may enable the AO to compute his total income in accordance with the provisions of this Act, as his total turnover is more than limit of Rs.25 lacs prescribed under second proviso to section 44AA(2) of I.T. Act, 1961.

Example: Mr. X commenced his business during FY 2020-21 relevant to AY 2021-22. He was engaged in a business of trading of goods. He reported total turnover of the business during the year as Rs.95 Lacss, entire sales were made in cash. Mr. X computed loss from the aforesaid business to be Rs.3.90 Lacs which was his sole income during the year. Whether Mr. X is required to maintain books of accounts in accordance with provisions of section 44AA and whether he has to get his accounts audited u/s 44AB?

Firstly, Mr. X is not required to get his accounts audited u/s 44AB of the Act, he claimed profit from business less than deemed income u/s 44AD i.e. actual loss of Rs.3.90 Lacs is less than deemed income of Rs.7.6 Lacs (8% of 95 Lacs). However the provision of section 44AD(4) shall not be applicable as this is first year of business. [Section 44AD(4)]

Also, Mr. X is required to maintain such books of account and other documents as may enable the AO to compute his total income in accordance with the provisions of this Act, as his total turnover is more than limit of Rs.25 Lacs prescribed under second proviso to section 44AA(2).

Exceptions to the provisions of section 44AD(4) & Sec. 44AD(5)

From the perusal of the study of the above sections, we have noted that once an assessee fails to opt the provisions of presumptive taxation, then that assessee cannot opt for these provisions for the next five years and he has to maintain the books and get them audited. But there are certain cases in which the assessee fails to opt the provisions not by his own option but is not eligible to opt for presumptive taxation due to increase in turnover or receipt of any commission. It is to be noted that the word option means when a person has more than one choice. But in the following cases, the assessee has no option but only compulsion.

1. **Assessee has not opted for presumptive taxation because of ineligible business**

   If a person has opted for presumptive taxation during previous years and due to increase in turnover over 2 crores during the current year, he is ineligible to opt the provisions of sec 44AD(1) of the Act. His business is an not eligible assessee u/s 44AD of the Act being total turnover is more than Rs.2 Crore. [Section 44AB(a) r.w.s. 44AD(1)] It is pertinent to note that person is not eligible to claim presumptive taxation for the year, he will not be covered by the provisions of section 44AD(4) and option to opt for presumptive taxation u/s 44AD(1) will be available in subsequent assessment years also.

Turnover of Mr. X for the F.Y. 2019-20 was Rs.74 Lacss. He has opted for Sec 44AD in that year. In the F.Y. 2020-21, his turnover was Rs.2.5 crores(in cash) He was required to maintain books of accounts and get them audited u/s 44AB. Now the question arises whether he can avail the benefit of Sec 44AD from F.Y. 2021-22?

Mr. X's turnover in the F.Y. 2020-21 was Rs.2.5 crores. He was required to get his books of accounts audited. Mr. X is required to get his accounts audited u/s 44AB(a) of the Act as he reported total turnover exceeds the limit of Rs.1 Crore as prescribed u/s 44AB{a) of the Act as he doesn't satisfy the condition of 95% of total receipts and expenses to be incurred in electronic mode. Whereas his business is not an eligible assessee u/s 44AD of the Act, as his total turnover is more than Rs.2 Crore. [Section 44AB(a) r.w.s. 44AD(1)]

It is pertinent to note that Mr. X was not eligible to claim presumptive taxation for the year, he will not be covered by the provisions of section 44AD(4) and option to opt for presumptive taxation u/s 44AD(1) will be available in subsequent assessment years. There was no option to MR. X to opt for the provisions of presumptive tax and he has to break the chain of sec 44AD by the operation of law and not on his own will. The requirement for continuously declaring profits u/s 44AD is not violated. The link is not broken due to compulsory applicability of Sec 44AB(a). Therefore, he can avail the benefit of Sec 44AD from F.Y. 2021-22.

Example:–Mr. A is engaged in a business of trading of goods. During FY 2019-20, he reported Total turnover of the business as Rs.2.25 Crore (50% of total sales were made in cash). Mr. A computed profit from the aforesaid business to be Rs.6.80 Lacs which was his sole income during the year. During FY 2017-18 and FY 2018-19, he opted for presumptive taxation scheme u/s 44AD. Whether Mr. A is required to get his accounts audited u/s 44AB for FY 2019-20?

Solution: Mr. A is required to get its accounts audited u/s 44AB(a) of the Act as assessee reported total turnover exceeds the limit of Rs.1 Crore as prescribed u/s 44AB(a) of the act as he doesn't satisfy the condition of 95% of total receipts and expenses to be incurred in electronic mode. Whereas his business is not an eligible assessee u/s 44AD of the act being total turnover is more than Rs.2 Crore. [Section 44AB(a) r.w.s. 44AD(1)] It is pertinent to note that being Mr. A was not eligible to claim

presumptive taxation for the year, he will not be covered by the provisions of section 44AD(4) and option to opt for presumptive taxation u/s 44AD(1) will be available in subsequent assessment years.

Example: – Mr. A is engaged in a business of trading of goods. During FY 2019-20, he reported total turnover of the business as Rs.2.25 Crore (complete sales and payments were made in electronic mode). Mr. A computed profit from the aforesaid business to be Rs.6.80 Lacs which was his sole income during the year. During FY 2017-18 and FY 2018-19, he opted for presumptive taxation scheme u/s 44AD. Whether Mr. A is required to get his accounts audited u/s 44AB for FY 2019-20?

Solution: Mr. A is not required to get its accounts audited u/s 44AB of the Act as he has reported total turnover is within limit of Rs.10 Crore as prescribed u/s 44AB(a) of the Act whereas his business is not an eligible assessee u/s 44AD of the Act being total turnover is more than Rs.2 Crore. [Section 44AB(a) r.w.s. 44AD(1)] It is pertinent to note that being Mr. A was not eligible to claim presumptive taxation for the year, he will not be covered by the provisions of section 44AD(4) and option to opt for presumptive taxation u/s 44AD(1) will be available in subsequent assessment years.

2. Assessee has not opted for presumptive taxation because of commission income

As per the provisions of sub section 6 of section 44AD, if an assessee has earned any income from specified activities such as commission, then provisions of section 44AD shall have no bearing on such assessee .In such a case, the assessee is not entitled to opt the provisions of sec 44AD.If ,in a year, the chain of sec 44AD is broken due to the receipt of commission ,that will not be considered as the assessee has gone out of the umbrella of sec 44AD.The asseessee is entitled to opt for sec 44AD in subsequent years.

It can be implied that where an assessee has turnover less that threshold specified u/s 44AB(a) and have earned any income as commission or brokerage, then he can file income with lower profits without getting its books of account audited.

Turnover of Mr. X for the F.Y. 2019-20 was Rs.74 Lacss. He has opted for Sec 44AD in that year. In the F.Y. 2020-21, his turnover was Rs.60 Lacss. Besides this turnover, his commission receipts were Rs. 5,000. He could not opt for Sec 44AD as per the provisions of Sec 44AD(6). Whether he can avail the benefit of Sec 44AD from F.Y. 2021-22?

Mr. X was having commission income in the F.Y. 2020-21 and was not eligible for Sec 44AD. As per the provisions of Sec 44AD(6), a person cannot opt for Sec 44AD, if he is having commission income. He has not opted out of Sec 44AD on his own, rather he was not eligible by the operation of law. Hence he can opt for Sec 44AD in the F.Y. 2021-22.

Example: Mr. X a proprietorship Firm engaged in the business of wholesale of Grocery Items & having a turnover of Rs.0.70 Crores during the Previous Year 2018-19. During the Previous Year 2019-20, he

started an agency business for metro milk& earned a net commission of Rs.70 Lacs apart from the Gross Turnover of Rs.50 Lacs for his main business i.e. trading of grocery items. This contract was only for 1 Year. During the Previous Year 2020-21, the agency contract got over & the Gross Turnover from trading of grocery items was Rs.1.4 Crores. Can he opt for Section 44AD during the Previous Year 2020-21?

- The restrictions that assessee couldn't opt for Section 44AD for the five years will be applicable only when he declares the profits lower than the 8%/6%.
- If because of any other reasons, he couldn't be able to opt for Section 44AD, then restrictions of Section 44AD(4) shouldn't impose. Since 44AD(4) gives the reference of Section 44AD(1) only & it also uses the word ''Profit not as per Section 44AD(1)'' i.e. percentage of rate.
- The assessee is not eligible to opt for section 44AD in the previous year 2019-20 since he is earning income like commission which is totally out of Section 44AD. Even for his trading business, he can't opt for Section 44AD.
- But he can opt for section 44AD during the Previous Year 2020-21.

Controversial Issue - Needs CBDT Clarification

The amendment was brought by Finance Act, 2016 w.e.f 01/04/2017. The government is discouraging taxpayers from misusing the scheme and constantly changing their option often. If any assessee opts for presumptive taxation, he has to continue it for 5 years and if he wants to opt out, he will be barred from resuming presumptive taxation for a period of 5 years. There is an important issue which emerges for reckoning the period of 5 years. Amendment to section 44AD (i.e., new sub section (4) and (5) is applicable from 01/04/2017 i.e., from Assessment Year 2017-18. Now, question arises regarding the counting of the continuous 6 assessment years for the purpose of sub section (4). Will it be done initially from the Assessment Year 2017-18 itself or even the options exercised in the earlier years can also be counted?

Another important question is, if the person has continuously opted for 5 years period in the past then the provision of 5 years restrictions will not be there as the sub section means that if a person has opted for 44AD for 5 years period continuously then no 5 years restrictions would be there if assessee decides to opt out. The issues are controversial and it would be in the interest of the masses if the CBDT clarifies it suitably.

For example, Mr. X claims to be taxed on presumptive basis under Section 44AD for AY 2019-20, he offers income on basis of presumptive taxation scheme. However, for AY 2020-21, he did not opt for presumptive taxation Scheme. In this case, he will not be eligible to claim benefit of presumptive taxation scheme for next five Assessment years i.e. from AY 2021-22 to 2025-26. Further, he is required to keep and maintain books of account and he is also liable for tax audit as per

section 44AB from the AY in which he opts out from the presumptive taxation scheme if his total income exceeds the maximum amount not chargeable to tax.

This can be explained with the help of following table.

Assessment Year	Turnover	Rate of Profit	Whether Total Income more than Basic exemption	Whether Section Applicable			Remarks
				44AA	**44AB**	**44AD**	
2018-19	3.00 Crore	7%	Yes	Yes	Yes	No	A
2019-20	1.20 Crore	9%	Yes	No	No	Yes	B
2020-21	85 Lacs	5%	Yes	Yes	Yes	No	C
2021-22	75 Lacs	10%	Yes	Yes	Yes	No	D
2022-23	1.20 Crore	2%	No	Yes	Yes	No	E
2023-24	1.5Crore	9%	Yes	Yes	Yes	No	F
2024-25	92 Lacs	6%	Yes	Yes	Yes	No	G
2025-26	95 Lacs	9%	Yes	Yes	Yes	No	H
2026-27	2.50 Crore	6%	Yes	Yes	Yes	No	I

Remarks	Explanation
A	Turnover exceeding Rs.1 Crore and hence, he is liable to keep books of account & Audit 44AB(a).
B	Since, Mr. X opted 44AD,he is not required to maintain books and not required to get audited u/s 44AB
C	Since, Mr. X fails to opt sec 44AD.The benefit of section 44AD shall not be available to the assessee for A.Y. 2021-22 to 2025-26. Therefore he is liable to keep books of account & Audit u/s 44AB(e).
D	Mr. X is liable to keep books of account & Audit u/s 44AB(e).
E	Mr. X is liable to keep books of account & Audit u/s 44AB(a). If his cash receipts is up to 5% of total receipts and his cash payments is up to 5% of total payments, then he is not liable to audit under sec 44AB(a). Further, he is not liable to audit u/s 44AB(e), as his total income is less than the basic exemption limit.
F	Mr. X is liable to maintain books of account and required to get them audited u/s 44AB(e).If his cash receipts is up to 5% of total receipts and his cash payments is up to 5% of total payments, even then he is liable to audit under sec 44AB(e), as the proviso to Sec 44AB(a), which provides exemption from audit is applicable only to sec 44AB(a) and not Sec 44AB(e).
G	Mr. X is liable to keep books of account & Audit u/s 44AB(e).
H	Mr. X is liable to keep books of account & Audit u/s 44AB(e).
I	Mr. X is liable to keep books of account & Audit u/s 44AB(a).

From the perusal of the above table, it is clear that if in any Previous Year, Mr. X fails to opt the provisions of Section 44AD(4) of the Act, then for the next 5 Previous Years he will not be eligible to claim the benefit u/s 44AD of the Act. In such case, he will be required to maintain the books of account and he will also be liable for tax audit as per section 44AB from the AY in which he opts out from the presumptive taxation scheme if his total income exceeds the maximum amount not chargeable to tax. From the above table, it can also be concluded that the period of five years shall be counted next to the year when assessee opts not to avail the benefits of sec 44AD of the Act. .After the expiry of five years, this cycle again will start from the year in which he opts to adopt the provisions of sec 44AD of the Act. Books of Accounts

An assessee having turnover upto Rs.2 crore and opting for sec 44AD is not required to maintain books of accounts. As provided in section (5) of 44AD the eligible assessee who claims to be taxed on presumptive basis is not required to maintain books of account as provided in section 44AA. If the turnover is below Rs.2 crores and opting for sec 44AD, audit u/s 44AB is not required. However, if the turnover is exceeding Rs.2 crores, the assessee is outside the ambit of section 44AD, as provided in section 44AD. It will be interesting to note that the presumption of income is to work on the basis of the turnover or gross receipts. The question would be if the books are not maintained how the turnover would be proved? Therefore, when the income is computed as per the provisions of section 44AD, it would be necessary to prove for the assessee the figure of turnover or gross receipts. Which records are to be maintained will depend upon the type of the business of the eligible assessee. Figures adopted under GST Act, 2017 provisions would be good evidence. Copies of invoices issued may also be maintained as evidence of turnover. If the correct turnover or gross receipts is not ascertainable from the records maintained, it is likely that the same may be estimated by the Assessing Officer in absence of proper records of turnover or gross receipts. Therefore it would be necessary for the eligible assessee to maintain such records with evidences so that the turnover or gross receipts can be conclusively proved.

While computing income of assessee u/s 44AD, the assessing officer does not have power to assesses anything in excess of returned income where returned income is either 8% or more than 8% on gross receipts / sale consideration.

- Abhi Developers Vs. ITO (2007) 12 SOT 444 (Ahd.Trib).
- CIT Vs. Nitin Soni(2012) 207 Taxman 332 (All.HC)
- Mohan Kumar Agarwal Vs. ITO . ITA NO: 1750/Kol/2018. Order dated 08/05/2019.

Interesting issues in Sec. 44AD

No presumptive taxation benefit u/s 44AD to partner on interest, remuneration from firm

This issue has been decided by Hon'ble Madras High Court In Anandkumar [TS-690-HC-2020(MAD)]Mr. A. Anandkumar (Assessee) is an individual, who had received remuneration and interest from partnership firms during subject AY 2012-13. While filing the return, assessee had applied the presumptive rate @8% u/s 44AD. Revenue noted that assessee was not doing any business independently but was only a partner in the firms. Moreover, as assessee had no turnover and receipts on account of remuneration and interest from the firms could not be construed as gross receipts mentioned u/s 44AD. Therefore, Revenue denied the benefit of Sec.44AD and brought to tax the entire amount of remuneration and interest from the firms. The assessment order was confirmed by CIT(A) and Chennai ITAT.

Aggrieved, assessee filed appeal before the Madras HC.

HC upholds ITAT order and denies presumptive taxation benefit u/s 44AD to assessee-partner on interest, remuneration from firm.

Key Observations of the HC:

1. At the outset, HC notes that Sec.44AD is a special provisions and 4 aspects to be noted in Sec.44AD are that (1) the assessee who claim such a benefit of the presumptive rate of tax should an eligible assessee as defined in Clause (a) of the explanation to Sec.44AD, (2) he should be engaged in an eligible business as defined in Clause (b) of Section 44AD and (3) 8% of the presumptive rate of tax is computed on the total turnover or gross receipts.

2. HC observes that the assessee who is an individual in the instant case is not carrying on any business. Therefore, the remuneration and interest received by the assessee from the partnership firm cannot be termed to be a turnover of the assessee [individual].

3. Likewise, HC holds that remuneration & interest does not qualify as gross receipts. Accepts Revenue's submission that in the statement issued by the ICAI on the Companies (Auditors report) Order 2003, the word term is defined as the aggregate amount for which sales are effected or services rendered by an enterprise.

4. Notes that in the present case the assessee has not done any sales nor rendered any services but has been receiving remuneration and interest from the partnership firms which amount has already been debited in the profit and loss account of the firms. Thus holds that the revenue was right in their contention that remuneration and interest cannot be treated as gross receipt.

5. Further concurs with ITAT's observation that remuneration and interest received from a firm, to the extent eligible u/s 40(b), would be considered as 'profits and gains from business or profession' of the recipient-partner, however that by itself would not translate such remuneration and interest, to gross receipts or turnover of business independently carried on by the partner.

6. Also refers to CBDT circular 5/2010 enhancing the threshold under the provisions of Sec.44AD from 1Cr to 2Cr. States that *intention is clear that it was made taking note of the fact that there has been substantial increase in small businesses who earns substantial income are outside the tax-net*.

7. Lastly, also refers to sub-section (2) of Sec.44AD which states that any deduction allowable u/s 30 to 36 is deemed to be given full effect and *conspicuously section 28(v) has not been included which*

deals with any interest, salary, bonus, commission or remuneration by whatever name called, due to or received by, a partner of a firm.

Now let us consider the case of a partnership firm which is engaged in eligible business as per section 44AD and whose turnover is say Rs.80 lacs in the preceding Financial Year 2020-21 and which shows Net loss from business of Rs.50,000/- after providing interest and salary to partners. Is this firm required to get the accounts audited under section 44AB read with section 44AD of the Income Tax Act'1961?

The answer is **'No'** because if we read section 44AD carefully, the audit is required where profits are less than 8% or 6% of the gross receipts or turnover and the income exceeds maximum amount not chargeable to tax.

Since, the firm is taxed at an income starting from Rs.1, therefore the maximum amount not chargeable to tax is nil.

In case of loss, since there is no income, therefore, it does not exceed the maximum amount not chargeable to tax and so the second condition mandating tax audit u/s 44AB r/w section 44AD is not satisfied and therefore the assessee is not required to get the accounts audited u/s 44AB. If its case falls under 44AD(4) then firm is liable to Tax Audit u/s44AB(e) provided if it earned any positive income

However, in the case of losses, the firm is not required to gets its accounts audited u/s44AB(e) assuming turnover of firm is less than 1 Cr.

If Turnover is more than 1 Cr then even in the case of loss the Firm is subject to Tax Audit u/s44AB(a) & the above limits shall be read as Rs.10 Crores provided other conditions laid down by Finance Act,2020 have been complied with.

It can be concluded with regard to firm that in case section 44AD(4) attracts they are always subject to Tax Audit u/s 44AB provided they earn positive income.

From the above it can be concluded that a firm having zero income of less is not liable for tax audit under section 44AB. It does not make any difference that the loss is after deducting the salary and interest to partners.

CHAPTER 6

Presumptive Taxation Scheme under Section 44ADA

Special provision for computing profits and gains of profession on presumptive basis.

44ADA. *(1) Notwithstanding anything contained in sections 28 to 43C,* [14]***[****in case of an assessee, being an individual or a partnership firm other than a limited liability partnership as defined under clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), who is a resident in India, and****]*** *is engaged in a profession referred to in sub-section (1) of section 44AA and whose total gross receipts do not exceed fifty lacs rupees in a previous year, a sum equal to fifty per cent of the total gross receipts of the assessee in the previous year on account of such profession or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the assessee, shall be deemed to be the profits and gains of such profession chargeable to tax under the head "Profits and gains of business or profession".*

(2) 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.

(3) The written down value of any asset used for the purposes of profession 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.

(4) Notwithstanding anything contained in the foregoing provisions of this section, an assessee who claims that his profits and gains from the profession are lower than the profits and gains specified in sub-section (1) and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (1) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB.

Introduction

The Scheme of Presumptive Taxation for Professionals was introduced under Section 44ADA in the Finance Act 2016 and is applicable from Financial Year 2016-17 onwards.

Before 2016, the benefits of Presumptive Taxation were only given to Businesses under Section 44AD and to Transporters under Section 44AE. Specified professionals were specifically kept out of this scheme of Presumptive Taxation.

As Professionals were specifically kept out of the scheme of Presumptive Taxation, the only option available for Professionals was to compute their Income under the normal system of taxation. These professionals were also required to maintain all books of accounts, maintain a copy of invoices for all expenses and in some cases – they were also required to get their Tax Audit conducted.

So many complexities ended up discouraging the professionals from filing income tax returns. So as to simplify the taxation for Professional, the Presumptive Taxation for Professionals was introduced under Section 44ADA in Finance Act, 2016 which is applicable from Financial Year 2016-17 onwards. The scheme of presumptive taxation was extended to professionals by introduction of section 44ADA of the ITA w.e.f. Assessment Year 2017-18. It was made applicable to all assessees, being a resident in India, who is engaged in the profession referred to in sub-section (1) of section 44AA of the ITA.
However, in the memorandum explaining the provisions in the Bill, it is clarified that section 44ADA of the Act are applicable only to individual, Hindu Undivided Family and partnership firm, but not a Limited Liability Partnership (LLP). Accordingly, the Bill proposed to amend sub-section (1) of section 44ADA of the ITA to provide that the provisions of section 44ADA of the ITA shall apply only to an assessee, being an individual, Hindu Undivided Family or a partnership firm, other than a limited liability partnership, who is a resident in India.
However, the Finance Act, 2021 has surprisingly and without any explanation has excluded 'Hindu Undivided Family' from the list of assessee, who would be eligible to opt for the presumptive scheme.
The above amendment is applicable from the Assessment Year 2021-22.

Eligible Profession:

Meaning of "Professional services"

"Professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the CBDT for the purposes of section 44AA(1) of the Act.

Section 44AA(1) prescribes for compulsory maintenance of such books of accounts and other documents which will enable the Assessing Officer to compute his total income in accordance with the provisions of this Act. Sub-section(1) applies to the followings-

1. A person carrying on a legal profession.
2. A person carrying on a medical profession.
3. A person carrying on engineering or architectural profession.
4. A person carrying on the profession of accountancy.
5. A person carrying on the profession of technical consultancy.
6. A person carrying on the profession of interior decoration.

7. Any other profession as notified by the Board. The CBDT has notified the following professions u/s44AA(1) of the Act.

(1) A person carrying on the **profession of an authorised representative or film artist**. [**Notification No. SO 17(E) dated 12-1-1977**]

"Authorised representative" means a person who represents any other person, on payment of any fee or remuneration, before any tribunal or authority constituted or appointed by or under any law for the time being in force, but does not include an employee of the person so represented or a person carrying on a legal profession or a person carrying on the profession of accountancy.

"Film artist" means any person engaged in his professional capacity in the production of a cinematograph film, whether produced by him or by any other person, as -

(i) an actor ;
(ii) a cameraman ;
(iii) a director, including an assistant director ;
(iv) a music director, including an assistant music director ;
(v) an art director, including an assistant art director ;
(vi) a dance director, including an assistant dance director ;
(vii) an editor ;
(viii) a singer ;
(ix) a lyricist ;
(x) a story writer ;
(xi) a screen-play writer ;
(xii) a dialogue writer; and
(xiii) a dress designer.

Example: Jatinder Sharma who is a professional singer. He is a stage artist and not a Playback singer. He wants to opt the provision of section 44ADA of the Act. Can he do so?

Ans: It is to be noted that by virtue of [Notification No. SO 17(E) dated 12-1-1977], a person carrying on the profession of an authorized representative or film artist is an authorised professional u/s 44AA(1) of the Act. "Film artist" means any person engaged in his professional capacity in the production of a cinematograph film, whether produced by him or by any other person, as singer also. In this connection, it is clear that only those singers are professional u/s 44AA(1) of the Act who are engaged in their professional capacity in the production of a cinematograph film, whether produced by him or by any other person. Hence, stage singers are not professionals for the application of sec 44ADA of the Act. It is also to be noted that the persons who are the singers on religious/social occasions can't opt the provisions of sec 44ADA of the Act as they are not singers for the purposes od sec 44ADA of the Act.

Whether a Model can opt the provisions of sec 44ADA

In the case of **DCIT (TDS) Vs Kodak India (P) Ltd. (ITAT Mumbai)** the issue under consideration is whether the services, the modeling, rendered by Ms. Katrina Kaif constitutes professional service and the fee paid to her for modeling with the purpose of marketing of the camera products of the assessee liable for TDS u/s 194J?

Undisputedly, Ms. Katrina Kaif has received the said fee not in connection with production of a cinematographic film and the same received admittedly for modeling. She has not received the sum for acting in an autographic Film. Receipts for all modeling and acting skills of an individual do not attract the said section 194J, unless, they are part of the production of a cinematographic film. In the original sense of the modeling, the same may be a profession and the receipts earned by such models may be professional receipts. But the fact is that modeling is not a defined or notified profession either in the Income Tax Act, 1961 or in the Notifications, In fact, there are many such un-notified professions and as such ones cannot be brought under the provisions of section 194J of the Act. In the instant, admittedly, the services rendered have nothing to do with the production of a cinematographic film. Further, before parting with the order, it is pertinent to mention that a person can have many skills i.e acting skills in Films, modeling skills for display of merchandise, singing skills etc. and such person can make earning out of such skills. It is not that total earning of that person in lieu of services rendered must attract the provisions of section 194J of the Act. Therefore, the taxable receipts u/s 194J of the Act are services-specific and not person specific. Therefore, the impugned payments made by the assessee to Matrix India on behalf of Ms. Katrina Kaif do not attract the provisions of section 194J of the Act.

A model can't opt the provisions of sec 44ADA of the Act on his income from modeling as a model is not a specified professional for the purposes of sec44ADA of the Act.

The profession of company secretary [Notification No. SO 2675 dated 25-9-1992]

"Company Secretary" means a person who is a member of the Institute of Company Secretaries of India in practice within the meaning of sub-section (2) of section 2 of the Company Secretaries Act, 1980 (56 of 1980).

The profession of information technology [Notification No. SO 385(E) dated 4-5-2001]

Interpretation of Fee for Professional Service

As per definition given under Income Tax Act,1961 following attributes are required to classify a service as "Professional Services":

1. Service is provided by a person;
2. Service is provided in the course of carrying out any profession;

3. Such service falls under the list of professions given in definition itself or it falls under any other profession notified for Section 44AA. These attributes are discussed below in detail:

a. Service is provided by a person

It is to be noted that "Professional Service" is the one which is rendered by a person.

"person" includes—
(i) an individual,
(ii) a Hindu undivided family,
(iii) a company,
(iv) a firm,
(v) an association of persons or a body of individuals, whether incorporated or not,
(vi) a local authority, and
(vii) every artificial juridical person, not falling within any of the preceding sub-clauses.
So, as per definition given, a person can either be an individual or HUF or Firm or any other artificial person.
However, activities mentioned in the definition of FPS are more into intellectual and artistic nature and the same can be provided by a person only and not by any artificial person.

"In course of Carrying out any profession"

- Profession is a business type which requires intellectual skills only. Further, all professional institutions permit their member professionals to practise in the capacity of Individual or Firm (Proprietorship Firm or Partnership Firm or Limited Liability Partnership Firm). Rationale behind such a condition is that artificial persons have independent liability from its directors and employees. However, in case of profession, complete onus lies on a person providing service. Therefore, profit be differentiated from their associated liability and therefore, they are permitted to practise either in individual name or under name of firm.

It is to be noted that professional services will be applicable to the cases where services are provided by individual or firm of individuals. However, Hon'ble Delhi High Court and Bombay High Court have interpreted the term person used in the definition of professional services is not restricted to the individual or firm of individuals and can be extended even to artificial person or corporate bodies. However, both these decisions were issued in the contest of payment made by Third Party Administrators ('TPA') to Hospitals.
However, considering existing legal position as per above mentioned High Court decisions professional services rendered even by an artificial person and body corporate will be covered in the definition of professional service. It is to be noted that certain Sports personnel (Sports Persons, Umpires and

Referees, Coaches and Trainers, Team Physicians and Physiotherapists, Event Managers, Commentators, Anchors and Sports Columnists) were notified as professionals by CBDT vide Notification No. 88/2008 dated 21-08-2008. However, this is notified under section 194J of the Income Tax Act, 1961 and not under section 44AA(1). Hence, for the purpose of section 44AA, they will be covered under section 44AA(2). These professionals are not entitled to opt for 44ADA.

Example: A City football Club has engaged Mr. X, a resident in India, as its coach at a remuneration of Rs.10 lacs per annum. The club wants to know from you whether it is liable to deduct tax at source from such remuneration.

Solution: Section 194J requires deduction of tax at source @10% from the amount credited or paid by way of fees for professional services, where such amount or aggregate of such amounts credited or paid to a person exceeds Rs.30,000 in the F.Y. 2021-22. As per Explanation (a) to section 194J, professional services include services rendered by a person in the course of carrying on such other profession as is notified by the CBDT for the purposes of section 194J.

Accordingly, the CBDT has, vide Notification No.88 dated 21.8.2008, in exercise of the powers conferred by clause (a) of the Explanation to section 194J notified the services rendered by coaches and trainers in relation to the sports activities as professional services for the purposes of section 194J. Therefore, the club is liable to deduct tax at source under section 194J from the remuneration payable to the Coach, Mr. Dev.

Applicability of provisions of Sec 44ADA in case TDS has been deducted u/s 194J

Shri Arthur Bernard Sebastine Pais V. Deputy Commissioner Of Income-Tax, CPC, Bengaluru - Bangalore ITAT (2019). In this case TDS was deducted u/s 194J. The assessee had offered income under 44AD. There was CPC mismatch and was assessed under sec 44ADA. The ITAT held that fees of technical services as enumerated in section 194J is a very broad term which encompasses any services in the nature of managerial, technical or consultancy services. Though the deduction of tax on fees paid to Assessee has been done u/s 194J as mandated by the Act, the services rendered by the Assessee do not fall under section 44AA(1) which is a pre-condition to tax the receipts @ 50% on presumptive basis under section 44ADA. The Assessee cannot be said to be providing technical consultancy as mentioned in section 44AA(1) of the Act.

Example: An Individual who is doing financial consultancy business and the service receiver while he is paying service charge, he is deducting TDS u/s 194J. Whether he can offer income u/s 44ADA? – Sec. 44ADA will be applicable only to the Notified Professions. It is an inclusive definition, it doesn't cover financial consultancy business, hence he can't offer income u/s 44ADA. – Notifications No. SO-18[E] dated 12.01.1977, No. SO 2675 dt.25.09.1992 and S.O. 385[E] dt.04.05.2001

Meaning of authorised representative-

Explanation to Rule 6F

Authorised representative means a person who represents any other person, on payment of any fee or remuneration before any Tribunal or authority constituted or appointed by or under any law for the time being in force, but does not include an employee of the person so represented or a person carrying on legal profession or a person carrying on the profession of accountancy.

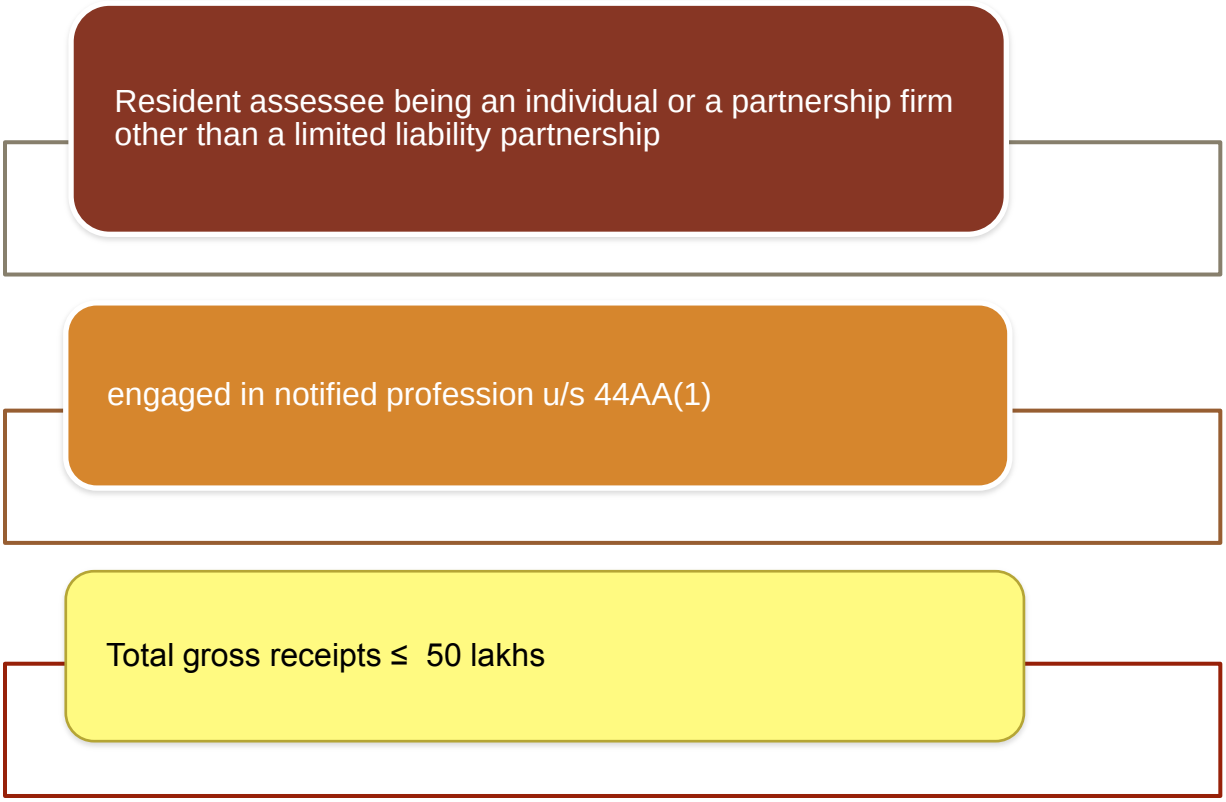
Eligible Business-Financial consultancy

EXAMPLE: An Individual who is doing financial consultancy business and the service receiver while he is paying service charge, he is deducting TDS u/s 194 J. Whether he can offer income u/s 44ADA?

Ans. No. Sec. 44ADA will be applicable only to the Notified Professions. It is an inclusive definition, it doesn't cover financial consultancy business, hence he can't offer income u/s 44ADA

Presumptive rate of income: Presumptive rate of income would be a sum equal to 50% of the total gross receipts, or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the assessee.

Eligible Assessee: All the three conditions should be satisfied:



No further deduction would be allowed: Section 44ADA(2) :Under the scheme, the assessee will be deemed to have been allowed the deductions under section 30 to 38. Accordingly, no further deduction under those sections shall be allowed.

Written down value of the asset: Section 44ADA(3) : The written down value of any asset used for the purpose of the profession of the assessee will be deemed to have been calculated as if the assessee had claimed and had actually been allowed the deduction in respect of depreciation for the relevant assessment years.

Maintenance of books of accounts and audit:

A very interesting issue is that whether a professional who has opted presumptive system of taxation has to maintain books of account also. To resolve this issue firstly we have to see the provisions of section 44AA(1) of the Act .

Section 44ADA overrides section 28 to section 43C but does not override section 44AA. Section 44AA(1) provides for compulsory maintenance of books of accounts by a person carrying on specified profession. Further, section 44ADA can be opted only by a person carrying on a specified profession in section 44AA(1). Therefore, on the plain reading of the law, it appears that it is mandatory for a person carrying on a specified profession as per section 44AA(1) has to compulsorily maintain books of accounts even if such a person declares his income as per section 44ADA(1).

If this interpretation is invoked, then the purpose of simplification will get defeated. The purpose of introducing the presumptive taxation is to provide relief to small taxpayers from the burden of maintaining the detailed books of account and reducing the cost of compliances.

The memorandum to Finance Bill 2016 states that in order to rationalize the presumptive taxation scheme and to reduce the compliance burden of the small taxpayers having income from profession and to facilitate the ease of doing business, it is proposed to provide for presumptive taxation regime for professionals. It further states that the assessee will not be required to maintain books of account under sub-section (1) of section 44AA and get the accounts audited under section 44AB in respect of such income unless the assessee claims that the profits and gains from the aforesaid profession are lower than the profits and gains deemed to be his income under sub-section (1) of section 44ADA and his income exceeds the maximum amount which is not chargeable to income-tax.

Further, the '**FAQs on Tax on Presumptive Taxation Scheme**' published on income tax portal clarifies the same in the following manner-

If a person adopts the presumptive taxation scheme of section 44ADA, then he is required to maintain books of account as per section 44AA?

In case of a person engaged in a specified profession as referred in sections 44AA(1) and opts for presumptive taxation scheme of sections 44ADA, the provision of sections 44AA relating to maintenance of books of account will not apply. In other words, if a person opts for the provisions of sections 44ADA and declares income @50% of the gross receipts, then he is not required to maintain the books of account in respect of the specified profession.

Even though the FAQ is not the law but still it can be an aid to interpretation on the issue. This view shall further fortify from the speech of the Finance Minister.

In the Budget Speech of the then Finance Minister while presenting the Union Budget 2016 stated as follows-

"*At present about 33 lacs small business people avail of this (presumptive taxation scheme under section 44AD) benefit, which free them from the burden of maintaining detailed books of account and getting audit done.*

I also propose to extend the presumptive taxation scheme to professionals with gross receipts up to Rs.50 lacs with the presumption of profit being 50% of the gross receipts."

From the speech, it is also suggested that professionals opting the *presumptive taxation scheme with gross receipts up to Rs.50 lacs with the presumption of profit being 50% of the gross receipts* are not required to maintain books of accounts.

The legislative intent is very clear that such a professional is not required to maintain books of account under section 44AA. Although, it can be said that when the plain meaning of the words of the statute is unambiguous, there is no need to resort to external aid for interpretation. However, one should not forget that it is a beneficial provision provided to small taxpayers and hence is required to be interpreted liberally.

From the perusal of above section, it is clear that it is mandatory for the professional who is covered under Section 44ADA to maintain books of accounts even though he has opted for the presumptive taxation scheme. Although, the Memorandum to the **Finance Bill, 2016** provides that an assessee opting for Section 44ADA would not be required to maintain books of account under Section 44AA(1), the same has not been brought out clearly in the Section 44AA. Section 44AA is silent in relation to the assessee who is covered by Section 44ADA. Moreover the provisions of Sec 44ADA overrides sec 28 to 43C and not sec 44AA of the Act. Hence, on combined reading of 44AA(1), 44AA(3) read with Rule 6F**,** the specified professionals would need to maintain books of account even if they opt for section 44ADA.

Option to claim lower profits: ***Section 44ADA(4):*** An assessee may claim that his profits and gains from the aforesaid profession are lower than the profits and gains deemed to be his income under section 44ADA(1); and if such total income exceeds the maximum amount which is not chargeable to income-tax, he has to maintain books of account under section 44AA and get them audited and furnish a report of such audit under section 44AB.

- Partner's Salary, Remuneration, Interest even though charged under the head as income from „ Business or Profession „ can be taxed u/s 44ADA in the hands of the individual partner having professional income.

  A question comes to our mind that whether the provisions of Section 44ADA shall be applicable to the remuneration and other receipts by a partner from a professional services firm? In this connection, it is to be noted that the Income Tax Act, 1961 vide Section 40(b) states that 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 u/s 10(2A).

  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.

  Now a question arises whether the remuneration and other income received from the firm can be called as 'gross receipts' for the purposes of Section 44ADA. Whether the share of profits of a partner can be considered as gross receipts for the purpose of Section 44ADA? The Mumbai Bench of the Income Tax Appellate Tribunal in the case of: ACIT v. India Magnum Fund (81 ITD 295) held that in order to trigger the provisions of Section 44AB, there should be first computation of profits and gains of business or profession i.e. computation of total income as per Section 4. As the income exempt under Section 10 does not form part of the total income, such exempt income cannot be subjected to the provisions of Section 44AB. Consequently, one may argue that share of partners profit which is exempt under section 10(2A) would not be considered for the purposes of the gross receipts This view is also supported by the guidance note issued by The Institute of Chartered Accountants of India on tax audit. As per the guidance note, gross receipts exclude partner's share of profit which is exempt u/s 10(2A).

  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 (ITAT Kolkata)** and Usha A Narayanan vs Deputy Commissioner of Income Tax (ITAT Kolkata).

Sagar Dutta Vs. DCIT (2014) 45 taxmann.com 575 (Kol.Trib). Order dated 17 February, 2014

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 lacs 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 liable 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 (supra) has confirmed the levy of penalty by observing as under :-

". 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 assessee 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 assessee 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 lacss, 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."

Usha A Narayanan Vs. DCIT. ITA NO: 703/Kol/2012. Order Dated 25/03/2013.(Kol. Trib).

The short issue in this appeal is whether or not penalty under section 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 section 44AB of the Income Tax Act and her failure to do so, invited penalty under section 271B of the Act.

The assessee's contention, 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.

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). Respectfully following the said decision, we uphold the action of authorities below and decline to interfere in the matter."

The following is evident from the above judgments:

1. In both the judgments, the tax payers were chartered accountants in partner capacity in a firm.

2. Both of them have received remuneration, salary, interest on capital and others more than the threshold limit specified under Section 44AB.

3. 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.

4. Since the tax payers failed to do so, the department has levied penalty under Section 271B amounting to 0.5% of the receipts.

5. The tax payer contention was that they were not carrying any profession in individual capacity but they were acting as 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 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.

Whether option of sec 44ADA optional or mandatory

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 Rs.50 lacs to apply the provisions of Section 44ADA or is it optional. Once the gross receipts are less than Rs.50 lacs 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.

Radiology & pathological laboratory run by a physician (M.D./ M.B.B.S. not specialized in radiology or Bio-chemistry) will be considered as profession or business for limits of tax audit?

S. 2(13) of the Income-tax Act, 1961 defines 'business' which includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The word 'business' is one of wide import and it means activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income. While S. 2(36) of the Act defines 'profession' to include vocation. The Supreme Court in CIT vs. Manmohan Das (deceased) [59 ITR 699] has held that, the expression 'profession' involves the idea of an occupation requiring

purely intellectual skill or manual skill controlled by the intellectual skill of the operator, as distinguished from an operation which is substantially the production or sale or arrangement for the production or sale of the commodities. So, from the facts of the case it is clear that radiology and pathology operated by a doctor who is not specialized would be a business. This view is supported by the Guidance Note on Tax Audit u/s. 44AB of the Income-tax Act, 1961, issued by the Institute of Chartered Accountants of India.

Presumptive Taxation in case of Partnership firms

Resident Partnership Firms are eligible to opt for presumptive taxation u/s 44AD or 44ADA or 44AE. Sec 44AD and 44AE were amended in 1997 w.e.f. 01/04/1994 to allow remuneration and interest to partners (subject to conditions and limits specified in section 40(b)) after determination of profits as per sec 44AD or 44AE. However, by Finance Act, 2016, second proviso to Section 44AD(2) has been omitted which provided for deduction under section 40(b) with regard to the salary and interest to partners. However, sec 44AE has not been amended. Hence, remuneration and interest to partners will not be allowed in sec 44AD of the Act. However, remuneration and interest to partners will be allowed if income is declared u/s 44AE. The provisions of sec 44ADA of the Act are silent for the allowance remuneration and interest on capital to partners. The professional firms can take this benefit as is explained in the following example.

Example : RSK & Associates, a firm of Chartered Accountants provides the following information:

Receipts	Net Profit	50% of receipt	Allowability of remuneration
Rs.40,00,000	Rs.20,00,000	Rs.20,00,000	No remuneration and interest will be allowed as expense.
Rs.40,00,000	Rs.24,00,000	Rs.20,00,000	Remuneration and interest can be allowed up to Rs.4,00,000, subject to sec 40(b)
Rs.40,00,000	Rs.18,00,000	Rs.20,00,000	Sec 44ADA not applicable as profit is claimed to be less than 50% of receipts. RSK & Associates will be required to get their books of account audited u/s 44AB(d). Remuneration may allowed as per sec 40(b).

CHAPTER-7

Presumptive Taxation Scheme under Section 44AE

Section 44AE *is as follows:*

44AE. *(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 at any time during the previous year 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,—

(i) being a heavy goods vehicle, shall be an amount equal to one thousand rupees per ton of gross vehicle weight or unladen weight, as the case may be, for every month or part of a month during which the heavy 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;

(ii) other than heavy goods vehicle, shall be an amount equal to seven thousand five hundred rupees for every month or part of a month during which the goods carriage is owned by the assessee in the previous year or an amount claimed to have been actually earned from such goods carriage, 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);

(aa) the expression "heavy goods vehicle" means any goods carriage, the gross vehicle weight of which exceeds 12000 kilograms;]

(a) 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.

Key features of the schemes are as under

A. Assessee engaged in the business of plying, hiring or leasing such goods carriages can opt for presumptive income in certain cases [section 44AE(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 at any time during the previous year 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 section 44AE (2)

The provisions of section 44AE (1) shall not apply in the following circumstances:
(i) If such person owns more than ten goods carriages at any time during the previous year.
{Section 44AE(1}
(ii) If such person owns not more than ten "goods carriages" at any time during the previous year but is not engaged in the business of plying, hiring or leasing of such goods carriage.

(iii) If such person is not covered by any of the above conditions and but who declares lower profits and gains than the profits and gains specified in sub- section (1) and (2) of section 44AE as income from such goods carriages

B. **Benefit of section 44AE is available to all the categories of taxpayers**,

Individual, HUF, firm, company, etc., who are engaged in the business of plying, hiring or leasing of goods carriages and who does not own more than 10 goods vehicles at any time during the year. Person opting for section 44AE would not be required to get the books of accounts audited even if turnover exceeds the limit of Rs.1 Cr or 2 Cr.

C. **No turnover limit**

The tax audit Limit is only applied on number of vehicle, so gross receipts may even exceed audit limits, still if opt for 44AE then no need for audit.

For Example: A transport contractor having 6 trucks is having gross receipts of Rs.105 Lacs for the F.Y. 2020-21. Is he liable for the tax audit?

ANS: Section 44AB does not contain any condition for tax audit of assessees engaged in transport operations (of goods) where the gross receipt exceeds Rs.100 lacss. Only where the assessee offers income below the presumptive limit prescribed in section 44AD or section 44AE, the accounts have to be audited under section 44AB.

The thrust of section 44AE for computing income in the case of assessees engaged in the business of plying, hiring or leasing goods carriages is the number of vehicles and not the aggregate of receipts. In the absence of a provision similar to that of proviso to section 44AD (1) even where the assessee has aggregate annual receipt exceeding Rs.100 lacss the accounts need not be audited under section 44AB so long as the assessee offers income as per the presumptive quantum prescribed in section 44AE. Only where the assessee offers income below the presumptive limit given in section 44AE irrespective of the quantum of receipt, the accounts have to be audited under section 44AB.

D. **Section 44AE operates on the basis of "ownership" and not on the basis of "usage".**

Even if the truck is not put to use, still income has to be offered u/s 44AE. It will include an owner by way of hire purchase or where the goods carriage has been taken on installments, even if whole or part of the amount is to be paid. The meaning of ownership period during which the goods vehicle is owned by the assessee, in the previous year. Part of the month would be considered as a full month. Thus even if any vehicle is idle/ not being used or sent on repairs–income shall be deemed earned. It is further to be noted that if due to lockdown in the country the goods carriers remain idle, even then they will be charged to tax. Also, if the goods vehicles have been impounded by the transport authorities/ police department, even then income will be charged to tax.

In the case of M. Rajendran [TS-298-ITAT-2014(CHNY)] ITAT rules that presumptive rate provided u/s 44AE applies only in case where assessee owns not more than 10 goods carriages at 'any point of time during the previous year'; Law does not stipulate operation but considers ownership, therefore, where

more than 10 goods carriages are owned but only ten carriages are operated during previous year, still Sec 44AE benefit cannot be granted.

E. **Presumptive amount of income to be computed**:
The presumptive income computed above is the final income and no further expenses will be allowed or disallowed. Separate deduction towards other business expenses like salary, depreciation etc. will not admissible. Written down value of any asset used in such business shall be calculated as if depreciation u/s 32 is claimed and has been actually allowed. However, taxpayers can claim deduction under chapter VI-A like deduction u/s 80C, 80D etc. No disallowance can be made u/s 40, 40A, 43B etc. for the taxpayers who have opted section 44AE.

F. **Allowability of remuneration:**
Where the assessee is a partnership firm, the remuneration & interest on capital to the partners can further be claimed as deduction subject to conditions & limit specified u/s 40(b). In case of presumptive scheme of taxation u/s 44AD and sec 44ADA, deduction towards interest & remuneration to partners is not available. However, it is not so in section 44AE.

G. **Payment of advance tax:** There is no concession as regards payment of advance tax & taxpayers covered by section 44AE will be liable to pay advance tax. [Benefit of payment of advance tax in one installment by 15th March is available only to taxpayers covered by section 44AD & 44ADA.

H. **Non allowance of depreciation and unabsorbed depreciation**: Since depreciation and carry forward of unabsorbed depreciation is covered by Sec 32, depreciation shall not be allowed from the deemed Income, however a notional depreciation is provided in the Block to arrive at the opening WDV of the next year.

I. **Benefit of set off and carry forward: Sec 70-80 will be applicable to the deemed income:** The brought forward losses of this business or any other business and current year losses from other businesses & other heads shall be allowed to be set off from the deemed income subject to rules framed under the Income Tax Act, 1961 for "set off and carry forward" of losses.

J. **Deduction u/s 80C to 80U**will be given from GTI of the assessee even from the deemed income included in the GTI.

K. **Minimum Income to be offered for taxation u/s 44AE:**
For heavy goods vehicle, income shall be an amount equal to Rs.1,000/- per ton of gross vehicle weight or unladen weight, as the case may be, for every month or part of a month during which the heavy 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;
For other than heavy goods vehicle, income shall be an amount equal to Rs.7,500/- for every month or part of a month during which the goods carriage is owned by the assessee in the previous year or an amount claimed to have been actually earned from such goods carriage, whichever is higher.

Important words for the purpose of section 44AE are

1. Heavy Goods Vehicle
2. Gross Vehicle Weight
3. Unladen Weight

Words used in charging part of the section is **"as the case may be"** which means that is every probability whereby in one case "gross vehicle weight" will be applicable & in another case the "unladen weight" will be applicable.

For section 44AE, the definition of "Heavy Goods Vehicle" is given in the explanation which is as under: the expression "heavy goods vehicle" means any goods carriage, the gross vehicle weight of which exceeds 12000 kilograms;]

As per explanation to section 44AE, The definition of "goods carriage", "gross vehicle weight" and "unladen weight" is to be taken as same as given in section 2 of the Motor Vehicles Act, 1988 (59 of 1988) which reads as under:

Definitions Under Motor Vehicles Act:

The definitions of various terms used in section 44AE as per Motor Vehicles Act are as under:

1. **Goods Carriage –** Section 2(14) of Motor Vehicle Act-1988:
   "Goods Carriage" means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adopted when used for the carriage of goods.
2. **Gross Vehicle Weight–** Section 2(15) of Motor Vehicle Act-1988:
   "Gross Vehicle Weight" means in respect of any vehicle the total weight of the vehicle and load certified and registered by the registering authority as permissible for that vehicle.
3. **Unladen Weight –** Section 2(48) of Motor Vehicle Act-1988:
   "Unladen weight" means the weight of a vehicle or trailer including all equipment ordinarily used with the vehicle or trailer when working, but excluding the weight of a driver or attendant; and where alternative parts or bodies are used the unlade weight of the vehicle means the weight of the vehicle with the heaviest such alternative part or body.
4. **Heavy Goods Vehicle** – Section 2(16) of Motor Vehicle Act-1988:
   "Heavy Goods Vehicle" means any goods carriage the gross vehicle weight of which, or a tractor or a road-roller, the unladen weight of either of which, exceeds 12,000 kilograms.

Let us analyze the definition of "Heavy Goods Vehicle" & "Unladen Weight" in both the relevant Act.

Heavy Goods Vehicle – Section 44AE:

The definition of "heavy goods vehicle" as given in explanation to section 44AE is as under: the expression "heavy goods vehicle" means any goods carriage, the gross vehicle weight of which exceeds 12000 kilograms;'

Difference in between the definition of "Heavy Goods Vehicle" in section 44AE of the Income Tax Act -1961 vs. Definition in the Motor Vehicle Act-1988

As per the definition of "Heavy Goods Vehicle" as given in Motor Vehicles Act has not been adopted in to in section 44AE of the Income Tax Act-1961.

Words **"**or a tractor or a road-roller the unladen weight of either of which" which is there in Motor Vehicle Act is missing in Section 44AE.

Concept of Unladen Weight :

No meaning or definition is specifically given for "unladen weight" in section 44AE. However, in Motor Vehicles Act the **concept of "unladen weight" has been attached to a vehicle or a trailer** whereas the concept of "gross vehicle weight" has been attached with goods carriages (the total weight of the vehicle and load certified).

It is but obvious that in case of any normal goods carriage, the gross vehicle weight is going to be more than "unladen weight" of the vehicle. The word "as the case may be" used in section 44AE means that either gross vehicle weight or unladen weight need to be taken for computing income. Where gross vehicle need to be used and where unladen weight need to be used is not provided in section 44AE. The word used in section 44AE to some extent conveys the idea that either the gross vehicle weight would be applicable or unladen weight would be applicable. The wording used in section 44AE conveys that both the weight cannot be simultaneously applicable.

If definition of "heavy goods vehicle" in Section 44AE would have been same as in Motor Vehicle Act 1988, no disputes or confusion would have been there. The concept of unladen weight in the motor vehicle Act is attached with Tractor, road roller.

While drafting Section 44AE**,** words "tractor and road roller" as available in the definition of heavy goods vehicle in the Motor Vehicle Act 1988 is not taken but the word "unladen weight" is duly taken. In my view, there appears to be an error as unladen weight is not attached to the "goods carriage" but attached to "tractor and road roller".

It is to be noted here that section 44AE is applicable for "Goods carriage" and in my view "Tractor or Road Roller" are not goods carriage.

However, CBDT vide F.No.225/233/2019/ITA-II Dated 14.08.2019 in response to the clarification sought by All India Motor Transport Congress has expressed the following view in short:
i. In respect of a "heavy goods vehicle" i.e. all goods carriage vehicle whose gross vehicle weight exceeding 12,000 Kg, the profits and gains from each goods carriage shall be at the rate of Rs. 1,000/- per ton of gross vehicle weight for every month or part of the month.

ii. In respect of a tractor or a road-roller (where the gross vehicle weight is not applicable), if unladen weight exceeds 12,000 Kg, the profits and gains from each goods carriage for the purposes of section 44AE of the Act shall be at the rate of Rs.1000/- per ton of unladen weight for every month or part of the month".

From the above discussion,we draw following conclusions:

1. The benefit of section 44AE is available to tractor and road roller even if it is not goods carriage in view of CBDT clarification vide F.No.225/233/2019/ ITA-II Dated 14.08.2019.
2. For Goods carriage, Section 44AE would apply on the basis of "Gross Vehicle Weight"
3. For road roller & tractor, Section 44AE would apply on the basis of "Unladen Weight

Can assessee apply Sec 44AE selectively on some trucks?

Sec 44AE does not permit the assessee to apply the provisions of this section on some of the truck while he claims the income from the others as per the books prepared. Thus this section applies to all the trucks owned by the assessee. He may opt for or out of the provisions of this Section for all the trucks.

Dy. CIT v. C.P. Kunhimohammed(2005) 94 ITD 278 (Cochin-Trib)

•The assessee having 3 lorries, 2 of them are old and the one being new, wanted to claim the benefit of section 44AE for 2 lorries and normal income scheme for the new lorry.

•The Tribunal held as below: "There is no provision which enables an assessee to apply the provisions of section 44AE in the case of some lorries and to go for regular assessment on the basis of books of account in respect of the remaining lorries. As plying hiring or leasing the goods carriages is treated as a separate business, all the lorries owned by the assessee form part of the said business and the tax treatment of all those lorries needs to be an uniform manner."

Is JCB a goods Carriage?

Gaylord Constructions v. Income-tax Officer

•The contention of the assessee is that JCB is analogous to goods carrier and the provisions of section 44AE are applicable. The Assessing Officer rejected the contention of the assessee as in the opinion of the Assessing Officer JCB is an earth mover machinery, cannot be equated with goods carrier like lorries and trucks.

The ITAT held -In the case of JCB, the principal function is not carriage of goods. In our opinion, by no stretch of imagination, JCB can be termed as "goods carriage". We, therefore, hold that the income from JCBs cannot be computed by applying section 44AE of the Act.

No benefit of income below the basic exemption limit

Contrary to the provisions of sec 44AD and sec 44ADA of the Act, the assessee has to get its books audited if he declares his income below the benchmarks given and his taxable income does not exceed the basic exemption limit.

Example: A Truck owner having 2 trucks, each having 15 ton gross weight, offering Rs.600 per ton per month. Total Income = 600*15*2*12= Rs.2,16,000. Is he liable for Tax Audit?

Under section 44AE, if profits offered are less than the prescribed limits, TAX AUDIT is APPLICABLE even if the income is below the non-taxable limits.

Example: Mr. X owns 8 goods carriage vehicles, 3 of which have unladen weight of 15MT, 18MT and 20MT and the rest are below 12MT capacity. The vehicle with 20MT was purchased on 22/07/19 and was used only from 21/01/2020

Vehicle	Gross Weight in Kg	Presumptive Income Per Month in Rs.	No. of Months	Total Presumptive Income in Rs.
1	7500	7500	12	90000
2	7500	7500	12	90000
3	7500	7500	12	90000
4	7500	7500	12	90000
5	7500	7500	12	90000
6	15000	15000	12	180000
7	18000	18000	12	216000
8	20000	20000	9	180000
Total Business Income				**1026000**

Section 194C- Payments to Transporters

Finance Act, 2015 make an amendment in the provisions of section 194C of the Act to expressly provide that the relaxation under sub-section (6) of section 194C of the Act from Non-Deduction of TDS on Payment made to a Transporter shall only be applicable to the payment in the nature of transport charges (whether paid by a person engaged in the business of transport or otherwise) made to a contractor who is engaged in the business of transport i.e. plying, hiring or leasing goods carriage and who is eligible to compute income as per the provisions of Section 44AE of the Act (i.e a person who is not owning more than 10 goods carriage at any time during the previous year) and who has also furnished a declaration to this effect along with his PAN.

From the above discussion, it is crystal clear that only a person who is engaged in the business of goods carriage is entitled for the benefit of no TDS under section 194C(6). To establish himself as a goods transporter he must own at least 1 truck else he will not qualify for the benefit so given under section 194C(6). When a person undertakes any transportation contract who does not own any truck or goods carriage and arranges trucks from other truck owners he cannot be said to be a person engaged in the business of transport i.e. plying, hiring or leasing goods carriage and he is also not eligible to compute income as per the provisions of section 44AE. In this case even if such a person gives a declaration of owning less than 10 trucks (zero number of trucks), he will not be given the benefit of non-deduction of TDS under section 194C(6).

Meaning of Goods Carriage:

Goods carriage means-

1. Any motor vehicle constructed or adapted for use solely for the carriage of goods;

   Or

2. Any motor vehicle not so constructed or adapted, when used for the carriage of goods.

   The term “motor vehicle” does not include vehicles:

   (a) Having less than 4 wheels and
   (b) With engine capacity not exceeding 25cc
   (c) vehicles running on rails or
   (d) Vehicles adapted for use in factory or in enclosed premises.

No TDS from transporter: If the amount of payment is being made to a contractor during the course of business of plying, hiring or leasing goods carriages, then no tax is required to be deducted from such payments if -

(a) such contractor owns ten or less goods carriages **at any time during the previous year** and

(b) furnishes a declaration to that effect along with his Permanent Account Number (PAN), to the payer.

1. There is no prescribed form or format of declaration. It can be given simply on the letter-head of the transporter with his seal and signature.

2. If the transporter does not furnish the PAN then no such declaration can be filed and tax shall be deducted at 20 per cent as per section 206AA.

3. This benefit of non-deduction of tax is only applicable for a transporter engaged in the business of plying, hiring or leasing goods carriages.

4. The relaxation under sub-section (6) of section 194C of the Act from non-deduction of tax shall only be applicable to the payment in the nature of transport charges (whether paid by a person engaged in the business of transport or otherwise) made to an contractor who is engaged in the business of transport i.e. plying, hiring or leasing goods carriage and who is eligible to compute income as per the provisions of section 44AE (i.e a person who is not owning more than 10 goods carriage at any time during the previous year) and who has also furnished a declaration to this effect along with his PAN. This is as per the amendment by Finance Act, 2015 w.e.f. 01.06.2015. (*Prior to this amendment, the benefit of non-deduction of TDS is applicable to all the transporters irrespective of their size.*)

5. The capacity of goods carriages have been made irrelevant.

6. The payer must furnish the details of payment to transporter in the quarterly statement of TDS to be filed with the income-tax department. [Sec. 194C(7). In this context following case laws are notable:

In **ACIT vs. Mr. Mohammed Suhail, Kurnool in ITA No. 1536/Hyd/2014**, order dated 13.02.2015, it was specifically held that the provisions of section 194C(6) are independent of section 194C(7), and just because there is violation of provisions of section 194C(7), disallowance under section 40(a)(ia) does not arise if the assessee complies with the provisions of section 194C(6). Further, in **Soma Rani Ghosh vs DCIT (ITA No. 1420 /KOL/ 2015), ITAT Kolkata** it was held that if the assessee complies with the provisions of Section 194C(6), no disallowance u/s 40(a)(ia) is permissible, even there is violation of the provisions of Section 194C(7). This is applicable even if aggregate payment in a FY exceeds Rs.1,00,000

Payment for transportation of passengers: Agreement for hiring services of contractors for rendering transportation services for goods and passengers by buses, cars, sumos, utility vans, etc., where the assessee do not take the possession of those vehicles from the contractor and the responsibility of operating and maintaining the vehicles is of the contractor comes within the meaning of work and tax is deductible under section 194C and not under section 194-I. [***CIT vs. Reliance Engineering Associates (P.) Ltd. (Tax Appeal No. 2286 of 2010) Gujarat High Court***]

Note- The exemption u/s 194C(6) is available only to the contractors engaged in the business of business of plying, hiring or leasing goods carriages. This exemption is not applicable for passenger transport contractors

A co-operative society was formed by the truck owners and it entered into contract with company for transportation. The company deducted TDS u/s. 194C(2). Whether the company was liable to deduct TDS on amount paid to truck-owners in terms of Sec. 194C(2) ?

Sec. 194C(2) dictates that the deduction is required only in case of a sub-contract. The relationship between company and its members was not that of a contractor and a subcontractor. The society was nothing more than a conglomeration of truck operators themselves. There was no sub-contract

Detailed Analysis of Section 194C(6):

The real intention of the Law maker has been explained **vide circular no. 19/2015 dated 27.11.2015 issued by the Central Board of Direct Taxes**.

Para 43.5 of the circular reads as follows
"The condition of not owning more than ten goods carriages by the transporter is required to be fulfilled on the date on which the amount is credited or paid, whichever is earlier. In case a transporter does not own ten goods carriages on the date on which the amount is credited or paid but becomes owner of ten goods carriages later in the previous year, the payer shall not be required to deduct tax from the payment made to the transporter during the period of the previous year when he was not owning more than ten goods carriages. However, the tax shall be required to be deducted from the payment made during that part of the previous year during which the transporter owned more than ten goods carriages**."**

Para 43.4 of the Circular reads as follows
"Further, this exemption from TDS is applicable only in respect of transport charges received for plying, hiring or leasing of goods carriage (s) owned by the transporter. Therefore, if a person receives payment in respect of plying, hiring or leasing of goods carriage (s) which are not owned by him, he shall not be entitled to claim exemption from TDS in respect of these payments**."**

Declaration Under Section 194C (6)

To,
Name of the Payer
Address of the Payer

Declaration Under Section 194C (6) For Non–Deduction of TDS

I, Name of vehicles owner, Proprietor/ Partner/ Director of M/s Name of the company or firm and address of the company, (hereinafter "The Contractor") do hereby make the following **declaration as required by sub section (6) of section 194C of the Income Tax, 1961** for receiving payments from the payer without deduction of tax deduction at source (TDS).

1. That name of party authorized to make this declaration in the capacity as proprietor/ partner/ Director.
2. That the contractor is engaged by the payer for hiring or leasing of goods carriage for its business.
3. That I have not own more than ten goods carriage vehicles as on date.
4. That if the number of goods carriages owned by the contractor exceeds ten at any time during the previous year, the contractor shall forthwith, in writing intimate the prater of this fact.
5. That the Income Tax Permanent account number (PAN) of the contractor is PAN of Payee .A self-attested photocopy of the same is furnished to the payer along with this declaration.

Place: Sign

Dated: (Name of Declarant)

Verification

I _____do hereby verify that the contents of paragraphs one to five above are true to my own knowledge and belief and no part of it is false and noting material has been concealed in it.

Place: Sign

Dated: (Name of Declarant)

CHAPTER 8

Interplay of Sec 44AA, 44AB and 44AD of the Income Tax Act,1961

Section 44AB of the income-tax Act, 1961, which provides for tax audit of certain taxpayers, has been amended in the recent past in order to relax the compliance burden on small taxpayers. However, while these amendments are well-intentioned, they have increased confusion amongst taxpayers. We know that there are various monetary limits u/s Sec 44AA , 44AB and Sec 44AD of the Act relating to maintenance of books of accounts and audit. These provisions have created ambiguity among taxpayers and professionals. There is lack of clarity amongst the stakeholders of business community regarding the conduct of audit in relation to the provisions of sec 44AB(a) and sec 44AB(e) of the Act. It is worth mentioning here that tax audit u/s 44AB is applicable when the turnover of the assessee is exceeding Rs.1 crore and the assessee has a lot of questions in his mind regarding the limit of turnover for audit or for maintenance of books of accounts.

Now let us start our journey to understand the provisions of these sections and their interplay with sec 44AD of the Act.

Firstly we have to read the relevant provisions of sec 44AB which are as under:

44AB. *[6]Every person,—*

(a) 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 [7][***]:

*[8][**Provided** that in the case of a person whose—*

(a) aggregate of all amounts received including amount received for sales, turnover or gross receipts during the previous year, in cash, does not exceed five per cent of the said amount; and

(b) aggregate of all payments made including amount incurred for expenditure, in cash, during the previous year does not exceed five per cent of the said payment:

*[9]**[Provided further** that for the purposes of this clause, the payment or receipt, as the case may be, by a cheque drawn on a bank or by a bank draft, which is not account payee, shall be deemed to be the payment or receipt, as the case may be, in cash,**]***

*this clause shall have effect as if for the words "one crore rupees", the words "[10]**[**ten**]** crore rupees" had been substituted; or]*

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

(c) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AE or section 44BB or section 44BBB, as the case may be, and he has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, in any previous year; or

(d) carrying on the profession shall, if the profits and gains from the profession are deemed to be the profits and gains of such person under section 44ADA and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his profession and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year; or

(e) carrying on the business shall, if the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds the maximum amount which is not chargeable to income-tax 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 :

***Provided** that this section shall not apply to the person, who declares profits and gains for the previous year in accordance with the provisions of sub-section (1) of section 44AD and his total sales, turnover or gross receipts, as the case may be, in business does not exceed two crore rupees in such previous year:*

***Sec 44AB(a) -** Every person carrying on business shall maintain books of accounts and get them audited from a Chartered Accountant if total sales, turnover or gross receipt from business during the previous year exceeds Rs.1 crore.*

***44AB(e)** Every person carrying on the business shall, if the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year*

Analysis of the provisions of Sec 44AB(a) of the Act

Every person –

(a) 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

Following proviso is inserted after clause (a) of section 44AB by the Finance Act, 2021, w.e.f. 1-4-2021:

[Provided that in the case of a person whose—

(b) aggregate of all amounts received including amount received for sales, turnover or gross receipts during the previous year,

in cash,

does not exceed five per cent of the said amount; and

(b) aggregate of all payments made including amount incurred for expenditure,

in cash,

During the previous year does not exceed five per cent of the said payment,

this clause shall have effect as if for the words "one crore rupees",

the words "ten crore rupees" had been substituted; or

Analysis of the provisions of Sec 44AB(e) of the Act

It is to be noted that u/s 44AB(e) of the Act, an assessee is required to get his books of account audited who is carrying on the business and is not eligible to claim presumptive taxation under Section 44AD for 5 subsequent years due to opting for presumptive taxation in one tax year and not opting for presumptive tax for any of the subsequent 5 consecutive years provided his income exceeds maximum amount not chargeable to tax. In other words we can say that for the applicability of Sec 44AB(e) of the Act, the assessee must fulfill following two conditions :

a) The assessee is not eligible for presumptive taxation u/s 44AD for subsequent 5 years, due to opting of presumptive taxation u/s 44AD in any previous year and not opting sec 44AD in any of subsequent 5 consecutive Assessment years.

b) His income exceeds the basic exemption limit.
44AA. *(2) Every person carrying on business or profession [not being a profession referred to in sub-section (1)] shall,—*

(i) if his income from business or profession exceeds one lacs twenty thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds ten lacs rupees in any one of the three years immediately preceding the previous year; or

(ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceed one lacs twenty thousand rupees or his total sales, turnover or

gross receipts, as the case may be, in business or profession are or is likely to exceed ten lacs rupees, during such previous year; or

(iii) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AE or section 44BB or section 44BBB, as the case may be, and the assessee has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, during such previous year; or

(iv) where the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year,

keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act:

***Provided** that in the case of a person being an individual or a Hindu undivided family, the provisions of clause (i) and clause (ii) shall have effect, as if for the words "one lacs twenty thousand rupees", the words "two lacs fifty thousand rupees" had been substituted :*

***Provided further** that in the case of a person being an individual or a Hindu undivided family, the provisions of clause (i) and clause (ii) shall have effect, as if for the words "ten lacs rupees", the words "twenty-five lacs rupees" had been substituted.*

Analysis Of the provisions of Sec 44AA(2) Of The Act

Sec 44AA(2) requires persons carrying on business to maintain books of accounts in certain cases. If a person is carrying on business, he is required to maintain books if his turnover exceeds Rs.10,00,000 **or** his profits from business exceeds Rs.1,20,000 in any of the three preceding years. Either of the condition satisfied will require person to maintain books because the word 'or' is used between the conditions. If any condition is satisfied in one or more years out of the three years preceding the previous year shall be required to maintain the books.

In case a new business is started during the previous year, if the turnover is likely to exceed Rs. 10,00,000 or profit is likely to exceed Rs.1,20,000 in such previous year, assessee is required to maintain books of accounts for that previous year. It is to be noted that the limit of Rs.1,20,000/- for Total Income & Rs.10,00,000/- for total sale receipts enhanced to Rs.2,50,000/- & Rs.25,00,000/- respectively in respect of Individuals/ HUF.

In respect of sec 44AA(2)(iv) of the Act, w.e.f. AY 2017-18, the assessee shall keep/maintain such books of account & other documents, if the provisions of Sec. 44AD(4) are applicable It means that if an assessee has declared profits as per sec 44AD(1) in any previous year and in the next 5 years he has failed to opt sec 44AD, then the assessee is not allowed to opt sec 44AD in the subsequent 5 years

after the year in which he failed to opt sec 44AD. The assessee will be required to maintain books if sec 44AD(4) is applicable and his income exceeds the basic exemption limit.

From the reading od sec 44AA(2)(iv) of the Act, we draw following two conditions:

a.The assessee is not eligible for presumptive taxation u/s 44AD for subsequent 5 years, due to opting of presumptive taxation u/s 44AD in any previous year and not opting sec 44AD in any of subsequent 5 consecutive Assessment years.

b.His income exceeds the basic exemption limit

These provisions can be summarised with the help of the following table.

	Category of Taxpayer	Threshold Limits for Income	Threshold Limits for Gross Turnover or Receipts
Business	Individual or HUF	Rs.2,50,000	Rs.25 lacss in any of the 3 years immediately preceding the previous year
Business	Others	Rs.1,20,000	Rs.10 lacss in any of the 3 years immediately preceding the previous year
Presumptive Tax Scheme under Sec. 44AD	Resident Individual or HUF	Rs.2,50,000	Taxpayer opted for scheme in any of last 5 previous years but does not opt for in current year.
Presumptive Tax Scheme under Sec. 44AD	Resident Partnership Firm	-	Taxpayer opted for scheme in any of last 5 previous years but does not opt for in current year.

Sec 44AD(4)

44AAD(4) Where an eligible assessee declares profit for any previous year in accordance with the provisions of this section and he declares profit for any of the five assessment years relevant to the previous year succeeding such previous year not in accordance with the provisions of sub-section (1), he shall not be eligible to claim the benefit of the provisions of this section for five assessment years subsequent to the assessment year relevant to the previous year in which the profit has not been declared in accordance with the provisions of sub-section (1).

Analysis of the provisions of Sec 44AD(4) of the Act

The above provision postulates as the following:

a. The assessee should have declared profit as per section 44AD for any previous year; and
b. The assessee should have declared profit not in accordance with section 44AD in any of the five assessment years succeeding the previous year in which profit was declared as per section 44AD as per condition (a).

44AD(5)*Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee to whom the provisions of sub-section (4) are applicable and whose total income exceeds the maximum amount which is not chargeable to income-tax, shall be required to keep and maintain such books of account and other documents as required under sub-section (2) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB.*

Analysis of the provisions of Sec 44AD(5) of the Act

Sub Section 5 will be applicable if following conditions are satisfied.

a. An eligible assessee to whom the provisions of sub-section (4) are applicable; and
b. The total income of that assessee has exceeded the maximum amount which is not chargeable to income-tax.

In other words, sub-sections (4) and (5) are mutually inclusive. Provisions of sub-section (4) shall not be applicable to an assessee who never opted for the scheme in any of the earlier previous years, as it provides that the eligible assessee should have declared profits as per section 44AD for any previous year. Under this situation, assessees who have never ever opted for the scheme till the AY 2016-17 can enjoy the benefits by showing lesser profits for the subsequent assessment years.

On combined analysis of 44AA(2)(iv), 44AB(e) and 44AD(4) we can interpret that u/s 44AB(e) those assessees are required to get their books audited whose

a. Total income exceeds basic exemption limit.
b. Earlier assessee has declared income u/s 44AD in any previous year.
c. Even being eligible, assessee do not declare income as per sec 44AD in any of next 5 A.Ys in which he first declared income as per sec 44AD of the Act.

We can divide our study in the following 4 parts:

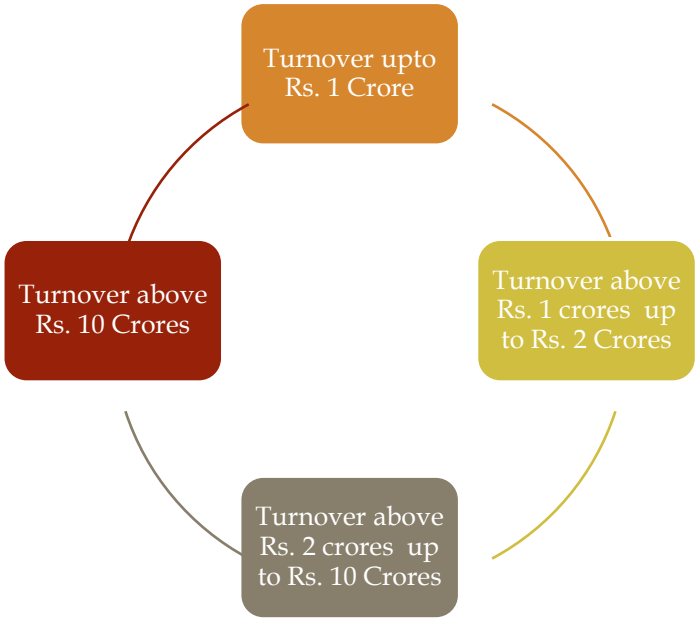
A. When business turnover is upto Rs.1 crore

B. When business turnover is exceeding Rs.1 crore but upto Rs.2 crore

C. When business turnover exceeding Rs.2 crore but upto Rs.10 crore

D. When business turnover exceeding Rs.10 crore

These all four categories can be shown as under



A. When business turnover is upto Rs.1 crore

If a person is having turnover/ gross receipts up to Rs.1 crore, clause (a) of Sec 44AB will not be applicable. If the person is declaring profits as per sec 44AD(1), he will not be required to get his books

of accounts audited. If in case he is declaring profits less the 8% of turnover (6% in case of sale is through banking channels), then we have to check two more conditions:

a) Whether in any of the preceding previous years, the person has declared profits as per sec 44AD.

AND

b) Whether the income of the person exceeds the basic exemption limit.

If both the above conditions are satisfied, then the person is required to get books of accounts audited. In case any of the condition is not satisfied or both the conditions are not satisfied, then the person would not be required to get the books of accounts audited.

(a) A person who has started a new business

It is a very interesting issue in which an assessee who has started a new business during the previous year and he is unable to decide whether to opt for sec 44AD of the Act or not. If he decides to avail the benefits of sec 44AD, then he has to declare profits at the rate of 8% or 6% of turnover or at higher rate as specified in sec 44AD. Then he shall neither be required to maintain books of account nor required to get them audited. In case, he decides to not opt for sec 44AD, the situation will be entirely different.

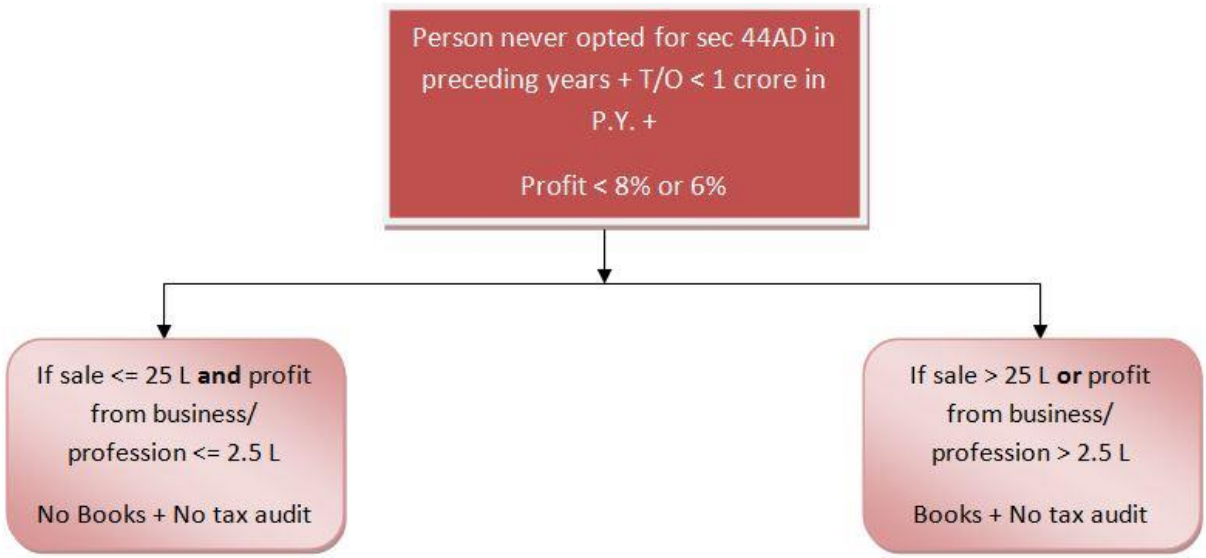
In this regard, it is to be noted that the assessee who has not declared profits u/s 44AD in any of the preceding previous years and he has not failed to declare profits in subsequent 5 years as per sec 44AD. The assessee who has started his business in the previous year has not satisfied the conditions of sec 44AD(4) of the Act .Hence the assessee will not be required to get his books of account audited in first year of business if his turnover is below Rs.1 crore during the previous year. However, he will be required to maintain books of accounts as per 44AA(2)(ii) if in case of individual/ HUF turnover is likely to exceed Rs.25 Lacs or his profits are likely to exceed Rs.2.5 Lacs.

Therefore, assessee who has started a new business would not be required to get books of accounts audited even if he is declaring profits below 8% or 6% because the condition that **in** earlier previous year he has declared income as per sec 44AD is not satisfied. The income may be below taxable limit or higher than that.

Example: Following are the 4 assesses who have started business during the previous year and they do not want to opt the provisions of sec 44AD of the Act.

Assessee	Turnover (Rs.)	Income/ Profits	Maintenance of Accounts	Audit of Books
A	20,00,000	1,50,000	No	No
B	20,00,000	3,00,000	Yes (profits exceeds Rs. 2.5 L)	No
C	50,00,000	3,25,000	Yes	No
D	50,00,000	1,75,000	Yes	No

From combined study of sec 44AA, 44AB and 44AD, we can conclude:



Example: Mr. X started a new business in P.Y. 2020-21 and had a turnover of Rs.95 lacs and profit of Rs.5 lacs in 2020-21. The assessee wants to know whether he will he be liable to tax audit u/s 44AB.

Ans: Mr. X has started a new business in the previous year 2020-21 so he has not satisfied the conditions of sec 44AD(4) of the Act Hence he will not be required to get his books of account audited

in first year of business if his turnover is below Rs.1 crore during the previous year. However, he will be required to maintain books of accounts as per 44AA(2)(ii)

Example: Mr. X is a Chartered Accountant and started a professional firm during the previous year 2020-21 and had a turnover of less than Rs.50 lacs in PY- 2020-21 and profit of less than 50%. Whether he will he be liable to tax audit u/s 44AB.

Ans: Since the assessee is engaged in profession and not business in this case, our answer will differ from above. Under the provision of sec 44ADA of the Act, there is no provision to refer the previous year and assessee has to see the provision year wise independently. The asseessee has to maintain the books independently and liable to be tax audit u/s 44AB(d).

(b) If an assessee who has never opted the provisions of 44AD

In this case if an assessee who has never opted the provisions of sec 44AD of the Act will not be required to get his books of accounts audited if his turnover is below Rs.1 crore even if he is declaring profits below 8% or 6% of turnover, because sec 44AD(4) of the Act is not applicable in his case. Two of the 3 conditions mentioned on combined analysis of sec 44AA(2), 44AB(e) and 44AD(4) are not satisfied in this case i.e. assessee has not declared income u/s 44AD in any previous year and assessee has not failed to opt sec 44AD in subsequent 5 years. It does not matter whether the income is below the basic exemption limit or higher than the basic exemption limit. This will be applicable for the person not only in the first year, rather in later years also. If in later years he has not declared income u/s 44AD even once, he would not be required to get books of accounts audited even his profits are below the rates provided in sec 44AD provided turnover is below Rs.1 crore.

A.Y.	Turnover (Rs.)	Income/ Profits	Maintenance of Accounts	Audit of Books
2016-17	1,35,00,000	4,00,000	Yes	Yes 44AB(a)
2017-18	2,50,00,000	5,50,000	Yes	Yes 44AB(a)
2018-19	1,25,00,000	3,00,000	Yes	Yes 44AB(a)
2019-20	80,00,000	3,25,000	Yes 44AA(2)(i)	No
2020-21	50,00,000	1,75,000	Yes 44AA(2)(i)	No
2021-22	75,00,000	4,25,000	Yes 44AA(2)(i)	No

From the above table it is clear that under this situation, assessees who have never ever opted for the scheme till the AY 2016-17 can enjoy the benefits by showing lesser profits for the subsequent assessment year.

(c) A person who has opted for Sec 44AD(1) in any of the previous year and in subsequent 5 previous years, declares profits to be lower than the 8% or 6% of turnover:

In such a situation, if a person who has opted presumptive taxation in the previous year and he can opt for the same in the current year also. But in case he does not want to opt the provisions of presumptive taxation, he will be liable to maintain books of accounts and get them audited under section 44AB(e) of the Act

In previous year 2018-19, the person has opted out of sec 44AD(1). Therefore in next 5 previous years i.e. upto P.Y. 2023-24, he is compulsorily required to get books of account audited u/s 44AD(e) irrespective of profits declared. It is to be noted that in P.Y. 2020-21, the income of the assesse is below the taxable income, the person is not required to get his books of accounts audited.

Previous Year	Turnover (in Lacss)	Profit %	Whether cash Receipts/Payments up to 5% of total receipts/ payments	Whether income above basic exemption limit	Whether audit required?
2017-18	80	9%	Yes	Yes	No
2018-19	75	5%	No	Yes	Yes [Sec 44AB(e)]
2019-20	62	10%	Yes	Yes	Yes[Sec44AB(e)]
2020-21	48	4%	Yes	No	No
2021-22	99	7%	No	Yes	Yes [Sec 44AB(e)]

Note- The exemption from audit if cash receipts are upto 5% of total receipts and cash payments are up to 5% of total payments is not applicable if turnover is upto 1 crore. The proviso for exemption from audit is given below the clause (a) of Sec 44AB i.e. only in cases where turnover is above Rs.1 crore. The method of receipts and payments is irrelevant if the turnover is less than or equal to Rs.1 crore

(d) No audit is required if turnover is up to Rs.1 crore and taxable income is below exemption limit

From the reading of provisions of the sec 44AD(5), it is concluded that there are two conditions of sec 44AD(5) of the Act. The first is regarding applicability of provisions of sec 44AD(4) of the Act and the second is that the income of assessee is more than the basic exemption limit. These both conditions are connected with word "and". These two conditions must be fulfilled simultaneously. If the assessee fails to fulfill any one condition or both, then the assessee is not required to maintain books of account and not to get the accounts audited.

In other words, we can say that the assessee is bound to get the books of accounts audited, if the following two conditions are satisfied:-

a. Earlier assessee has declared income u/s 44AD in any previous year and assessee do not declare income as per sec 44AD in any of next 5 A.Ys in which he first declared income as per sec 44AD.

b. The total income of the assessee exceeds the maximum amount which is not chargeable to income tax

To claim the benefit of above sec 44AD(5),firstly we have to see the meaning of total income. As per sec 2(45) of the Act, Total income means the total amount of income referred to in section 5 computed in the manner laid down in the Act. Thus total income for the purpose of Sec 44AD(5) would be determined as under :

i) Income from all heads of income be aggregated after adjusting for brought forward losses, unabsorbed depreciation, etc. and after excluding exempt incomes;

ii) From the resultant, amount eligible for deduction under Chapter VI-A will be deducted.

iii) Balance will be total income for the purposes of section 44AD(5)

If the total income is below the maximum amount not chargeable to tax in the case of assessee then the assessee will not be required to maintain books and get them audited if he declares profit from eligible business lower than that deemed under section 44AD.

Further, if any individual/HUF has incurred loss, then also there is no need to maintain books and to get them audited.

(e) No audit of a person other than resident individual/HUF/Partnership Firm

- It is noteworthy that an assessee except resident individual/HUF/Partnership Firm eligible u/s 44AD, such as company or a LLP shall not be required to get its accounts audited u/s 44AB of the Act, even if there:
    - gross receipts during the year does not exceed Rs.1 Crore,
    - they report profit lower than the presumptive rate of 6 percent or 8 percent as the case may be, and
    - their taxable income exceeds maximum amount of taxable income not chargeable to tax.

(f) Assessee has not opted for presumptive taxation because of commission income

As per the provisions of sub section 6 of section 44AD, if an assessee has earned any income from specified activities such as commission, then provisions of section 44AD shall have no bearing on such assessee .In such a case, the assessee is not entitled to opt the provisions of sec 44AD.If ,in a year, the chain of sec 44AD is broken due to the receipt of commission ,that will not be considered as the assessee has gone out of the umbrella of sec 44AD.The asseessee is entitled to opt for sec 44AD in subsequent years.

It can be implied that where an assessee has turnover less that threshold specified u/s 44AB(1) and have earned any income as commission or brokerage, then he can file income with lower profits without getting its books of account audited.

Turnover of Mr. X for the F.Y. 2019-20 was Rs.74 Lacss. He has opted for Sec 44AD in that year. In the F.Y. 2020-21, his turnover was Rs.60 Lacss. Besides this turnover, his commission receipts were Rs.5,000. He could not opt for Sec 44AD as per the provisions of Sec 44AD(6). Whether he can avail the benefit of Sec 44AD from F.Y. 2021-22?

Mr. X was having commission income in the F.Y. 2020-21 and was not eligible for Sec 44AD. As per the provisions of Sec 44AD(6), a person cannot opt for Sec 44AD, if he is having commission income. He has not opted out of Sec 44AD on his own, rather he was not eligible by the operation of law. Hence he can opt for Sec 44AD in the F.Y. 2021-22.

B. When business turnover is exceeding Rs.1 crore but upto Rs.2 crore

The turnover limit for audit u/s 44AB(a) is Rs.1 crore. However, Sec 44AD allows a person to declare profits @ 8% or 6% of turnover if turnover is up to Rs.2 crores. This makes the interplay of Sec 44AB and 44AD more interesting. In such a situation, a person may come across the following situations :

(a) New business started during the previous year

In such a situation, if a person has cash receipts and payments less than 5% then by virtue of the proviso to sec 44AB(a), he is not required for tax audit. But if his cash receipts and payments from business are more than 5% then he is liable for audit under section 44AB(a) of the Act. In both the cases, he has to maintain the books of account . It is also open to the person who has turnover upto Rs.2 crores to declare profits @8% or 6% of the turnover. In such a situation that person will not be liable for audit and maintenance of books of accounts.

Example: Mr. X has started a new business in P.Y. 2020-21 and has turnover of Rs. 1.5 crore. Whether he will be liable for audit u/s 44AB?

Ans. If the cash receipts and payments from business of Mr. X are more than 5% then he is liable for audit under section 44AB(a) of the Act. Since his turnover is upto Rs. 2 crores he has a option to declare profits @8% or 6% of the turnover. In such a situation that person will not be liable for audit and maintenance of books of accounts. If the cash receipts and payments from business of Mr. X are less than 5% then he will not be liable for audit.

(b) A person who has opted presumptive taxation during any of the previous year

In such a situation, if a person who has opted presumptive taxation in the previous year and he can opt for the same in the current year also. But in case he does not want to opt the provisions of presumptive taxation, he will be liable to maintain books of accounts and get them audited under section 44AB(e) of the Act. It does not matter whether his transactions are less than or more than 95% in any mode other than cash. In this connection, it is to be noted that the proviso to section 44 AB(a) is not applicable to section 44AB(e) of the Act.

Example:

Mr. X is engaged in a business of trading of goods. During FY 2019-20 relevant to AY 2020-21, he reported Total turnover of the business as Rs.1.45 Crore, entire sales were made in cash. Mr. X computed profit from the aforesaid business to be Rs.6.80 Lakh which was his sole income during the year. During FY 2017-18 and FY 2018-19, he opted for presumptive taxation scheme u/s 44AD. Whether Mr. X is required to get his accounts audited u/s 44AB ?

Ans. Mr. X is required to get his accounts audited u/s 44AB(e) of the Act as he had claimed profit from business less than deemed income u/s 44AD i.e., actual income of Rs.6.80 Lakh is less than deemed income of Rs.11.6 Lakhs (8% of 1.45 Crore). Whereas, total income of assessee for the FY 2019-20 exceeds the maximum amount not chargeable of tax. {Section 44AD(5)}

Also, Mr. X Shall not be allowed to avail the benefit of presumptive taxation for next 5 assessment years as well i.e., AY 2021-22 to AY 2025-26 as he was eligible for opting for presumptive taxation u/s 44AD for A.Y. 2020-21 but had not opted for the same [Section 44AD(4) r.w.s. 44AB(e)].

(c) A person who has not opted presumptive taxation in any of the previous year

If a person who has not declared profits u/s 44AD in any previous year and for the current financial year he does not want to opt the provisions of the presumptive taxation then he would be liable for audit under sec 44AB(a)of the Act. If he wants to opt the provisions of presumptive taxation then he is not liable to maintain books of accounts and get them audited.

(d) A person having income below the basic exemption limit

In such a scenario, the following situations may emerge

a. If a person who has declared profits u/s 44AD in any of the preceding previous year, and he does not want to opt the provisions of presumptive taxation for the current year. His total

income is below the exemption limit, even then the audit would be conducted as per the provisions of sec 44AB(a). In such a situation, he can take the benefit of proviso to section 44AB(a).

b. If a person who has failed to opt the provisions of presumptive taxation under section sec 44AD(1) and his income is above the basic exemption limit, then he will be required to get his books of accounts audited u/s sec 44AB(e) even if he declares profits above 8% or 6% of turnover.

Example: Mr. X is engaged in a business of trading of goods. During FY 2020-21 relevant to AY 2021-22, he reported Total turnover of the business Rs.1.47 Crore, entire sales were made in cash. Mr. X computed profit from the aforesaid business to be Rs.2.15 Lacs which was his sole income during the year. During FY 2018-19 and FY 2019-20, he opted for presumptive taxation scheme u/s 44AD. Whether Mr. X is required to get his accounts audited u/s 44AB for F Y 2020-21?

MR. X is required to get his accounts audited u/s 44AB(a) of the Act as total income of assessee for the FY 2020-21 relevant to AY 2021-22 is less than maximum amount not chargeable to tax even if he had claimed profit from business less than deemed income u/s 44AD i.e., actual income of Rs.2.15 Lacs is less than deemed income of Rs.11.76 Lacs (8% of 1.47 Crore).

However, Mr. X shall not be allowed to avail the benefit of presumptive taxation for next 5 assessment year as well i.e., AY 2022-23 to AY 2026-27 as he was eligible for opting for presumptive taxation u/s 44AD for A.Y. 2021-22 but had not opted for the same. (Section 44AD(4) r.w.s. 44AB(e)).

This implies that if in AY 2022-23 to AY 2026-27, his total income exceeds maximum amount not chargeable to tax, he shall be mandatorily required to get his accounts audited u/s 44AB irrespective of the fact that his profit from such business exceeds deemed profit stipulated u/s 44AD(1).

(e) A Person who has received commission during the year

A restriction under section 44AD(6) of the Act has been imposed that a person receiving any commission or brokerage cannot opt for the provisions of presumptive taxation. If it is the first year of business and the person receives any commission then he cannot opt the benefits of presumptive taxation. That person will have to get his books of accounts audited under section 44AB(a) of the Act. In such a case, the assessee can avail the benefit of proviso to the section 44AB(a) of the Act.

As per the provisions of sub section 6 of section 44AD, if an assessee has earned any income from specified activities such as commission, then provisions of section 44AD shall have no bearing on such assessee .In such a case, the assessee is not entitled to opt the provisions of sec 44AD.If ,in a year, the chain of sec 44AD is broken due to the receipt of commission ,that will not be considered

as the assessee has gone out of the umbrella of sec 44AD.The asseessee is entitled to opt for sec 44AD in subsequent years.

Example: Mr. X is engaged in a trading business. In P.Y. 2020-21 his turnover is Rs.1.5 crores (all by digital mode) Also he has received Rs.5,000 as commission income. Profit shown as per books is Rs.2,40,000. In P.Y. 2018-19 and P.Y. 2019-20 he has opted for presumptive taxation. Whether he is liable to get his accounts audited u/s 44AB?

Answer: MR. X is not eligible to opt the provisions of presumptive taxation by virtue of the provisions of section 44AD (6) of the Act. In this case the provisions of Section 44AB (a) will be applicable and not Section 44AD (e). However by virtue of proviso to Section 44AB (a), he is not liable to get his books of accounts audited.

(f) Professional firms falling under this category whether they are 95 or not have audit and accounts because the proviso is applicable to sec 44ab(a) of the Act.

This can be understood with the help of an example. Mr. X has started business on 01.04.2019.

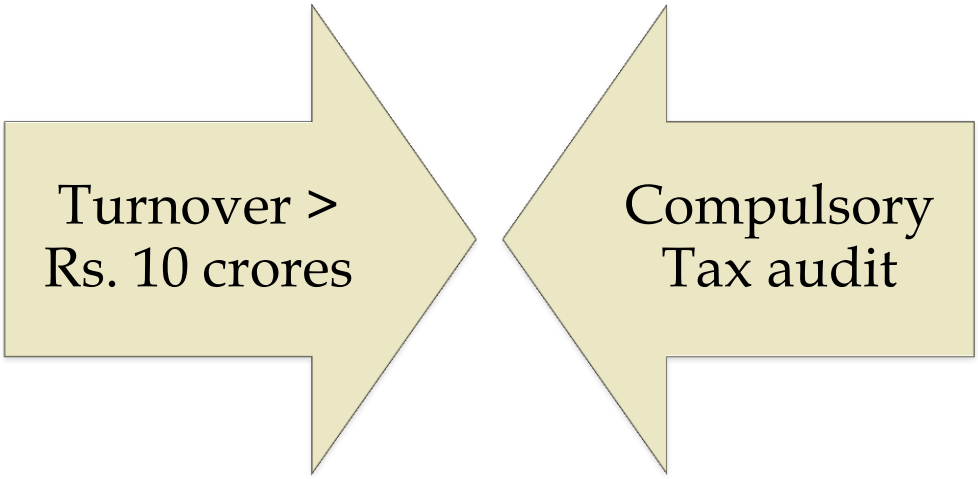
Previous Year	Turnover (in Lacss)	Profit %	Whether cash Receipts/Payments up to 5% of total receipts/ payments	Whether income above basic exemption limit	Whether audit required?
2019-20	150	5%	Yes	Yes	No [Proviso to sec 44AB]
2020-21	140	5%	No	No	Yes [44AB(a)]
2021-22	120	10%	Yes	Yes	No
2022-23	175	4%	No	No	Yes [44AB(a)]
2023-24	175	4%	Yes	yes	Yes [44AB(e)]

C. When business turnover exceeding Rs.2 crore but upto Rs.10 crore

As per the proviso to section 44AB (a),in cases where the aggregate cash receipts and aggregate cash payments made during the year from business does not exceed 5% of total receipt and total payment respectively the assessee is not liable to get his books of accounts audited under section 44AB(a) if his turnover does not exceed Rs.10 crores. However if the less than 95% of the business transactions is done through banking channels, the assessee is liable to get his books of accounts audited. This provision is only applicable if the assessee is engaged in a business and not in a profession. A person engaged in a profession is liable to get his books of accounts audited under section 44AB(b) if his turnover exceeds Rs.50 Lakhs.

D. When business turnover exceeding Rs.10 crore

A person engaged in business whose turnover exceeds Rs.10 crores is liable to get his books of accounts audited under section 44AB even if more than 95% of the business transactions is done through banking channels. It is to be noted that the proviso to section 44AB(a) is only applicable to a person engaged in a business. A person engaged in a profession is liable to get his books of accounts audited under section 44AB(b) if his turnover exceeds Rs.50 Lakhs.



Comprehensive Table

Covering all situations in the interplay of Sec 44AA, 44AB and 44AD:

Case	Turnover	Whether total income below exemption limit	Whether cash receipts/ payments upto 5% of total receipts/ payments	Whether opted for Sec 44AD in any of the preceding year	Rate of profits declared as %age of turnover	Whether required to maintain books u/s 44AA(2)	Whether required to get books of accounts audited
A (a)	Up to Rs.1 crore	Yes	Irrelevant	No	**8%**	Note 1	No
(b)	Up to Rs.1 crore	**No**	Irrelevant	Yes	4%	Yes	Yes
(c)	Up to Rs.1 crore	Yes	Irrelevant	No	4%	Note 1	No
(d)	Up to Rs.1 crore	No	Irrelevant	Yes, But opted out from Sec 44AD in any of the preceding 5 years	10%	Yes	Yes u/s 44AB(e)
(e)	Up to Rs.1 crore	Yes	Irrelevant	Yes	4%	Note 1	No
B (a)	Rs.1 crore-Rs.2 crores	No	Yes	No	5%	Yes	No [Proviso to Sec 44AB(a)]
(b)	Rs.1 crore-Rs.2 crores	Yes	No	Yes	5%	Yes	Yes u/s 44AB(a)
(c)	Rs.1 crore-Rs.2 crores	Yes/No	No	Yes	9%	Yes	No
(d)	Rs.1 crore-Rs.2 crores	No	No	Yes, But opted out	10%	Yes	Yes u/s 44AB(e)

				from Sec 44AD in any of the preceding 5 years			
(e)	Rs.1 crore-Rs.2 crores	Yes	No	Irrelevant	5%	Yes	Yes u/s 44AB(a)
C (a)	Rs.2 crores-Rs.10 crores	Irrelevant	Yes	Irrelevant	Irrelevant	Yes	No [Proviso to Sec 44AB(a)]
(b)	Rs.2 crores-Rs.10 crores	Irrelevant	No	Irrelevant	Irrelevant	Yes	Yes, Sec 44AB(a)
D	Above Rs.10 crores	Irrelevant	Irrelevant	Irrelevant	Irrelevant	Yes	Yes

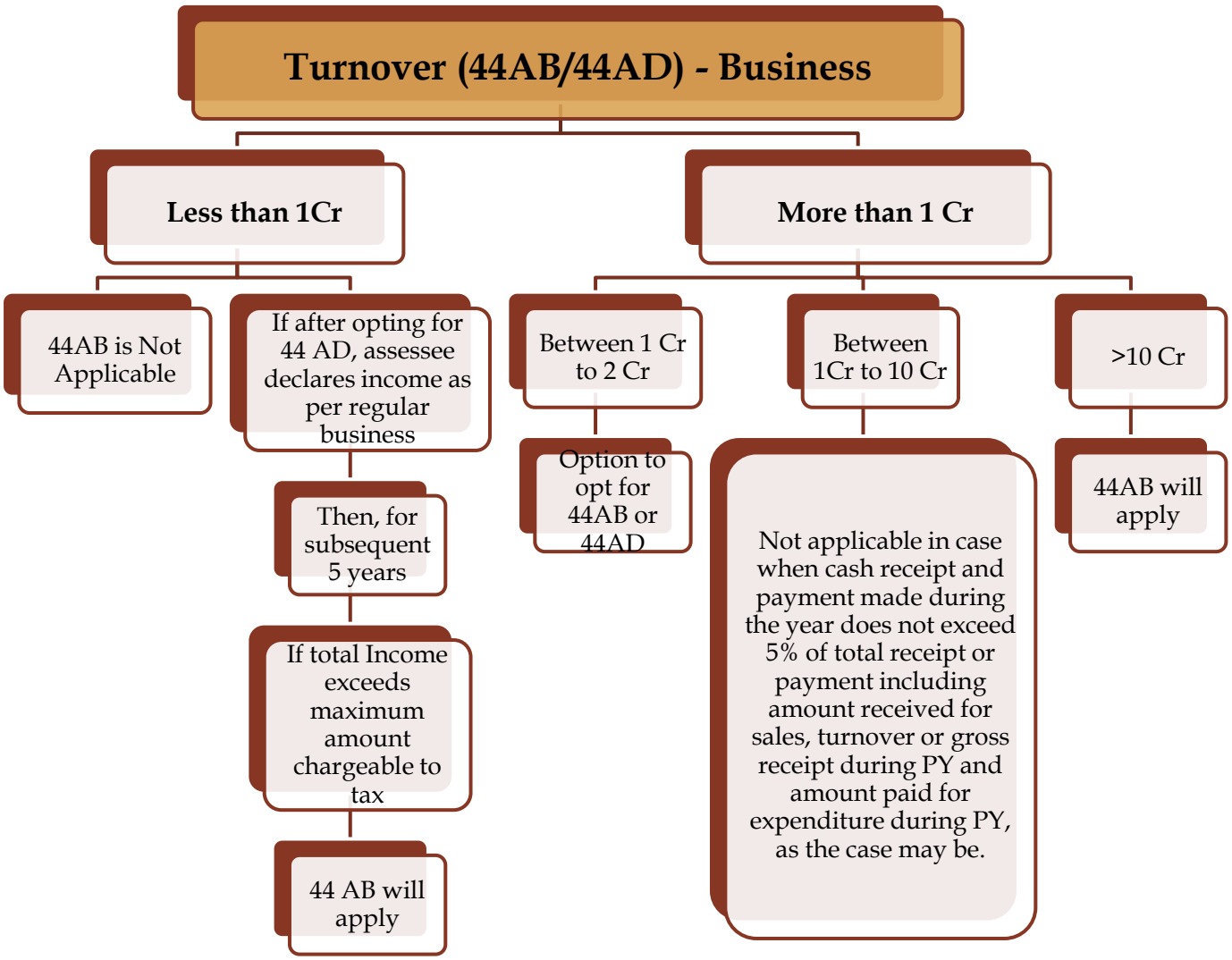
Note 1- In case of individuals and HUF if turnover is up to Rs.25 Lacs and profits are up to Rs. 2.5 Lacs in P.Y. and for firm turnover is upto Rs.10 Lacs and profits up are to Rs.1.2 Lacs, maintenance of books is not mandatory. Otherwise books of accounts are to be maintained

CHAPTER 9

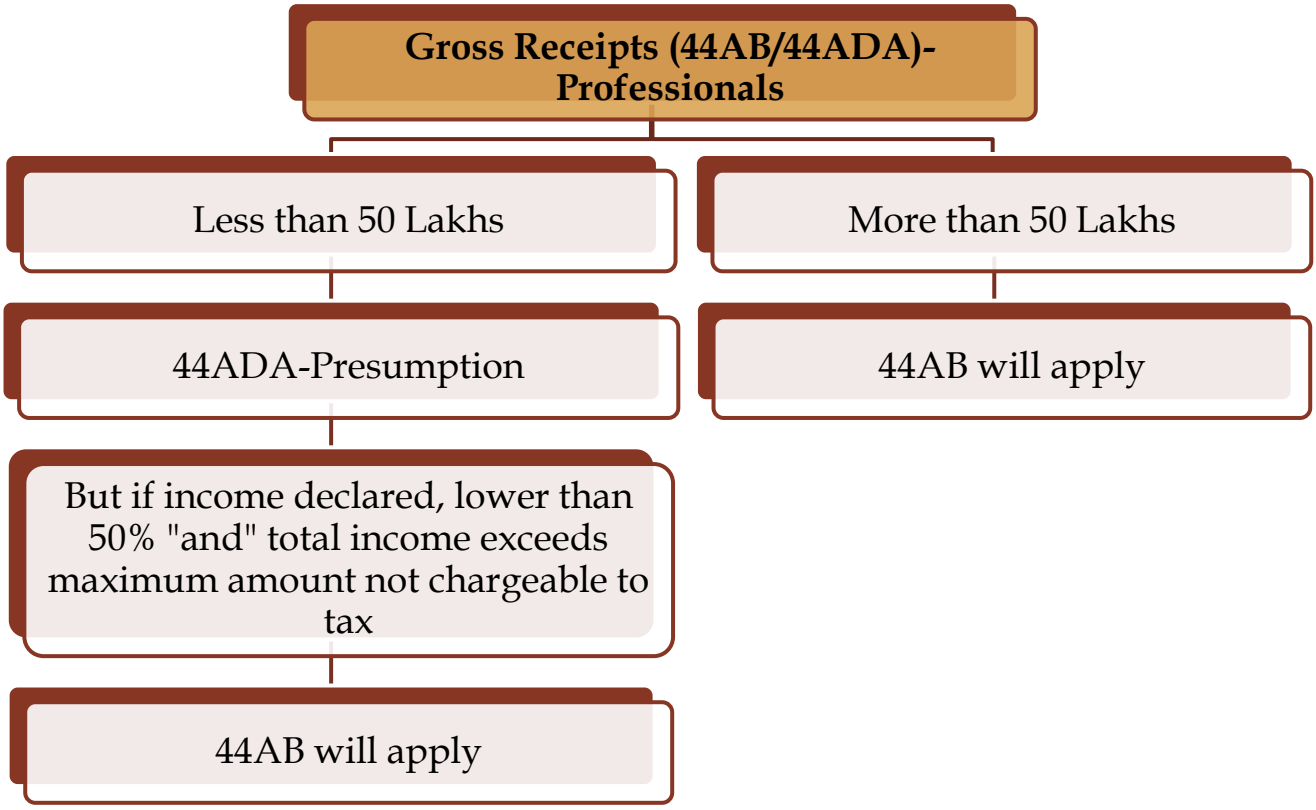
Applicability of tax audit and presumptive taxation in case a person is carrying on both Business and Profession

The limits specified for getting your accounts audited are different in case of business and profession. Some persons are engaged in carrying on both business and profession at the same time. Now a question may arise in the case of an assessee carrying on business and at the same time engaged in a profession as to what are the limits applicable to him under section 44AB for getting the accounts audited.

Let us first discuss the limits specified in case of a business--



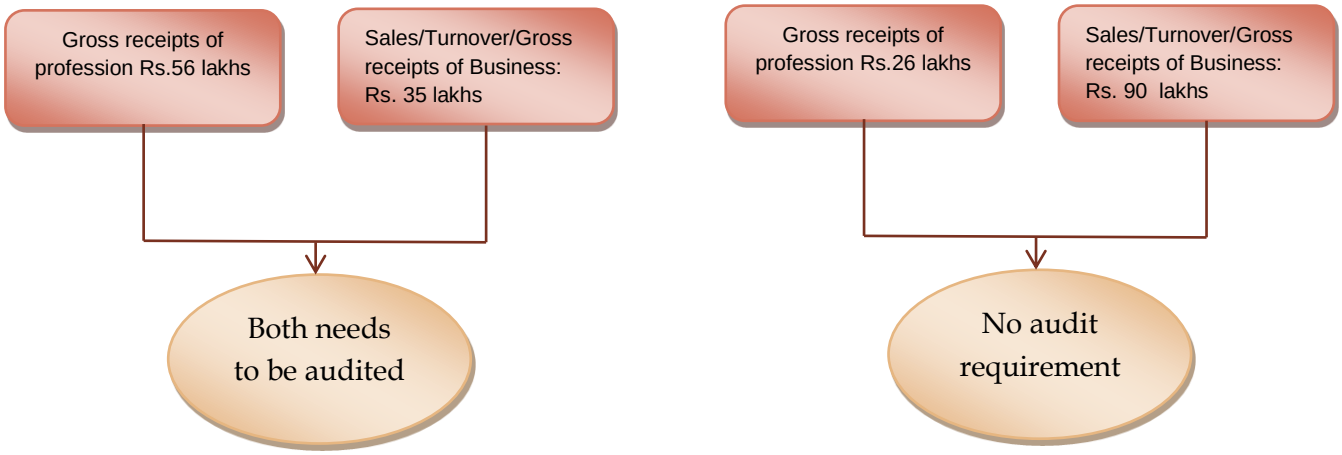
Limits specified in case of a Profession –



Case where the receipts from any of his business or profession are exceeding the limits specified under Sec 44AB

In such a case if his professional receipts are, say, rupees fifty six lacs but his total sales, turnover or gross receipts in business are, say, rupees thirty five lacs, it will be necessary for him to get his accounts of the profession and also the accounts of the business audited because the gross receipts from the profession exceed the limit of rupees fifty lacs. If however, the professional receipts are, say, rupees twenty six lacs and total sales turnover or gross receipts from business are, say, rupees ninety lacs it will not be necessary for him to get his accounts audited under the above section, because his gross receipts from the profession as well as total sales, turnover or gross receipts from the business are below the prescribed limits.

Para 5.20 of Guidance Note of ICAI



A person who is running an eligible business can opt to pay tax under the presumptive taxation scheme as per sec 44AD. However, his gross receipts or turnover should not exceed Rs.2 crores during the year and depending upon the nature of receipts, the tax will be charged on 8% or 6% on the turnover. If a person is carrying on profession, then a specific provision 44ADA can be opted by him for payment of tax on a presumptive basis. The person should be an eligible assessee as per sec 44ADA and his gross receipts or Turnover during the year should not exceed Rs.50 lacs. 50% of the above Turnover will be subject to tax under 44ADA. But in some cases an assessee is doing both business and profession simultaneously.

It is often seen that architects/interior designers [profession referred in Section 44AA(1)] also supply material, labour, etc. under their own name or carry on such contractor business in addition to the profession referred above. So, in such cases, these persons cannot avail the benefit of Section 44AD for contractor business or for turnover from supply of material because they are also engaged in profession as referred above and such profession is outside the purview of this scheme as referred to in subsection (6) of section 44AD. Same will be the case of doctors/medical professionals who are providing medical, nursing home, medical consultation (OPD) services and in addition to that are also carrying on business activities like medical supplies, supply of surgical goods etc.

Example: Assessee is doctor by profession but he is also engaged in medicine sale - Rs.82 lacs. His Professional Receipts are Rs.42 lacs ,Net Profit offered in profession - 26 lacs. Can he opt for Sec. 44AD?

Since profit from profession is more than 50%, he can opt for Sec. 44ADA. However, he cannot opt for Sec. 44AD since he is a professional (as per Sec.44AD(6).No Tax Audit since T/o less than 1 cr. [44AB(a)].

Example: Mr. X is a medical practitioner, having clinic and medical shop. His turnover/gross receipts are as under:

Fees from Profession - Rs.40 lacs
Sales in medical Shop- Rs.70 lacs
Advise whether sec 44AB / 44ADA is applicable to him.

Every person -

(a) 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 ; Or

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

In the present case tax audit is not applicable as the gross receipts from profession and sales from business is below threshold limits specified u/s. 44AB(b) and 44AB(a).

Whether a particular activity can be classified as 'businesses' or 'profession' will depend on the facts and circumstances of each case.

The term "business" is defined in section 2(13) of the Act, as under: "Business" includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The word `business' is one of wide import and it means activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income. The expression "business" does not necessarily mean trade or manufacture only. Whether a particular activity can be classified as "business" or "profession" will depend on the facts and circumstances of each case. Barendra Prasad Roy v ITO[1981]129ITR295(SC) Sec 2(36) defines profession to include vocation. The profession is not defined under the Act except in section 44AA (1) for maintenance of Books of account which are listed as under: - The expression "profession" involves the idea of an occupation requiring purely intellectual skill or manual skill controlled by the intellectual skill of the operator, as distinguished from an operation which is substantially the production or sale or arrangement for the production or sale, of commodities. SC has stated "The expression 'profession' involves the idea of an occupation requiring purely intellectual skill or manual skill controlled by the intellectual skill of the operator, as distinguished from an operation which is substantially the production or sale or arrangement for the production or sale, of commodities." •CIT Vs. Manmohan Das (Deceased)[1966]59ITR699(SC), •CIT Vs. Ram Kripal Tripathi [1980]125ITR408(All).

Following have been classified to be Business as per judicial decisions:

- Insurance Agent
- Nursing home
- Management consultants

- Coaching classes
- Stock broking
- Dealer in shares/securities
- Gain on sale on investments
- Clearing, forwarding and shipping agents
- Financial Planning Advisors
- Group of Doctors practicing jointly as partners of a partnership firm

A person could be earning income from the above two sources, let's a take a scenario of a doctor. He might be engaged in medical consulting and he may simultaneously be running a pharmacy. Now, being a doctor, he is an eligible assessee u/s 44ADA of the Act and he can opt the provisions of presumptive taxation. But in respect to his pharmacy which is a business, he will not be eligible to opt the provisions of sec 44AD of the Act by virtue of the restriction of sec 44AD(6) of the Act. But he will not be eligible to opt for both sections 44AD and sec 44ADA simultaneously.

Sec 44AD (6) it reads as; "The provisions of this section, notwithstanding anything contained in the foregoing provisions, shall not apply to –

(i) a person carrying on profession as referred to in sub-section (1) of section 44AA;
(ii) a person earning income like commission or brokerage; or
(iii) a person carrying on any agency business"

From the above reading, we can conclude that sec 44AD(6) neglects out of its purview of a person engaged in profession specified u/s 44AA.

From the reading of the above section, it is clear that a person who is a specified professional cannot opt sec 44AD of the Act, but there is no bar for such persons to opt sec 44ADA on their professional income .It is to be noted that in sec 44ADA of the Act there is no restriction regarding the opting for presumptive taxation. It is important to know the intent of the law makers. If such professions or other specified businesses as referred in Section 44AD(6) were also provided, by way of an exception, in the definition of "eligible business" along with the business referred in Section 44AE, instead of subsection (6)then such professions and specified businesses would have been able to avail the benefit of Section 44AD in respect of businesses like contractor business, medical supplies, patient room rent, etc. as now it will also fall under "eligible business"

Example: Whether the following persons would be considered to be engaged in business or profession for the purposes of Section 44AD and Section 44ADA

Mr. A is a yoga teacher

Mr. B is cost accountant

Mr. C is a Chartered Accountant engaged in running coaching classes is business or profession

Mr. D is a software developer who prepares and sells computer software to companies.

Mr. E is an astrologer

Solution:

Mr. A	Yoga teacher is not a specified under section 44AA(1). So income from yoga classes would be considered as business income and he shall be eligible for section 44AD if his turnover is less than Rs.2 crores.
Mr. B	Cost accountant is not a specified profession under section 44AA(1). So his income would be considered as business income and he shall be eligible for section 44AD if his turnover is less than Rs.2 crores.
Mr. C	Income from coaching classes run by a Chartered Accountant is a return from professional activity. Profession includes vocation and teaching is a vocation
Mr. D	Preparing a software and selling the same to others is a business activity. In this case the professional skills are utilised for commercial purposes.
Mr. E	**An Astrologer is not a specified under section 44AA(1). So income of Astrologer would be considered as business income and he shall be eligible for section 44AD if his turnover is less than Rs.2 crores.**

Conclusion: In the nutshell we can conclude that the provisions of Section 44AD would be applicable on person having business income or professional income from non-specified professionals under section 44AA(1). There are two different schools of thought regarding income of non-specified professionals.

First School of Thought- Sec 44ADA of the Act deals with professional income of persons specified u/s 44AA(1) of the Act. Sec 44AD(6) restricts application of sec 44AD to specified professionals u/s 44AA(1). No restriction has been provided under section 44AD regarding the professions not specified u/s 44AA(1). Hence, the professions not specified u/s 44AA(1) are also eligible for availing benefit of sec 44AD of the Act.

Second School of Thought- Some professionals are of the view, that though sec 44AD(6) does not restrict non-specified professionals, but they are not eligible to claim the benefit of declaring profit at the rate of 8%/ 6% of their receipts. Rather, they should maintain proper books of accounts and declare their income accordingly.

Due to the above divergent views, some clarification from Central Board of Direct Taxes is required in this regard.

Interplay of Sec 44AD and 44ADA of the Act

In a case, where a person carries on both business and profession, he can opt the presumptive taxation in case of his professional income u/s 44ADA of the Act and he cannot opt the presumptive taxation on his business income by virtue of sec 44AD(6) of the Act. It implies that a person who carries on both business and profession cannot opt sec 44AD and 44ADA of the Act simultaneously. Following are some of the practical scenarios which might arise where a person will be engaged in both business and profession

i) **Person A** is a doctor carrying on his medical practice (eligible u/s 44AA) and simultaneously selling medicines (business u/s 44AD)

ii) **Person B** is an architect engaged in providing blueprints to buildings (eligible u/s 44AA) and simultaneously selling cement (business u/s 44AD)

iii) **Person C** is engaged in interior decoration (eligible business u/s 44AA) and simultaneously selling other fashionable household items (business u/s 44AD) an eligible assessee as per sec 44ADA and he will be carrying an eligible business u/s 44AD.

iv) **Person D** is a teacher (not eligible u/s 44AA) and simultaneously has a book publishing business (business u/s 44AD).

v) **Person E** is a teacher (not eligible u/s 44AA) and simultaneously has a bakery (business u/s 44AD).

Person	Business Turnover	Gross Receipts of Profession	Total	Type of Profession	Is Sec. 44AD Applicable?	Is Sec. 44ADA Applicable?
A.	60 Lacs	35 Lacs	0.95 Cr	44AA	No	Yes
B.	2.85 Cr	32 Lacs	3.17 Cr	44AA	No	No
C.	75 Lacs	65 Lacs	1.4 Cr	44AA	No	No
D.	90 Lacs	35 Lacs	1.25 Cr	Non 44AA	Yes	No
E.	1.60 Cr	45 Lacs	2.05 Cr	Non 44AA	No	No

Now let us discuss the reason for applicability/ non applicability of Sec. 44AD/ 44ADA in the above cases :

Person A – The gross receipts from business as well as from profession are below the threshold limit of Sec. 44AD/44ADA but still he is only eligible for presumptive taxation U/s 44ADA because as per section 44AD (6), a person who is a specified professional cannot opt sec 44AD,but there is no bar for such persons to opt for sec 44ADA on their professional income. It is to be noted that in sec 44ADA there is no restriction regarding the opting for presumptive taxation.

Person B – The gross receipts from business exceed the threshold limit of Sec 44AD but the professional receipts are within the specified limits. But still it cannot opt for Sec. 44ADA because it will be necessary for him to get his accounts of the business and also the accounts of the profession audited because the gross receipts from the business exceed the limit of 2 Cr.

Person C– The professional receipts exceed the threshold limit of Sec 44ADA of the Act but the business receipts are within the specified limits. But still it cannot opt for Sec. 44AD of the Act because as per section 44AD (6) of the Act, a person who is a specified professional cannot opt sec 44AD of the Act.

Person D – Both the gross receipts from business and the professional receipts are within the limits specified under section 44AD/44ADA of the Act. But it can only opt for presumptive under section 44AD of the Act and not under Sec. 44ADA of the Act because the profession is not a specified profession as per section 44 AA(1) of the Act. He is entitled to opt sec 44AD of the Act on the total turnover of Rs. 1.25 crores.

Person E – Both the gross receipts from business and the professional receipts are within the limits specified under section 44AD/44ADA. But it cannot opt for presumptive taxation under section 44AD /44ADA because the profession is not a specified profession as per section 44 AA(1) . Also the combined receipts from the business and non-specified profession exceed the threshold limit. Let us discuss this point in detail.

Tax Audit requirements when the assessee is carrying on two or more businesses

It may be noted that in cases where the assessee carries on more than one business activity, the results of all business activities should be clubbed together. In other words, the aggregate sales, turnover and/or gross receipts of all businesses carried on by an assessee would be taken into consideration in determining whether the prescribed limit (Presently Rs.1 crore w.e.f. A.Y. 2013-14) as laid down in section 44AB has been exceeded or not. However, where the business is covered by section 44B or 44BBA turnover of such business shall be excluded. Similarly, where the business is

covered by section 44AD or 44AE and the assessee opts to be assessed under the respective sections on presumptive basis, the turnover thereof shall be excluded. So far as a partnership firm is concerned, each firm is an independent assessee for purposes of Income-tax Act. Therefore, the figures of sales of each firm will have to be considered separately for purposes of determining whether or not the accounts of such firm are required to be audited for purposes of section 44AB. However, if Assessee opts to be assessed under respective sections on presumptive basis, the turnover thereof should be excluded

From the perusal of above one can conclude following:

Tax audit u/s 44AB is applicable to an assessee (assuming he is not an eligible assessee) where turnover of business exceeds Rs.2 crores - Clause (*a*) of section 44AB. Now the issue is if such assessee is carrying out three businesses and having turnover of Rs.70 L in each business. Now the total turnover is Rs.2.10 Cr which exceeds the limit of Rs.2 Cr. The question here is the limit of Rs.2 Cr is to be applied business wise or turnover of all business is required to be clubbed. Though section 44AD talks about 'eligible business' however looking towards para 5.21 of the guidance note on Tax Audit, it appears that turnover of all business need to be considered. However at this juncture one may refer to the contrary judgment of Honorable Karnataka High Court in Asstt. CIT v. Dr. K. Satish Shetty [2010] 188 Taxman 32, The Karnataka High Court held that the conjoint reading of the provisions of section 44AB and section 2(*13*) (definition of 'business') "does not show anywhere that in case assessee is carrying on many businesses, then the aggregate of businesses has to be arrived at and thereafter, the same is required to be audited." The Court further observed that ".....section 44AB does not show or contemplate that all businesses are required to be consolidated for working out the aggregate of turnover." The practical difficulty in applying this judgment is the moment one puts Rs.2.10 Cr as turnover (Refer the above example) in the turnover column in return of income, either system may not allow to upload the return or if allows then notice u/s 139 may come treating the return as defective as in the ITR there is no provision to enter the eligible businesswise turnover and profitability details. However in the above example assuming the assessee is an "eligible assessee" and all three business are "eligible business" and he decides to offer the income u/s 44AD, he would be facing the same practical difficulty as discussed above and the same difficulty under both the scenario is precisely because the ITR does not allow to enter business wise details.

CHAPTER 10

TAX DEDUCTED AT SOURCE AND ADVANCE TAX

Liability To Deduct Tax At Source By Individual And HUF

Liability to deduct tax at source under section 194A, 194C, 194H, 194I and 194J was first introduced by the Finance Act, 2002 by inserting various provison to the respective sections. Proviso to section 194A(1), Proviso to Section 194C(1), Second Proviso to 194H(1), Second Proviso to Section 194I(1), Second Proviso to 194J(1) were inserted by Finance Act, 2002 w.e.f. 01-06-2002 —Provided that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under section 44AB (a)/(b) during the financial year immediately preceding the financial year in which such sum is credited or paid, shall be liable to deduct income-tax under this section.

Finance Act, 2020 amended all the above sections w.e.f. 01-04-2020, and after amendment, above proviso reads as under: Provided that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the one crore rupees in case of business or fifty lacs rupees in case of profession [Substituted by FA, 2020 w.e.f. 01.04.2020] during the financial year immediately preceding the financial year in which such sum is credited or paid, shall be liable to deduct income-tax under this section.

Impact of Amendment:

The effect of above amendment is that individual or Hindu undivided family are required to deduct tax at source under section 194A, 194C, 194H, 194I and 194J if total sales, gross receipts or turnover exceed (A) one crore rupees in case of business or (B) fifty lacs rupees in case of profession during the financial year immediately preceding the financial year in such sum is credited or paid. ¬ As a result, the individual or HUF carrying on business and whose total sales, gross receipts or turnover exceeds Rs.1 crore but does not exceed Rs.2 crore in preceding financial year and opted for section 44AD of the Act are now liable to deduct tax at source under section 194A, 194C, 194H, 194I and 194J w.e.f. 01-04-2020. Similarly, the individual or HUF engaged in plying, hiring and leasing of goods carriages and whose total sales, gross receipts or turnover exceeds Rs.1 crore in preceding financial year and opted for section 44AE of the Act are now liable to deduct tax at source under section 194A, 194C, 194H, 194I and 194J w.e.f. 01-04- 2020.

ILLUSTRATION

Mr. A, proprietor of AB enterprises made turnover of ₹ 150 lacss during previous year 2018-19, his turnover for the year ended 31-03-2020 was ₹ 85 lacss. Decide whether he is liable to deduct tax at

source under section 194A in PY 2019-20? Since Mr. A's turnover exceeds ₹ 100 lacss in the immediately preceding financial year i.e. FY 2018-19, he is liable to deduct tax at source under section 194A in the previous year 2019-20, irrespective of his turnover being less than ₹ 100 lacss in the Financial year 2019-20. He will not be required to deduct tax for the FY 2020-21 as his turnover for the FY 2019-20 is below ₹ 100 Lacss. Therefore if any partnership firm, LLP, Company, AOP, society pays interest exceeding the threshold limit, it is required to deduct TDS.

Obligation of compliance of TDS provisions:

It is to be noted that the provisions for presumptive taxation override only sec 28 to 43C and not the provisions of TDS. Therefore, assessee declaring income u/s 44AD, 44ADA or 44AE is liable to deduct TDS. e.g. Every 'person' is required to deduct TDS u/s 192 if the estimated salary exceeds the maximum amount not chargeable to tax. Any individual paying salary of Rs.8,50,000 p.a. would be required to deduct TDS even though he is declaring income u/s 44AD.

Further, sec 194A, 194C, 194H, 194I and 194J have been amended by Finance Act, 2020.

Now, individual or HUF having turnover/ gross receipts of more than Rs.1 crore in case of business and more than Rs.50 Lacs in case of profession during the preceding financial year shall be required to deduct TDS under the above sections. Earlier in sec 194A, 194H, 194I and 194J it was mentioned that if the turnover/ receipts exceed the monetary limits specified u/s 44AB in the preceding financial year. In sec 194C, it was if individual or HUF was liable for audit under clause (a) or (b) of section 44AB in the preceding financial year.

Effect of amendment: The persons having turnover of more than Rs.1 crore but less than Rs.2 crore and declaring income u/s 44AD would be required to deduct TDS under the above sections.

Example:

Mr. A has a turnover of Rs.1,25,00,000 in the P.Y. 2019-20. In F.Y. 2020-21 he paid interest of Rs. 25,000. Whether Mr. A has to deduct TDS u/s 194A if he declares income u/s 44AD?

Yes, Mr. A will be required to deduct TDS u/s 194A as his turnover in the preceding F.Y. is above Rs.1 crore. The interest amount is above Rs.5,000. Hence, Mr. A will be required to deduct TDS even if income is declared u/s 44AD otherwise he will be deemed as assessee in default as per sec 201. However, he does not deduct TDS, no disallowance of expense will be made as per sec 40(a).

Example : In case of eligible assessee being a Firm which offers income under the presumptive income scheme and does not maintain books of accounts, where it is liable to deduct TDS from interest, contract work, salary etc. then whether it has to deduct tax at source at the time of payment only?

Ans: A firm doing eligible business under section 44AD though not maintaining books is fully covered under the provisions of TDS like section 194A, 194C etc. and is liable for deducting tax at the time of credit to the account of payee (liability to pay arises) or payment thereof to the payee whichever is earlier.

ILLUSTRATION-

Turnover of Mr. X in F.Y. 2019-20 was Rs.1.25 crores. In the F.Y. 2020-21, turnover was Rs.80 Lacss. He has paid rent of Rs.60,000/- per month. Whether TDS will be deducted u/s 194I(b) or 194IB?

Answer: TDS u/s 194I(b) is to be deducted by an individual/HUF tenant, if his turnover/ gross receipts in the preceding F.Y. exceeds Rs.1 crore. TDS is to be deducted at the rate of 10% if the rent paid during the year exceeds Rs.2.40 Lacss.

TDS u/s 194IB is to be deducted by an individual/ HUF tenant, if his turnover/ gross receipts in the preceding F.Y. are below Rs.1 crore (Rs.50 Lacss in case of professional).

In the F.Y. 2020-21 TDS is to be deducted u/s 194I(b) as the turnover in the preceding Financial Year exceeds Rs.1 crore.

In the F.Y. 2021-22, TDS u/s 194IB is to be deducted as the turnover in the preceding F.Y. is less than Rs.1 crore.

Example: Suppose assessee is a firm whose turnover doesn't exceeds Rs.1 Crores in AY 2020-21 made the payment of Rent exceeding Rs.50,000/- per month in AY 2021-22. Comment on TDS to be deducted.

Ans – The exemption for not deducting the TDS shall be applicable only for individual/HUF and not on the Firms. Hence, they are liable to deduct the TDS u/s194I provided other conditions of Section 194I apply.

Obligation of compliance of Advance Tax provisions:

Further, since the presumptive taxation regime has been extended for professionals also, the eligible assessee is now required to pay advance tax by 15th March of the financial year.

Section 211(1)(b): an assessee who declares profits and gains in accordance with the provisions of sub-section (1) of section 44AD or sub-section (1) of section 44ADA, as the case may be, to the extent of the whole amount of such advance tax during each financial year on or before the 15th March:

Section 234B: The provisions of sec 234B(1) are as

Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than ninety per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a

month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax.

Interest u/s 234B is charged if an assessee fails to deposit at least 90% of the total tax liability as advance tax. If advance tax is not deposited up to 31st March of P.Y. interest is charged @ 1% p.m. or part thereof up to the date of payment of such tax.

Section 234C(1)(b) : The provisions of sec 234C(1)(b) are as

an assessee who declares profits and gains in accordance with the provisions of sub-section (1) of section 44AD or sub-section (1) of section 44ADA, as the case may be, who is liable to pay advance tax under section 208 has failed to pay such tax or the advance tax paid by the assessee on its current income on or before the 15th day of March is less than the tax due on the returned income, then, the assessee shall be liable to pay simple interest at the rate of one per cent on the amount of the shortfall from the tax due on the returned income

If advance tax in case of assessee covered u/s 44AD and 44ADA is not paid up to 15th March, the assessee shall be liable to pay interest u/s 234C @ 1%.
Proviso to 211(1) says any amount paid by way of advance tax on or before 31st day of March shall also be treated as advance tax paid during the financial year ending on that day.

Note: As per section 208: advance tax shall be payable if tax liability is Rs.10,000 or more.

Example: Dr. X is a cardiologist having gross receipts of Rs.45,00,000 for the P.Y. 2019-20. He declares his income u/s 44ADA. Compute his advance tax liability and interest u/s 234B and 234C if (a) he deposits advance tax on 20th March (b) if he does not deposit advance tax.

The tax payable by Dr. X is Rs.5,07,000 which is more than Rs.10,000. Hence, he is required to deposit his entire advance tax liability on or before 15th March 2020. If he deposits 90% or more of his advance tax liability before 31st March of the P.Y., no interest u/s 234B would be charged. However, if advance tax is not deposited up to 31st March of P.Y. interest is charged @ 1% p.m. or part thereof up to the date of payment. Interest u/s 234C will be charged @1% if advance tax is not deposited on or before 15th March of the P.Y.

In case (a) he deposited advance tax on 20th March 2020, no interest will be charged u/s 234B. However, interest u/s 234C will be charged @ 1% of Rs.5,07,000 = Rs.5,070

In case (b) he has not deposited advance tax. Interest u/s 234C will be charged @ 1% of Rs.5,07,000 = Rs.5,070. Interest u/s 234B will be charged @ 1% p.m. or part thereof up to the date of payment.

Suppose, return is filed and tax is paid on 20th July 2020, interest u/s 234B will be Rs.20,280 (1% p.m. for four months, Rs.5,07,000 * 1% * 4 months).

Chapter-11

Penalty for failure to get accounts Audited Section 271B

"Failure to get accounts audited 271B.

If any person fails to get his accounts audited in respect of any previous year or years relevant to an assessment year or furnish a report of such audit as required under section 44AB, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum equal to one half per cent of the total sales, turnover or gross receipts, as the case may be, in business, or of the gross receipts in profession, in such previous year or years or a sum of one hundred fifty thousand rupees, whichever is less."

Therefore, the failure of a person to get his accounts audited in respect of any previous year or to furnish a copy of such report as required under section 44AB may attract a penalty equal to 0.5% of the total sales, turnover or gross receipts, or Rs.1.5 lakh, whichever is less. However, in view of the specific provisions contained in section 273B, no penalty is imposable under section 271B on the assessee for the above failure if he proves that there was reasonable cause for the said failure.

Reasonable Causes

a. Resignation of tax auditor and consequent delay

b. Bona fide interpretation of the 'turnover' based on expert advice

c. Death or physical inability of the partner in charge of the account

d. Labor problems such as strike, lock-out for a long period, etc.

e. Loss of accounts because of fire, theft, etc., beyond the control of the assessee

f. Non-availability of accounts on account of seizure

g. Natural calamities, commotion, etc.

'Reasonable cause' held by Hon'ble ITAT for not levying penalty u/s 271B

- Audit could not be completed in time due to voluminous work and non-receipt of bank statements in time would be a 'reasonable cause' for the purpose of Section 44AB of the Income Tax Act, 1961. [DCIT v. Machino Techno Sales (P) Ltd., 62 ITD 225 (Cal)™]

- Delay on the part of the accountant in completing the audit work before the specified date on account of his prior professional commitments constituted a reasonable cause for the failure of the assessee to obtain the audit report as required u/s 44AB within the specified date. [ACIT v Gayatri Traders, 58 ITD 121 (Hyd) (SB)]

- Justification accepted during immediately previous year that audit report delayed due to seizure and retention of books, the same reason also justifies for delay in completion of audit for A.Y. 1986-87, even though books of account of the said A.Y. were not seized. [ACIT v Roopali Dyeing & Printing Works, 86 Taxmann 124 (Ahd.) (Mag)]

- Existence of dispute between partners of assessee firm would constitute a reasonable cause for delay in getting audit report u/s 44AB. [Allied Distributors vs. ITO, 89 Taxmann 205 (Cal) (Mag)]

- Delay in getting audit report u/s 44AB due to reappointment of another auditor on resignation of previous auditor was held as a reasonable cause for not levying penalty u/s 271B. [Progressive Construction (P) Ltdv. ITO 20 ITD 182 (Hyd).]

- No penalty under Section 271B by ITO exceeding Rs.10,000 in absence of prior approval of Joint Commissioner. Sagar Dutta Vs. CIT, [2014] 44 taxmann.com 311 (Calcutta)

- Held that no penalty is imposable u/s 271B for non-compliance with the provisions of Sec. 44AB on the ground that the returns were filed belatedly. Penalty is leviable only if the assessee fails to get his accounts audited and obtain a report. CIT v. Apex Laboratories Pvt. Ltd. [2010] 320 ITR 498 (Mad)

- For purpose of Sec. 44AB turnover of all businesses carried on by assessee has to be considered but provisions of Sec. 271B can be applied only in respect of that business, accounts of which have not been audited and not in respect of accounts which have been audited. Asst. CIT v. Smt. Bharti Sharma [2011] 44 SOT 230 (Del.)
- Where assessee, an advertising agent, was under bona fide belief that commission income earned by him was not in excess of limits prescribed under section 44AB and, thus, he was not required to get books of account audited, impugned penalty order passed under section 271B deserved to be set aside. Manoj S. Gugale vs. ITO [2017] 80 taxmann.com 193 (Pune – Trib.). Also see Off-shore India Ltd. Vs. DCIT [2017] 167 ITD 0635 (Kol.- Trib.)

ITAT Lucknow has held that penalty under section 271B for failure to get accounts audited and furnish tax audit report u/s 44AB cannot be levied simultaneously along with penalty u/s 271A

These appeals are preferred by the assessee against the consolidated order of the ld. CIT(A) on a common ground that the ld. CIT(A) has erred in confirming the penalty levied under section 271B of

the Income-tax Act, 1961 (hereinafter called in short “the Act"). During the course of hearing of the appeals, the ld. counsel for the assessee has invited our attention that the Assessing Officer initiated penalty proceedings under section 271A and 271B of the Act. Since the Assessing Officer has levied penalty under section 271A of the Act, penalty under section 271B of the Act cannot be levied on account of non-auditing of the accounts. In support of his contention, the ld. counsel for the assessee has placed reliance upon the judgment of the jurisdictional High Court in the case of CIT vs. Bisauli Tractors, [2007] 165 Taxman 1 (All). During the course of hearing, a specific query was raised from the ld. counsel for the assessee as to what happened with regard to the penalty initiated under section 271A of the Act. In response thereto, the ld. counsel for the assessee could not furnish satisfactory reply with regard to the levy of penalty under section 271A of the Act. He has, however, submitted that he has no information with regard to the levy of penalty under section 271A of the Act. On the basis of the assessment order he can simply say that penalty under section 271A of the Act was initiated. In the absence of complete details with regard to the levy of penalty under section 271A of the Act, we are of the view that let the matter be sent back to the file of the Assessing Officer with a direction to verify whether penalty under section 271A of the Act was levied or not, if levied, what was the fate of it. If penalty under section 271A of the Act is levied against the assessee, penalty under section 271B of the Act cannot be levied. With this direction, we restore the matter to the file of the Assessing Officer. Accordingly the appeals of the assessee are allowed for statistical purposes.

In Surajmal Parsuram Todi v. CIT (1996) 222 ITR 691, the Gauhati High Court has held that when a person commits an offence by not maintaining books of accounts as contemplated by section 44AA, the offence is complete and after that there can be no possibility of any offence as contemplated by section 44AB and, therefore, the imposition of penalty under section 271B is erroneous.
Therefore, in this case, the Assessing Officer is not justified in levying penalty under section 271B.

No books of accounts maintained – No Penalty under section 271B for Failure to get its audited

Short Overview : When there are no books of account, the question of its audit does not arise, so as to impose penalty under section 271B.

Assessee assailed the imposition of penalty under section 271B imposed by AO on account of failure to get accounts audited under section 44AB. Assessee contended that penalty was not justified as no books of account were maintained by assessee.

It is held that AO himself recorded that no books were maintained by assessee and penalty under section 271B is to be imposed when any person fails to get his accounts audited. Admittedly there was no dispute that no books were maintained by the assessee and as rightly contended by assessee the question of getting the same audited did not arise at all. If there is any fault in the matter, the said fault can be examined with reference to non-maintenance of Books of Account.

Delhi ITAT deletes penalty levied u/s.271B on assessee in the case of Sh. Mohit Garg [TS-302-ITAT-2020(DEL)] individual for failure to get the accounts audited u/s.44AB for AY 2012-13; In addition to the penalty levied u/s.271A (for non-maintenance of books of accounts), the AO had levied penalty u/s.271B on the assessee; States that a twin responsibility has been casted upon the assessee to (i) Maintain books of accounts u/s.44AA and (ii) To get the books audited u/s.44AB, also notes that the legislature also provides for separate levy of penalty for failure to meet each statutory requirement; Opines that In the instant case, the audit could not have been conducted in the absence of books of accounts. If a person has not maintained the books of accounts, the question of audit does not arise."; Rules that the infraction of Sec.44AB gets attracted only when the assessee maintains the books of accounts but fail to get them audited, holds that penalty for non-maintenance of books of accounts has already been rightly levied, hence the offence has already been taken note of and the only recourse is to levy penalty U/s 271A for non-compliance of Sec.44AA.

CHAPTER 12

Presumptive Taxation does not create a privileged class of taxpayers

There is a misconception in the mind of business as well as professional community that if a person opts the provisions of presumptive taxation, then he is free to enjoy the difference between the actual profits and the presumptive profits. It is to be noted that the provisions of presumptive taxation are enacted to facilitate computation of total income and filing of return of income. It does not give a license to the assessee to declare lower income despite the assessee having a higher income. The law is not creating a privileged class out of such assessees, but only is providing a window of concession for a limited purpose. It is to be noted that whenever the law provides any concession for its rigors, the observance and satisfaction of the qualifying criteria are presumed and section 44AD would not operate to curtail the scope of section 2(24) read with section 5 of the Act. The assessee must keep in mind that where they admittedly earn a higher income, they would be liable to be assessed on that basis and presumptive profits shall have no application. The assessee is legally bound to return higher income if the same is higher than the benchmark given .To understand this concept, first of all we have to study the relevant portion of the section 44AD and 44ADA which are relevant.

44AD. (1) ……. a sum equal to eight per cent of the total turnover or gross receipts of the assessee 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 assessee……

44ADA(1) ……. a sum equal to fifty per cent of the total gross receipts of the assessee in the previous year on account of such profession or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the assessee…….

44AE. (2) For the purposes of sub-section (1), the profits and gains from each goods carriage,—

(i) being a heavy goods vehicle, shall be an amount equal to one thousand rupees per ton of gross vehicle weight or unladen weight, as the case may be, for every month or part of a month during which the heavy 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;

(ii) other than heavy goods vehicle, shall be an amount equal to seven thousand five hundred rupees for every month or part of a month during which the goods carriage is owned by the assessee in the previous year or an amount claimed to have been actually earned from such goods carriage, whichever is higher.

From the study of the above three sections, one thing is apparent that under section 44AD and Section 44ADA, an assessee can declare the presumptive profits or an higher amount of profits as claimed by the assessee. These two profits may be less than the actual profits. In this context we must understand that under presumptive taxation there are three kinds of profits- Firstly presumptive profits, secondly the profits claimed to have been earned by the assessee and thirdly the actual profits of the business. If the assessee declares minimum presumptive profit then he is not required to maintain books of accounts and get them audited. But if we see the provisions of section 44AE, which gives only two options to the assessee which is- presumptive profits or actual profits- whichever is higher.. The lawmakers have very rightly enacted the provisions of section 44AD and section 44ADA with the words "as claimed to have been earned by assessee". If the lawmakers had used the words actual profits-as given in section 44AE then the purpose of section 44AD and section 44ADA shall be defeated because to compute the actual profits the assessee must maintain books of accounts. However, it can be easily seen that the phrase, "***whichever is higher***" is absent in the amended section 44AD which is a distinctive feature of the amended section 44AE. In sec 44AD and sec 44ADA the word "or as the case may be" which has been defined in legal lexicon as 'whichever the case may be'.

Meaning of words 'claimed to have been earned by the eligible assessee'

The section has been amended for the benefit of the assessee and the words claimed to have been earned by the eligible assessee. By the introduction of these words in section 44AD(1), the legislature shows his intention to accept specified income as returned income even if higher sum is earned by eligible assessee unless it is claimed by assessee in his Income Tax Return. The word "Claim" signifies the right of assessee to the extent to opt between actual profits and presumptive profits. It is further to be noted that to claim the profits upto presumptive rate is the right of the assessee and if the actual profits are more than the presumptive profits then it is an obligation of assessee to declare the actual profits to the department. In other words, the scheme of presumptive taxation provides both right- to the extent of presumptive profits and obligation to the extent of actual profits. It cannot be said that if an assessee who has opted for presumptive taxation is not free to enjoy the gap between presumptive profits and actual profits. The distinction between right and obligation is very necessary here. The language of section 44AD(1) requires claims to have been made by an assessee for returning higher income. If there is no claim made by assessee in return for higher income, there is no higher income. The assessee, who has opted presumptive taxation system, is under no obligation to explain individual entry of cash deposit in bank unless such entry has no nexus with gross receipts

Example– Mr. Sham is carrying on business. The Turnover is Rs.90 Lacs. The profit as per his books or calculation is Rs.9 Lacs. However, he opts to return the income under section 44AD @ 8% i.e. Rs.7.20 lacs. Now a question arises regarding the power of AO to assess the difference of Rs.1.8 lacs as undisclosed income. In this case Mr. Sham has claimed the income of Rs.7.20 lac as in his return of

income as his claim. The assessee is free to exercise this option at his will. Legally he is given the option by the statute and such an option cannot be equated with obligation cast upon the assessee. There is a definite difference between OPTION and OBLIGATION and an option granted to the assessee cannot be construed to be his obligation when his actual income is more than 8% of Turnover. The AO cannot make any addition on this count as there is no provision under the Act permitting him to make such addition. Further, the words used are "higher income claimed to have been earned by the assessee". It is to be clarified that if the assessee has not made a claim in the return of Income regarding any higher income, it implies there is no claim for higher Income made by assessee. AO cannot claim that the assessee has earned higher income, because under the statue, he is not entitled to do so. Another pertinent point is that if 8 per cent of gross receipts are 'deemed' income of the assessee, the remaining 92 per cent are also 'deemed' expenditure of the assessee. Meaning thereby that actual expenditure may not be 92 per cent of gross receipts, only for the purposes of taxation, it is considered to be so. To take it further, it can be said that the expenditure may be less than 92 per cent or it may also be more than 92 per cent of gross receipts. It means that the assessee has incurred the expenditure of 92 percent for earning the presumptive profits of 8 percent. The point to be noted is that 92 percent has been expanded and this amount is neither saved nor invested. AO can make addition if he is having sufficient evidence that the difference between actual profits and presumptive profits have been invested.

Now let us understand the applicability of this section under the following cases:

Case 1. When Actual profits is less than Presumptive Profits

In this case if the assessee wants to opt for the actual profits then he has to maintain books of accounts and get them audited. On the other hand if the assessee opts for presumptive profits then he is not required to maintain books of accounts.

Now, a question arises that if an assessee opts for presumptive taxation, when the actual profits are less than presumptive profits, then the actual profit will be added in the capital account of the assessee. In this context it is to be noted that he has opted the provisions of presumptive taxation to avoid the maintenance of books of accounts and its audit. His capital account will be credited with the actual profits earned by him during the year. The reason is very simple that the system of presumptive taxation does not override the system of actual accounting. Presumptive taxation is a method to compute the profits and gains in a simpler manner for taxation purposes and not for maintenance of books.

Example: Mr. A has turnover of Rs.1.2 Cr for the FY 20-21 and his actual profits is Rs.5,20,000. But in such a case his presumptive profit will be 9,60,000. The assessee opts for presumptive taxation and declares his income @8%. In his books of accounts, the profits amounting to Rs.5,20,000/- will be

credited to the capital account. Though, he will declare profits of Rs.9,60,000 in his return of income, the profits in books will be Rs.5,60,000 only.

CASE 2: When Actual profits are more than Presumptive Profits

There may be situation when assessee is earning profit more than presumptive taxation profits. In such a situation if an assessee declare profit under presumptive tax then @ 8% or 6% as the case maybe, AO can assess correct income on the basis of investment if they have sufficient documentary evidence which may be available during survey, search & assessment proceeding. AO can bring to tax the higher income in such cases.

In this case, there will be two situations which will depend on whether the assessee is maintaining books of accounts or not. If he is maintaining books of accounts, then he is obliged to declare actual profits which are higher than the profits at presumptive rate. He cannot take the benefit of declaring lower profits, in spite of higher actual profits in books of accounts.

Second situation is where the assessee is not maintaining books of accounts. In this case, the assessee has the option to declare profits at the presumptive rate or higher profits than that. Since, the books of accounts are not maintained, actual profits would not be available. The rates specified under sections- 6% or 8% or 50% are the benchmarks. The assessee can claim higher profits than these rates. If assessee declares profits at the rate of 10% of receipts, also implies that 90% of the receipts have been expended (ITAT Chandigarh in case of Nand Popli vs DCIT). The AO cannot question the expenditure upto 90% of receipts. However, some taxpayers are of the view that If they declare their savings and investment more than the amount of profits declared in their return. If the assessee has declared profits at the rate of 10% of receipts, he can deposit or make investment upto 10% of receipts only. The reason being, the assessee has claimed that he has expended 90% of the receipts. The AO cannot question the expenditure upto 90%, but he has right to assess the investment over and above the declared profits as income.

Example: A doctor has gross receipts of Rs.45 Lacs. He has declared profits u/s 44ADA amounting Rs.24 Lacs. In actual, he has earned Rs.30 Lacs. He invested Rs.30 Lacs in an FDR. Whether he can claim that he has deposited the actual profits and the AO has no right to question since he has declared profits under presumptive scheme.

The assessee cannot make investment of more than the declared profits. If he has declared 24 Lacs as profits, also implies that he has expanded Rs.21 Lacs (Rs.45 Lacs – Rs.24 Lacs). In this case, the AO can make an addition of Rs.6 Lacs. Further, the assessee should have declared 30 Lacs as his profits, since the actual profits are known and are higher than the presumptive profits.

Almost similar issue was dealt by Ahmedabad bench of ITAT in the case of Shivani Builders Vs. ITO [2007] 295 ITR (AT) 281.

The relevant paragraphs of the order reproduced below brings out the import of the presumptive sections which we are discussing:

It is, thus, clear that the law envisages all the three situations by laying down appropriate procedure for all of them, i.e., the assessee disclosing a higher, lower, or an amount equal to the presumptive income (reckoned at the rate of 8 per cent of the turnover). - In the instant case, the assessee contended to have declared its income at the presumptive rate, being covered by the provisions of section 44AD, of which, clearly, there was no doubt, it being engaged in the civil construction of residential flats. The provision of section 44AA i.e., with regard to mandatory maintenance of books of account, would apply to an assessee engaged in such business, only, if the assessee chooses to be taxed at lower than the presumptive rate of 8 per cent, which is clearly in the nature of a, and the only, concession accorded by the statute to the relevant class of assessees, to which assertion of the assessee, there could be no doubt, it being statutorily recognized/ enacted.

However, where the assessee, despite the said concession, chooses to maintain the books of account, preferring to rely thereon for various other purposes, both apart from and under the Act, it cannot ignore the book results and claim to be entitled to a lower presumptive rate of income than that revealed by such books. The law does not accord a privileged status to the assessee engaged in this line of business but only, considering the vagaries that attend thereto, draws a higher bar for the purpose of maintenance of books, i.e., than that normally obtains under section 44AA.

As such, it cannot be said that though the assessee, admittedly, earns more, he would still be liable to be assessed to income-tax at a lower income by virtue of the said concession.

Section 44AD would not operate to curtail the scope of income as defined under section 2(24), read with section 5, so that where the assessee admittedly earns a higher income, the character of which as income is undoubted, it would be liable to tax on that basis, that is, on the basis of real income, even as held by the Commissioner (Appeals).

The assessee's plea of the said interpretation as amounting to be penalizing it for the maintenance of its books, was wholly misconceived; the act of paying tax on the basis of income earned cannot, by any stretch of imagination, be considered as amounting to being penalized; the law is not creating a privileged class out of such assessees, but thereby only is providing a window of concession for a limited purpose.

From above discussion, following points can be concluded

1. An assessee filing the return of income is under an obligation to offer its correct and true income in accordance with the provisions of the Act.
2. The presumptive scheme of taxation allows taxpayers to offer income higher than the prescribed rate. In short, it is the minimum rate u/s 44AD which has to be considered and higher income option is open for the taxpayers which have to be used if taxpayers have higher income.
3. The powers of the AO are very wide & exhaustive. AO can assess correct income on the basis of investment if they have sufficient documentary evidence which is very much possible during survey, search & assessment proceeding. AO can bring to tax the higher income in such cases
4. Though the presumptive scheme of taxation is introduced with an aim to relieve the taxpayers form the requirements of maintaining the books of accounts, however, it doesn't not relieve the taxpayers from justifying its investment sources. In short, it may not be taken as a permission to show lower income even if taxpayers are earning higher income.
5. The concept of making disclosure in the ITR forms with respect to few Balance Sheet data in income tax returns seems to have been introduced with this concept only.
6. Not offering true or correct income may even result in the application of section 69, 69A or section 69C of the Act if the investment or the expenditure is in excess of the returned income.
7. Section 44AD does not give a license to the assessee to declare lower income despite the assessee having a higher income

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CHAPTER 13

Invocation of Section 68 If Assessee Is Opting For Presumptive Taxation

The basic edifice of presumptive scheme u/s 44AD is assessee would not be called to maintain books under the Act and get them audited if profit shown by assessee is otherwise in accordance with prescription of section 44AD of the Act. But maintaining books of account is *sine qua non* for making addition under section 68. Since section 44AD does not obligate assessee to maintain books, provisions of section 68 could not be invoked where assessee had filed return of income under provisions of section 44AD without maintaining books of account.

Deposits in bank account maintained by the assessee

This is the case of a person who has filed his return of income under presumptive taxation .He has made certain deposits in his bank account. Now a question arises, whether these deposits in bank can be transformed as unexplained cash credit u/s 68 of the Act.
Before proceeding further to decide this issue it would be imperative to refer to the relevant provisions of section 68 of the Act. The same are reproduced herein under :–

"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the assessing officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year:"

The pre-requisites for invoking the provisions of section 68 are-

(i) any sum is found credited in the books of an assessee.

(ii) the assessee offers no explanation about the nature and source thereof.

(iii) the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory.

Maintenance of books of account is *sine qua non* for making addition under section 68

A bare perusal of section 68 of the Act makes explicitly clear that the addition can be made under the section if, any sum is found credited in the books maintained by the assessee. .The Hon'ble High Court of Gauhati in the case of Anand Ram Raitani v. CIT (1997) 223 ITR 544 (Gau) : 1997 TaxPub(DT) 0638 (Gau-HC) has held that existence of books of account is a condition precedent for invoking the provisions of section 68 by the assessing officer. The relevant extract of the judgment is as under :–

"We have gone through section 68 of the Act. The assessing officer before invoking the power under section 68 of the Act must be satisfied that there are books of account maintained by the assessee and the cash credit is recorded in the said books of account and if the assessee fails to satisfy the assessing officer, the said sum so credited has to be charged to income-tax as the income of the assessee of that previous year. The existence of books of account is a condition precedent for invoking of the power. Discharging of burden is a subsequent condition. If the first point is not fulfilled the question of burden of proof does not arise. The assessing officer made the assessment by making addition of the amount for which disallowance was claimed Mr. Bhuyan very candidly admits that addition was made in exercise of the power under-section 68 of the Act, therefore, the first condition necessary for invocation of the power is the existence of the books of account.

Meaning of Books of Accounts

The **"books or books of account"** have been defined in section 2(12A) of the Act. The same reads as under :–

"2(12A) books or books of account" includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device;"

The definition of books under the Act is inclusive. A perusal of the definition shows that the same does not include bank passbook or bank statement. A conjoint reading of above provisions would thus lead to the conclusion that the addition under section 68 can be made only where any amount is found credit in the books as defined under section 2(12A) of the Act maintained by the assessee.

a. Books of the assessee and not any other person

It is to be noted that the books in which credit appears should be of the assessee only. Thus, any credit in the books of one person cannot be assessed in the hands of other person u/s. 68 [Shanta Devi vs. CIT – 171 ITR 532 (P&H), Anand Ram Raitani vs. Raitani – 223 ITR 544 (Gau)].

b. Balance sheet and profit and loss accounts are not Books of account. They are just byproducts

The Hon'ble Madras High Court in case of CIT vs. Taj Borewell (291 ITR 232) has held that the Profit and Loss Account and Balance Sheet cannot be said to be books of account of the assessee. On the facts of that case, the Court has given the finding that "object of a P&L a/c is to ascertain the income of a business and by offsetting the expenses of earning that income, to ascertain the net increase (profit) or decrease (loss) in the traders' "net worth" for the period while Balance sheet lists the assets and liabilities and equity accounts of the company. It is prepared 'as on' a particular day and the accounts reflect the balances that existed at the close of business on that day.

C. Loose sheet or loose papers are not books of account.

Going by the definition of the books as given by section 2(12A) of the Act, loose sheet found during search could not be treated as books for the purpose of section 68 and also any entry in such sheet cannot be treated a credit entry. The entries in loose papers/sheets are irrelevant and inadmissible as evidence. Such loose papers are not "books of account" and the entries therein are not sufficient to charge a person with liability

• Common Cause (A Registered Society) v. UOI (2017) 394 ITR 220

• CB I. v. V. C. Shukla (1998)3 SCC 410

d. Objectives of books of account

In the case of Sheraton Apparels v. Asstt. CIT [2002] 256 ITR 20 (Bom HC) Bombay High Court laid down the following objectives of books of accounts:

Main objectives of the books of account are to maintain a record of business:

• to calculate profit earned or loss suffered during the period of time;

• to provide credible data and information to file the tax returns;

• to depict the financial position of the business;

• to portray the liquidity position;

• to provide up to date information of assets and liabilities with a view to derive information so as to prepare a profit and loss account and draw a balance-sheet to determine income and source thereof;

• It cannot be understood to mean compilation or collections of sheets in one volume;

• Not diaries which are maintained merely as a man's private record;

• Not the ones prepared by him as may be in accordance with his pleasure or convenience to secretly record secret, unaccounted clandestine transactions not meant for the purposes of the Act, but with specific intention or desire on the part of the assessee to hide or conceal income so as to avoid imposition of tax thereon.

e. Whether bank pass book is considered to be books of accounts?

It is to be noted that a bank passbook is not considered as books of account due to following reasons:

• The relationship between the banker and the customer is one of debtor and creditor and not a trustee and beneficiary.

• It is only a copy of the constituent's account in the books maintained by the bank.

• It is not as if the pass book is maintained by the bank as an agent of the constituent.

• Nor can it be said that the pass book is maintained by the bank under the instructions of the constituent.

Following judicial pronouncements support this issue that a pass book is not a book of account

The Hon'ble Bombay High Court in the case of *CIT v. Bhaichand N. Gandhi* (supra) upholding the decision of Tribunal concluded that bank passbook does not constitute books as envisaged under section 68 of the Act. The relevant extract of the judgment reads as under :–

"…….. the pass book supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not as if the pass book is maintained by the bank as the agent of the constituent, nor can it be said that the pass book is maintained by the bank under the instructions of the constituent. In view of this, the Tribunal was, with respect, justified in holding that the pass book supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee, that is, a book maintained by the assessee or under his instructions. In our view, the Tribunal was justified in the conclusions at which it arrived."

We find that the aforesaid view of the Hon'ble Bombay High Court had thereafter been followed by a 'SMC' bench of the ITAT, Mumbai in the case of **Smt . Manshi Mahendra Pi tkarVs. ITO 1(2), Thane (2016) 73 taxmann.com 68** (Mumbai Trib.) wherein i t was held as under: -

"I have carefully considered the rival submissions. In the present case the addition has been made by the Income Tax authorities by treating the cash deposits in the bank account as an unexplained cash credit within the meaning of section 68 of the Act. The legal point raised by the assessee is to the effect that the bank Passbook is not an account book maintained by the assessee so as to fall within the ambit of section 68 of the Act. Under section 68 of the Act, it is only when an amount is found credited in the account books of the assessee for any previous year that the deeming provisions of section 68 of the Act would apply in the circumstances mentioned therein. Notably, section 68 of the Act would come into play only in a situation Where any sum is found credited in the books of

an assessee……. . . . . , The Hon'ble Bombay High Court in the case of Shri Bhaichand Gandhi (supra) has approved the proposition that a bank Pass Book maintained by the bank cannot be regarded as a book of the assessee for the purposes of section 68 of the Act. Factually speaking, in the present case, assessee is not maintaining any books of account and section 68 of the Act has been invoked by the Assessing Officer only on the basis of the bank Pass Book. The invoking of section 68 of the Act has to fail because as per the judgment of the Hon'ble Bombay High Court in the case of Shri Bhaichand N.Gandhi (supra), the bank Pass Book or bank statement cannot be construed to be a book maintained by the assessee for any previous year as understood for the purposes of section 68 of the Act. Therefore, on this account itself the impugned addition deserves to be deleted. I hold so. "We further

find that a similar view had also been arrived a tin a ' third member ' decision of the Tribunal in the case of **Smt . Madhu Rai tani Vs. ACIT (2011) 10 taxmann.com206 (Gauhat i) (TM) ,** as well as by the co-ordinate Benches of the Tribunal in the case of **Mehul V. Vyas Vs .ITO (2017) 164 ITD 296 (Mum) and ITO, Barabanki Vs .Kamal Kumar Mishra (2013) 33 taxamann.com610 (Lucknow)**

The Co-ordinate Bench of the Tribunal in the case of *Shri Kokarre Prabhakara v. ITO* (supra), in a similar situation where the assessee had declared income under section 44AD of the Act without maintaining books and the assessing officer had invoked the provisions of section 68 of the Act, the Tribunal deleted the addition by placing reliance of various decisions of the Tribunal holding that where the returns are filed on the basis of income declared under section 44AD of the Act, there cannot be any application of section 68 of the Act.

In the case of Vishan Swaroop Gupta [TS-109-ITAT-2021(JPR)] Jaipur ITAT deletes addition u/s 68 for AY 2015-16, made by Revenue based on unexplained cash deposited in assessee's (retired doctor) bank account, holds credit in bank account not equivalent to credit books of accounts; The addition was partly upheld by CIT(A) to the tune of Rs.4.03 lakhs; ITAT finds force in assessee's contention that provisions of Sec. 68 which requires any sum to be credited in the 'books of accounts' of assessee (with no/ unsatisfactory explanation of source) to attract an addition, should be construed strictly; Accepts assessee's contention that as per section 44AA, assessee is not required to maintain books of account and the pre-requisite condition for invoking Sec. 68 is the credit entries in the books of account of the assessee; Relies on Bombay HC ruling in *Bhaichand N. Gandhi*, and Mumbai ITAT ruling in *Manshi Mahendra Pitkar*, holds,*"a bank pass book or bank statement cannot be considered to be a 'book' maintained by the assessee for any previous year for the purpose of Section 68"*.:

In the case of Dinesh kumar Verma [TS-703-ITAT-2020(Mum)]Mumbai ITAT deletes Sec.68 made for assessee-individual during AY 2014-15, holds that Sec.68 cannot be invoked where the assessee has filed return of income u/s 44AD without maintaining books of account; Revenue had made additions u/s 68 w.r.t assessee's cash deposit into his bank account treating as unexplained cash; Perusing Sec.68, ITAT states that the section "*makes explicitly clear that the addition can be made under the section if, any sum is found credited in the books maintained by the assessee*."; Relies on Gauhati HC ruling in Anand Ram Raitani to hold that maintenance of books by the assessee is sine qua non for making addition u/s 68; Rejects Revenue's contention that passbook of assessee's bank account constitutes books of account; Opines that "*Since section 44AD does not obligates the assessee to maintain books, the provisions of section 68 cannot be invoked where the assessee has filed return of income under the provisions of section 44AD*…" :

In the case of Smt. Babbal Bhatia [TS-306-ITAT-2018(DEL)] Delhi ITAT deletes addition u/s 68 [dealing with unexplained cash credits] in respect of cash deposited in the bank accounts of assessee-individual during AYs 2010-11 to 2012-13, despite assessee being unable to explain the sources of cash deposits;

Holds that Sec. 68 is applicable only when the credits are found in the books of account of assessee, relies on jurisdictional HC ruling in Ms. Mayawati; Clarifies that a credit in the bank account of an assessee cannot be construed as a 'credit' in the books of the assessee, remarks that *The account of the assessee in the books of the bank is different from the books of the assessee*."; Noting that assessee had made it very clear in the returns of income that she is not maintaining books of account, ITAT deletes addition; Relies on Bombay HC ruling in Bhaichand N Gandhi, distinguishes Revenue's reliance on Delhi ITAT Special Bench ruling in Manoj Aggarwal noting that it was delivered before jurisdictional HC ruling in Mayawati, also distinguishes Revenue's reliance on Bombay HC ruling in Arun Kumar J. Muchhala on facts.

Sri Girish Vs. Yalakkishettar vs.The Income Tax officer (ITA No. 354/ Bang/ 2019) (Dtd. 27.01.2020) (SMC) (Bangalore)

In the present case, the Assessing Officer found certain deposits as unexplained in the bank account of the assessee with ICICI Bank, Dharwad branch at Rs.36.26 lakh. In my opinion, when moneys are deposited in the bank account, the relationship that is constituted between the banker and the customer is one of the debtor and creditor and not of trustee and beneficiary. Applying this principle, the bank statement supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not as if the bank statements are maintained by the bank as the agent of the constituent, nor can it be said that the pass book is maintained by the bank under the instructions of the constituent. Therefore, the bank statements supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee, nor a book maintained by the assessee or under his instructions. As such, addition u/s 68 of the Act of the amount entered only in the bank statements was not justified.

My view is fortified by the judgment of the Hon'ble Bombay High Court in the case of CIT v. Bhaichand H. Gandhi [141 ITR 67 (Bom.)] and also the judgment of the Hon'ble Allahabad High Court in the case of Smt. Sarika Jain v. CIT (407 ITR 254). The Hon'ble Allahabad High Court held that the Tribunal is not competent to sustain the addition u/s 69A of the Act after deleting the said addition made by the A.O. and confirmed by the CIT(A) u/s 68 of the Act, the entire order of the Tribunal stands vitiated in law. Being so, the amount found credited in the bank account of the assessee cannot be made an addition u/s 68 of the Act. Accordingly, I am inclined to delete the addition made u/s 68 of The Income Tax Act, 1961.

CHAPTER 14

Invocation of Section 69C If Assessee Is Opting For Presumptive Taxation

Let us first of all see what section 69C of the Income Tax Act, 1961 reads. Section 69C reads as under:

69C. Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year :

Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.

If assessee opts for presumptive taxation it cannot claim any deduction of any expenditure including Depreciation. Since no deduction is allowed the AO is not permitted to add back the income as unexplained expenditure. It is to be noted that the provisions of section 69C of the Act are very clear that wherever the assessee fails to explain about the source of certain expenditure incurred during the year, the same may be deemed to be the income of the assessee.

To understand this concept we must see the provisions of section 44AD (1):

"44AD (1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an eligible assessee engaged in an eligible business, a sum equal to eight per cent of the total turnover or gross receipts of the assessee 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 assessee, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

(2) 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 :"

The provisions of the above section are quite unambiguous to the effect that in case of an eligible business based on the gross receipts/total turnover, the income under the head 'profits & gains of business' shall be deemed to be @ 8% or any higher amount. The first important term here is 'deemed to be', which proves that in such cases there is no income to the extent of such percentage, however,

to that extent, income is deemed. It is undisputed that ‘deemed’ means presuming the existence of something which actually is not. Therefore, it is quite clear that though for the purpose of levy of income tax 8% or more may be considered as income, but actually this is not the actual income of the assessee. This is also the purport of all provisions relating to presumptive taxation.

This issue has been explained very well in the following cases.

Nand Lal Popli Vs. DCIT (2016) 160 ITD 413 (Chd Trib)

The assessee was a civil contractor. He had declared its profits under section 44AD at the rate of 8 per cent against the gross receipts. During assessment proceedings, the assessee explained that he had made payments from the bank account on various dates which were not reflected in the cash flow statement. Since no documentary evidence was filed to prove that those payments were towards contract work, the Assessing Officer made addition of said amount to assessee's income under section 69C.The Commissioner (Appeals) confirmed said addition. On second appeal:

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The provisions of section 44AD are quite unambiguous to the effect that in case of an eligible business based on the gross receipts/total turnover, the income under the head 'profits & gains of business' shall be deemed to be at the rate of 8 per cent or any higher amount. The first important term here is 'deemed to be', which proves that in such cases there is no income to the extent of such percentage, however, to that extent, income is deemed. It is undisputed that 'deemed' means presuming the existence of something which actually is not. Therefore, it is quite clear that though for the purpose of levy of tax at rate of 8 per cent or more may be considered as income, but actually this is not the actual income of the assessee. This is also the purport of all provisions relating to presumptive taxation.

Putting the above analysis, in converse, it can be easily inferred that the same is also true for the expenditure of the assessee. If 8 per cent of gross receipts are 'deemed' income of the assessee, the remaining 92 per cent are also 'deemed' expenditure of the assessee. Meaning thereby that actual expenditure may not be 92 per cent of gross receipts, only for the purposes of taxation, it is considered to be so. To take it further, it can be said that the expenditure may be less than 92 per cent or it may also be more than 92 per cent of gross receipts.

From the combined reading of sub-section (1) and sub-section (5), it is apparent that the obligation to maintain the books of account and get them audited is only on the assessee who opts to claim the income being less than 8 per cent of the gross receipts.

Applying the above to the facts of the present case, it is observed that the Assessing Officer, for making the impugned addition has started with the presumption that an amount to the extent of 92

per cent of the gross receipts is the expenditure incurred by the assessee, which is a totally wrong premise. If the income component is estimated, how the expenditure component on the basis of said income can be considered to have been 'actually' incurred. This is not a case, where the Assessing Officer has doubted the gross receipts or gross turnover of the assessee. In fact, accepting the same, estimating income at the rate of 8 per cent on the same at presumptive rate, he preferred to make further addition under section 69C of the Act. The argument of the revenue that the turnover of the assessee has been doubted by the Assessing Officer is totally ill-found, in view of the same.

Further, it is a fact on record that the assessee had not maintained books of account that is why he opted for 8 per cent income as per section 44AD of the Act. The section also does not put obligation on the assessee to maintain books of account, more so, in view of the fact that his income has been assessed as per section 44AD of the Act, he cannot be punished for not maintaining the same. The argument of the revenue that the assessee was in fact, maintaining books of account is untenable. Keeping or preparing a cash flow statement cannot be considered as keeping the books of account.

Coming to the argument of the revenue that the addition has been made under section 69C, on which there is no bar under section 44AD, one is quite in agreement with the same. The only fetter provided under section 44AD are the applicability of provisions of sections 30 to 38 of the Act.

The crucial words in section 69C for the purposes of present appeal are 'any financial year an assessee has incurred any expenditure'. But can one say on the facts and circumstances of the present case that the assessee has 'incurred' any expenses. From an analysis of section 44AD it has already been held that the assessee had not incurred the expenses to the extent of 92 per cent of the gross receipts. Therefore, in the present case, the provisions of section 69C cannot be applied. Asking the assessee to prove to the satisfaction of the Assessing Officer, the expenditure to the extent of 92 per cent of gross receipts, would also defeat the purpose of presumptive taxation as provided under section 44AD or other such provision.

Since the scheme of presumptive taxation has been formed in order to avoid the long drawn process of assessment in cases of small traders or in cases of those businesses where the incomes are almost of static quantum of all the businesses, the Assessing Officer could have made the addition under section 69C, once he had carved out the case out of the glitches of the provisions of section 44AD. No such exercise has been done by the Assessing Officer in this case.

As already held in the preceding paragraph, the Assessing Officer himself while computing the income of the assessee has made the business income to be taxable at the rate of 8 per cent of the gross receipts as provided under section 44AD of the Act. In such circumstances, this ground of appeal is allowed.

Thomas Eapen Vs. ITO (2020) 180 ITD 741 (Cochin Trib) / 113 Taxmann.com 268 (Cochin – Trib)

Section 44AD, read with section 69A, of the Income-tax Act, 1961 - Presumptive taxation (Scope of provision) - Assessment year 2015-16 - Assessee, a small trader in medicine, declared return of income under section 44AD at 8 per cent of his turnover - Assessing Officer made addition under section 68 in respect of unexplained cash credit found in assessee's bank - On appeal, Commissioner (Appeals) held that since assessee did not maintain books of account, said unexplained deposits could not be taxed under section 68 but under section 69A - Whether since scheme of presumptive taxation had been formed in order to avoid long drawn process of assessment in case of small traders or in case of businesses where incomes were almost of static quantum of all businesses, Assessing Officer could have made addition under section 69A, once he carved out case out of glitches of provisions of section 44AD, and in instant case no such exercise being done by Assessing Officer, addition made under section 69A was to be deleted - Held, yes [In favour of assessee].

It is to be noted that the assessee having been taxed under the presumptive taxation under section 44ADof the Act, the Assessing Officer is not right in asking him to substantiate the expenditure incurred by him. Reliance was placed on the judgment of Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Surinder Pal Anand (2010) 192 Taxman 264 (P&H)

The assessee filed his return of income showing certain business income under section 44AD. The Assessing Officer did not accept the return and made an addition in respect of the cash deposited in the bank account during the year. On appeal, the Commissioner (Appeals) held that the assessee was not required to maintain regular books of account as the return had been filed under section 44AD and the turnover was below Rs.40 lakhs. It was also recorded that since the cash deposits in the bank statement were lower than the business receipts shown by the assessee and in the bank statement there were withdrawals as well as deposits, the addition was unjustified. The Tribunal upheld the order of the Commissioner (Appeals).

On the revenue's appeal to the High Court: HELD

Sub-section (1) of section 44AD clearly provides that where an assessee is engaged in the business of civil construction or supply of labour for civil construction, income shall be estimated at 8 per cent of the gross amount paid or payable to the assessee in the previous year on account of such business or a sum higher than the aforesaid sum as may be declared by the assessee in his return of income notwithstanding anything to the contrary contained in sections 28 to 43C. This income is to be deemed to be the profits and gains of said business chargeable of tax under the head 'Profits and gains of business or profession'. However, the said provisions are applicable where the gross amount paid or payable does not exceed Rs.40 lakhs.

Once under the special provision, exemption from maintenance of books of account has been provided and presumptive tax at the rate of 8 per cent of the gross receipt itself is the basis for determining the taxable income, the assessee is not under any obligation to explain individual entry of cash deposit in the bank, unless such entry has no nexus with the gross receipts. In the instant case, the stand of the assessee before the Commissioner (Appeals) and the Tribunal that the amount in question was on account of business receipts had been accepted. The revenue could not show with reference to any material on record that the cash deposits were unexplained or undisclosed income of the assessee.

Therefore, no question of law arose from the Tribunal's order and the revenue's appeal was to be dismissed.

Chapter- 15

Compilation of Judicial Pronouncements

1. **[TS-8499-ITAT-2019(Cochin)-O]** - Section 44AD exempts the assessee from maintenance of books of accounts, and asking assessee to prove to the AO's satisfaction expenditure to the extent of 92% of gross receipts/ deposit would defeat the purpose of presumptive taxation u/s 44AD or other such provision; ITAT rules in assessee's favour, notes the contradiction: if the income is estimated, how could the expenditure component on the basis of said income be considered to have been 'actually incurred'? It is only presumption that 92% of gross receipts was incurred as expenditure; ITAT holds that section 69A of the Act cannot be applied as neither AO nor CIT(A) have given any reason as to why Section 44AD is not applicable;

2. **[TS-6983-ITAT-2019(Kolkata)-O]** -Presumptive taxation u/s 44AD – can addition be made u/s 68 when income/ profit is estimated – neither AO nor CIT(A) have given any reason as to why s. 44AD is not applicable; ITAT holds that AO cannot examine statement of accounts in such cases, or make additions towards undisclosed purchases, undisclosed expenditure, undervaluation of closing stock, etc. The turnover declared by the assessee is accepted by the Revenue, and such additions go against the spirit of the Act

3. **[TS-6380-ITAT-2019(DELHI)-O]** - Cash deposit during demonetization period - ITAT: Insufficient evidence to consider sales as bogus or to make addition of cash in hand – ITAT notes that Assessee, a small trader, declared return of income under presumptive provisions u/s 44AD and case was selected under limited scrutiny for cash deposit during demonetization period from 09.11.2016 to 30.12.2016; The fact that during assessment, the assessee submitted a copy of his balance-sheet does not prove that the assessee maintained books of account; AO made addition u/s 68 on account of unexplained cash credits due to bogus sales; On appeal, CIT(A) restricted addition to the extent of cash in hand, which was considered as unaccounted; ITAT ruled in Assessee`s favour and delete the entire addition, notes that "If there is no creditor in the books of account and no books of account have been maintained, there is no question of considering it to be cash credit"; Assessee had filed details of sales & purchase before AO giving names, telephone number and address of parties; held that if the AO had any doubt, he could have made direct inquiry; ITAT held that there was no justification to consider the assesee's sales to be bogus or to make addition of cash in hand as per details submitted; AO did not bring any sufficient evidence on record to justify the addition;

4. **[TS-8316-ITAT-2019(Hyderabad)-O]** - Merely because of cash deposits in bank account during demonetization period (Nov-Dec 2015), cash in hand as on 31-03-2016 cannot be doubted – ITAT notes that assessee is engaged in money lending business and therefore cannot be expected to be without any cash in hand at the end of the relevant assessment years (AYs); The assessee has been showing closing balance of cash in hand even for the earlier AYs and sundry debtors were shown in the Balance Sheet ended 31st March, 2015, hence cash flow statement demonstrates the sources of the funds with the assessee; ITAT further notes that the return of income filed by Assessee has been accepted by the Department and was not picked up for scrutiny; ITAT deletes the addition, holds that cash in hand of as on 31-03-2016 cannot be doubted;

5. **[TS-8936-ITAT-2017(Mumbai)-O]** - ITAT upholds CIT(A)'s order, sets aside addition u/s 69 for cash deposits in bank account; AO treated the deposits as unexplained investment, as return of income was filed in ITR–2 wherein there is no option for offering income u/s 44AD, and had also offered income under the head income from other sources; the CIT(A) deleted the addition by observing that merely because option to offer income u/s 44AD is not present in Form ITR-2 was no reason for rejecting the appellant's return; the CIT(A) applied presumptive rate of tax of 8% on cash deposited; ITAT notes that AO, in the preceding AY 2010–11, has accepted the assessee's aforesaid claim and the CIT(A)'s finding that cash deposits are from his cosmetics and merchandise business, set aside addition u/s 69; ITAT cautions assessee that "he should not take advantage of his ignorance by repeatedly committing same mistake. If he intends to avail the benefit of presumptive tax u/s 44AD, he has to comply with requirement of the relevant statutory provisions"

CHAPTER 16

Comparative study of Section 44AD AA ADA AND 44AE

PARTICULAR	44 AD	44 ADA	44 AE
Eligible Assessee	Individual/HUF/Firm (Other than LLP)	Resident assessee being an individual or a partnership firm other than a limited liability partnership	Any person
Eligible Business	Any Business except 44 AE	Profession referred in 44AA	Plying, hiring or leasing good carriages
Applicability	Turnover or gross receipts should not exceed 2 Crores. Person should not be engaged in agency business or in commission or brokerage or Profession referred in 44 AA	Gross receipts should not exceed 50 Lacs.	No. of vehicles own should not exceed 10 at any time during the previous year
Presumptive Income	8% or 6%	50 %	7500/Month or part of the month 1000 Per Ton.
Interest and Remuneration	Not allowed	Not allowed	Allowed
Applicability of 44 AB	If 44AD(4)get attracted and Total Income Basic Exemption	Income offered is less than 50% and total income exceeds Basic Exemption limit	Income offered is less than the presumptive Income
Higher Income	Claimed to have been earned	Claimed to have been earned	Actually Claimed to have been earned
Advance tax	Applicable	Applicable	Silent Applicable
Number of installments	100% in the last installment	100% in the last installment	Silent all 4 installments
Applicability to Non-Resident	Not applicable	Not applicable	Applicable