

IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR

BEFORE SH. N.S.SAINI, ACCOUNTANT MEMBER AND
SH. N.K.CHOUDHRY, JUDICIAL MEMBER

ITA Nos.59 & 60(Asr)/2018
Assessment Years:2012-13 & 2013-14

The Haldar Foods (P) Ltd.,
V. Asif Wala
R.O. Moga Road, Ferozepur
Cantt.

Vs. Income Tax Officer,
Ward-III(5), Ferozepur

[PAN:AABCL 6432D]
(Appellant)

(Respondent)

Appellant by: Sh. P.N. Arora (Ld. Adv.)
Respondent by: Sh. Yashender Garg (Ld. DR)

Date of hearing: 20.02.2019
Date of pronouncement: 22.03.2019

ORDER

PER N.K.CHOUDHRY, JM:

The aforesaid appeals have been preferred by the Assessee/Appellant against the composite order impugned herein dated 28.11.2017 passed by the Ld. CIT(A)-Bathinda, u/s 250(6) of the I.T. Act, 1961 (hereinafter called as 'the Act'), whereby the Ld. CIT(A) affirmed the penalty imposed by the Assessing Officer u/s 271B of the Act.

2. The issue involved in these appeals is identical therefore for the sake of brevity have been taken into consideration simultaneously for adjudication and facts of ITA No.59/Asr/2018 shall be quoted for adjudication and the result of the same shall apply mutatis mutandis to ITA No.60/Asr/2018.

3. The assessee has raised the following grounds in ITA No.59/Asr/2018.

“1. That the learned Assessing Officer-cum Income Tax Officer, Ward-III(5), has passed orders of penalty on 31.3.2015 to the tune of Rs.150000/- for not getting books audited under section 44AB of the I.T. Act, 1961 under Section 271(B) of the I.T. Act, 1961 on conjectures and surmises. The same may kindly be deleted.

2. That the learned Assessing Officer-cum-Income Tax Officer, ward-III(5), Ferozepur has levied the penalty to the tune of Rs.150000/- under section 271(B) of the I.T. Act, 1961 which is wrong, illegal and baseless because this the assessee has reasonable cause for not getting the books audited under section 44AB of the I.T. Act, 1961 in time due the reasons beyond his control. Since the assessee had reasonable cause for not getting the books of accounts audited hence penalty levied may kindly be deleted.”

4. The brief facts of the case are that the Assessing Officer from the assessee's audit report dated 20.03.2014 received in its office on 31.02.2014 for the F.Y.2011-12 relevant to the assessment year i.e. 2012-13, came to know that the assessee was under legal obligation to get its account audited before the specified date i.e. up to 30.09.2012 as per the provisions of section 44AB of the Act because during the year under consideration, the gross receipts of the assessee were 5,35,30,801/-, however, the assessee has failed to do so accordingly penalty proceedings u/s 271B of the Act were initiated while issuing a notice dated 13.02.2015. The assessee before the Assessing Officer filed the reply against the action for imposing penalty u/s 271B of the Act. The Assessing Officer though considered the reply of the assessee but did not get impress and ultimately imposed the penalty of Rs.1,50,000/- being 0.50% of gross receipts by holding that it clearly indicates that the books of account have actually not been got audited by the stipulated date and with a view to get immunity from the penal consequences in respect of committed default of failure to get its books of accounts audited, the assessee has misconceived the facts

which deserves no cognizance. For brevity and ready reference, the concluding part of penalty order is reproduced herein below:-

- i.) *The perusal of the copy of FIR reveals that FIR was lodged against the company on 11-01-2012 for criminal breach of trust and embezzlement of certain quantity of rice which the assessee company failed to supply to Food Corporation of India as per directions of the Punjab State Civil Supplies Corporation Ltd. and not by the SBI Ferozepur for non-payment of interest on the term loan as alleged by the assessee.*
- ii.) *Furthermore there is no mention in the FIR that premises of the said concern was locked. The assessee has also failed to establish that the factory premises were locked and the relevant documents/books of accounts were not in its possession.*
- iii) *No detail/documentary evidence as regards arrest of directors of the company and their subsequent release on bail has been furnished by the assessee to substantiate its claim that there was reasonable cause for failure to get the books of accounts audited as per provisions of section 44AB of the Income Tax Act 1961.*
- iv) *The case of M/s. Hindustan Steel Ltd., State of Orissa (1972)83 ITR 26: (1983)144 ITR 259(P&H) referred to in by the assessee also does not help the assessee as facts of these cases are different from that of assessee. In the instant case, the assessee failed to prove that there was*

reasonable cause for failure to get its accounts audited and the cause if any was the only one that assessee itself indulged in criminal proceedings for breach of trust and embezzlement which resulted in failure to get its books of accounts audited by the stipulated date.

v) In its reply the assessee has submitted that FIR was lodged by the Vigilance Department on 11-01-2012 with the result Sheller was locked. The perusal of the record of the assessee reveals that assessee has shown turnover of Rs.5,35,30,801/- in the A.Y. 2012-13 and Rs.3,33,08,219/- in the A.Y. 2013-14, but the assessee has failed to give any plausible explanation as to how the said huge turnover was made during the period under consideration when the premises of the assessee was locked.

vi) Further more, till date the assessee has failed to file its return of income for the year under consideration i.e. for the financial year 2011- 12 relevant to the assessment year 2012-13.”

5. The assessee challenged the imposition of penalty before the Ld. CIT(A), who while considering the penalty order and submissions of the assessee affirmed the penalty by holding as under:

“6. *I have given careful consideration to the facts of the case and it is for consideration that the delay for both the AY is as under:*

Assessment Year	Due Date	Actual Date	Period of Delay	Total TO (Gross Business Receipts emphasis ours)

2012-13	30/09/2013 (2012 emphasis ours)	20/03/2014	17 months 20 days	Rs. 5,35,30,801
2013-14	30/09/2014 (2013 emphasis ours)	20/03/2014	5 months 20 days	Rs. 3,33,08,219

The arguments of the appellant are not acceptable for the following reasons:

- a) The statutory audit was got completed in the month of March 2014 when the entire financial year 2013-14 had passed. In this period, for the entire financial year the appellant was able to muster turnover of Rs. 3,33,08,219/-. If the business could be run normally, there is no reason that the accounts were not available for the purposes of audit.*
- b) The criminal proceedings were mounted in January 2012 and the bail was granted in May 2012. Even if the medical reasons of one of the director is accepted, it cannot be accepted that the other director was free enough to run business but was not capacity to get the accounts audited.*
- c) Neither the date of sealing of factory by the bank has not been provided nor any document in its support has been given.*
- d) The reasoning given by the Assessing Officer that the statutory audit has not been done by the appellant in order to avoid the criminal proceedings mounted by the food authorities for breach of trust and embezzlement of quantity of rice also appears to be a possible reason for not getting the accounts audited.*

6.1 In consideration of the facts mentioned above, the default of not getting the accounts audited does not appear to be for genuine reasons and for the reasons beyond the control of the appellant. On the contrary, the accounts were not audited with a specific motive to scuttle the criminal proceedings. The grounds of appeal are dismissed and hence the appeal of the appellant is dismissed.”

6. The assessee on aggrieved by the order of the Ld. CIT(A) preferred the instant appeal.

7. The issue involved in the instant appeals relates to the imposition of penalty u/s 271B of the Act upon the Assessee for not getting audited its books of account for which it was under legal obligation. It was argued by the learned counsel that the assessee company is a private limited company having two Directors namely Sh. Ramesh Chander and Sh. Ashish Garg, being father and son. On hearing the news of FIR against the company's Directors, Sh. Ramesh Chander suffered serious setback which resulted into becoming patient of depression and after initiation of criminal proceedings on 11.1.2012 both the Directors avoided their arrest however, Sh. Ramesh Chander was got arrested on 07.02.2012 but got bail on 23rd May, 2012. It was further submitted by the learned counsel for the assessee that another Director Sh. Ashish Garg was able to avoid arrest. The FIR was lodged by the Vigilance Department and the State Bank of India, Ferozpur in which the assessee was having CC Limit and secured turn over loan. Business of the company also considerably gone down from the sales of Rs.5,35,30,801/- for the A.Y.2012-13 to Rs.3,33,08,219/- for the A.Y.2013-14. Therefore, the circumstances stated above were beyond the control of the assessee which resulted into delay in getting audit the books of account for both the years under consideration i.e. 2012-13 and 2013-14 and therefore the aforesaid reasons constitute a reasonable delay.

8. On the contrary, the Ld. DR relied upon the orders passed by the authorities below and submitted that the order under challenge does not suffer from any perversity or illegality or impropriety.

9. Having heard the parties and perused the material available on record. Let us to peruse the relevant provisions of law applicable to the instant case.

“44AB. *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 [one crore rupees] in any previous year [***]; or*

(b) carrying on profession shall, if his gross receipts in profession exceed [twenty-five 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 [section 44AE] [or section 44BB or section 44BBB], 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; or] [***]*

[(d) 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 section 44AD4 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 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 [***] section 44B or [section 44BBA], on and from the 1st day of 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-section (2) of section 288

[(ii)"specified date", in relation to the accounts of the assessee of the previous year relevant to an assessment year, means

[the due date for furnishing the return of income under sub-section (1) of section 139].]"

9.1 From sub-clause(a) of Section 44AB, it reflects that every person who is carrying business, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds 1 crore rupees (earlier it was 60 lacs) in any previous year then such person is required to get his accounts of such previous year audited by an accountant before the specified date which in the instant case was 30th Sep., 2012 and further required to submit such report in the prescribed form duly signed and verified by such Accountant and setting forth such particulars as may be prescribed. According to provision of section 44AB, the assessee was under legal obligation to get its accounts audited before 30th September, 2012. Further Sec.271B provides the penal consequences for non-compliance of the provisions of Sec.44AB. For the sake of completeness and ready reference the relevant provisions of section 271B and 273B of the Act as applicable in the instant case, are reproduced herein below.

“271B. If any person fails ('without reasonable cause' stands omitted by the Taxation Laws (Amendment & Miscellaneous Provisions) Act,1986 w.e.f. 10-09-1986) to get his accounts audited in respect of any previous year or years relevant to an assessment year or obtain a report of such audit as required under section 44AB, the Income-tax 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”.

Section – 273-B, Notwithstanding anything contained in the provisions of 40[clause (b) of sub-section (1) of] 41[section 271, section 271A, 42[section 271AA,] section 271B42[, section 271BA], 43[section 271BB,] section 271C, 44[section 271CA,] section 271D, section 271E, 45[section 271F, 46[section 271FA,] 46a[section 271FAB,] 47[section 271FB,] 48[section 271G,] 48a[section 271GA,] 49[section 271H,] 49a[section 271-I,] clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA] or 50[section 272B or] 51[sub-section (1) 52[or sub-section (1A)] of section 272BB or] 53[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 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 cause⁵⁴ for the said failure.**]

9.2 From the provisions of section 271B, it is clear that if any person fails to get his accounts audited in respect of any previous year or years relevant to an assessment year or obtain a report of such audit as required u/s 44AB, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum equal to one-half percent of the total sales, turnover or gross receipts, as the case may be, in business or of the gross receipts in profession or a sum of (Rs.1,50,000/-) which ever is less. Upto 9.9.1986 there was a provision in section 271B of the Act that if any person was able to establish reasonable cause then he was likely to get exonerated, but by virtue of the Taxation Laws (Amendment & Miscellaneous Provisions) Act, 1986 w.e.f. 10-09-1986), the phrase '**without reasonable cause**' has been omitted in order to make provisions more stringent. However section 273-B of the Act puts rider on imposition of penalty and provides that notwithstanding anything contained in the provisions of Section 271-B, amongst other sections, **no penalty shall be impossible** on the person or the assessee, as the case may be, for any failure referred to in the

concerned provisions **if he proves that there was a reasonable cause for the said failure.** It is thus to be seen that as to whether the assessee has been able to prove that there was a reasonable cause for the assessee for not getting its accounts audited under section 44AB of the Act and then to furnish the report by the specified date. In order to get exonerate from penal consequences, the onus is upon the assessee to establish reasonable cause for non-compliance of legal obligations.

9.3 While coming to the instant case we realized that the Assessing Officer has imposed the minimum penalty i.e. 1,50,000/- as prescribed under the provisions applicable hereto. The assessee case is based upon the criminal proceedings which resulted into non-getting audit of the books of account. It is an admitted fact that the FIR was lodged on 11.01.2012 against the assessee company for criminal breach of trust, embezzlement of certain quantity of rice which the assessee company failed to supply to Food Corporation of India (FCI) as per directions of Punjab State Civil Supplies Corporation Ltd. and not by the SBI Ferozpur for non-payment of interest on the term loan as claimed by the assessee. Further it was observed by the Assessing Officer that the assessee failed to establish that the factory premises were locked and the relevant documents/books of account were not in its possession. It was further observed by the Assessing Officer that although it was claimed by the assessee that the FIR was lodged by the Vigilance Department on 11.01.2012 which resulted into seller locked however it revealed that the assessee had shown turn over of Rs.5,35,30,801/- in the relevant assessment year and therefore, the assessee has failed to give any plausible explanation as to how the said huge turn over was made during the period under consideration when the premises of the assessee was locked. It was further observed by the

Assessing Officer that till date 31st August, 2015 the date of passing the Penalty order) the assessee failed to file its return of income for the F.Y. under consideration. The Ld. CIT(A) while considering the imposition of penalty observed if the business could be run normally then there is no reason to say that the accounts were not available for the purpose of audit. Further the criminal proceedings were mounted in January, 2012 and the bail was granted in May, 2012 therefore even if the medical reasons of one of the director is accepted, it cannot be accepted that the other director was free enough to run business but was not capable to get the accounts audited. It was further observed that neither the date of sealing of factory by the Bank nor any document in its support has been provided and therefore in consideration of the facts mentioned above, the default of not getting the accounts audited does not appear to be for genuine reasons and for the reasons beyond the control of the appellant. On the contrary, the accounts were not audited with a specific motive to scuttle the criminal proceedings.

9.4 We realize, as per provisions, the assessee was required to get its accounts audited on or before 30-09-2012 and the FIR was lodged on 11.01.2012 by the Vigilance Department for criminal breach of trust and embezzlement of certain quantity of rice which the assessee company failed to supply to Food Corporation of India as per directions of Punjab State Civil Supplies Corporation Ltd, and in pursuance thereof one of the director was arrested but was released on bail in May, 2012 itself whereas the assessee was under obligation to get its accounts audited upto 30th Sep., 2012 for the F.Y.2011-12 and upto 30th Sep., 2013 for the F.Y. 2012-13 but the same gets audited only on 20-04-2014 and therefore there is huge time gap of 17 months 20 days and which in our considered view, does not seem to be reasonable nexus with the criminal proceedings because it is not the case of

the Assessee that the staff of account department and/or the persons who were dealing with the financial transactions of the assessee company were also arrested and/or subjected to the criminal proceedings. The other ground i.e. illness of one of the director is also does not seems to be a reasonable cause for non-compliance of legal obligation because it is not the case of the Assessee that the company is being run by one man only and it is also not the case of the assessee that it does not have staff of accounts department for compliance of legal obligations, hence in our considered view, as accounts department's officials along with one of the directors were freely available to handle the accounts and administration and to carry the business activities of the assessee company and therefore would have complied the legal obligations as well, as enshrined under the Act. Even on specific query as to whether the income in Income tax Return and audit report is same or not, neither reply nor audit Report furnished. The assessee has taken the stand of criminal proceedings and illness of one of the directors in order to avoid the penal consequences of Section 271B of the Act which we have already held no nexus with non-compliance of legal obligation. It is thus clear the assessee has not been able to give any sufficient and reasonable cause for not getting the accounts whatsoever maintained by it audited Under Section 44AB of the Act and therefore failed to discharge the onus. In the overall consideration and analyzation and keeping in view the spirit of stringent provisions, we are of the considered view that the authorities below rightly invoked the provisions of section of 271-B of the act and imposed the penalty in peculiar facts and circumstances of the case, therefore we do not find any impropriety, illegality and/or perversity in the impugned order, hence the same is affirmed.

10. In the result, the appeal i.e. ITA No. 59 (Asr)/2018 filed by the assessee stands dismissed.

11. In view of order passed in ITA No. 59 (Asr)/2018, ITA No. 60 (Asr)/2018 also stands dismissed.

Order pronounced in the open Court on 22.03.2019.

Sd/-
(N.S.SAINI)
ACCOUNTANT MEMBER

Sd/-
(N.K.CHOUDHRY)
JUDICIAL MEMBER

Dated:22.03.2019

/PK/ Ps.

Copy of the order forwarded to:

- (1) Sh. Haldar Foods (P) Ltd., V. Asif Wala
R.O. Moga Raod, Ferozepur Cantt.
- (2) The Income Tax Officer, Ward-III(5), Ferozepur
- (3) The CIT(A), Bhatinda
- (4) The CIT concerned
- (5) The SR DR, I.T.A.T., Amritsar

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By order