

अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

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

**BEFORE SHRI RAJPAL YADAV HON'BLE VICE PRESIDENT
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.339/Ind/2020
Assessment Year:2014-15**

Sachchidanand Tripathi Bhopal (Appellant)	<u>बनाम/</u> Vs.	ITO 5(2) Bhopal (Respondent)
P.A. No.AAMPT3788N		
Appellant by	Shri S.S. Deshpande, AR	
Respondent by	Shri Amit Soni, Sr.DR	
Date of Hearing:	12.11.2021	
Date of Pronouncement:	06.12.2021	

आदेश / O R D E R

PER MANISH BORAD:

The above captioned appeal at the instance of Assessee is directed against the order of Ld. Commissioner of Income Tax(Appeals)-2, (in short 'CIT(A)'), Bhopal dated 01.05.2019 which are arising out of the order u/s 271B of the Income Tax Act 1961(In short the 'Act') dated 26.05.2017 framed by ITO-5(2) Bhopal.

The Assessee has raised following grounds of appeal in ITANo.

339/Ind/2020:

1. *That on the facts and in the circumstances of the case the ld. CIT(A)-2, Bhopal was not justified in confirming the levy of penalty of Rs.150000.00 under section 271B.*
2. *The assessee craves leave to add, later amend or withdraw any ground of appeal on or before the time of hearing.*

2. Brief facts of the case as culled out from the records are that the assessee is a retired employee and filed the return of income for A.Y. 2014-15 on 08.07.2015 declaring income of Rs.4,53,210/-. Case selected for 'Limited Scrutiny' through CASS, followed by serving of notices 143(2) & 142(1) of the Act. During the course of assessment proceeding Ld. AO came across the information that the assessee is also engaged in share trading comprising of intra-day trading as well as delivery based trading. Information from Nirmal Bang Securities Pvt. Ltd. was called u/s 133(6) of the Act. On receiving information it was observed that total sales made by the assessee on delivery based transaction was Rs.3,13,81,410/- which exceeded the limit of turnover of Rs. 1 cr. provided u/s 44AB of the Act which requires the assessee to get its book of accounts audited. During the course of

assessment proceedings it was stated by the assessee that books of account were not maintained and since books of account were not maintained there was no possibility to get books of account audited u/s 44AB of the Act. Before the Ld. AO it was claimed that the assessee had incurred loss in the said trading of share and he was not aware as to whether he was required to get the account audited. However, Ld. AO initiated the proceedings for levy of penalty u/s 271B of the Act and vide order dated 25.05.2017 levied penalty of Rs. 1,50,000/- u/s 271B of the Act.

3. Aggrieved assessee challenged the levy of penalty u/s 271B of the Act before the Ld. CIT(A) but failed to succeed.

4. Now assessee is in appeal before this Tribunal. Ld. counsel for the assessee reiterated the submission made before the Ld. CIT(A) which are placed in the paper book dated 26.08.2021 containing 12 pages.

5. Per contra Ld. DR vehemently argued supporting the orders of both lower authorities.

6. We have heard rival contentions and perused the records placed before us. Assessee's sole grievance in this appeal is challenging the

finding of Ld. CIT(A) confirming the levy of penalty of Rs.1,50,000/- u/s 271B of the Act for not getting books of account audited u/s 44AB of the Act. We note that the assessee is a retired employee and files regular return of income. For the year under appeal though the assessee has filed income tax return but he has not disclosed the transaction of purchase/sale of equity shares neither under the head of business and profession nor capital gain. Assessee is maintaining share trading account with Nirmal Bang Securities Pvt. Ltd. Total sales made on delivery based transaction amounting to Rs.3,13,81410/-. Assessee has not disputed this figure of sale turnover of share trading of delivery based transaction but only claimed before ld. AO that these transaction were in the nature of purchase and sale of shares held for less than 12 months and there was short term capital loss which was not disclosed in the income tax return.

7. We, however find that Ld. AO has given categorically finding that the assessee had made frequent transaction in both delivery as well as non-delivery based segment of shares and volume and quantity of buying and selling of shares was also found to be substantially high which are sufficient to prove

that transactions of share trading carried out by the assessee during the year are in the nature of business. This plea of the assessee that he was ignorant about the provision of getting books of account audited, find no merit as ignorance of law is no excuse and carrying out the transactions of the magnitude of Rs. 3,13,81,410/- in itself leaves no room for the assessee to make an excuse for not getting books of account audited u/s 44AB of the Act.

8. We, further find that Ld. CIT(A) has examined the issue in detail and in the light of settled judicial pronouncement has rightly confirmed the levy of penalty u/s 271B of the Act at Rs. 1,50,000/- observing as under:

I have carefully considered the facts of the case, assessment order, written submission and arguments of the appellant. It is an undisputed fact that the turnover of the appellant in share transactions was more than Rs. 1 crore and therefore, he was liable to maintain books of account u/s 44AA and get them audited by Chartered Accountant u/s 44AB. The appellant has pleaded ignorance that he was not aware that he was liable to maintain books of accounts and to get them audited. The appellant is a retired pensioner and is an educated person. He was involved in daily routine transactions of shares and the magnitude of his turnover was more than Rs. 3 crore. In the case of the appellant, ignorance of the relevant provisions of Section 44AA and 44AB

cannot be called a good defence for the appellant. Reliance is placed in the case of Anahaita Nalin Shah v. Deputy Commissioner of Income Tax - 4(1), ~ Mumbai(2014) 43 taxmann.com 206 (Mumbai - Trib.). In this identical case, the tribunal has justified the imposition of penalty u/s 271B when the assessee having turnover more than the limit prescribed for getting books of account audited did not get the books audited. The concluding para of the decision of Hon'ble !TAT, Mumbai is reproduced as under:

"Undisputed facts of the case are that the assessee had entered in to speculative business of the shares, that the transactions entered in to by her were more than the prescribed monetary limit as nuisaqed by the provisions of section 44AB of the Act, that no bonofide reasons was furnished by the assessee, for not getting the books of account audited, before the AO or the FAA. We are of the opinion that words total turnover indicate the aggregate price of the commodities received by an assessee during the course of his trading or business activities. It does not differentiate between commodities sold under the head speculative business/ normal business. Transfer of immovable or movable property by way of investment is not included by the provisions of the section 44AB of the Act. Provisions of the Act are clear that all revenue receipts are covered by the words turnover, wherever capital receipts are not to be considered a part of the turnover for the purposes of the said section. In other words, receipts which are not relatable to business and may fall under the expression 'income to be subjected to tax as income from sources' do not form part of total turnover. Considering the principles gotJerning the imposition of penalty u/ s. 271 B and the facts of the case we are of the opinion that AO was justified in levying penalty for not her books of accounts audited. "

In his submission the appellant has relied upon the following case laws:

- i) *Surajmal Parshuram Todi v CII' (1997) (Gau) 209*
- ii. *CIT v Bisauli Tractors (200812991TR 219 (ALL)*
iii) *CIT & ANR. V S. K. Gupta & Co. (2010)*
322 ITR 86 (All) The gist of all the referred cases is that the requirement of getting the books of account audited could arise only when the books of account are maintained by the assessee. In these Cases, Hon'ble Courts have decided that if a person has not maintained the books of account, the question of its audit does not arise. The has is of decisions of Hon'ble Courts is this that when a person commits an offence by not maintaining the books of account as contemplated by section 44AB., the offence is complete and after that there can be no possibility of any offence as contemplated by Section 44AB.

6.1 I have perused the relevant case laws and facts & legal proposition in the present case. The provisions relating to maintenance of books of account by certain persons carrying on business and profession has been incorporated in Section 44AA in Income Tax Act. For the sake of brevity, relevant provision of Section 44AA are reproduced as below:

"Section 44AA

(2) Every person carrying on business and profession not being a profession referred to in sub-section (1) shall keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act.

On plain reading of the aforementioned lines, it is clear that for the purposes of Section 44AA, there is no specific definition of the books of account to be maintained by the assessee. The section just requires the maintenance of books of account and also other documents in the form which may enable the AO to compute the total

income of the appellant in accordance with the Income Tax Act, 1961. In the case of the appellant, a retired pensioner used to invest in share transactions and he did not require to maintain certain specific kind of books of account in the form of balance sheet, P&L e.l c etc. The record of transactions done by the appellant is available at all time with the broker of the appellant. The computation of total income can easily be done on the basis of statement of transactions provided by the broker. In other words, the statement of transactions provided by the broker in any form is sufficient in the case of the appellant which may enable the AO as well as the appellant to compute the turnover and total income from the business carried out. Thus, the records made available to the appellant by its broker is nothing but the books of account which were required to get audited as per the provisions of Section 44AB of the Act. During the assessment proceedings, the AO obtained the statement of transactions from the broker u/s 133(6) and on the basis of this statement, the AO noticed the quantum of turnover and profit or Therefore, it can be said that the AO was able to complete the assessment proceedings on the basis of available books of account of the appellant in the form of statement of transactions. No other records / documents were needed by the AO to ascertain the total income of the appellant. The AO nowhere in the assessment order or penalty order has mentioned that the appellant did not maintain books of account u/s 44AA. Therefore, it is clear that the AO was satisfied with the adequacy of the books of account in the form of statement of transactions obtained from the broker. Therefore, in my opinion, the facts and circumstances of the case laws quoted by the appellant and those of the present case are different as in case laws quoted by the appellant, the assessee was liable to maintain books of account in the form of Trading e.[c, P & L e.f c, Balance Sheet, Bills and Vouchers, cash book

etc. Moreover, in my views, it is not necessary that books of account may always be produced before the AO by the appellant. If the AO obtains such documents from any other source by utilizing his power under the provisions of the income Tax Act and if these documents are sufficient to make AO enable to compute the total income of the assessee, there is no necessity that certain kinds of documents be always produced by the assessee. The documents gathered by this way by the AO will certainly come under the definition of books of account. Further, the appellant was also in possession of such records. In the case of S.J. Agarwal & Co. v. Income Tax Officer, Ward 5(4), Pune, (2008) 114 ITD 27 (PUNE) (SMC), Hon'ble ITAT, Pune has discussed the identical matter in details. Relying upon the decisions of Hon'ble Delhi High Court in two cases, namely, (i) Central Warehousing Corpn. v. Secretary, Department of Revenue 12005] 277 ITR 452 (Delhi) and(ii) Rajesri Kumar, Proprietor, Surya Trading v. Dy. CIT [2005] 275 ITR 641 (Delhi), Hon'ble ITAT has expressed similar views. However, the issue in these cases was related to special audit u/s 142(2A), the discussion taken place in these cases regarding the definition of books of account may be extracted herein under:

"16. In the light of the decisions of the Hon'ble Delhi High Court in above two cases and the expression 'accounts' used in section 44AB of the Act, it is, thus, clear that the expression 'accounts' used in section 142(2A) or under section 44AB is not merely books of account of the assessee, but it could include books of account, balance sheets and all other records maintained by the assessee, irrespective of the fact whether the accounts maintained by the assessee may or may not be in such form or manner or system as prescribed under section 44AB of the Act. Therefore, the assessee's contention that as the assessee was not maintaining any regular books of account, he was not supposed to get his accounts audited under section 44AB of the Act is devoid of any

merit. The interpretation given to the word 'accounts' used in section 44AB, by the assessee that it would include only the regular books of account required to be maintained under section 44AB is prima facie an unsuccessful and non-bona fide attempt to create an unwarranted or unnecessary controversy as to the meaning of "accounts" as used in the section 44AB of [he Act so as to get himself rid of the obligation to get the accounts audited as contemplated under section 44AB of the Act. We further held that giving such a meaning to the expression "accounts" as given by the assessee would completely defeat the very purpose and object of the section 44AB of the Act, which has been inserted in the statute to ensure that the books of account and other records are properly initiate that they faithfully reflect the income of the taxpayer and claims for deductionare correctly made by him. Such audit would. al so help in checkingfraudulent practices. It can also facilitate the administration of tax laws by a proper presentation of the accounts before the tax authorities and considerably saving the time of Assessing Officers carrying out routine verifications, like checking correctness of totals and verifying whether purchases and sales are properly vouched or not. The time of the Assessing Officers' thus saved could be utilized for attending to more important investigational aspects of case .”

I am therefore convinced that there was no requirement of further production of any other document except the records already available by the appellant before the Assessing Officer during the assessment proceedings as well as penalty proceedings. In his submission, the appellant has also pleaded that the ignorance of the appellant regarding the mandatory provision of getting the books of account audited vij s 44AB was the reasonable cause for the said failure u/s 273B of the Act and therefore, the appellant should not be penalized. The contention of the appellant does not hold any merit. In Para 19, in

the case of S.J. Agarwal & Co. v. Income Tax Officer, Ward 5(4), Pune (Supra), Hon'ble ITAT, Pune has commented as under:

"19. Now the question arises as to whether for the default committed by the assessee under section 44AB, the penalty under section 271 B is still leviable. Section 273B provides that notwithstanding anything contained in the provisions of section 271 B, amongst other sections, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the concerned provisions if he proves that there was a reasonable cause for the said failure. It is thus to be seen that as to whether the assessee has been able to prove that there was a reasonable cause Jar the assessee for not getting its accounts audited under section 44AB of the Act arui then to [furnish. the report by the specified date. The assessee's only reason given for not getting the accounts audited is that since he did not maintain any regular books or accounts or books of account the question of getting them audited under section 44AB simply did or could not arise. No other reason or reasons have been given by the assessee for not complying with the provisions of section 44AB of the Act. On the facts and the present case, the assessee's stand that he was not maintaining any books of account and as such the question of getting them audited under section 44AB did not arise, is not found to be at all bona fide and honest one as held by us above. The assessee has taken this stand with a motive to avoid the penal consequences of section 271B of the Act. It is thus clear the assessee has not been able to give any sufficient and reasonable for not getting the accounts whatsoever maintained by him audited under section 44AB of the Act. " Thus, the appellant was required to get its records i.e. books of account audited as per the provisions of Section 44AB of the Act. The plea that the appellant had not maintained books of account holds no merit and factually incorrect. I am of the opinion that in the present case the appellant

has been unable to prove that there was reasonable cause for failure to get the books of account audited as required u/s 44AB. Thus, the appellant was required to maintain its records i.e. books of account audited as per the provision of section 44AB of the Act. The plea that the appellant had not maintained books of account holds no merit and is factually incorrect.

6.2 I am of the opinion that in the present case the appellant has been unable to prove that there was reasonable cause for the failure to get the books of account audited as required u/s 44AB. In his submission, the appellant has clearly stated that he deals in share (including intraday) and all the records relating to such transactions are mentioned online by his broker. Therefore, the record of the transactions entered into by the appellant was always accessible to him. In view of the broad discussion held herein before and relying upon the cited case laws. I confirm the penalty u/s 271B imposed by the Ld.AO of Rs.1,50,000/-. Consequently, the grounds of appeal are hereby dismissed.

9. As far as the decisions referred and relied by the ld. counsel for the assessee are concerned, we find that they are distinguishable as the facts are different and the ratio laid down in these decisions are not applicable on the facts of the case. We, therefore, find no inconsistency in the finding of Ld. CIT(A) and the same stands confirmed. Grounds of appeal raised by the assessee are dismissed.

10. In the result, Appeal of the Assessee in ITANo.339/Ind/2020 is dismissed.

Order pronounced as per Rule 34 of I.T.A.T., Rules 1963 on ... 06.12.2021.

Sd/-
(RAJPAL YADAV)
VICE PRESIDENT

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Indore; दिनांक Dated : 06/11/2021

Patel/PS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore