

**IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD
BEFORE SHRI P.M. JAGTAP, VICE-PRESIDENT
AND MS. MADHUMITA ROY, JUDICIAL MEMBER**

**ITA No. 1889/Ahd/2019
Assessment Year : 2015-16**

Gaurangbhai Chimanbhai Kapadia, House No.836, Muni Ward No.8, Bhavsar Wad, Nadiad, Kheda-387001 PAN : ADMPK 6603 N	Vs	Income Tax Officer, Ward-2, Nadiad
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri Sanjay R. Shah, AR
Revenue by :		Shri Shramdeep Sinha, Sr DR

सुनवाई की तारीख/Date of Hearing : 18/07/2022
घोषणा की तारीख /Date of Pronouncement: 05/08/2022

आदेश/ORDER

PER P.M. JAGTAP, VICE-PRESIDENT :

This appeal filed by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-2, Vadodara ["CIT(A) in short]" dated 04.10.2019 whereby he confirmed the penalty of Rs.1,50,000/- imposed by the Assessing Officer under Section 271B of the Income-tax Act, 1961 ["the Act" in short].

2. The assessee, in the present case, is an individual who suffered a loss of Rs.2,52,12,010/- on derivative transactions during the year under consideration. Since the turnover of the assessee involved in the said transactions as worked out by the Assessing Officer was Rs.5,87,05,414/-, he was of the view that the assessee was liable to get his accounts audited by an accountant before the specified date and furnish the report of said audit in the prescribed form duly signed and verified as per Section 44AB of the Act. Since there was a failure on the part of the assessee to comply with the said requirement, the Assessing Officer issued a notice requiring the assessee to show-cause as to why penalty under Section 271B of the Act should not be imposed. In reply, it was submitted by the assessee that he was engaged in share market future/option and commodity transactions; and since the delivery element was absent in such types of

transactions, the said transactions did not form part of the turnover as held in various judicial pronouncements. The Assessing Officer did not find this explanation offered by the assessee to be satisfactory. By relying on the guidance note issued by the Institute of Chartered Accountants of India (ICAI), he held that total of favourable (Profit) and unfavourable (loss) difference in case of derivatives and future/option transactions was liable to be taken as turnover besides premium received on sale of options and since the total turnover of the assessee so worked out was more than the specified limit of Rs.1 crore, the assessee was required to comply with the requirement of Section 44AB of the Act. As there was a failure on the part of the assessee to comply with the said requirement, the Assessing Officer imposed a penalty of Rs.1,50,000/- on the assessee under Section 271B of the Act.

3. The penalty imposed by the Assessing Officer under Section 271B of the Act was challenged by the assessee in the appeal filed before the learned CIT(A); and, since the learned CIT(A) did not find merit in the submission made by the assessee in support of his case, he proceeded to confirm the penalty imposed by the Assessing Officer under Section 271B of the Act vide paragraph No.5.4 of his impugned order as under :-

"5.4. I have considered the above facts and circumstances and find that the assessing officer had noted that the assessee has incurred a loss of Rs.2,52,12,010/- and the total turnover worked out to Rs.5,87,05,414/-, turnover of the assessee has been calculated as per Para 5.14(b) of Guidance note on Tax Audit under section 44AB of the Act (revised 2014 Edition) issued by ICAI. During the appellate proceeding, the AR of the appellant was requested to submit the copy of form 10DB, but the AR of the appellant has not file the copy of form 10DB. It appears that the appellant has nothing to say on this issue, the appellant has also agreed his incurred loss of Rs,2,52,12,010/- and total turnover to Rs.5,87,05,414/- and appellant stated that there is not getting the accounts. audited in as much as there is loss resulting from derivative/future options transactions in question which is not claimed to be set off or carried forward and he was under bonfide belief that he is not required to get account audit and therefore he had not got accounts audited u/s. 44AB in respect of such derivative/future option transaction. In view of the above facts, it is cleared that the turnover calculating by the Assessing Officer is right and turnover is exceeding the limit prescribed u/s 44AB of the Act and assessee has violated the provisions of section 44AB of the Act and hit by the provision of section 271B of the Act. The appellant has done speculative business

in future and options and the so called argument of his being ignorant of provisions of section 44AB for his being bonafide belief that he is not required to get account audit and therefore he had not got accounts audited u/s.44AB. Therefore, the reasonable cause advanced fails as non-convincing and in-consistent with appellant's background doing transaction in future and options. Therefore, in my considered view, the penalty u/s.271B imposed by the Assessing Officer is sustainable and stand confirmed. Thus, grounds of appeal raised by the appellant is dismissed."

Aggrieved by the order of the learned CIT(A), the assessee has preferred this appeal before the Tribunal.

4. We have heard the arguments of both the sides and also perused the relevant material available on record. Although the learned DR has strongly supported the impugned order passed by the learned CIT(A) confirming the penalty imposed by the Assessing Officer under Section 271B of the Act by submitting that even the future/option transactions involved definite turnover as clarified by the ICAI in the guidance note and since the turnover worked out by the Assessing Officer as per the said guidance note was exceeding the specified limit, the assessee was required to comply with the requirement of Section 44AB of the Act, it is observed that the issue involved in this appeal of the assessee is squarely covered in favour of the assessee by various decisions of the Tribunal cited by the learned Counsel for the assessee. In one of such decisions rendered in the case of Growmore Exports Ltd Vs. ACIT, [2001] 78 ITD 95 (Mum), the Mumbai Bench of this Tribunal held that since no delivery had taken place in the speculative transactions, no turnover was effected at all by the assessee and he, therefore, was not liable to get its accounts audited under Section 44AB of the Act and there was no question of imposition of penalty under Section 271B of the Act. In another case of Banwari Sitaram Pasari HUF vs. ACIT, [2013] 140 ITD 320 (Pune-Trib), the assessee was engaged in online buying and selling of commodities through a commodity exchange, as a speculative activity wherein no physical delivery was taken or given and in these facts and circumstances of the case, it was held by Pune Bench of this Tribunal that total transactions booked by the assessee with commodity exchange could not be considered as turnover for the

purpose of holding the assessee liable to get his accounts audited under Section 44AB of the Act. As rightly contended by the learned Counsel for the assessee, the ratio of this decision of this Tribunal is clearly applicable in the present case and the assessee in any case can be said to have a *bona fide* belief that he was not required to get his accounts audited under Section 44AB of the Act on the basis of the proposition propounded by this Tribunal in the said cases. In the case of Bajrang Oil Bills Vs. ITO, [2007] 295 ITR 314 (Raj.), cited by the learned Counsel for the assessee, the Hon'ble Rajasthan High Court held that such *bona fide* belief constituted a reasonable cause for the failure of the assessee to comply with the provision of Section 44AB of the Act and the imposition of penalty under Section 271B of the Act was not justifiable. We accordingly cancel the penalty imposed by the Assessing Officer under Section 271B of the Act and confirmed by the learned CIT(A) and allow this appeal of the assessee.

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

Order pronounced in the open Court on 5th August, 2022 at Ahmedabad.

Sd/-

(MADHUMITA ROY)
JUDICIAL MEMBER

Ahmedabad, Dated 05/08/2022

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Sd/-

(P.M. JAGTAP)
VICE-PRESIDENT

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधिआयकर अपीलीय अधिकरण ,/DR,ITAT, Ahmedabad,
6. गार्ड फाईल /Guard file.

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आदेशानुसार/ BY ORDER,

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण
ITAT, Ahmedabad