

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 748/JPR/2023
निर्धारण वर्ष/Assessment Year : 2014-15

Manphool Singh C-142, Mangal Marg, Bapu Nagar, Jaipur	बनाम Vs.	Income Tax Officer, Ward 6(2), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AEPPS 4925 K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. Dev Arora (CA)
राजस्व की ओर से / Revenue by : Sh. Monisha Choudhary (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 18/01/2024
उदघोषणा की तारीख / Date of Pronouncement: 07/02/2024

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, A.M.

This appeal is filed by the assessee aggrieved from the order of the National Faceless Appeal Centre, Delhi [Here in after referred as (NFAC)] for the assessment year 2014-15 dated 19.10.2023, which in turn arises from the order passed by the AO under Section 271B of the Income tax Act, 1961 (in short 'the Act') dated 28.10.2020.

2. The assessee has taken following grounds in this appeal;

“1. That the learned Authorities below have grossly erred in law and facts in passing the order which is bad in law and facts. Hence liable to be quashed.

2. That the learned Authorities below have grossly erred in law and facts in making/confirming Penalty of Rs. 64,503/- u/s 271B of Income Tax Act on assumption and presumption basis. Hence the addition is liable to be deleted.

3. The appellant has reserved a right to add, amend or alter any ground or grounds of appeal on or before the appeal hearing.”

3. The fact as culled out from the records is that the assessee has filed his return of income for assessment year 2014-15 on 28.03.2016 declaring total income of Rs. 3,15,530/-, the case was selected for scrutiny and notice u/s 143(2) issued on 19.09.2016. The scrutiny assessment was completed on 26.12.2016 at the income of Rs. 4,14,850/-. During the assessment proceedings, it was noticed that the total turnover/gross receipts of the assessee was at Rs.1,29,00,787/-. Therefore, the assessee was required to get his accounts audited by an accountant but as per the records the accounts of the assessee were not got audited. Based on these observation order of levying penalty u/s. 271B for an amount of Rs. 65,000/- was passed by the NeFAC.

4. Aggrieved from the said action of the Assessing Officer, assessee preferred an appeal before the Id. CIT(A)/NFAC. Apropos to the grounds so raised the relevant finding of the Id. CIT(A)/NFAC is reiterated here in below:-

“This appeal is against the order u/s 271B of the Income Tax Act, 1961. During the year, the total turnover/gross receipts of the appellant was Rs.1,29,00,787/-. Therefore, appellant was required to get the accounts audited. As the accounts were not audited, penalty u/s 271B was levied. Further, the appeal filed against the assessment order was dismissed by the CIT(A)-2, Jaipur vide order dated 28.03.2019, which corroborates the findings of the Assessing Officer and appellant did not filed further appeal in ITAT.

5.1 There is a mistake in the last line of the order u/s 271B of the Act. Penalty impossible @ ½% of gross receipts is worked out at Rs. 64,503/-, but in the last line penalty amount is mentioned as Rs. 65,000/-. Therefore, Assessing Officer is directed to charge penalty of Rs. 64,503/- thereby relief of Rs. 497/- is given remaining amount of penalty is confirmed.”

5. As the Id. CIT(A) confirmed the levy of the penalty holding that the reasons advanced by the are not covered under the any reasonable clause and since the assessee has not complied the statutory provisions, the action of levy of penalty by the AO was confirmed. Aggrieved from the said order of the Id. CIT(A) the assessee preferred this appeal solely on the levy of the penalty u/s. 271B of the Act. To support the ground so raised the Id. AR appearing on behalf of the assessee has placed their written submission which is extracted in below;

“Brief Facts of the Case are as under:

That the appellant filled his return of income on 28/03/2016 declaring income as under:

Particular	Amount
Income from House Property	2,52,000
Income from Capital Gain	19,075
Income from Other Sources	1,03,571
GROSS TOTAL INCOME	3,74,646
Less : Deduction under Chapter VI-A	59,321
TOTAL INCOME	3,15,325

That the appellant is a regular taxpayer and filling his return of income continuously since a long. The only source of income of the appellant is Income from House Property and Income from Other Sources.

That during the year under consideration the appellant sold a capital asset (piece of land) for Rs. 1,29,00,788/- (which was purchased in the year 2006) and shown Income from capital gain of Rs. 19,075/- (after reducing indexed cost of purchase & improvement exp. and after claiming exemption u/s 54 of the Income Tax Act).

That the appellant make improvement in the capital asset, so that he can earn more profit from sale of this asset. But the Ld. AO consider it as business activities even though he was fully aware about the fact the appellant doesn't involve in any type of business activities neither in past nor in future.

That the Ld. AO without considering the facts and history of the appellant treated the said transaction as Business Transaction and considered the sale consideration as Business Turnover of the appellant. Accordingly Ld. AO passed the assessment order and assessed the total income Rs. 4,14,850/-

Thereafter the Ld. AO imposed the penalty of Rs. 65,000/- u/s 271B treating the appellant in default for fails to get his accounts audited u/s 44AB of the Income Tax Act.

That the assessee doesn't maintain any books of accounts as he was not required to do so and further, he has no business income. It is the AO who treated the capital gain transaction as business transaction.

That being aggrieved from the order of the Ld. AO, appellant filed an appeal before the Commissioner of Income Tax (Appeals), NFAC and submitted the written submission before him.

But the Ld. CIT(A), NFAC confirmed the penalty u/s 271B on the single ground that the appellant didn't file the appeal against the assessment order confirmed by the CIT(A), before the ITAT and ignore the submission of the appellant made before him.

That being aggrieved from the order of the Ld. CIT(A), NFAC, appellant filed this appeal before this Bench and raised following grounds of appeal:

1. That the learned Authorities below have grossly erred in law and facts in passing the order which is bad in law and facts. Hence liable to be quashed.
2. That the learned Authorities below have grossly erred in law and facts in making/ confirming Penalty of Rs. 64,503/- u/s 271B of Income Tax Act on assumption and presumption basis. Hence the addition is liable to be deleted.
3. The appellant has reserved a right to add, amend or alter any ground or grounds of appeal on or before the appeal hearing.

GROUND OF APPEAL

1. That the learned Authorities below have grossly erred in law and facts in passing the order which is bad in law and facts. Hence liable to be quashed.

That the appellant doesn't maintain any books of accounts as he was not required to do so. That during the course of assessment proceedings no extra income or any new material was found and brought on record. The AO simply change the nature of transaction. In the AO opinion the transaction was in nature of business and profession, while the assessee was treating the same transaction in the nature of capital gain. Hence it is simple case of difference in opinion.

- Hon'ble Supreme Court in the case of CIT v. U.P. State Bridge Corpn. Ltd. [2018] 97 taxmann.com 278 held as under:

where assessee had furnished certain details regarding expenditure as well as income in return, which were not found inaccurate, nor could be viewed as concealment of income on part of assessee, merely because said claim was not accepted or was not acceptable to revenue, that by itself would not attract

penalty. - It further held that when penalty is being imposed taking into account quantum of additions upheld or accepted, then statute providing limitation will have to be applied strictly in that respect.

- Hon'ble Supreme Court in the case of CIT v. V.S. Sirpurkar and Dr. Mukundakam Sharma [2010] 189 Taxman 322 held as under:

Merely because assessee had claimed expenditure, which claim was not accepted or was not acceptable to revenue, that by itself would not attract penalty.

It is well settled law that penalty shouldn't be imposed when there is different view possible. Hence the Penalty order passed and confirmed by learned Authorities below is bad in law and facts, hence liable to be quashed.

2. That the learned Authorities below have grossly erred in law and facts in making/ confirming Penalty of Rs. 64,503/- u/s 271B of Income Tax Act on assumption and presumption basis. Hence the addition is liable to be deleted.

That the authorities imposed / confirmed the penalty u/s 271B of the Income Tax Act. The section 271B reads as under:

"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."

This section depends upon section 44AB and Section 44AB is related to "Audit of accounts of certain persons carrying on business or profession"

Hence it is clear the assessee who is required to get his accounts audited is required to maintain accounts first. In Income Tax Act section 44AA deals with the maintenance of accounts by an assessee.

The section 44AA reads as under:

"(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 60 by the Board in the Official Gazette shall keep and maintain such books of account and other

documents as may enable the 61 [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 62[one lakh twenty] thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds 63 [ten lakh] 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 64 [one lakh 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 65 [ten lakh] rupees, 66 [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 67 [section 44AD or section 44AE or section 44AF] 68[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 69 [previous year,]

The following clause (iv) shall be inserted after clause (iii) of sub-section (2) of section 44AA by the Finance (No. 2) Act, 2009, w.e.f. 1-4-2011 :

(iv) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business and his income exceeds the maximum amount which is not chargeable to income-tax during such previous year, keep and maintain such books of account and other documents as may enable the 70[Assessing] Officer to compute his total income in accordance with the provisions of this Act.

(3) The Board may, having regard to the nature of the business or profession carried on by any class of persons, prescribe 71 , 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.]

Further there is a penalty provision in section 271A Income Tax Act for non maintenance of books of accounts as prescribed u/s 44AA of the Income Tax Act, which are as under:

“Failure to keep, maintain or retain books of account, documents, etc.

271A. Without prejudice to the provisions of section 271, if any person fails to keep and maintain any such books of account and other documents as required by section 44AA or the rules made thereunder, in respect of any previous year or to retain such books of account and other documents for the period specified in the said rules, the [Assessing] Officer or the [Commissioner (Appeals)] may direct that such person shall pay, by way of penalty, [a sum of twenty-five thousand rupees].”

That it is very well settled that if an assessee doesn't maintain books of accounts then he will be liable for penalty u/s 271A of the Income Tax Act and further he couldn't be liable for penalty u/s 271B of the Income Tax Act for failure to get his accounts audited, because he is already got penalize for non maintenance of books of accounts and assessee couldn't be penalize twice for a single mistake.

- In the case of Lokesh Kumar Sharma vs. ITO (2023) ITA No. 278/JP/2022 Hon'ble ITAT Jaipur Bench, Jaipur held as under.

“Provisions of section 44AB can only be invoked when assessee had first complied with provisions of section 44AA; where assessee was not maintaining any books of account, no penalty under section 271B was to be imposed upon him for violation of provision of section 44AB”

- In the case of Surajmal Parsuram Todi vs. CIT (1996) 222 ITR 691 (Gau) Hon'ble Gauhati High Court (D.P.B. Page 1-2) held as under.

“Maintenance of accounts as envisaged under s. 44AA and on failure to do so the assessee shall be guilty and liable to be penalised under s. 271A. Even after maintenance of books of account the obligation of the assessee does not come to an end. He is required to do something more i.e., by getting the books of account audited by an accountant. But when a person commits an offence by not maintaining the books of account as contemplated by s. 44AA the offence is complete. After that there can be no possibilities of any offence

as contemplated by s. 44AB and, therefore, the imposition of penalty under s. 271B is erroneous.”

- In the case of LAVETI CHINASIMHACHALAM & ANR. vs. INCOME TAX OFFICER & ANR. (2016) 46 CCH 0569 VishakapatnamTrib. ITA No.323/Vizag/2013 (D.P.B. Page 3-7); Hon’ble Vishakapatnam Tribunal held as under:

“Penalty u/s 271B—Failure to get accounts audited—Assessee was engaged in business of trading in textiles—Survey operation u/s 133A was conducted in business premises of assessee and during course of survey, it was noticed that assessee was not disclosing his true sale in books of accounts—Assessee filed his return of income for assessment year 2008-09 declaring total sales of Rs. 35,94,342/- with net loss of Rs. 5,53,643—Assessment for year had been completed u/s 143(3) by determining total income of Rs. 4,34,364—AO issued show cause notice u/s 271B and proposed to levy penalty for failure to get accounts audited u/s 44AB— A.O. held that turnover of assessee for year under consideration was above Rs. 40 lakhs, which was confirmed by assessee during course of assessment proceedings, therefore, plea of assessee that turnover for year under consideration was less than Rs. 40 lakhs had not been accepted— Since, assessee failed to get it’s accounts audited u/s 44AB AO, invoked provisions of section 271B and levied penalty of Rs. 22,851/- being half percentage of gross turnover—CIT(A) upheld penalty levied on assessee—Held, A.O. levied penalty u/s 271B for failure to get accounts audited u/s 44AB—A.O. was of opinion that turnover of assessee for year exceeded Rs. 40 lakhs— Despite turnover exceeded Rs. 40 lakhs, assessee had not submitted his audit report as required by law— Therefore, it was fit case for levy of penalty u/s 271B—Though assessee admitted unaccounted turnover which resulted into total turnover exceeds Rs.40 lakhs, same had not been recorded in books of accounts in absence of necessary sales bills and hence question of audit u/s 44AB did not arise— Requirement of audit u/s 44AB applied, when turnover as per books of accounts exceeded Rs. 40 lakhs— Total turnover as per books of accounts of assessee was less than Rs. 40 lakhs therefore A.O. was not correct in levying penalty u/s 271B—ITAT set aside order passed by CIT(A) and directed A.O. to delete penalty levied u/s 271B—Assessee’s Appeal allowed.”

- In the case of COMMISSIONER OF INCOME TAX & ANR. vs. S.K. GUPTA & CO. (2010) 322 ITR 0086 (All) (D.P.B. Page 8-9) Hon’ble Allahabad High Court held as under:

“Penalties—Failure to get accounts audited under s. 44AB—Assessee firm engaged in the construction work —It had not maintained any books of account and gross receipts from contract business were to the tune of Rs. 1,24,69,486—It did not get its books of account audited nor submitted any audit report while filing the return of income—Requirement of getting the books of account audited could arise only where the books of account are maintained—There was a reasonable cause for not getting the accounts audited as no accounts were maintained, and thus the assessee could not be penalised both under ss. 271A and 271B.”

- As decided by the Hon’ble Allahabad HC in the case of COMMISSIONER OF INCOME TAX vs. BISAULI TRACTORS (2008) 299 ITR 0219 (D.P.B. Page 10-13)

“Penalty under s. 271B—Leviability—No books of accounts maintained by assessee—Penalty under s. 271B is not attracted in a case where assessee has not maintained any books of accounts—Instead, recourse can be taken to s. 271A in such a case.”

- In the case of RAM PRAKASH C. PURI vs. ASSISTANT COMMISSIONER OF INCOME TAX (2001) 77 ITD 0210 (D.P.B. Page 14-15) Hon’ble Pune Tribunal held as under:

“Penalty under s. 271B—Failure to get accounts audited—Non-maintenance of accounts—Assessee had not maintained any books of account and suffered penalty under s. 271A—Penalty under s. 271B not justified. — Surajmal Parsuram Todi vs. CIT (1997) 142 CTR (Gau) 209 : (1996) 222 ITR 691 (Gau) followed.”

3. The appellant has reserved a right to add, amend or alter any ground or grounds of appeal on or before the appeal hearing.

Not pressed.

Looking to the above facts and circumstance of the case, this court is requested to kindly allow the appeal in the interest of justice and oblige.”

6. Per contra, Id. DR supported the order of the Id. CIT(A). The Id. DR thus submitted that the assessee failed submit audit report

though liable to get his books of accounts audited and failed furnish the audit report and thus the levy of penalty is correct and the same be upheld.

7. We have heard the rival contentions and perused the material on record. We have also gone through the judicial decision cited by the Id. AR of the assessee in support his arguments before us. The bench noted that for the year under consideration the assessee sold a capital asset (piece of land) for Rs. 1,29,00,788/- (which was purchased in the year 2006) and shown Income from capital gain of Rs. 19,075/- (after reducing indexed cost of purchase & improvement expenses and after claiming exemption u/s 54 of the Income Tax Act). The assessee had made improvement in the capital asset, so that he can earn more profit from sale of this asset. The Id. AO consider this activity of the assessee as business activities even though he was fully aware about the fact the appellant doesn't involve in any type of business activities neither in past nor in future. Based on these finding the Id. AO also recorded a finding that since the turnover / gross receipt of the assessee is Rs. 1,29,00,788/- which is exceeding the limit of Rs. 1

or prescribed for getting the books of accounts audited and to furnish the audit report u/s. 44AB of the Act and on account of such violation the assessee was called upon to pay a penalty u/s. 271B of the Act for an amount of Rs. 65,000/-. On this issue the assessee contended that his income was offered under the head capital gains. He does not maintain any books of accounts as he was not required to do so and further, he has no business income. It is the AO who treated the capital gain transaction as a business transaction. When the assessee prefers the appeal before the Id. CIT(A) the CIT(A), NFAC confirmed the penalty u/s 271B on the single ground that the appellant didn't file the appeal against the assessment order confirmed by the CIT(A), before the ITAT and ignore the submission of the appellant made before him. The bench noted that the Id. AO has changed the head of income from capital gain to business income. The bench noted that the revenue could not controvert the fact that the assessee submitted that this is only solitary transactions which cannot be termed as business income. Merely the assessee has not challenged the finding of the Id. CIT(A) in quantum in the penalty proceeding the assessee cannot be called upon pay the penalty as failure to get the books of

accounts audited and failure file the audit report. The reasons advanced by the assessee this he has offered the income under the head capital and under that head though the income / receipt 1 or there is no requirement to get the books of accounts audited and therefore, this being the **reasonable cause for the assessee**. The provision of section 273B gives power to the taxing authority not to impose the penalty if the assessee proves that there was a reasonable cause for such failure. The provision of section 273B reads as follows :

Penalty not to be imposed in certain cases.

273B. Notwithstanding anything contained in the provisions of clause (b) of sub-section (1) of [section 271](#), [section 271A](#), [section 271AA](#), [section 271B](#), [section 271BA](#), [section 271BB](#), [section 271C](#), [section 271CA](#), [section 271D](#), [section 271E](#), [section 271F](#), [section 271FA](#), [section 271FAB](#), [section 271FB](#), [section 271G](#), [section 271GA](#), [section 271GB](#), [section 271H](#), [section 271-I](#), [section 271J](#), clause (c) or clause (d) of sub-section (1) or sub-section (2) of [section 272A](#), sub-section (1) of [section 272AA](#) or [section 272B](#) or sub-section (1) or sub-section (1A) of [section 272BB](#) or sub-section (1) of [section 272BBB](#) or clause (b) of sub-section (1) or clause (b) or clause (c) of sub-section (2) of [section 273](#), no penalty shall be imposed on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure.

Considering the facts and circumstances of the case and the decision cited by the assessee we hold that the assessee was prevented by sufficient cause and therefore, we are of the considered view that the penalty of levied by the lower authorities

confirmed by the Id. CIT(A) u/s 271B of the Act does not have any legs to stand, therefore, the same is deleted. Therefore, we direct the Id. AO to delete the penalty of Rs. 64,503/- levied. In terms of these observations the appeal filed by the assessee is allowed.

In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 07/02/2024.

Sd/-
(संदीप गोसाई)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

Sd/-
(राठौड कमलेश जयंतभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 07/02/2024

*Ganesh Kumar, PS

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Manphool Singh, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward 6(2), Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA Nos. 748/JPR/2023}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar