

आयकर अपीलिय अधीकरण, न्यायपीठ –“C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
[Before Hon’ble Shri J.Sudhakar Reddy, AM and Hon’ble Shri A. T. Varkey, JM

ITA No. 835/Kol/2019
Assessment Year: 2012-13

Jhantu Ghosh PAN: AQUPG3689B	s.	I.T.O., Ward 1(4), Burdwan
Appellant		Respondent

Date of Hearing (Virtual)	01-09.2020
Date of Pronouncement	10 .09.2020
For the Appellant	Shri Somnath Ghosh, Advocate, Ld. AR
For the Respondent	Shri Supriyo Pal, Addl. CIT/Ld.DR

ORDER

Shri A. T. Varkey, JM

This is an appeal preferred by the assessee against the order of Ld. CIT(A), Burdwan dated 25-02-2019 for the assessment year 2012-13, wherein he (Ld. CIT-A) confirmed the penalty of Rs. 58,556/- imposed by the AO u/s. 271B of the Income-tax Act, 1961 [hereinafter referred to as ‘the Act’] .

2. Brief facts as noted by the AO in his assessment order are that the assessee did not file his return of income for the assessment year 2012-13 u/s. 139 of the Act. Therefore, the AO reopened the assessment by an order dated 30-08-2017 u/s. 147/143(3) of the Act and assessed the income of assessee at Rs.9,36,900/- i.e 8% turnover of Rs. 1,17,11,217/-. Thereafter, the AO initiated the penalty proceedings u/s. 271B of the Act, since according to AO, the total turnover of the assessee was to the tune of Rs.1,17,11,217/- and the assessee has not got its accounts audited u/s. 44AB of the Act within the due date as prescribed by the Act. The AO imposed penalty of Rs. 58,556/-, which is ½ % of total turnover. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who was pleased to confirm the said penalty. Aggrieved, the assessee is before us.

3. We have heard both the parties and perused the records. We note that the assessee is an individual and is engaged in the business of baby food products in the name and style of "Ghosh Variety Stores". It is admitted by the assessee before us also that he had not filed his return of income u/s. 139(1) of the Act, since his income did not exceed the threshold limit as prescribed by the Act. Later on the AO came to know that there has been gross deposits of Rs. 1,17,11,217/- in his banks accounts and therefore, he issued notice u/s. 148 of the Act for re-opening the assessment for the assessment year 2012-13 i.e relevant year under consideration and, thereafter, the assessee filed his return on 28-04-2017 disclosing the income at Rs. 1,73,990/-. The AO resorted to estimation of the income of the assessee because according to him, the assessee did not produce any bills, vouchers or books of account in support of his return filed on 28-04-2017. Thereafter, the AO issued penalty notice u/s. 271B of the Act and imposed the impugned penalty of Rs. 58,556/- i.e ½% of the total sales turnover. The AO levied the penalty by holding as under:-

".... I hold that on account of its failure to get its accounts audited as per Sec. 44AB of the I.T Act, 1961, the assessee is liable to penalty u/s. 271B and the crux of the provision of 271B is clearly applicable in this case..."

4. Thereafter, the Ld. CIT(A) while upholding the penalty order of the AO has observed as under:-

"....It is seen that the appellant in the instant case has failed to maintain books of account and get them audited before the specified date as per the provisions of Section 44AB and according, he is liable for penalty u/s. 271B..."

5. So we note that the AO was of the view that assessee failed to get his accounts audited as per provisions of section 44AB of the Act and, therefore, he levied the impugned penalty. However, the Ld. CIT(A) has said that the assessee has failed to get his accounts audited before the specified due date as per provisions of section 44AB of the Act, which means that the Ld. CIT(A) was of the opinion that the assessee could not get his accounts (books of account) audited before the specified due date as per provisions of section 44AB of the Act and so it is not the case of the Ld. CIT(A) that the assessee has failed

to get its accounts audited. We note that the assessee had filed audited report in Form 3CB and 3CD before the AO, which is placed at pages-35,36-40 respectively of the P.B, which shows that these Forms are part of audit report u/s. 44AB of the Act and the Financial Statement of assessee is placed at pages 41-42 of the P.B. We note that the assessee's accounts was audited by Mr. Bidyut Kumar Mitra, Chartered Accountant on 10th day of June, 2012. This goes on to shows that the assessee got his accounts audited before the due date, which falls on 30-09-2012. Thus, we find that the assessee has audited his accounts before the due date as prescribed by the Act and therefore, no penalty could have been levied/imposed on the assessee. On this issue, it is also pertinent to note the CBDT Circular No. 05/2007 dated 26-072017, which is reproduced as under:-

“6(i) The report of audit under section 44AB is not to be attached with the return. It should not be furnished separately also before or after the due date. However, an assessee should get the report of audit from an accountant under said section before the due date of the furnishing of the return and should fill out the relevant columns of these forms on the basis of such report. The assessee should retain the report with himself. It may be furnished in original during the assessment proceedings. No penalty under section 271B shall be initiated or levied for not furnishing the tax audit report on or before the due date. However, if the audit report has not been obtained before the due date, provisions of section 271B shall be attracted. “

6. We note that auditor has given audit report in Form 3CB and 3CD, which are placed from pages 35 to 41 of the P.B, which were filed before the AO, which has not been accepted by the AO on the suspicion that it was an afterthought and the Ld. CIT(A) has brushed aside the audit report without any basis/ material. Since the audit report has been obtained by the assessee before the due date u/s. 44AB of the Act, no penalty u/s. 271B of the Act could have been initiated for levying the penalty and therefore, we cancel the same.

7. In the result, the appeal of assessee is allowed.

Order is pronounced in the open court on 10 September 2020

Sd/-
(J. Sudhakar Reddy)
Accountant Member

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 10 September 2020

****PP(Sr.P.S.)**

Copy of the order forwarded to:

1. Appellant –Shri Jhantu Ghosh C/o S.N Ghosh & Associates, Advocates, SEBEN BROTHERS' LODGE, P.O Buroshibtala, P.S Chinsurah, Dist-Hooghly, Pin 712105.
2. Respondent – The Income Tax Officer, Ward 1(4), Burdwan, Kachari Road, Court Compound, P.O & P.S Burdwan, Dist Purba Bardhaman-713101.
3. CIT(A)-, Kolkata (sent through e-mail)
4. CIT- , Kolkata.
5. DR, ITAT, Kolkata. (sent through e-mail)

By order,

/True Copy,

Assistant Registrar