

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई।
**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI**

श्री वी दुर्गा राव, न्यायिक सदस्य एवं श्री जी मंजूनथ, लेखा सदस्य के समक्ष
**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.229/Chny/2019
निर्धारण वर्ष /Assessment Year: 2015-16

Shri V. Seetharaman,
No.5, Kappiyampuliyur
Main Road,
Villupuram – 605 601.
[PAN: AACPR 0873L]

**The Asst. Commissioner of
Income Tax,**
Vs. Villupuram Circle,
Villupuram.

(अपीलार्थी/**Appellant**)

(प्रत्यर्थी/**Respondent**)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से /Respondent by

: Mr. S. Sridhar, Advocate
: Mr. AR.V. Sreenivasan, Addl. CIT

सुनवाई की तारीख/Date of Hearing

: 06.10.2021

घोषणा की तारीख /Date of Pronouncement

: 06.10.2021

आदेश / ORDER

Per V. Durga Rao, Judicial Member:

This appeal filed by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals), Puducherry in I.T.A No.63/CIT(A)-PDY/2017-18 dated 15.11.2018 relevant to the Assessment Year 2015-16.

2. The grounds of appeal raised by the assessee are reproduced as under:

"1. The order of the Commissioner of Income Tax (Appeals), Puducherry dated 15.11.2018 in 1TANo.63/CIT(A)-PDY/2017-18 for the above mentioned Assessment Year is contrary to law, facts, and in the circumstances of the case.

2. The CIT (Appeals) erred in sustaining the levy of penalty u/s 271B of the Act for the presumed violation of section 44AB of the Act without assigning proper reasons and justification.

3. The CIT (Appeals) failed to appreciate that the sustenance of levy of penalty for the reasons stated from para 5 of the impugned order was not correct while further ought to have appreciated that the relevant facts which would fortify the stand of the Appellant for deleting the penalty imposed by the Assessing Officer were completely overlooked proving perversity in the findings recorded in relation thereto.

4. The CIT (Appeals) failed to appreciate that the stand consistently taken by the Appellant on the non applicability of section 44AB read with section 271B of the Act would constitute reasonable cause within the scope of section 273B of the Act while vitiating the levy of penalty in relation thereto mechanically.

5. The CIT (Appeals) failed to appreciate that the order imposing penalty u/s 271B of the Act was passed out of time, invalid, passed without jurisdiction and not sustainable both on facts and in law."

3. The brief facts of the case are that the assessee is a Civil Contractor, filed his return of income by admitting total income of Rs. 21,01,840/- on estimate basis. The A.O has completed the assessment u/s. 143(3) of the Income Tax Act, 1961 (hereinafter as "the Act") at Rs. 55,80,009/- by disallowing 5% of the expenses on the ground that non submissions of bills and vouchers. Subsequently, the A.O has initiated penalty proceedings u/s. 271B of the Act on the ground that the assessee has failed to comply with the provisions of s. 44AB of the Act and imposed penalty of Rs. 1,50,000/-. The assessee has submitted

before the A.O in his reply dated 03.07.2017 to the notice u/s. 271B of the Act, which is reproduced as under:

"During the Financial year- 2014-15, I executed neatly 25 contract works at various places. I have to procure material, organize the labours for executing the said contract works. The nature of my business is such that I am unable to maintain Books of accounts, i studied upto SSLC and also i am having no knowledge in maintaining the Books of accounts for the purpose of my business...."

I humbly submit that if a person has not maintained account books or any accounts, the question of audit does not arise and the provision of section 44 AB do not get violated in a case where accounts have not been maintained at all and therefore the penal provisions of section 271 B of the I. T. Act would not apply (Commissioner of income Tax Vs Bisuali Tractors 299 ITR 219 (All))."

4. After considering the submissions of the assessee, the A.O has noted as under:

"The assessee-quoted the above-mentioned order of Hon. Allahabad High Court as relevant to His case. It is a case of undisputed non-maintenance of Books of Accounts. Emphasis is placed on this point. The relevant sentence from Para I of the Judgement is produced below:

"Undisputedly, the assessee is not maintaining Books-of Accounts.

But in this case, there existed trial balance from which balance-sheet and profit and loss account were prepared and without Books of Accounts, trial .balance could not have been prepared. The assessee cannot take strength from the Hon. High Court, judgement, since it is irrelevant to this case.

Interestingly, the term. "Books of "Accounts" is nowhere mentioned in the Section and 271-B. The term used in both the sections is "accounts" is a record or statement of financial expenditure and receipts relating to a particular period or purpose". Therefore, it is not necessary to have books of accounts to get the accounts audited. For instances, the accounts may be

- (a) Audit Through expenses.*
- (b) Audit through projects undertaken.*
- (c) Audit through bank statements.*

Therefore, the assessee's contention is without any merit and irrelevant to the present facts. Therefore, it is clear that the assessee, without reasonable cause, failed to complete with the

provisions of section 44-AB of the Income Tax Act, 1961. Hence, it is a fit case for levy of penalty u/s. 271B of the Income Tax Act, 1961 of sum equal to one-half percentage of the gross receipts or one fifty thousand rupees whichever is less (0.5% of 4,76,00,080/- is Rs. 2,38,004/-). Therefore, a penalty of Rs. 1,50,000/- u/s. 271B of the Income Tax Act, 1961 is hereby levied on the assessee for the non compliance of Section 44-AB of the Income Tax Act, 1961.”

*As detailed in the penalty order, there is no reasonable cause maintaining and auditing the books of accounts. The assessee has relevant accounts statements to bank through a Chartered Accountant. No reasons -with supporting evidences have been submitted for non-compliance to section 44AB. Claim that he has been penalized under section 271A cannot absolve him for the penal consequence u/s 271B. Penalty is **confirmed.**”*

5. On appeal, the Ld. CIT(A) has confirmed the order passed by the A.O.

6. Before us, the Id. Counsel for the assessee has submitted that when the assessee has not maintained the books of accounts, the auditing of account does not arise, therefore, penalty u/s. 271B of the Act cannot be levied. It is also submitted that it is not possible for the assessee to get accounts audited because of non maintenance of books of accounts and submitted that s. 271B of the Act cannot be imposed. He strongly relied on the judgment of the Hon'ble High Court of Allahabad in the case of **CIT v. Bisuali Tractors [2008] 299 ITR 219 (All.)**.

7. On the other hand, the Id. D.R strongly relied on the order passed by the A.O as well as Ld. CIT(A).

8. We have heard both the sides, perused the material available on record and gone through the orders of the authorities below. The assessee is a Civil Contractor executed various projects and offered his income for taxation at 4% on estimate basis. The A.O has accepted the estimation of income made by the assessee. In the assessment order, the A.O only disallowed 5% of the expenses on the ground that non submission of bills and vouchers. It is an admitted fact that the assessee has not maintained books of accounts for that the assessee has filed a detailed submission before the A.O as well as Ld. CIT(A). When the assessee is not maintained the books of accounts, the question of auditing does not arise, but, it does not mean that the assessee need not maintain the books of accounts. It is the obligation on the part of the assessee to maintain the books of accounts u/s. 44AA of the Act. The assessee has failed to maintain the books of accounts on that the A.O has power to impose penalty u/s. 271A of the Act. However, in the present case, the A.O has not imposed penalty u/s. 271A and imposed penalty u/s. 271B of the Act. Under similar facts and circumstances of the case, the Hon'ble High Court of Allahabad has observed in the case of **CIT v. Bisuali Tractors** (supra), which is reproduced as under:

5. We have heard Sri A.N. Mahajan, learned standing counsel appearing for the revenue. Nobody had appeared for the respondent assessee.

6. Learned standing counsel for the revenue submitted that under Section 44AB of the Act it is obligatory on the part of the assessee whose turnover exceeded the maximum limit in the relevant previous year, to get the accounts audited and failure to do so would make liable such person for penalty as provided under Section 271B of the Act. According to him non-maintenance of account, as required under Section 44AA of the Act attracts penalty provisions under Section 271A of the Act but that would not take out the jurisdiction of the assessing authority to impose penalty under Section 271B of the Act. The submission is wholly misconceived. Section 44AB of the Act read as follows:

44AB. Audit of accounts of certain persons carrying on business or profession. Every person

(a) carrying on business shall, if his total sales, turnover or gross receipt as the case may be in business exceed or exceeds forty lakh rupees in any previous year, or

(b) carrying on profession shall, if his gross receipts in profession exceeds ten lakh rupees in any previous year, get his accounts of such previous year audited by an accountant before the specified date and obtain before that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed.

The penalty provisions are contained in Sections 271A and 271B of the Act which are reproduced below:

271 A. Failure to keep, maintain or retain books of account, documents, etc. Without prejudice to the provisions of Section 271, if any person fails to keep and maintain any such books of account and other documents as required by Section 44AA or the Rules made thereunder, in respect of any previous year or to retain such books of account and other documents for the period specified in the said rules, the assessing officer or the Commissioner (Appeals) may direct that such person shall pay by way of penalty a sum of twenty five thousand rupees.

271B. Failure to get accounts audited. If any person fails to get his accounts audited in respect of any previous year or years relevant to an assessment year or furnish a report of such audit as required under Section 44AB the assessing officer may direct that such person shall pay, by way of penalty, a sum equal to one half per cent of the total sales, turnover or gross receipts, as the case may be, in business, or of the gross receipts in profession, in such previous year or years or a sum of one hundred thousand rupees, whichever is less.

7. It may be mentioned here that separate penalty has been provided for non-maintenance of accounts, i.e., under Section 271A of the Act and for not getting the accounts audited and not furnishing the audit report i.e., under Section 271B of the Act. In the present case, the assessing officer did not impose penalty under Section 271A of the Act and instead proceeded to impose penalty under Section 271B of the Act. If a person has not maintained the accounts book or any accounts the question of its

audit does not arise. In such an event the imposition of penalty under the provision contained in Section 271A for the alleged noncompliance of Section 44AA may arise but the provisions of Section 44AB does not get violated in case where the accounts have not been maintained at all and, therefore, penal provisions of Section 271B would not apply. It is well settled by the Apex Court in the case of CIT v. Vegetable Products Ltd. (SC) that if the language is ambiguous or capable of meanings more than one, then we have to adopt that interpretation which favours the assessee, more particularly so because the provision relates to imposition of penalty. The Constitution Bench of the Apex Court in the case of J.K. Synthetics Ltd. v. CTO has held that penalty provision in a taxing statute has to be strictly construed. Penalty is exigible only where a person falls within the four corners of the penal provisions otherwise not. Further in the tax matter interpretation in favour of the assessee has to be adopted. We may mention here that in case where the returns are not being filed, there is unanimous judicial view that no penalty can be imposed for concealment of income and that is why the Parliament had to make suitable amendment in the penalty provision by inserting Explanation 3 to Section 271 of the Act and Explanation 3 to Section 18 of the Wealth Tax Act, 1957.

8. The question as to whether an assessee has concealed the particulars of his turnover where he has not filed the return came up for consideration before the Apex Court in the case of Narain Das SurajBhan v. CST (1968) 21 STC 104 (SC). The Apex Court while considering the provisions regarding the imposition of penalty provided under Clause (b) of Section 15A(1) of the U.P. Sales Tax Act has held as follows:

In our opinion, Clause (b) of Section 15A(1) is attracted as soon as it is shown that the assessee has concealed the particulars of its turnover or deliberately furnished inaccurate particulars of such turnover in the return filed under Section 7 of the Act. It is manifest that from the grammatical point of view the words 'inaccurate particulars of such turnover' in Clause (b) of Section 15A(1) refer back to Clause (a) where the return under Section 7 is specified. In other words, Clause (b) refers to default in respect of a return furnished under Section 7 and cannot possibly refer to any default in respect of anything done by the assessee in a proceeding under Section 21. As there is no question of furnishing a return of a turnover in a proceeding under Section 21, the assessee cannot be guilty of concealing particulars of its turnover from, or of furnishing inaccurate particulars in a proceeding under Section 21. The concealment or furnishing inaccurate particulars must be in the return furnished under Section 7. Clause (a) of Section 15A(1) deals with the failure of the assessee to furnish the return of the turnover, which he is required to furnish under Section 7 or the failure of the assessee to furnish it within the time allowed or in the manner prescribed. Clause (b) of the Section deals with the concealment or inaccurate furnishing of particulars of the turnover in respect of which the return was required to be filed and which is referred to in Clause (a)?

9. This Court, in the case of CST v. Shahid Hussain Rakesh Kumar (1977) 39 STC 520 has held that in a case where no return has been filed

penal proceedings can be initiated only under Section 15A(1)(a) and not 15A(1)(b) of the U.P. Sales Tax Act, 1948. It has held as follows:

A perusal of the two parts clearly establishes that Section 15A(1)(a) applies in a case where the dealer has failed to furnish the return under Section 7, where Sub-clause (b) applies in a case where the return has been furnished but there is deliberate concealment or the return furnished is inaccurate. The Legislature has in the two sub-clauses mentioned two different categories and has also laid down different penalties in subclause (c). They deal with different situations, and the Sales Tax Officer in this case proceeded under Section 15A(1)(a) and from the amount of penalty imposed, it is clear that he exercised his jurisdiction under Section 15A(1)(b) and not under Section 15A(1)(a). The language of the Section clearly indicates that in a case where no return has been filed penal proceedings can be initiated only under Section 15A(1)(a). There are observations in a decision of the Supreme Court in Narain Das SurajBhan v. CST which supports the view that we are taking.

10. In the case of *Thoppil Kutti Eroor v. CIT the Kerala High court while considering the question of imposition of penalty under Section 38(1)(c) of the Cochin Income Tax Act which provides imposition of penalty for concealment or for furnishing inaccurate particulars has held as follows:*

It is impossible to say that when a person has failed to furnish any return at all what he has done is to conceal the particulars of income or to deliberately furnish inaccurate particulars of such income within the meaning of Clause (c) of Section 38(1) of the Act. We entertain no doubt that the offence in such a case should be considered as one coming under Clause (a) and not under Clause (c) of Sub-section (1) of Section 38.

11. In the case of *S. Narayanappa & Bros. v. CIT the Mysore High Court has held as follows:*

What was urged before us was that in a case where an assessee has furnished no return at all before the Income Tax Officer, it should be presumed for the purposes of Section 28(1)(b) that he has furnished a return of his income intimating the Income Tax Officer that his income is nil. It seems to me that the language of Section 28(1) does not admit of any such construction since the clear requirement of the provisions of this sub-section is that an assessee on whom a penalty is proposed to be imposed under Section 28(1)(b) should have in the first instance furnished his return. That, in my opinion, is the ordinary and grammatical meaning of the words occurring in the Act. To interpret the language of this provision in the manner suggested by the learned Government Pleader would, in my opinion, be too artificial and too far-fetched to commend itself for acceptance. Although it is true that the provisions of a statute like those contained in Section 28(1)(b) have to receive to construction so as to promote the object of the statute, it is clear that when we interpret a penal provision like that contained in Section 28(1)(b), the interpretation

we should place upon it must accord with reason and justice and must be in accordance with the plain ordinary and rational meaning of the words contained in those provisions. So interpreted, I would not, in my opinion, be right in placing on Section 28(1)(b) the construction for which the learned Government Pleader contends.

12. The Madras High Court in the case S. Santhosa Nadarv. First Addl ITO has gone to the extent that a voluntary return filed after the period of four years from the close of the assessment year is not a valid return and such a case should be regarded as if no return has been filed at all and it cannot be said in such a case that there has been a concealment of the particulars of income or deliberate furnishing of inaccurate particulars and Section 28(1)(c) of the Income Tax Act, 1922 would not be applicable. The Madras High Court has held as follows:

When we come to Section 28(1)(c), it deals specifically with the concealment of 'particulars' of income or the deliberate furnishing of inaccurate 'particulars' of income. In the setting in which this sub-section finds place it is impossible to construe Section 28(1)(c) except as relating to a case where a return has been filed but from which return particulars of income have been omitted or any particulars have been deliberately inaccurately furnished. The use of the expression 'particulars of his income' and 'particulars of such income' would be wholly inapposite in a case where no return has at all been filed; such a case would clearly come within the scope of Section 28(1)(a) alone.

13. This Court in CWT v. Yadu Raj Narain Singh also taken the same view. It has held as follows:

Thus applying the strict construction of penalty provisions contained in clause (1) of Sub-section (c) of Section 18 of the Act, we find that prior to the amendment in Explanation 3 by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1-4-1989 in a case where the person who has previously been assessed under the Act does not file any return in response to the notice or even where time for filing the return has expired has not filed any return there cannot be any concealment for which penalty provision can be imposed. In view of the foregoing discussions, we are of the considered opinion that in the present case the respondent assessee has not concealed the particulars of his income for which wealth no penalty under Clause (1) of Sub-section (c) of Section 18 of the Act is exigible.

14. Therefore, Section 271B of the Act is not attracted in a case where no account has been maintained and instead recourse under Section 271A can be taken.

15. In view of the foregoing discussions we answer the question referred to us in the affirmative, i.e., in favour of the assessee and against the revenue. There will be no order as to costs."

9. The Id. D.R has not placed any material to show that the judgment of the Hon'ble High Court of Allahabad in the case of **CIT v. Bisuali Tractors** (supra) has been reversed by Hon'ble Supreme Court. Further, the Id. D.R has not placed the decision of Hon'ble Jurisdictional High Court, which supports the case of the A.O.

10. In this case, the assessee has not maintained any books of accounts and the assessee has offered an income on estimate basis and the same is accepted by the A.O. Keeping in view of the above facts and circumstances of the case and also respectfully following the decision of the Hon'ble High Court of Allahabad in the case of **CIT v. Bisuali Tractors** (supra), penalty u/s. 271B imposed by the A.O in this case cannot be sustained. Therefore, the penalty imposed by the A.O and confirmed by the Ld. CIT(A) is cancelled. Thus, the appeal filed by the assessee is allowed.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced on 06th October, 2021 in Chennai.

Sd/-

(श्री जी मंजूनथ)

(G. MANJUNATHA)

लेखासदस्य/ACCOUNTANT MEMBER

Sd/-

(वी दुर्गार)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai, दिनांक/Dated: 06th October, 2021.

EDN/-

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF