

**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK 'SMC' BENCH,  
CUTTACK**

**BEFORE SHRI N.S SAINI , ACCOUNTANT MEMBER**

**ITA No. 40/CTK/2015**  
Assessment Year : 2009-2010

Abdul Amzad Ali Khan, Prop. Milan Financial Services, At: Kusupala, PO: Begunia, Dist: Khurda.	Vs.	ITO, Khurda Ward, Sriram Nagar, Khurda
PAN/GIR No. AMLPK 1554 G		
<b>(Appellant)</b>	..	<b>( Respondent)</b>

Assessee by : Shri S.K.Agarwal, AR

Revenue by : Shri D.K.Pradhan, DR

**Date of Hearing : 03 /01/ 2017**

**Date of Pronouncement : 03/01/ 2017**

**ORDER**

This is an appeal filed by the assessee against the order of CIT(A)-1, Bhubaneswar, dated 29.10.2014, for the assessment year 2009-2010.

2. The sole issue involved in this appeal is that the Id CIT(A) erred in confirming the action of the Assessing Officer in imposing penalty under section 271B of the I.T.Act, 1961 for Rs.27,500/-.

3. I have heard the rival submissions and perused the orders of lower authorities and materials available on record. In the instant case, the assessee filed the return of income on 30.9.2009 showing income of Rs.1,53,850/-. The Assessing Officer observed that the assessee was required to get the account audited u/s.44AB and furnish the same to the department. The return was filed without audit report for which the Assessing officer issued a letter dated 29.4.2010 calling for furnishing of a copy of the audit report by 7.5.2010. The assessee did not file the audit report and, therefore, he initiated the penalty proceedings u/s.271B of the Act and levied penalty of Rs.27,500/- @ 0.5% of the gross receipts.

4. On appeal before the Id CI(A), the assessee submitted that the return of income was required to be filed in ITR-4, whereas by mistake the assessee filed the return of income in ITR-2. Since the ITR-2 does not have space to mention regarding the audit report u/s.44AB, the Assessing Officer presumed that no audit has been done u/s.44AB of the Act before the specified date whereas the audit has been done on 21.9.2009 i.e. before the specified date. It was submitted that while filing the return of income, the assessee was not required to furnish any annexure including the audit report.

5. The Id CIT(A) after considering the submissions of the assessee, observed that the assessee should have filed the audit report by 7.5.2010 before the Assessing Officer as required by the Assessing Officer. However,

the assessee did not comply with the request and when the penalty notice was issued refused to receive the notice sent by RPAD. Subsequently, the assessee sought 14 to 15 days more time to submit the audit report. This shows that the audit was not done when the assessee sought more time to produce the same which is much after the specified date. This clearly shows that the audit report u/s.44AB has been back dated and not prepared by the specified date. He further observed that the assessee was not only required to get the accounts audited but furnish the same within the specified date. The assessee failed to furnish the audit report even by 15.5.2010, which is much after the specified date when the assessee asked for more time. Therefore, he held that the Assessing Officer is justified to conclude that the assessee has failed to get the accounts audited and furnished the same by the specified date and in levying the penalty.

6. Before me, Id A.R. of the assessee filed a copy of the audit report dated 21.9.2009 and reiterated the submissions made before the Assessing Officer as well as Id CIT(A).

7. On the other hand, Id D.R. supported the orders of lower authorities.

8. I find the explanation of the assessee is a plausible one that the assessee by mistake filed his return of income in ITR-2 whereas it was required to file the return of income in ITR-4. As there was no column provided in ITR-2 to

mention regarding the audit report u/s.44AB, the same could not be mentioned by the assessee. Ld A.R. submitted that throughout the submission before the Assessing Officer as well as Id CIT(A) and also before the Tribunal is that the audit report was obtained on 21.9.2009 and this fact could not be reported in the return of income by the assessee in ITR-2 in place of ITR-4. Before me, Id A.R. of the assessee has filed the copy of audit report u/s.44AB of the Act of the assessee for the assessment year 2009-2010. In view of above facts of the case and also keeping in view the fact that the assessment of the assessee was made at the returned income of the assessee at Rs.2,43,900/-, the default committed by the assessee was only a technical or venial breach of law in not submitting the particulars of audit report in the return of income filed by the assessee and, therefore, the assessee is not exigible to penalty u/s.271B of the Act. My above view finds support from the decision of Hon'ble Supreme Court in the case of [Hindustan Steel Ltd. vs. State of Orissa](#) (1972) 83 ITR 26 (SC) whereby Hon'ble Apex Court has held as under: -

"Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act or were the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

9. Hence, I delete the levy of penalty u/s.271B of the Act of Rs.27,500/- and allow the ground of appeal of the assessee.
10. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 03/01/2017 in the presence of parties.

Sd/-

(N.S Saini)  
**ACCOUNTANT MEMBER**

Cuttack; Dated 03/01 /2017  
B.K.Parida, SPS

**Copy of the Order forwarded to :**

1. The Appellant : Abdul Amzad Ali Khan,  
Prop. Milan Financial Services, At: Kusupala,  
PO: Begunia, Dist: Khurda
2. The Respondent. ITO, Khurda Ward,  
Sriram Nagar, Khurda
3. The CIT(A)-1, Bhubaneswar
4. CIT, Bhubaneswar.
5. DR, ITAT, Cuttack
6. Guard file.  
//True Copy//

BY ORDER,

ASST.REGISTRAR,  
**ITAT, Cuttack**