

IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI

BEFORE SHRI RAJESH KUMAR, AM AND SHRI AMARJIT SINGH, JM

आयकरअपीलसं./I.T.A. No.6008/Mum/2018
(निर्धारणवर्ष / Assessment Year: 2013-14)

Mr. Santosh Ghanshyam Biyani 103-B, Hare Krishna, Firoz Shah Mehta Road, Vile Parle East, Mumbai-400057.	बनाम/ Vs.	ITO-4(2)(2) Aayakar Bhavan, M. K. Road, Mumbai.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :AAIPB5664K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Vishwas V. Mehendale
Revenue by:	Shri V. Vinod Kumar(Sr. AR)

सुनवाईकीतारीख / Date of Hearing: 04/12/2019
घोषणाकीतारीख /Date of Pronouncement: 13/01/2020

आदेश / ORDER

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 24.08.2018 passed by the Commissioner of Income Tax (Appeals) -02, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y.2013-14.

2. The assessee has raised the following grounds: -

“Whether on the facts and in the circumstances of the case and in law, the Id. Commissioner of Income Tax (Appeals) is correct in upholding the Order passed by A.O u/s. 271B for penalty of Rs.1,50,000/-, ignoring the fact that the transaction under issue is below the tax audit limit u/s. 44AB of the 1.1 Act, i.e. Rs.1 crore for the year of consideration.

On the facts and in the circumstances of the case and in law, the Id. Commissioner of Income Tax (Appeals) has erred in upholding the Assessment Order passed by A.O u/s. 2718, ignoring the appellant's contention that the turnover in shares speculation (non-delivery based) transaction is the aggregate amount of both positive and negative differences of each contract that is calculated only to the extent of Rs. 5,05,507 for the purpose of section 44AB and not the total of only sales side of each contract i.e. Rs.2.07 crore.

Whether on the facts and in the circumstances of the case and in law, the Id. Commissioner of Income Tax (Appeals) is correct in rejecting the ICAI guidelines for accounting in speculation transaction followed by the appellant.

Whether on the facts and in the circumstances of the case and in law, the Id. Commissioner of Income Tax (Appeals) is correct in ignoring the judgment of Honorable ITAT Mumbai in the case of Manisha Arun Sheth vs. ACIT vide ITA No. 6221/Mum/2010 for the assessment year 2004-05 held on 24.07.2013 and the judgment of Honorable ITAT Pune Bench in the case of Banwari Sitaram Pasari HUF Vs. ACIT Vide IT Appeal No.1489 (Pune) of 2011 for the A.Y.2006-07 held on 22nd November 2012 that to consider net amount of each contract in the case of non-delivery based transaction for the purpose of considering turnover u/s 44AB of the I. T. Act,

The appellant craves leave to submit at the time of hearing such further facts, information, clarification, documents etc. as may be necessary for the purpose of deciding the issues in the appeal.

The appellant craves leave to add, alter, amend or modify the aforesaid grounds of appeal.”

3. The brief facts of the case are that the assessee filed the return of income on 18.12.2013 declaring total income to the tune of Rs.Nil. The return was accepted u/s 143(1) of the Act. The case was selected for scrutiny under CASS. Notices u/ 143(2) & 142(1) of the Act were issued and served upon the assessee. It was found that the assessee was a stock broker and a member of National Stock Exchange (NSE). The assessee carried out the share trading activity and following the transactions on delivery basis in the A.Y. 2013-14.: -

S. no	Name of the shares	Purchase	Sale
1	Central Bank	324937	344278
2	Fujitsu ICIM	16652500	50415524
3	Geod Ltd.	40879478	8482817
4	Hexaware Ltd.	925272	=
5	IDBI Bank Ltd.	786536	1417245
6	JK Corp. Ltd.	=	128
7	Zensar Tech Ltd.	11637244	9691825
8	Del. Brok.	34	=
9	Del. St. Dt.	3734	=
10	Demat CGS.	751	=
11	Serv. Tax	2313	=
12	Serv. Tax	6469	=
13	STT on Del.	50965	=
14	Tran CGS	4819	=
	Total	7,12,75,053	7,03,51,817

The assessee was engaged in Share transaction on non-delivery basis. The details are hereby mentioned as under.:-

S. no	Name of the shares	Purchase	Sale
1	Fujitsu ICIM	14989844	14955416
2	Geod Ltd.	2061517	2119405
3	HCL Infosys	197985	197000
4	HCL Techno	231326	231641
5	Industrial D.	1822395	1832947
6	Infosys Tech	247230	247290
7	JK Corp. Ltd.	637505	637263
8	Ranbaxy Labo	82339	82551
9	TCS	129600	129890
10	Techmah	167948	167063
11	Zensar Tech	102966	104573
12	Del. Brok.	29	=
13	Del. ST. DT	546	=
14	Serv. Tax	46	=
15	Serv. Tax	329	=
16	STT on Trd.	806	=
17	Tran. CGS	1431	=
18	Trd. St. Dty	109	=
	Total	2,06,73,948	2,07,05,039

The turnover of the assessee was found in sum of Rs.7,03,51,817/- on account of Sale of Shares on delivery basis. The said transaction was claimed to be invested and profit and loss account arisen out of that transaction was treated short/long term capital gain in the returned of income. The assessee was found engaged in the sale of share on different companies on non-delivery basis in sum of Rs.2.06 crores. The profit arisen from the transaction was in sum of Rs.31,090/- which was claimed as business income.

4. Since, the assessee's turnover of the Sale of Shares claimed as business was of Rs.2.07 crores which was more than prescribed limit. According to Section 44AB of the Act, the assessee should audited the books of accounts and submit the report as per Income Tax-Rule. But the assessee failed to do so, therefore, the penalty proceeding to Section 271B of the Act was initiated and 0.5% of its total transaction i.e. to the tune of Rs.1,50,000/- penalty was levied. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who dismissed the appeal of the assessee, therefore, the assessee has filed the present appeal before us.

5. We have heard arguments advanced by the Ld. Representative of the parties and perused the record. The only issue is in connection with the confirming of the penalty in view of the provisions u/s 271B of the Act. The AO crystalized the transaction on delivery basis with ten parties in which the purchase was invoked to the

tune of Rs.7,03,51,817/-. The AO also crystalized the transaction on non-delivery basis i.e. purchase for a sum of Rs.2,06,73,948/- and sale for a sum of Rs.2,07,05,039/-. The AO was of the view that the total turnover of gross receipt was excess of Rs.1 crores, therefore, the penalty was leviable us/ 44AB of the Act. The Ld. Representative of the assessee has argued that the assessee calculated the transactions on the basis of the guidelines of Institution of Chartered Accountant of India and accordingly there is no turnover on account of transactions on delivery basis and the turnover on the share transactions on non-delivery basis was only to the extent of 1,10,757/-, therefore, no penalty is required to be attracted in view of the provisions of Section 44AB of the Act. In support of these contention, the Ld. Representative of the assessee has placed reliance upon the decision of the **Kolkata Tribunal in the case of Off-Shore India Ltd. Vs. DCIT, Cirlee-4, Kolkata (2017) 87 taxmann.com 202 (Kol Trib.)**. However, on the other hand, the Ld. Representative of the Department has refuted the said contentions. It is necessary to go into the transaction of the assessee to arrive at this conclusion for implement of provision u/s 44AB of the Act. The gain/loss pertaining to the share transactions on delivery basis resulted a purchase of Rs.7,12,75,053/- and sale of the same for Rs.7,03,51,817/-. The difference has been shown as income from capital gain. This fact is mentioned in para no. 4.1 for the assessment order. Purchase/sale of capital assets is not required to be considered as turnover in view of the provisions u/s 44AB of the Act. It is not in dispute that the sale/turnover of gross receipt of the business is more than 1 crores then the accounts are liable to be audited and the non-audited of the accounts attract the penalty in view of the provisions u/s 44AB of the Act but in the instant case, the purchase and sale of share are not investment/capital assets and not of business stock in trade, hence, is not liable to be treated as turnover. The capital gain has been accepted by u/s 44AB of the Act. The transaction is covered u/s 45 of the Act and is not liable to be covered u/s 28 of the Act. The assessee calculated the turnover on the basis of guidance of Institution of Chartered Accountant of India. So far as the transaction on non-delivery basis is concerned, the speculation of the income of assessee was 31,090/- on the share transaction on non-delivery basis resulted to purchase contract for Rs.2,06,7,948/- which was shown under the head of income business or profession. By adding the

positive and negative results of each contracts, the turnover was calculated to the extent of Rs.1,10,757/- for the purpose of Section 44AB that is below the limit for audit, hence, not liable to be audited u/s 44AB of the I. T. Act. The factually assessee did not make the payments for purchase amounting sum of Rs.2,06,73,948/- and nowhere received amount of Rs.2,07,05,039/-. The aggregate payments and receipts were of Rs.1,10,757/- which nowhere came within the ambit of provisions of Section 44AB of the Act. The Ld. Representative of the assessee has placed reliance upon the decision in the case of titled as **Kolkata Tribunal in the case of Off-Shore India Ltd. Vs. DCIT, Circle-4, Kolkata (2017) 87 taxmann.com 202 (Kol Trib.)**. The relevant finding has been given in para no. 6 which is hereby reproduced as under.: -

“6. We have considered the rival submissions and also perused the relevant material available on record. It is observed that even though the net profit / loss arising from the purchase and sale of securities was disclosed by the assessee in the profit and loss account, the value of such securities held by the assessee was fully and truly disclosed by the assessee under the head investment in the relevant balance sheet. It, therefore, cannot be said that this method of disclosure was deliberately followed by the assessee in order to avoid the compliance of section 44AB. On the other hand, the said method was followed by the assessee as per the relevant guidelines laid down by the ICAI and we find merit in the contention of the learned counsel for the assessee that the belief of the assessee about the non applicability of provisions of section 44AB based on such method of disclosure as adopted by it following guidelines of ICAI was a bona fide belief. In the case of Sachinam Trust (supra) cited by the learned counsel for the assessee, the assessee carrying on the business of financing had believed that gross receipts of interest and not gross amount of advances would constitute the basis for ascertaining the limit of Rs. 40,00,000/- so as to attract u/s 44AB and since the said belief was based on the legal opinion of eminent counsel contained in tax audit manual published by the Bombay Chartered Accountant Society, the assessee was held to have a bona fide belief which constituted the reasonable cause for not getting its accounts audited u/s 44AB. Hon’ble Gujarat High Court accordingly held that no penalty u/s 271B could be imposed on the assessee. In our opinion, the ratio of the decision of Hon’ble Gujarat High Court in the case of Sachinam Trust (supra) is squarely applicable to the facts involved in the present case and respectfully following the same, we cancelled the penalty imposed by the AO u/s 271B and confirmed by the Ld. CIT (A).”

6. The fact of the present case is quite similar to the facts of the case decided by Kolkata Tribunal **Off-Shore India Ltd. (supra)**. In the instant case, the assessee calculated the gross profit sale/purchase on the basis of the guidelines laid down by ICAI, therefore, taking into account, all the facts and circumstances and by relying

upon the decision of **Off-Shore India Ltd. (supra)**, we set aside the finding of the CIT(A) on this issue and allowed the claim of the assessee.

6. In the result, the appeal filed by the assessee is hereby ordered to be allowed.

Order pronounced in the open court on 13/01/2020

Sd/-

(RAJESH KUMAR)

लेखासदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 13/01/2020

Vijay Pal Singh/Sr. P.S.

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील)/ The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल /Guard file.

Sd/-

(AMARJIT SINGH)

न्यायिकसदस्य/JUDICIAL MEMBER

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

(Assistant Registrar)

आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai