

THE INCOME TAX APPELLATE TRIBUNAL
“E” Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Pawan Singh (JM)

I.T.A. No. 49/Mum/2013 (Assessment Year 2009-10)

Surgi Pack (India) Pvt. Ltd. M/s. G. Deepak & Co., CAs B/14, Shubhlaxmi 2 nd Floor, 8 th Road Santacruz-East Mumbai-400 055. PAN : AACCS1508C (Appellant)	Vs.	ITO 8(3)(2) Mumbai. (Respondent)
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Assessee by	None
Department by	Shri Amit Pratap Singh
Date of Hearing	1.10.2019
Date of Pronouncement	5.12.2019

ORDER

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned CIT(A) dated 8.10.2012 and pertains to A.Y. 2009-10.

2. The issue raised is that learned CIT(A) erred in confirming the penalty of Rs. 78,001/- u/s. 271B of the I.T. Act.

3. Brief facts of the case are as under :-

The assessee company has filed return of income for the year under consideration declaring total income at Rs. NIL on 30.09.2009. On perusal of the return of income, the A.O. has noticed that the gross receipts for the year under consideration was shown at Rs. 1,56,00,247/-. Hence the Assessing Officer found that the provisions of Section 44AB of the IT. Act are applicable and it is obligatory on the part of the assessee to get the accounts audited because the total receipts have exceeded the amount of Rs. 40,00,000/-. He

further noted that it is also obligatory on the part of the assessee to mention the name of the auditor, membership number, PAN of the auditing firm and dated of audit report was not filled in the E-filed return. From the perusal of the E-filed return of the assessee, the A.O. has observed that it has marked 'No' against the column 'Are you liable to maintain accounts as per the Section 44AB' and also not mentioned any details of the auditor in the other columns of the E-filed return of income. The Assessing Officer was not satisfied with assessee's explanation. The A.O. has also asked the assessee to file evidence of having filed the copies of the audit report and audited statement of accounts with any statutory authority. In response to the show-cause notice, the AR of the appellant has submitted its reply. The Assessing Officer was not convinced. In view of these facts and circumstances, the A.O. has held that the assessee has failed to prove that it has audited its accounts as per the provisions of Section 44AB prior to the filing of return of income or within the stipulated time by filing any documentary evidence, therefore, it has committed default and attracted penalty provisions u/s 271 B of the IT. Act. Accordingly, the penalty of Rs. 78,001/- was levied u/s 271 B.

4. Upon assessee's appeal learned CIT(A) noted that the assessee has informed the Assessing Officer on 29.12.2010 that the accounts were audited on 24.8.2009 as per Companies Act and tax audit report was obtained on 26.9.2009. Thereafter the A.O. has again given a show-cause notice to the appellant to explain whether this audit report was submitted to any other government authority to prove the fact that the audit was completed on 26.09.2009. In response to this show-cause notice, the AR of the appellant has submitted that the assessee company had furnished Form No. 23AC for the year ended 31.03.2009 on 19.01.2010. The AR has also submitted a copy of Form No. 23AC taken from MCA website which mentions that balance sheet was signed and audited on 24.08.2010 by M/s. D.G.Thakkar & Associates, membership number of the auditor and PAN of the auditor firm were also mentioned on the same. After considering this reply of the AR of the appellant, the A.O. has held the assessee company has failed to prove in any way that it

has got its accounts audited u/s 44AB of the IT. Act on or before filing the E-return on 30.09.2009.

5. Learned CIT(A) further noted that the same submissions were made before learned CIT(A). It was submitted that by mistake it was mentioned in the E-filing return that audit was not carried out and copy of the audit report was duly submitted before the Assessing Officer vide letter dated 29.12.2010. Further learned CIT(A) took adverse inference that the assessee having not mentioned the name of the auditor and other details in the E-filing return. He held that it cannot be taken as a technical mistake. Learned CIT(A) also drew adverse inference for the delay in submission/response of the assessee to the Assessing Officer. He disbelieved the date of audit report on the ground that the assessee had not responded as to whether the said report was furnished to any other Government authority. The assessee's submission in this regard were found to be not "complete evidence". Accordingly, learned CIT(A) upheld levy of penalty.

6. Against this order assessee is in appeal before us.

7. We have heard learned Departmental Representative and perused the record. Upon careful consideration, we find that the penalty in this case has been levied primarily because the assessee had not mentioned about the audit details in E-filing return. It is undisputed that in physical form audit report was submitted before the Assessing Officer. Assessee's submission of technical mistake in not filing the details in E-filing return has been disbelieved by the authorities below on the ground that the assessee has not submitted 'complete evidence' of filing the same and also not explaining that tax audit report was furnished to any other government authority. We find that the authorities have totally disregarded the copy of Form No. 23AC taken from MCA website which mentions that balance sheet was signed and audited on 24.8.2010 by M/s. D.G. Thakkar & Associates, membership number of the auditor and PAN of the auditor firm were also mentioned on the same. We find that the

authorities have taken hyper technical view. We are of the opinion that the assessee has duly explained that it was mistake in not filing detail in E-filing return. It is also undisputed that the Ministry of Corporate Affairs website does contain necessary details. In this view of the matter, in our considered opinion the authorities below are not justified in levying penalty on hyper technical ground, as the conduct of the assessee is not at all contumacious. We draw support from the decision of Hon'ble Apex Court in the case of Hindustan Steel Ltd. Vs. State of Orissa (83 ITR 26) that if the conduct of the assessee is not contumacious the authority can decline to levy penalty. Accordingly, in the background of the aforesaid discussion and precedent we set aside the orders of the authorities below and delete the penalty.

8. In the result, this appeal by the assessee stands allowed.

Order has been pronounced in the Court on 05.12.2019.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 05/12/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

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