

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

**Before: Shri Mahavir Prasad, Judicial Member
and Shri Amarjit Singh, Accountant Member**

[Conducted through E-Court at Ahmedabad]

**ITA Nos. 197 & 198/Rjt/2018
Assessment Year 2013-14**

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| Shri Ashok Shankarnarayan Hebbar, B-5, Mahavir Apartment, Opp. Satya Sai School, Palace Road, Jamnagar PAN: AACPH1800K (Appellant) | Vs | The ITO, Ward-1(3), Jamnagar (Respondent) |
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**Revenue by: Shri Praveen Verma, Sr. D.R.
Assessee by: Shri Chetan Agarwal, A.R.**

Date of hearing : 02-07-2019
Date of pronouncement : 15-07-2019

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

These two assessee's appeals for A.Y. 2013-14, arise from order of the CIT(A), Jamnagar, in proceedings under section 271A & 271B of the Income Tax Act, 1961; in short the Act.

2. The solitary ground of appeal is against the order of ld. CIT(A) in confirming penalty of Rs. 25000/- imposed by the assessing officer u/s. 271A.

3. The fact in brief is that assessee has filed return of income declaring income of Rs. 3,20,020/- on 2nd May, 2014. The case was selected under scrutiny by issuing of notice u/s. 143(2) of the act on 28th August, 2015. During the course of assessment on perusal of the record, the assessing officer has noticed that assessee has been engaged in the business of share trading and he has total turn-over of Rs. 6,02,35,276/- during the course under consideration. He has not maintained any books of account. The assessing officer has referred section 44AA of the act and stated that the assessee is required to maintain his books of accounts as per provision of section 44AB. He has further stated that the assessee has violated both the provisions of section 44AA and 44AB of the act. Therefore, the assessing officer has initiated penalty proceedings u/s. 271A and 271B of the act. The assessee was show caused vide notice u/s. 274 r.w.s. 271A of the act on 22nd Feb, 2016 to explain why not the penalty u/s. 271A should be imposed. The assessee has not made any compliance. Therefore, the assessing officer has imposed penalty of Rs. 25,000/- as the assessee has failed to keep or maintain books of account and documents as required u/s. 44AA of the act.

4. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has sustained the penalty levied by the assessing officer. Relevant part of the decision of Id. CIT(A) is reproduced as under:-

“5.1 The second ground of appeal of the appellant is that the AO has erred in law and on facts by treating the transactions in equity shares as business transactions without granting opportunity of being heard to the appellant. As per this ground of appeal the AO has erred on facts by stating that the appellant had not maintained books of account. Thus the contention of the appellant is that based on the documents provided by him to the AO during the assessment proceedings, the AO was able to compute and in fact he himself had verified the documents and quantified the turnover and had also stated net result of transactions (i.e. net loss) in the assessment order. As per the appellant this fact itself confirm the compliance of section 44AA with respect to maintenance of books of accounts. But the various contentions as raised by the appellant as per his submission dated 25/07/2017 is not found to be tenable. First of

all, the appellant has not explained as to which were the documents which were submitted to the AO by him during the course of assessment proceedings and based on such documents the AO / was able to compute the net loss as a result of transactions in shares. The fact is that the appellant had total turnover of share transactions of Rs. 6,02,35,276/- during the year under consideration. Such a high 'magnitude of share transactions normally cannot be done by a investor. This voluminous transactions of shares to the extent of Rs. 6,02,35,276/- clearly show that appellant was continuously engaged in purchases and sales of shares on a very large scale. Further the appellant in his return of income as filed for the year under consideration has not shown the net loss as a result of share transactions as capital loss. Rather the appellant has not declared any profit/ loss or transactions from these purchases and sales of the shares in his return of income. The appellant either at the assessment stage or at the appellate stage has not produced any relevant records and balance sheet etc. for the year under consideration which could establish that he was merely investor and was not engaged in trading of shares. It seems that the appellant has produced some bills and vouchers after obtaining the same from the brokers and has contended that based on these documents the AO was able to compute the net loss. But the fact is that the appellant has not maintained any records , or books of account in respect of transactions in shares. Thus the appellant has not claimed any capital loss on account of share transactions in his return of income and has also nor filed the return of income on or before due date. After considering the various facts and circumstances of the case it can be said that the appellant was not investor, but he was engaged in purchases and sale of shares on a very large scale and therefore, the net loss incurred on account of such purchases and sale of shares has to be treated as business loss and not a capital loss. In view of this, the AO has correctly observed that the appellant was not maintaining books of account in respect of share transactions and has correctly levied the penalty of Rs. 25,000/- for failure to keep on maintain books of accounts and documents etc as required u/s. 44AA of the Act. In view of these facts, the penalty of Rs. 25,000/- as levied by the AO u/s. 271A of the Act is hereby confirmed. Thus the grounds of appeal of the appellant are dismissed.”

5. We have heard the rival contentions and perused the material on record. With the assistance of ld. representatives, we have gone through the material on record and it is observed that assessee was having total turn-over of share transaction to the amount of Rs. 6,02,35,276/- during the year under consideration. However, assessee has not maintained any books of account. In this regard, provisions of section 44AA(2) of the act is reproduced as under:-

“(2) Every person carrying on business or profession [not being a profession referred to in sub-section (1)] shall,—

(i) if his income from business or profession exceeds ⁶⁶[one lakh twenty] thousand rupees or his total sales, turnover or gross receipts as case may be, in business or profession exceed or exceeds ⁶⁷[ten lakh] rupees in any one of the three years immediately preceding the previous year; or
(ii) where the business or profession is newly set up in any previous if his income from business or profession is likely to exceed ⁶⁸[one lakh twenty] thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession are or is likely to exceed ⁶⁹[ten lakh] rupees, ⁷⁰[during such previous year; or

(iii) where the profits and gains from the business are deemed to be the profits and gains of the assessee under ⁷¹[section 44AE] ⁷²[or section 44BB or section 44BBB], as the case may be, and the assessee 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, during such "[previous year; or]]
⁷⁴*[(iv) where the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year.]*
keep and maintain such books of account and other documents as may enable the "[Assessing] Officer to compute his total income in accordance with -provisions of this Act."

In the light of the above provision, it is clear that assessee has to keep and maintain such books of account and other document to enable the assessing officer to compute his total income in accordance with the provisions of the act. However, in the case of the assessee, the assessee has failed to disprove the material fact that in spite of high turn-over as cited above, he has not made compliance with the provision of section 44AA(2) of the act. In the light of the above facts and findings, we do not find any infirmity in the decision of the Id. CIT(A) in confirming the penalty of Rs. 25,000/- as per provision of section 271A of the act. Accordingly, the appeal of the assessee is dismissed.

ITA No. 198/Rjt/2018

6. This appeal has been filed by the assessee against the decision of Id. CIT(A) in confirming penalty of Rs. 1,50,000/- imposed by the assessing officer u/s. 271B of the act.

7. Without reiterating the facts of the case as already elaborated while adjudicating ITA No. 197/Ahd/2018, we are going directly to the issue in the appeal. The assessing officer has levied penalty u/s. 271B of the act to the amount of Rs. 1,50,000/- on the ground that assessee had not got his

books of account audited as per provision of section 44AB of the act. The assessing officer observed that the assessee has failed to submit audited report even the turn-over of the assessee was Rs. 6,02,35,276/- for the assessment year under consideration which was exceeding Rs. 1 crore therefore penalty of Rs. 1,50,000/- was levied.

8. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has dismissed the appeal of the assessee.

9. We have heard the rival contentions and perused the material on record. During the course of appellate proceedings before us, the Id. counsel has placed reliance on the decision of ITAT, Delhi in the case of Sh. Keshav Garg Vs. ITO vide ITA Nos. 6574 & 6575/Del/2018 dated 08-04-2019 wherein it is held that since the assessee has been separately penalize for non-maintenance of accounts u/s. 271A, therefore, the penalty for non-audit of the accounts separately was not justified. The relevant part of the decision of the Co-ordinate Bench of the ITAT as cited above is reproduced as under:-

“6. I have considered the rival submissions and have perused the order of the AO and the learned CIT(A) . I find that the assessee has claimed that it was not maintaining any account books and, therefore, the audit of the same was not possible and has relied on the decision of Hon'ble Courts cited at the bar by the learned counsel for the assessee. I find that the Assessing Officer has separately penalized the assessee for non-maintenance of accounts by levying a penalty of Rs. 25,000/- u/s 271A of the Act and the Ld. Counsel for the assessee has stated at the bar that the order has become final and assessee has already paid the amount of penalty. In these facts, I hold that since the assessee has been separately penalized for non -maintenance of accounts, the penalty for non-audit of the accounts separately was not justified and accordingly, the penalty imposed u/s 271B is deleted and the grounds of appeal of the assessee are allowed.”

Respectfully following the decision of Co-ordinate Bench as cited above on similar facts and circumstances, we do not incline with the decision of Id. CIT(A), therefore, the appeal of the assessee is allowed.

10. In the combined result, Appeal ITA No. 197/Rjt/2018 is dismissed and Appeal ITA 198/Rjt/2018 is allowed.

Order pronounced in the open court on 15-07-2019

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER
Ahmedabad : Dated 15/07/2019

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

आदेश क०० तलम अ० षत / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order,

Assistant Registrar,
Income Tax Appellate Tribunal,
Rajkot