

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

श्री रमेश सी० शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH. C. SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 888/JP/2017
निर्धारण वर्ष / Assessment Year : 2013-14

Shri Sohan Nath, 84, Nath Gawadi, Vill: Ladpura, Ajmer.	बनाम Vs.	The ITO, Ward-1(3) Ajmer.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AFYPN 0276 J		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by: Shri Mahendra Gargieya (Adv.)
राजस्व की ओर से / Revenue by : Smt. Roshanta Meena (JCIT)

सुनवाई की तारीख / Date of Hearing : 13/02/2019
उदघोषणा की तारीख / Date of Pronouncement: 06/03/2019

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 14.08.2017 of the Id. CIT(A), Ajmer arising from penalty order passed U/s 271B of the I.T. Act for the assessment year 2013-14. The assessee has raised the following grounds:-

"1. The impugned penalty order u/s 271B of the Act dated 28.09.2016 is bad in law and on facts of the case, for want of

jurisdiction and various other reasons and hence the same kindly be quashed.

2. The impugned penalty order u/s 271B of the Act dated 28.09.2016 is bad in law and on facts of the case, is barred by limitation hence, the same kindly be quashed.

3. Rs. 68,944/-:- The Id. CIT(A) erred in law as well as on the facts of the case in confirming the penalty u/s 271B of the Act of Rs. 68,944/-. The penalty so imposed by the AO and confirmed by the Id. CIT(A) being totally contrary to the provisions of law and facts kindly be deleted in full.

4. The appellant prays your honour indulgences to add, amend or alter of or any other grounds of the appeal on or before the date of hearing.”

2. The assessee has e-filed its return of income for the year under consideration on 12.07.2013 declaring total income of Rs. 2,15,000/- from truck hiring business. During the course of assessment proceedings, the AO as noted that the assessee has also carried out liquor business during the year under consideration but has not declared any income from the liquor business. In response to the notice issued U/s 142(1) of the Act the assessee filed revised return of income on 30.07.2015 and declared total income of Rs. 6,38,900/-. The assessee has shown total sales from liquor business amounting to Rs.

1,37,88,837/-. The AO treated as revised return of income as invalid and completed the assessment proceedings on the basis of the original return of income. Subsequently, the AO while passing the assessment order has also recorded satisfaction that the assessee has not complied with the provisions of Section 44AB of the Act and therefore, it is fit case for initiation of penalty proceedings U/s 271B of the Act. The AO accordingly, initiated the penalty proceedings U/s 271B by issuing notice dated 14.03.2016 and thereafter dated 11.08.2019. There was no representation or attendance on behalf of the assessee in the penalty proceedings. Accordingly, the AO passed the impugned order by holding that the assessee has failed to get his books of accounts audited within stipulated period and as required U/s 44AB of the Act and consequently penalty U/s 271B of the Act being ½% of total sale was imposed. The Assessee challenged the action of the AO before the Id. CIT(A) but could not succeed.

3. Before us, the Id. AR of the assessee has submitted that the assessee has made substantial compliance of provisions of Section 44AB of the Act when the assessee filed the audit report along with revised return of income during the assessment proceedings. The Id. AR has further submitted that the assessee is regular business activity is truck

hiring and liquor business was carried out only during the year under consideration and therefore, inadvertently the assessee has not declared the income from liquor business while filing the return of income U/s 139(1). However, during course of assessment proceedings the assessee filed a revised return of income and also filed the audit report, therefore, the purpose and intent of filing the audit report is to extent help of the Assessing Officer while completing the assessment proceedings was justified. Once, the assessee filed the audit report during the assessment proceedings a substantial compliance was made as required U/s 44AB of the Act. The assessee has also explained the reasonable cause for not disclosing the income from liquor business in the original return of income and therefore, the said explanation of the assessee is a valid and bonafide in terms of Section 273B of the Act. He has also submitted that though the books of accounts of the assessee were audited by the auditor however, due to lack of coordination between the auditor and the tax advocate the income from liquor business was not declared in the return of income. Thus, due to the inadvertent and bonafide mistake, the assessee could not declare liquor business income and also did not file the audit report. Thus, the Id. AR of the assessee has submitted that when the turnover declared by the

assessee in the original return of income is less than the limit prescribed U/s 44AB of the Act then, there was no requirement of filing the audit report along with the return of income. Subsequently, when the assessee filed the revised return of income on a higher turnover the assessee has also filed audit report in compliance of the provisions of Section 44AB of the Act. In support of his contentions, he has relied upon the decision of Hon'ble Gauhati High Court in case of Surajmal Parsuram Todi vs. CIT 222 ITR 691.

4. On the other hand, the Id. DR has submitted that it is a clear case of default committed by the assessee for not filing of the audit report along with return of income. Further, it is not a case of inadvertence or bonafide mistake but the assessee has deliberately not disclosed the income from liquor business and only when the AO issued a show notice the assessee filed the revised return of income which was not accepted by the AO and the same was treated invalid. Therefore, there was no compliance on the part of the assessee. Even during the penalty proceedings, the assessee has failed to furnish any explanation or even to attend the proceedings. Therefore, the case of the assessee does not fall in the bonafide explanation in terms of Section 271B of the Act. He has relied upon the orders of the authorities below.

5. We have considered the rival submissions as well as relevant material on record. The main contention of the Id. AR is that the assessee filed audit report during the assessment proceedings, therefore, it is a substantial compliance of Section 44AB of the Act. We find that the assessee has filed the e-return on 12.07.2013 but did not disclose the income from liquor business. Subsequently, only when the AO issued a show cause notice U/s 142(1) of the Act to assess the income from liquor business the assessee filed a revised return of income and declared income from liquor business as well as turnover of the liquor business at Rs. 1,37,88,837/-. The assessee has also filed the audit report dated 05.09.2013. Thus, it is a clear that at the time of filing the return of income on 12.07.2013 the audit report dated 05.09.2013 was not in existence. Since, the assessee e-filed its return of income, therefore, if the income from liquor business would have been declared in the original return of income then, as per the Income Tax Rules the audit report was also required to be annexed along with the return of income. However, the assessee did not disclose income from liquor business and consequently has also stated in the return of income that audit report is not required. Therefore, it is not the case of non filing of the audit report at the time of filing the original return of

income but the said audit report was not in existence on the said date of filing the return of income and only when the Assessing Officer has pointed out and issue a show cause to assess the income from liquor business the assessee came forward with the revised return of income to offer the income from liquor business and then also sought to file the audit report. AO while passing the assessment order treated the revised return as invalid and completed the assessment on the original return of income. Thus, it cannot be a case of inadvertence and banafide mistake of not filing the Audit Report alongwith return of income but the assessee has not even the declared the turnover and income of the liquor business at the time of filing of the return of income U/s 139(1) of the Act. The decision relied upon the Id. AR of the assessee in case of Surajmal Parsuram Todi vs. CIT(supra) is on the point of not filing the return of income but in the said case the assessee was not even maintaining the books of accounts and therefore, the Hon'ble High Court has held that when the assessee committed an offence by not maintaining the books of account as contemplated U/s 44AA of the Act the offence is completed and therefore, there cannot be possibility of any offence U/s 44AB of the Act. In the case in hand, the assessee has stated to have maintained the books of account but there was a

misrepresentation for not disclosing the income and turnover from liquor business. Therefore, the said decision will not help the case of the assessee. Further, the assessee has not bothered to participate in the penalty proceedings and to furnish the explanation for not filing the audit report as contemplated U/s 44AB of the Act. The provisions of Section 44AB of the Act requires the audit report to be filed in the prescribed form along with ROI before due date of filing the return of income U/s 139(1) of the Act. The Explanation 2 of Section 44AB of the Act has made it clear that the audit report has to be filed before the due date of return of income U/s 139(1). Subsequent, filing of the audit report is not a compliance of the provisions of Section 44AB of the Act particularly when the assessee has not declared the turnover and income from liquor business. Further, the alleged audit report was not in existence on the date of filing the original return of income. Therefore, in the absence of any reasonable explanation for non compliance of the provisions of Section 44AB the penalty provisions of Section 271B of the Act are attracted. We fortify our view by the decision of Hon'ble Jurisdictional High Court in case of Shi Ram Rajaram & Party vs. CCIT 281 CTR 214 wherein the Hon'ble jurisdictional High

Court has considered an identical issue and has held in paras 18 to 27 as under:-

"18. We have considered the rival contentions and have perused the orders passed by all the three authorities.

19. To appreciate the controversy in all the three appeals, it would be appropriate to quote ss. 44AB, 271B as also 273B of the IT Act. which provide ad infra:

"Sec. 44AB. Audit of accounts of certain persons carrying on business or profession—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 forty lakh rupees in any previous year: or*
- (b) carrying on profession shall, if his gross receipts in profession exceed ten lakh 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 s. 44D or s. 44AE or s. 44AF. 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. 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 derives income of the nature referred to in s. 44B or s. 44BB or s. 44BBA or s. 44BBB. on and from the 1st April, 1985 or. as the*

case may be the date on which the relevant section came into force, whichever is later :

Provided further 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 s. (2) of s. 288.*
- (ii) specified date, in relation to the accounts of the previous year relevant to an assessment year means—*
 - (a) where the assessee is a company, the 30th day of November of the assessment year,—*
 - (b) in any other case, the 31st day of October of the assessment year.*

Sec. 27IB. Failure to get accounts audited—If any person fails to get his accounts audited in respect of any previous year or years relevant to an assessment year or furnished a report of such audit as required under s. 44AB. the AO 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.

Sec. 273B. Penalty not to be imposed in certain cases— Notwithstanding anything contained in the provisions of cl. (b) of sub-s. (1) of s. 271. s. 271A. s. 271B. s. 271BB. s. 271C. s. 271D. s. 271E. s. 271F. cl. (c) or cl. (d) of sub-s. (1) or sub-s. (2) of s. 272A. sub-s. (1) of s. 272AA or sub-s. (1) of s. 272BB or cl. (b) of sub-s. (1) or cl. (b) or cl. (c) of sub-s. (2) of s. 273. no penalty shall be imposable 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."

20. *A conjoint reading of s. 44AB and s. 271B. mandates that any person carrying on business having total sales, turnover or gross receipts, as the case may be. exceed or exceeds Rs. 40 lacs in any previous year, then not only the account books are required to be audited from a chartered accountant but has to be furnished in the prescribed form duly signed and verified by such accountant along with other particulars. It may be noticed that up to 30th June. 1995. the requirement was only to obtain an audit report on or before the due date but by the Finance Act. 1995. w.e.f. 1st July. 1995. it was mandated that the audit report is required to be furnished on or before the due date of furnishing of the return of income. A perusal of s. 271B. noticed herein above, it also mandates that if the report of such audit, as required under s. 44AB. has not been filed on or before the due date, the AO could levy penalty under s. 271 B of the Act. However, s. 273B prescribes that in case there is reasonable cause for the said failure, penalty need not be imposed and s. 271B forms part of s. 273B.*

21. *It would be appropriate to deal with the submission of the counsel that the AO at Bharatpur on account of change of jurisdiction did not accept the return of income or the audit report when presented immediately after completion of the audit of accounts as well as return of income but what was contended, no tangible evidence or material either in the shape of an affidavit or otherwise of the person who claimed that he had presented the return of income along with audit report before the AO at*

Bharatpur was placed or refusal by the officer at Bharatpur. In our view, mere justification as alleged without any supporting evidence, is explanation and the Tribunal had rightly rejected the same.

22. *Though it may not be relevant but from the narration of facts, it can be inferred that the audit report, which has been annexed by counsel for the assessee. on an earlier query raised by this Court by way of an additional affidavit in the case of Shis Ram Raja Ram & Party (DBIT Appeal No. 15 of 2007) and on perusal of the audit report, it can be noticed that in the trading account, which is part of the audited accounts, the total sale has been declared at Rs. 4.85.35.759 and even if we consider other receipts i.e.. rebate from distillary Rs. 3.09.028 and rebate from WS Rs. 30.07.429. then the total of all the three receipts (sale) is to the extent of Rs. 5.18.52.216 whereas the AO at least at two places in the penalty order states that the turnover as shown by the assessee is. to the tune of Rs. 7.58.62.563. Thus, though as stated herein above, we need not comment upon but at least can be inferred that the turnover as per audit report and the turnover as noticed by the AO in the penalty order is not supported with cogent material on record. This discrepancy, when noticed, was expressed to the counsel for the assessee on the earlier date of hearing and specifically observed in the order-sin of 13th Feb.. 2014 but even after lapse of about 8 months on the date of final hearing, counsel for the assessee was unable to clarify the correct figures or the discrepancy noticed. However, ultimately insofar as imposition of penalty is concerned, the Act provides that it is minimum to the extent of Rs. 1 lac which ultimately has been imposed by the AO and sustained by the Tribunal.*

23. *We may also observe that though the assessee has tried to challenge that there was no Information about transfer of cases from Bharatpur to Jaipur and s. 127 provides that notice is required to be served to the assessee but it can safely be observed that the assessee neither challenged the transfer of*

cases from Bharatpur to Jaipur office nor raised issue of jurisdiction at the time of transfer of cases rather the assessee submitted to the Jurisdiction of the Dy. CIT. Central Circle-2. Jaipur and not only file the return of Income but the audit report also, though belatedly and appeared regularly before the Dy. CIT, Central Circle-2. Jaipur in the regular assessment proceedings and submitted to its jurisdiction without even uttering a word assailing the same before any authority.

24. *In the case of Rajasthan Co-operative Dairy Federation Ltd. (supra), the fact can be noticed that the power to appoint auditor was with the Registrar. Co-operative Societies, under s. 68 of the Co-operative Societies Act. 1965 and unless the auditor is appointed by the Registrar. Co-operative Societies, it was not possible for the assessee to get its accounts audited and despite of repeated requests made by the assessee. the auditor was not appointed and therefore, this Court felt that, there was a reasonable cause.*

25. *In the case of Rajasthan State Electricity Board (supra), it was the claim that the accounts of the said assessee were required to be got audited through the accountant general and the accountant general was the concerned person and the competent authority to audit the accounts and despite the books having been handedover to the office of the accountant general, the audit was not completed and therefore, that assessee was prevented in getting the accounts audited statutorily by the accountant general in time and thus this Court was of the opinion that its cause was a reasonable cause.*

26. *The Kerala High Court in the case of K. Ravindranathan Nair v. Dy. CIT [\[2009\] 319 ITR 108](#) has held that if there is an acceptable explanation, then penalty could have been avoided whereas in the absence of any evidence adduced by the appellant at least before the Tribunal, the minimum penalty imposed under s. 271B for admitted delay for filing audit report was upheld.*

27. Resultantly in view of what we have observed herein in our view, the Tribunal has rightly sustained the penalty under s. 271B of the Act. Questions are answered in favour of the Revenue and against the assessee."

Accordingly, in view of the above facts and circumstances of the case as well as the binding precedent, we do not find any error or illegality in the impugned order of the authorities below for levy of penalty U/s 271B of the Act.

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

Order pronounced in the open court on 06/03/2019

Sd/-
(रमेश सी0 शर्मा)
(Ramesh. C. Sharma)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 06/03/2019.

*Santosh.

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

1. अपीलार्थी / The Appellant- Shri Sohan Nath, Ajmer.
2. प्रत्यर्थी / The Respondent- ITO, Ward-1(3), Ajmer.
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 No. 888/JP/2017}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. RegistrarS