

IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH KOLKATA

BEFORE SHRI A.T. VARKEY, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.1006/Kol/2015

(निर्धारणवर्ष / Assessment Year: 2005-06

M/s B. W. M International 4, Meer BoharGhat Street, Kolkata – 700 007.	Vs.	I.T.O, Ward – 44(4), Kolkata.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AADFB 3904 B		
(अपीलार्थी/ Assessee)	..	(प्रत्यर्थी / Respondent)

निर्धारितीकीओरसे /Assessee by : Shri T. K. Chakraborty, Advocate.

राजस्वकीओरसे /Respondent by : Shri KalyanNath, ACIT

सुनवाईकीतारीख/ **Date of Hearing** : **09/09/2017**

घोषणाकीतारीख/**Date of Pronouncement** : **29/11/2017**

आदेश / ORDER

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the assessee, pertaining to Assessment Year 2005-06, is directed against the order passed by the Commissioner of Income Tax (A)-13, Kolkata in Appeal No.562/CIT(A)-13/W-44(4)/14-15, dated 23.04.2015, which in turn arises out of a penalty order passed by the Assessing Officer u/s 271B of the Income Tax Act, 1961, (hereinafter referred to as the 'Act'), dated 26.03.2010.

2.The assessee has raised the following grounds of appeal:

"1.That, on the facts and in the circumstances of the case, the Id. CIT(A) was not justified in upholding penalty of Rs.1,00,000/- imposed by the Assessing Officer u/s 271B of the I.T. Act without recording any finding as to how the submission of the assessee was not acceptable as evidence.

2.That, the Id. CIT(A) also erred in law in confirming penalty u/s 271B of the I.T Act without legally considering the provision of Sec. 273B of the Act.

3. That, the Id. CIT(A) was also unjustified in law in relying on the decisions of Hon'ble Kerala High Court and Calcutta High Court as the ratio of decisions in those cases are not applicable to the facts of the case of the assessee under appeal.

4. That, the assessee craves leave to amend, alter or withdraw any of the above-mentioned grounds or add any further ground(s) before or at the time of hearing of the appeal.”

3. Although, in this appeal, the assessee has raised a multiple grounds of appeal, but at the time of hearing, the main grievance of the assessee has been confined to the issue that the penalty of Rs.1,00,000/- imposed by the Assessing Officer u/s 271B of the I.T. Act was without recording any finding and without legally considering the provision of Section 273B of the Act.

4. The brief facts qua the issue are that the assessee filed his return of income on 28.12.2005 showing total income of Rs.31,980/-, accompanied with Form No. 3CB & 3CD. The accounts of the assessee-firm was audited and signed on 21.12.2005. The tax Audit Report was supposed to be completed and signed by the auditor before 30th September of the relevant Assessment Year, that is, on 30.09.2005. In the instant case, the AO noted that the assessee failed to get its accounts audited in respect of the previous year relevant to the Assessment Year in question as required u/s 44AB of the Act. Therefore, the assessee violated the provisions of the said Act, as such, penalty proceedings u/s 271B was initiated during the course of assessment proceedings u/s 143(3) of the Act. The AO observed that the Audit Report was signed by the Auditor only on 21.12.2005 which resulted delay in filing the return along with Tax Audit Report. According to the assessee's submission as the delay took place on the part of the Auditor to hand over the signed report. But AO observed that the contention of the assessee, as was found, was like putting the blame on the shoulder of some other person and that too in order to avoid the consequences of penal provisions of the Act. The AO observed that contention of

the assessee had not been substantiated by any material evidence, therefore, AO imposed penalty at Rs.1,00,000/-.

5. Not being satisfied with the order of the Assessing Officer passed u/s 271B of the Act, imposing penalty of Rs.1,00,000/-, the assessee filed an appeal before the CIT(A) who has confirmed the penalty u/s 271B of the Act. The Id. CIT(A) observed that the provision of section 271B making filing of audit report along with return of income compulsory is in stipules from the year 1995. The very fact that the assessee claims to have audited the account with the help of a Chartered Accountant, in time, indicate he was aware of the provisions and even had the expert guidance of a Chartered Accountant. Under such circumstances he cannot avoid penalty by shifting the blame to his account. The CIT(A) relied on the judgment of the Hon'ble High Court of Calcutta in CIT vs. Capital Electronics 261 ITR 4 (Cal) 2003, wherein it was held that provisions of section 271B read with section 273B, makes it clear that the penalty is to be imposed when the assessee is not able to provide a reasonable cause for such failure. Absolute default on the part of the assessee need not be proved. It was further held that the provision was simply a coercive method to secure compliance of provisions of the Act. The CIT(A) noted that in the present case, the assessee has not been able to prove that there was a reasonable cause for failure. The explanation offered was not acceptable without any evidence. In view of the above the CIT(A) confirmed the penalty imposed by AO.

5. Not being satisfied with the order passed by the Id. CIT(A), the assessee is in further appeal before us. At the outset, the counsel for the assessee submitted before us that there was a reasonable cause for not getting books of

accounts audited u/s 44AB of the Act. The assessee could not produce the documents and papers to the tax auditor timely. Therefore, there was delay in getting tax audited u/s 44AB of the Act. The Id. Counsel also furnished before us a certificate of a Chartered Accountant which reads as under:

TO WHOM IT MAY CONCERN

This is to certify that the books of accounts of the firm M/s B.W.M International for the financial year 2004-05 was given for auditing to us before 31.10.2005. Due to want of some papers/documents the tax audit of said firm was completed by us as on 21.12.2005.

FOR BAID BORAR & COMPANY

Chartered Accountants.

The Id. Counsel for the assessee has further submitted before us that the assessee filed Return of Income on 28.12.2005 along with P.L. A/c, Balance Sheet and Tax Audit Report in Form No. 3 CD. Due date for filing Return of Income for A.Y. 2005-06 was 31.09.2005. The assessment for A.Y. 2005-06 was completed on 31.12.2007 on total income of Rs.2,17,217/- and on further appeal, the total income was reduced to Rs.1,62,190/-. The assessee filed his submission before the A.O. through letter dated 22.06.2009 stating inter-alia that Audit Report was signed by the Auditor on 21.12.2005 and after obtaining the Audit Report from the Auditor, Return was filed by the assessee firm on 28.12.2005. As the Auditor delivered the accounts late to the Assessee firm, the filing of Return of Income was consequently delayed and this is a reasonable cause as per provision of Sec.273B of the I.T. Act. Copy of the Auditor's Certificate indicating completion of Audit on 21.12.2005 was also filed before the A.O. But the Assessing Officer did not accept the submission and stated that failure to get its accounts audited within stipulated time was without any reasonable cause and accordingly, he imposed penalty at Rs.1,00,000/- U/s. 271B of the Act.

Before the C.I.T. (A) - 13, Kolkata, similar written submission was filed by the assessee on 09.05.2013 and also cited the decision of I.T.A.T., Jobbalpur Bench in the case of Lalta Prasad Chaurasia -VS- I.T.O. 104, Taxman 110 and also the decision of Madras High Court in the case of C.I.T.- VS - Apex Laboratories Pvt.

Ltd reported in (2010) 320 ITR 498 (Madras).The C.I.T. (A) - 13, Kolkata while disposing of this case cited the decision of Kerala High Court in the case of River View Bar & Silver Restaurant -VS - C.I.T. (Central), 211 Taxman 187 (Ker) and also the decision of Calcutta High Court in the case of C.I.T. -Vs - Capital Electronics, 261, ITR 4 (Cal). The Counsel submitted us that the decisions of these Hon'ble Courts are totally distinguishable from the fact of this case and the Hon'ble Calcutta High Court especially emphasized on the reasonable cause which is the dominant factor for proving the default.

The Id. Counsel for the assessee has relied on the judgment of the Allahabad High Court in the case of CIT Vs. U.P. RajyaSahkariEvamBhoomiVikas Bank Ltd. dated 26th April, 2010 wherein it was held thatthe delay was caused on the part of the auditors and it amounts to reasonable cause.

The Id. Counsel for the assessee hasaslo relied on the judgment of the Madras High Court in the case of CIT Vs. Alex Laboratories P. Ltd. dated 8th July, 2008 wherein it was held thatthe accounts were audited and also the assessee got the audit report, but the same was filed along with the return which was filed belatedly.

In view of the aforesaid facts the Id Counsel prayed the Bench for deletion of the penalty imposed u/s. 271B of the I. T. Act at Rs.1,00,000/-.

6. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

7. Having heard the rival submissions, perused the material available on record, we note that in the assessee`s case under consideration the accounting year ends on 31.03.2005. The assessee prepared the profit and loss account and Balance Sheet as on 31.03.2005 and he supposed to get the accounts tax audited U/s 44AB on or before 30.09.2005. The responsibility to get the accounts tax audited is on the assessee not on the Chartered Accountant. In the instant case the books of accounts of the assessee was audited and signed by a Chartered Accountant on 21.12.2005. Therefore, there is a delay of 82 days, in getting the tax audit

done. The financial statements, that is, Balance Sheet, profit and loss accounts etc as on 31.03.2005, was to be tax audited by a chartered accountant, appointed by the assessee, up to due date of 30.09.2009. Therefore, legislature has given six Month`s time to the assessee to get the accounts audited and file the return of income. As per the intention of the legislature, the said six Months time is enough for the assessee to submit the books of accounts and documents to the Chartered Accountant and get the tax audit done. If the assessee fails to get his accounts audited within this time limit then penalty U/s 271B will be imposed. Section 271B of the Act begins with the phrase 'if any person fails without reasonable cause' to get his accounts audited within the time stipulated, then the concerned income-tax authority may direct that such person shall pay by way of penalty, the sum mentioned therein. That is, if the assessee fails to get the account audited u/s 44AB then penalty u/s 271B will be imposed on the assessee, a sum equal to ½% of the total sales/turnover, as the case may be, or a sum of Rs.1,00,000/- whichever is less. In this case, the assessee failed to get his accounts audited u/s 44AB, therefore, the AO imposed penalty of Rs.1,00,000/-.

Before us, the Counsel for the assessee submitted that as per provisions of section 273B of the Income Tax Act, no penalty shall be imposed on the assessee for any failure, if he proves that there was reasonable cause for the said failure. In the assessee's case under consideration, the counsel for the assessee has explained us reasonable cause stating that there was a delay in submitting paper to the tax auditor as the books of accounts of the firm was given to the auditor as on 31.10.2005. We find that, there was a delay on the part of the assessee in submitting books of accounts to the tax auditor (vide certificate of tax auditor).

In this case, the tax audit should have been completed up to 30.09.2005. Therefore, books of accounts should have been given by the assessee to the tax auditor before 30.09.2005 but as per the certificate of the CA the books of accounts were given to the CA before 31.10.2005 therefore it is delay on the part of the assessee and the assessee did not explain this delay before us. The assessee has not explained us, that what was the reason for not submitting book of accounts to the tax auditor, before 30.09.2005 and why it was submitted before 31.10.2005. Why the books of accounts were not submitted to CA before 30.09.2005, (so that, tax audit would have been completed on time), has also not

been explained by assessee. During the course of hearing, the Id. Counsel has been emphasizing that there was a delay on part of the Chartered Accountant (CA) to complete the tax audit report but from the certificate which was submitted by the assessee before us clearly shows that there is no delay on the part of the CA. It is the delay on the part of the assessee in submitting the books of accounts to the CA. The CA certificate is furnished below for ready reference:

TO WHOM IT MAY CONCERN

This is to certify that the books of accounts of the firm M/s B.W.M International for the financial year 2004-05 was given for auditing to us before 31.10.2005. Due to want of some papers/documents the tax audit of said firm was completed by us as on 21.12.2005.

FOR BAID BORAR & COMPANY

Chartered Accountants.

From the above certificate we note that books of accounts were submitted to CA before 31.10.2005, and why the books of accounts were not given to CA before 30.09.2005 has not been explained. In the assessee`s case under consideration the due date of furnishing the tax audit report is 30.09.2005 and the assessee failed to explain that why books of accounts were not submitted to CA prior to 30.09.2005. Therefore, from the above certificate it appears to us that there is no delay on part of CA, but it is delay on the part of the assessee.

Therefore, assessee has not explained before us the reasonable cause for delay in getting the tax audited done. The Id. Counsel only stated that the tax audit report was signed on 21.12.2005 and the return was filed on 28.12.2005 and explained us that tax auditor delayed the accounts, is not acceptable in view of the tax auditor certificate mentioned above. The assessee has explained the delay between 21.12.2005 to 28.12.2005 which is not relevant here, because this is the further delay after getting the delayed tax audit report. The counsel for the assessee has failed to explain the delay between 30.09.2005 to 21.12.2005 therefore, we are of the view that it is failure on the part of the assessee.

Unless it is proved that there was reasonable cause for the failure, there is no escape from the imposition of penalty. Section 271B does not leave any discretion at the hands of the authority except as provided in section 273B. It is only when

reasonable cause for failure is proved, the penalty can be avoided. In this case under consideration, the Id. Counsel for the assessee has failed to prove the reasonable cause. The assessee cannot simply shirk his responsibility by saying that there was delay on the part of the CA whereas we noticed that there was delay on the part of the assessee. It is the duty of the assessee to ensure that the CA is doing his job properly. The assessee should have enquired periodically or at least within a reasonable time as to whether the tax audit report signed/filed or not with the revenue authorities. In this case, the assessee has not established any correspondence between himself and the CA. As per the certificate of the CA, it is also clear that he could not complete the tax audit because assessee did not submit some papers/documents to him, (relevant portion of CA certificate is reproduced below:

“Due to want of some papers/documents the tax audit of said firm was completed by us as on 21.12.2005.”

Therefore, it is abundantly clear that the assessee has failed to submit the relevant papers/documents to the CA to get the accounts audited. The assessee has failed to explain the delay in submitting the books of accounts to his CA. The Id. Counsel for the assessee has cited a lot of judgments of High Courts/Tribunals but these are not applicable to the fact of the case as discussed above. Therefore, considering the factual position we confirm the penalty u/s 271B of the Act.

8. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on this **29/11/2017**.

Sd/-
(A.T. VARKEY)

न्यायिक सदस्य / JUDICIAL MEMBER

कोलकाता/Kolkata;

दिनांक Dated **29/11/2017**

RS, SPS

Sd/-
(DR. A.L.SAINI)
लेखा सदस्य / ACCOUNTANT MEMBER

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Assessee- M/s B. W. M International
2. प्रत्यर्थी/ The Respondent.-I.T.O, Ward – 44(4), Kolkata.
3. आयकरआयुक्त(अपील) / The CIT(A), :Kolkata.
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.
सत्यापितप्रति

True Copy

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.