

**IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'B' AT KOLKATA
[BEFORE SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER &
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER]**

[THROUGH VIRTUAL COURT]

**I.T.A. No. 280/Kol/2020
Assessment Year: 2015-16**

Chandra Kanta Falor.....Appellant
A-36, Armstrong Apartment, Sector - 2A,
Bidhannagar, Durgapur - 713212.
[PAN: AJPF 7591 E]

Vs

ACIT, Circle - 1, Durgapur.....Respondent

Appearances by:

Shri Arvind Agarwal, AR appearing on behalf of the Assessee
Smt. Ranu Biswas, ACIT, appearing on behalf of the Revenue:

Date of concluding the hearing : February 02, 2022

Date of pronouncing the order : March 16, 2022

ORDER

PER SONJOY SARMA, JM

This appeal filed by the assessee for A.Y. 2015-16 against the order dated 27.12.2019 passed by the Ld. CIT(A), Durgapur. The assessee in this appeal has taken the following grounds:

"i. For that, in view of facts and circumstances of the case and submissions made, Ld. CIT(A), Durgapur erred on facts as well as in law in confirming the penalty of Rs. 1,50,000/- imposed by ld. Assessing Officer u/s 271B of the Income Tax Act, 1961 in most arbitrary manner.

ii. For that, without prejudice to the above, Ld. CIT(A), Durgapur was not justified in not considering the submission in proper perspective that returned income was accepted in assessment made under section 143(3) for the year under appeal as all transactions were done on line through recognised stock exchanges and were supported by documentary evidences.

iii. For that, without prejudice to the above, Ld. CIT(A) Durgapur was not justified in appreciating the fact that the assessee is not required to maintain books of accounts as his speculation transactions were duly supported by proper documentary evidences and have not derived any benefit by not obtaining audit report u/s 44AB of the I.T. Act, 1961.

iv. For that, order of Ld. AO is otherwise bad on facts as well as in law.”

2. The brief facts of the case are that the assessee is engaged in the business of trading in shares and derivatives and filed her return of income for the assessment year 2015-16 on 22.03.2016 declaring total income of Rs. 16,09,190/-. The return was processed u/s 143(1) of the Income Tax Act, 1961 on 03.05.2016 and the case was selected through CASS for limited scrutiny. Accordingly, notice u/s 143(2) dated 29.01.2016 was issued by the ITO, Ward-1, Durgapur and it was properly served on the assessee. Further, notice u/s 142(1) dated 19.06.2017 was also issued to the assessee. Thereafter, the case was transferred to ACIT, Circle-1, Durgapur on 25.07.2017. The notice u/s 142(1) dated 16.08.2017 was again issued upon the assessee, in response to the same, the Ld. AR of the assessee appeared before the AO. The Ld. AR furnished the details as called for by the AO. While passing the order, the AO finds that the assessee was engaged in investing/trading in shares/derivatives/currency and in profit and loss accounts has shown loss of Rs. 8,26,857/- from her business activity and the turnover by the assessee during financial year 2014-15 are as under:

<i>Transaction Code</i>	<i>Value of transaction (in Rs.)</i>	<i>STT paid (in Rs.)</i>
03	43,762,31/-	1094
04	1,366,308/-	232.27
05	455,506,572/-	45,550/-

The AO was of the view that the quantum of transaction made by the assessee during the FY. 2014-15 was above auditable limit and accounts of the assessee were required to be audited in terms of section 44AB of the IT Act. However, she failed to get her accounts audited and accordingly penalty proceedings u/s 271B of the act was initiated by

issuing notice u/s 271B of the Act. Aggrieved by the said order dated 18.06.2018, she preferred an appeal before the Ld. CIT(A)- Durgapur where in the Ld. CIT(A) discussed the appeal by holding and observing as under:

“I have carefully considered the facts of the case and the arguments preferred by the appellant and have also referred to the decisions rendered by different courts on issues similar to the one in this case. I find that various Courts and Tribunals have ruled that in case of genuine and bona fide reasons the authorities must take a lenient view of the matter. However, in the instant case, except for stating that the appellant was under a bona fide belief that she was not required to get her accounts audited, there is no evidence or any fact that she actually was under such a bona fide belief. I find she had the services of a qualified chartered accountant/ tax practitioner. As such, it was not her case that she had worked under complete ignorance of law. In such a situation, in my view, the claim of the appellant being under a bona fide belief that she was not required to get her books audited, is not proved. The appeal is, therefore dismissed.”*

3. At the time of hearing the learned AR placed before us, the copy balance sheet along with ledger accounts (speculation profit and loss account). He further submitted that the assessee is engaged in buying and selling of shares without taking delivery of the same. Although, the same transactions are speculative in nature and the transactions in shares are not delivery based, it is only the net of the sales and purchase is to be treated as turnover u/s 44AB of the Act. Further, he relied upon the guidance note on Tax Audit issued by the Institute of Chartered Accountant and submitted that there is no violation of the provisions of section 44AB of the Act. Hence the penalty proceeding u/s 271B could not be levied. The Ld. AR of the assessee in defence of his arguments relied upon the judgements of the different benches of ITAT as under:

“i. Santosh Ghanshyam Biyani vs ITO-4(2)(2) in ITA No. 6008/Mum/2018. Hon’ble Mumbai Bench has followed the ratio of the judgement of the

Hon'ble ITAT, Kolkata Bench in the case of Off-Shore India Ltd. vs DCIT reported in (2017) 87 taxmann.com 202.

ii. Rajjak Ahmed Khan vs ITO ITA No. 1181/JP/2019 dated 13th January, 2020 (Jaipur).

iii. Sanjay Prakash vs ITO ITA No. 1052 to 1054/JP2019 dated 17th February 2020 (Jaipur).

iv. Dwaraknath Krishnaram vs ITO ITA No. 3215/Chny/2019 dated 25th February, 2020 (Chennai)."

4. We have heard the rival parties and perused the material on records including the case laws cited before us. We observe that the penalty imposed u/s 271B for not getting the accounts audited as according to him the turnover exceeds the threshold limit as prescribed u/s 44AB of the Act. However, we find that the assessee is doing non delivery based transactions and the transactions are settled in short span without taking deliveries of shares. In such type of typical trading where the derivative trading is done without physical delivery of shares, the trade is allowed against margins of total transactions done that the assessee and turnover as considered to be net of buying and selling in derivative/shares. In such cases the turnover has to be determined on the basis net of sales and purchase in derivate of shares. The case of the assessee is squarely covered by the decision of the coordinate bench in the case of Santosh Ghanshyam Biyani vs ITO operative part whereof is enclosed:

"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 u/s 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 contentions, 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, Circle-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.

5. Keeping in view all the facts and circumstances of the case and relying on the decision of coordinate bench in the case of Mr. Santosh Ghanshyam Biyani (supra), we are of the view that there is no requirement for getting the accounts audited u/s 44AB of the Act as the turnover is less than the prescribed limit and no penalty can be levied

upon the assessee u/s 271B of the Act. Therefore, we set aside the order of Ld. CIT(A) and direct the AO to delete the penalty.

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

Order Pronounced in the Open Court on 16th March, 2022.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(SONJOY SARMA)
JUDICIAL MEMBER

Dated: 16/03/2022

Biswajit, Sr. PS

Copy of order forwarded to:

1. Appellant: Chandra Kanta Falor.
2. Respondent: ACIT, Circle-1, Durgapur.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Assistant Registrar
ITAT Kolkata Benches, Kolkata