

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

**Before Shri Chandra Poojari, AM & Shri George George K, JM**

ITA No.299/Coch/2019 : Asst.Year 2004-2005

ITA No.300/Coch/2019 : Asst.Year 2008-2009

ITA No.301/Coch/2019 : Asst.Year 2009-2010

Sri.Abdul Azeez M Anzar Cashew Co Chandanathoppe Kollam -691 014. <b>PAN : AASPA7948M.</b>	Vs.	The Asst.Commissioner of Income-tax, Circle 1 Kollam.
(Appellant)		(Respondent)

Appellant by : Sri.N.S.Rajagopal

Respondent by : Smt.A.S.Bindhu, Sr.DR

Date of Hearing : 07.08.2019	Date of Pronouncement : 08.08.2019
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**ORDER**

**Per George George K, JM**

These appeals at the instance of the assessee are directed against consolidated order of the CIT(A) dated 13.02.2019. The relevant assessment years are 2004-2005, 2008-2009 and 2009-2010. Common issues are raised in these appeals, hence, they were heard together and are being disposed off by this consolidate order.

2. Brief facts of the case are as follows:

The assessee is an individual, who is engaged in the business of cashew processing and exporting of cashew kernels. For the assessment years 2004-2005, 2008-2009 and 2009-2010, the turnover of the assessee was exceeding Rs.1

crore. As per the provisions of section 44AB of the I.T.Act, the assessee was required to get his books of account audited and file return of income within the prescribed time. The assessee failed to get the books of account audited and belatedly filed his return of income. Hence, penalty proceedings u/s 271B of the I.T.Act were initiated and penalty orders for all the three assessment years mentioned above were passed on 28.03.2013.

3. Aggrieved by the orders imposing penalty u/s 271B of the I.T.Act amounting to Rs.1 lakh for each assessment years, the assessee preferred appeals to the first appellate authority. The CIT(A) confirmed the imposition of penalty u/s 271B of the I.T.Act and dismissed the appeals filed by the assessee vide its consolidated order dated 13.02.2019.

4. Aggrieved by the CIT(A)'s order in confirming the penalty imposed u/s 271B of the I.T.Act for assessment years 2004-2005, 2008-2009 and 2009-2010, the assessee has filed these appeals before the Tribunal. The common contentions raised in all the appeals is that the penalty order passed u/s 271B of the I.T.Act is barred by limitation. It was submitted that for all the assessment years as per the provisions of section 275(1)(c) of the I.T.Act, the penalty orders should have been passed on or before 30.06.2011, whereas in these cases, the penalty orders were passed only on 28.03.2013. Therefore, it was submitted that it was barred by limitation. The learned Departmental Representative present was duly heard in this matter.

5. We have heard the rival submissions and perused the material on record. Admittedly, the assessee has filed the appeals before the first appellate authority as regards the quantum assessment. The penalty u/s 271B of the I.T.Act was imposed for non-audit of books of account within the prescribed time limit provided. Since annual turnover determination was a subject matter of appeal, the limitation law as per the proviso to section 275(1)(a) of the I.T.Act would have application and not section 275(1)(c) of the I.T.Act as contended by the assessee. Hence, this common contention raised by the assessee for all the assessment years are rejected. Now we shall consider whether the penalty can be sustained for each of the assessment years.

#### **Assessment Year 2004-2005**

6. For assessment year 2004-2005, the due date for filing of the audit report was 01.11.2004. The return of income along audit report was filed only on 31.03.2005, i.e., after a delay of 5 months. The learned Counsel for the assessee relying on the order of the Cochin Bench of the Tribunal in the case of *Johns Biwheelers v. ACIT [(2019) 70 ITR (Trib.) 325 (Cochin)]* had submitted that the return of income and audit report u/s 44AB of the I.T.Act was filed much before the assessment was completed, hence the default was only a technical breach not causing any loss to the exchequer, therefore, penalty imposed may be deleted. The learned Departmental Representative relied on the orders passed by the Income-tax authorities.

7. We have heard the rival submissions and perused the material on record. Admittedly, in this case, the audit report was filed much before the assessment order was completed. The assessee has only committed a technical venial breach, which does not create any loss to the exchequer, as the audit report was available to the Assessing Officer well before the completion of the assessment order. The Cochin Bench of the Tribunal in the case of *Johns Biwheelers (supra)* had deleted the penalty imposed u/s 271B of the I.T.Act on similar set of facts. The relevant finding of the Tribunal reads as follow:-

*“7. We have heard the rival submissions and perused the record. In this case, the assessee was required to get his books of account audited and filed along with the return of income u/s. 44AB within the due date of 30/09/2013 for the assessment year 2013-14. However, the audit report was furnished only on 28/03/2014. The contention of the Ld. AR was that the delay in filing the return of income was due to damage to computer system due to virus infection which is a reasonable cause as prescribed u/s. 273B of the I.T. Act. The Ld. AR relied on the following judgments in support of his contentions:*

- i) CIT vs. Malayalam Plantations Ltd. (1976) (103 ITR 835) (Ker.)*
- ii) ACIT vs. Amar Chand Raj Kumar (2004) (89 ITD 96)(ITAT, Chandigarh)*
- iii) Prem Prakash Senapati vs. ITO (ITA No.459 & 185 /CTK/ 2017 dated 17/04/2018) (ITAT, Cuttack).*

*7.1 From the material available on record, we are of the view that the assessee got his books of accounts audited on 28/03/2014 which was made available to the Assessing Officer and no prejudice has been caused to the Revenue. Now the short question that arises is whether in this scenario, penalty u/s. 271B of the Act can be levied or not. In our considered opinion, the assessee had only committed technical venial breach which does not create any loss to the exchequer as the audit report was available to the Assessing Officer before the completion of the assessment proceedings. The Madras High Court in the case of CIT vs. A.N. Arunachalam (208 ITR 481) in the context of filing of audit report for claiming deduction u/s. 80J of the Act, observed that once audit report has been made available before the Ld. Assessing Officer before the completion of assessment proceedings, the assessee should be granted deduction u/s. 80J of the Act. We observe that this judgment was rendered in the context of adjudication of quantum of deduction claimed by the assessee. Hence, the said analogy can very well be drawn and used in the penalty*

*proceedings like that of the assessee. To sum up, we hold that the assessee had committed only technical venial breach for which he cannot be penalized. In view of the above, we are inclined to delete the penalty made by the assessee u/s. 271B of the Act.”*

7.1 In view of the order of the co-ordinate Bench of the Tribunal, cited supra, we delete the penalty imposed u/s 271B of the I.T.Act.

7.2 In the result, the appeal filed for assessment year 2004-2005 is allowed.

### **Assessment Year 2008-2009**

8. The contention raised by the assessee is that the assessee has not maintained books of account for the assessment year 2008-2009, and therefore, penalty cannot be imposed u/s 271B of the I.T.Act. For the above said proposition, the learned AR had relied on the judgment of the Hon'ble Allahabad High Court in the case of *CIT v. Bisauli Tractors [(2008) 299 ITR 0219 (All.)]*. The Hon'ble Allahabad High Court had observed that separate penalty proceedings has been provided for non-maintenance of account u/s 271A of the I.T.Act, whereas, for not getting the accounts audited and not furnishing the audit report, the penalty to be imposed is u/s 271B of the I.T.Act. It was held by the Hon'ble High Court that the if a person has not maintained the accounts book or any accounts the question of its audit does not arise and in such an event the imposition of penalty is under the provision contained in section 271A of the I.T.Act. Therefore, it was concluded by the Hon'ble Allahabad High Court that the penalty proceedings u/s 271B of the I.T.Act would not apply. No contrary judgment of the Hon'ble

jurisdictional High Court has been brought to our notice, hence, by following the judgment of the Hon'ble Allahabad High Court in the case of *Bisauli Tractors (supra)*, we delete the penalty imposed u/s 271B of the I.T.Act in respect of assessment year 2008-2009. It is ordered accordingly.

8.1 In the result, the appeal for assessment year 2008-2009 is allowed.

### **Assessment Year 2009-2010**

9. Admittedly in this case, no audit report has been filed for assessment year 2009-2010. It is the contention of the assessee that there was a reasonable cause as mandated u/s 273B of the I.T.Act. It was submitted by the learned AR that consequent to search and seizure operation, the entire books of account and records were taken by the department. Further it was stated that the Chartered Accountant of the assessee was suffering from chronic illness and succumbed to illness on 09.03.2016. It was stated that the above two incidence had let to a situation of the books of account not being audited. The learned Departmental Representative supported the orders of the Income-tax authorities.

9.1 We have heard the rival submissions and perused the material on record. The search and seizure in assessee's case was conducted on 06.01.2009. The assessee had obtained the copy of all the seized records. The demise of the Chartered Accountant in the year 2016 cannot be a reason for not auditing the books of account for assessment year 2009-2010.

Therefore, there was no reasonable cause as mandated u/s 273B of the I.T.Act for deletion of the penalty imposed u/s 271B for assessment year 2009-2010. It is ordered accordingly.

9.2 In the result, the appeal for assessment year 2009-2010 is dismissed.

10. To sum up, the appeals for assessment years 2004-2005 and 2008-2009 are allowed and for assessment year 2009-2010 is dismissed.

Order pronounced on this 08<sup>th</sup> day of August, 2019.

Sd/-  
**(Chandra Poojari)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(George George K.)**  
**JUDICIAL MEMBER**

Cochin ; Dated : 08<sup>th</sup> August, 2019.  
Devdas\*

**Copy of the Order forwarded to :**

1. The Appellants
2. The Respondent.
3. The CIT(A)-III, Kochi.
4. The CIT (Central) Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)  
**ITAT, Cochin**