

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.**

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I.T.A. No. 454/(Asr)/2017

Assessment Year: 2014-15

Ramesh Kumar s/o Chiranji
Lal, Old Sabzi Mandi, Near
Geeta Bhawan, Kotkapura
[PAN: AHTPK 5134D]

(Appellant)

Vs. The Income Tax Officer,
Ward-3(3), Faridkot

(Respondent)

Appellant by : Sh. P. N. Arora (Adv.)

Respondent by: Sh. P. K. Sharma (D.R.)

Date of Hearing: 28.02.2018

Date of Pronouncement: 29.05.2018

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee agitating the confirmation of the levy of penalty u/s. 271B of the Income Tax Act, 1961 ('the Act' hereinafter) for Assessment Year (AY) 2014-15 vide order dated 15.07.2016, by the Commissioner of Income Tax (Appeals), Bathinda ('CIT(A)' for short) vide his order dated 02.05.2017.

2. The sole issue arising in the instant appeal is the validity in law of the levy of the said penalty in the facts and circumstances of the case. The background facts of the case are that the assessee-individual, a trader in paddy husk, filed his return of income for the relevant year on 31.03.2015, also uploading the tax audit report u/s. 44AB (dated 31.03.2015) on the same day. The same was, in terms of section

44AB, required to be obtained and furnished (to the Income Tax Department) by the due date of filing the return of income, i.e., by 30.09.2014. The contravention attracts penalty u/s. 271B, which reads as under:

‘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 thousand rupees, whichever is less.’

The assessee, in reply to the show-cause notice, submitted that he was not required to get his accounts audited up to the year relevant to AY 2012-13. He was accordingly not advised in the matter by his Advocate, Shri Sanjeev Arora. It is this non-advice by his counsel that led to a failure to get his accounts audited, constituting a reasonable cause u/s. 273B, saving penalty. The same was, however, regarded as an afterthought as the assessee was a regular assessee; in fact, a reputed businessman, availing services of professionals. The plea of non-advice by his counsel was, accordingly, regarded as an afterthought and a concocted story. Penalty at the rate of 0.5% of the turnover, i.e., Rs.87,600/-, was accordingly levied. The same found favour in first appeal. There was, it was noted by the Id. CIT(A), no advice to the contrary by the counsel. Aggrieved, the assessee is in second appeal.

3. We have heard the parties, and perused the material on record.

3.1 A reasonable cause saves penalty (including u/s. 273B), the burden to prove which – a matter of fact, though, is on the assessee. The assessee’s case is lack of proper advice by his counsel, Shri Sanjeev Arora, Advocate. The argument is valid in principle as nobody can be expected to know the law and, further, as it has not been shown that the assessee’s sales at any time in the past exceeded the threshold

monetary limit required for tax audit. The Assessing Officer (AO) ought to have examined this aspect, particularly so as the monetary limit for tax audit prior to 01.04.2010 was much lower, i.e., at Rs. 40 lacs. An assessee would normally heed to the advice by his counsel, who, it is stated, failed to advise him in the matter. Surely, ignorance of law is no excuse, but, then, it needs to be borne in mind that we are here concerned with penalty proceedings, *in which the conduct is of essence*.

3.2 Coming to the discharge of the burden of proof, the assessee has furnished an affidavit dated 09.03.2016 by Shri Sanjeev Kumar, Advocate (at PB page 8). The same states that as the assessee's, whose returns he has been filing since AY 2008-09, turnover up to (the year relevant to) AY 2012-13 did not exceed the limit prescribed under section 44AB, he could not advise the assessee to get his accounts audited for AY 2014-15. On enquiry about the intervening year, i.e., the previous year relevant to AY 2013-14, the counsel, Shri P.N. Arora, would clarify that the returns for both the years, i.e., AYs. 2013-14 and 2014-15, were filed on 31.03.2015, and audit reports for both the years (dated 31.03.2015), uploaded on the same day, placing a copy of the said returns on record. This is clearly surprising. This is as a counsel, if not alert, and advising his client in anticipation, i.e., on his turnover approaching the prescribed limit, would normally advise his client only when the latter approaches him for filing the return accompanied by his unaudited accounts - in case of business income, i.e., on observing the turnover for the relevant year. For all we know, there may have been an occasion for such a counsel while preparing and furnishing the return for AY 2012-13, as where the turnover for that year approximated Rs. 100 lacs. As the due date for filing the return for AY 2013-14 (for unaudited accounts) fell on 31.07.2013, the assessee would have, post AY 2012-13, only approached his Advocate for filing the return

for that year sometime between April and July, 2013, i.e., as he would be doing in the past. The accounts for that year being also required to be audited under section 44AB, the latest that the assessee would therefore become aware of his obligation under law to get his accounts audited (and file the same with the Department) is by the end of July, 2013, allowing him a reasonable time to obtain the audit report (for AY 2013-14) and file the same by the due date therefor (u/s.44AB), i.e., 30.09.2013, and, in fact, also return his income for that year. *Why, then, he did not do so?* The ld. AR could not, on being asked during hearing, explain. *And neither do we find any answer to this question in the pleadings by the assessee in the penalty and the appellate proceedings, i.e., before the Revenue.* Not only the assessee did not do so, he also did not approach his counsel for filing the return for the current year (AY 2014-15) in time, being due – for unaudited accounts, by 31.07.2014. This is as, again, doing so would have, likewise informed him that the last date for filing the return (for AY 2014-15) is 30.09.2014, by which he is also to furnish the audit report under section 44AB to the Department. And which he does only on 31.03.2015. It is thus patent that the error lies not in the advice of the counsel, who in fact, guided him – on being approached, rightly, but with the assessee, inasmuch as he did not approach him in time for filing the return, firstly, for AY 2013-14, and then again for AY 2014-15. The plea of being not advised by his Advocate is, in the facts and circumstances of the case, clearly misplaced. No wonder, the same has been found by the Revenue as an afterthought and a concocted story. *Why, the assessee nowhere states of when he approached his counsel for filing the return for AY 2013-14, or even for AY 2014-15, much less filing an affidavit in support of his case.* Even the affidavit by the counsel is silent on this, basing the non-rendering of the advice as to the requirement for audit on the accounts for AYs. 2008-09 to 2012-13. How, one may wonder, is that relevant? This is as no such requirement arose for those years. We, in fact, have already

proceeded on the basis that the assessee was not aware of the obligation for tax audit – a matter of common knowledge among businessmen, so that nothing in fact turns thereon. The occasion for rendering advice would arise only when the assessee is preparing to file the return for AY 2013-14 and, in any case, for AY 2014-15. *In fact, approaching the counsel in time for either year would make him aware of the requirement of law and, consequently, the penal consequence attending non-compliance.* If anything, it shows that the assessee is aware – or stands made aware on seeking professional advice, of the last date for filing the return/s belatedly, and chooses to, for reasons best known to him, avail of the said time period. It is the assessee's own lackadaisical conduct that has been thus responsible for the admitted contravention of section 44AB, *with that under reference being the second such default in succession.* No reasonable cause, under the circumstances, stands shown, much less proved, so as to eschew the impugned penalty.

3.3 Continuing further, even as no case law was referred to during hearing, we find two decisions by the Hon'ble jurisdictional High Court in the assessee's compilation, which we are therefore obliged to take note of. In *CIT v. Deepak Kumar* [2010] 38 DTR 118 (P&H), the Hon'ble Court upheld the deletion of penalty under section 271(1)(c). All the facts along with the dates of purchase and sale of shares stood disclosed. That the assessee had acted *bona fide* on the basis of the advice of his counsel, who furnished an affidavit admitting his mistake. In the facts of the present case, on the other hand, a plea similar thereto has been found lacking a factual basis. In *CIT v. Usha Ashoka Dairy* [2005] 279 ITR 32 (P&H), the assessee filed its return, accompanied by audit report, on November 29, 1985, as against the due date of 30.09.1985. The reasons for the delayed filing of the audit report, stated at para 2 of the judgment, which would appeal to any

reasonable person, were found reasonable by the Tribunal, and it is upon this basis, also discussed by the hon'ble court at para 14, that it upheld the concurrent findings of the first and the second appellate authority. How is the said case law relevant? If anything, it shows that 'reasonableness' is a matter of fact, to be decided on appreciation of all the relevant facts.

3.4 We have, in fact, at the very outset, already stated that a reasonable cause is essentially a matter of fact – a cause (be it a fact or circumstance or both) that had led a man of ordinary prudence, acting with due diligence in regard to his affairs, to committing a default. And, further, proceeded on the basis of the assessee being unaware of the legal requirement – itself, highly improbable as the provision of section 44AB, coopted on the statute by Finance Act 1984, with effect from 01.04.1985, is by now 30 years old, and a matter of common knowledge for the Accountants, examined his conduct to find it as negligent. In fact, the basic question as to why he did not proceed to file his returns for the two successive years, the second of which is before us, in time, remains completely unanswered. The delay in approaching his counsel, post for AY 2012-13, the return for which fell due in July, 2012, is in fact not for months, but for years, as we have clarified that approaching his counsel in time for either year (AY 2013-14 or 2014-15) would prevent the default. The explanation advanced, supported by an affidavit, when examined in the context of the facts of the case, does not exhibit the counsels' mistake at all – which, in substance, is the assessee's explanation. Rather, the assessee's conduct exhibits his awareness of his legal obligations and the concomitant implications. The cited case law would thus be of little assistance to the assessee. In fact, as a reading thereof shows, no substantial question of law arises in either of the decisions.

3.5 So, however, the fact of the matter is that the assessee has filed his returns for AYs 2013-14 and 2014-15 together on 31.03.2015, implying that the returns for these years, as well as the books of account for the same, were prepared and, as the case may be, audited (u/s. 44AB) – ostensibly for the first time, simultaneously. There is nothing on record to suggest that the books of account for these years were not complete or not maintained in the regular course of business. The only reason for the contravention of s. 44AB that therefore emerges is, as stated, the assessee being unaware of the audit requirement, coupled with the delay in filing his returns of income. The said delay, which has been discussed in detail in the foregoing part of this order, has neither been explained by the assessee nor enquired into. Laches on the part of the assessee, which therefore has been inferred by us, cannot be a reasonable cause u/s. 273B. There could, however, be a valid reason for the delay in the filing the said returns, constituting a reasonable cause for the delayed audit. The matter, strictly speaking, should therefore go back to the file of the AO for examination of the reason/s for the delayed filing of his returns by the assessee. We, however, in the facts and circumstances of the case, as well as considering the quantum of the penalty involved, do not consider it proper to restore the matter back for the same.

4. In view of the foregoing, giving the assessee the benefit of doubt, so that he has furnished a reasonable explanation *bona fide* for the delayed audit of his accounts, we direct the deletion of the impugned penalty. Needless to add, this order, rendered in the peculiar factual matrix of the case, shall not constitute a precedent. We decide accordingly.

5. In the result, the assessee's appeal is allowed.

Order pronounced in the open court on May 29, 2018

Sd/-
(N. K. Choudhry)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Date: 29.05.2018

/GP/Sr. Ps.

Copy of the order forwarded to:

- (1) The Appellant: Ramesh Kumar S/o Chiranji Lal, Old Sabzi Mandi,
Near Geeta Bhawan, Kotkapura
- (2) The Respondent: The ITO, Ward-3(3), Faridkot
- (3) The CIT(Appeals), Bathinda
- (4) The CIT concerned
- (5) The Sr. DR, I.T.A.T

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By Order