

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'SMC', NEW DELHI
BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER

ITA No. 5005/Del/2018
Assessment Year: 2010-11

M/S DHARMENDRA KUMAR CONTRACTOR VS. ITO, WARD 1(2)
C/O ASHISH AGARWAL, ADVOCATE MUZAFFARNAGAR
183/2, NORTH CIVIL LINES,
MUZAFFARNAGAR-251001
(PAN: AADFD4950H)

(APPELLANT)

(RESPONDENT)

Assessee by : Sh. Prem Prakash, Advocate &
Sh. Ashish Aggarwal, Advocate
Revenue by : Sh. SL Anuragi, Sr. DR.

ORDER

The Assessee has filed the Appeal against the Order dated 27.6.2018 of the Ld. CIT(A), Muzaffarnagar pertaining to assessment year 2010-11 on the following grounds:-

- i) That the order is against law and facts on the record.
- ii) Ld. CIT(A) was wrong in confirming penalty u/s. 271B of the I.T. Act, 1961 although the same was time barred.

2. The brief facts of the case are that assessee firm derives income from civil contractor but the ITR was not filed by the assessee within the time allowed as per the provisions of section 139 of the Income Tax Act, 1961 (in short "Act"). The same was filed on 17.2.2014 declaring total income of Rs. 20,000/-. Hence, the return could not be processed u/s. 143(1) of the Act. The assessment u/s. 147/143(3) of the Income Tax Act, 1961 was completed at an income of Rs. 4,40,600/-. AO observed that as per the provisions of section 44AB of the Act the assessee is under obligation to get its account audited and therefore, a show cause notice u/s. 271B of the Act was issued to the assessee on 17.3.2016 and in compliance to the notice, the assessee filed written submission on 18.4.2016 requesting therein to keep the penalty proceedings in abeyance till the disposal of first appeal. Aggrieved with the assessment order, the assessee went in appeal before the Ld. CIT(A), Muzaffarnagar who vide order dated 18.5.2017 partly allowed appeal of the assessee and held that the AO has estimated the gross receipts at Rs. 1.40 crore without any basis and upheld that the AO has been justified in estimating the net profit @8%. The AO was directed to recomputed net profit by taking

gross receipt of Rs. 1.35 crore as declared and by allowing further salary to the partners at the enhanced profit u/s. 40(b) of the Act. After receipt of the order of the Ld. CIT(A), again a show cause notice u/s. 271B of the Act dated 17.8.2017 was issued to the assessee and in compliance to the notice the assessee furnished his reply by stating that delay in audit of a/cs was due to the reason that due to some family problems of working partner Sh. Dharmendra Kumar, the audit was done late and audit was done voluntarily and without any notice from the department, hence, the cause is a reasonable cause and accordingly requested to cancel the notice. After considering the reply of the assessee, the AO observed that the AO has already established for failure of the assessee to get its accounts audited or to furnish a report of such audit as required u/s. 44AB vide his assessment order dated 17.3.2016 and the Ld. CIT(A) has also confirmed the major part of the addition made by the AO and vide written submission dated 25.2.2016, the AR of the assessee firm specifically submitted"....the assessee has maintained only cash book and ledger. The assessee has not maintained bills and vouchers regarding expenses...." Accordingly, the AO held that since the

assessee has failed to comply the provision of section 44AB of the Act and therefore, is liable to be penalized u/s. 271B of the Act and made the penalty @0.5% of Rs. 67,950/- u/s. 271B of the Act vide order dated 30.10.2017. Against the said penalty order, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 27.6.2018 has dismissed the appeal of the assessee. Aggrieved with the impugned order, assessee is in appeal before the Tribunal.

3. During the hearing, Ld. counsel for the assessee has stated that Ld. CIT(A) has wrongly confirmed the penalty of Rs. 67,950/- although the same was time barred. It was further submitted that the audit u/s. 44AB of the Act should have been done upto 30.9.2013, but audit was done on 13.12.2013 and return was filed on 17.2.2014 suomoto without any notice, hence, no penalty u/s. 271-B of the Act can be levied. To support his contention, he relied upon the decision of the ITAT, Cochin in the case of TT Kuruvilla vs. ACIT (2019) 198 TTJ (Cochin) (UO) 17.

4. On the other hand, Ld. DR relied upon the order of the Ld. CIT(A) and stated that he has passed a well reasoned order, which does not need any interference.

5. I have heard both the parties and perused the records especially the impugned order as well as the case law cited by the Id. counsel for the assessee. It is noted that the assessee has not furnished its return of income within the time prescribed u/s 139 of the Act nor accounts have been got audited within the prescribed period u/s 44AB of the Act. The AO has estimated the turnover of the assessee at Rs.1.40 crore in the assessment proceedings u/s 143(3)/147 of the Act passed on 17-03-2016, which has been challenged by the assessee by filing appeal u/s 246A of the Act. The issue of finality of the turnover of the business of the assessee was disposed off vide order u/s 250 of the Act dated 18-05-2017 in the appeal filed against the assessment order. I find that it is provided u/s 275 of the Act that where the relevant assessment order or the other order is subject matter of appeal before the Ld. Commissioner of Appeals u/s 246A of the Act, penalty order has to be passed before the expiry of financial

year in the course of which such proceedings have been initiated or within one year from the end of financial year in which order of the Commissioner (Appeals) is received by the Principal CIT - whichever is later. In this case the quantum of penalty to be imposed u/s 27I-B of the Act was dependent on the outcome of appellate order u/s 250 of the Act in the appeal filed against the assessment order passed by the AO. Therefore, the AO has validly kept the penalty proceedings u/s 27IB of the Act in abeyance and has disposed off the same by 30-10-2017 within the prescribed period after the disposal of appellate order u/s 250 of the Act. The assessee has not furnished any reasonable cause for not getting the accounts audited as required u/s 44AB of the Act. It is also noted that the AO has already established for failure of the assessee to get its accounts audited or to furnish a report of such audit as required u/s 44AB vide his assessment order dated 17.3.2016 and the Ld. CIT(A) has also confirmed the major part of the addition made by the AO. It is also noted vide written submission dated 25.2.2016, the AR of the assessee firm specifically submitted "...the assessee has maintained only cash book and ledger. the assessee has not maintained bills

and vouchers regarding expenses.....” Hence, the case law cited by the Ld. Counsel for the assessee is distinguished on facts. Keeping in view of the facts and circumstances of the case as explained above, I am of the considered view that AO has rightly imposed penalty u/s 271B of the Act at Rs.67,950/- in accordance with the provisions of the Act and therefore, the same was rightly confirmed by the Ld. CIT(A), which does not need any interference on my part, hence, I uphold the action of the Ld. CIT(A) on the issue of dispute and reject the ground raised by the assessee.

6. In the result, the Appeal of the Assessee is dismissed.

Order pronounced on 09-04-2019.

Sd/-

**[H.S. SIDHU]
JUDICIAL MEMBER**

Date:09/04/2019

SRBhatnagar
Copy forwarded to: -

1. Appellant
 2. Respondent
 3. CIT
 4. CIT(A)
 5. DR, ITAT
- By Order,

Assistant Registrar, ITAT, Delhi Benches