

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

**Before: Shri P.M. Jagtap, Vice President
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 598/Ahd/2019
Assessment Year 2012-13**

Shri Naresh Gopaldas Bhojwani, 1 st Floor, A Wing, Gopal Palace, Opp: Ocean Park, Negrunagar, Satellite, Ahmedabad PAN: ABLPB3567B (Appellant)	Vs	The ITO, Ward-5(2)(3), Ahmedabad (Respondent)
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**Assessee by: Shri Pritesh L. Shah, A.R.
Revenue by: Shri Abhimanyu Singh Yadav, Sr. D.R.**

Date of hearing : 13-06-2022
Date of pronouncement : 31-08-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-9, Ahmedabad in Appeal no. CIT(A)-9/10325/DCIT(E)(HQ)/17-18 vide order dated 04/03/2019 passed for the assessment year 2010-11.

2. The assessee has taken the following Grounds of Appeal:

“1. The learned CIT(A)-V, Ahmedabad erred in law and on facts in confirming the penalty of Rs. 1,50,000/- imposed by A.O. under section 271B of the Income Tax Act, 1961, which is requested to be deleted.

Your appellant prays for leave to add, to alter and /or to amend the above ground before the final hearing of the appeal.”

3. At the outset, we observe that the appeal is time-barred by 21 days. The assessee has also filed an affidavit requesting for condonation of delay in filing the appeal. The reason cited by the assessee was that the order passed by the Ld. CIT(Appeals) sought to be appealed against, was handed over to the accountant of the assessee so that the same may be handed to the CA of the assessee for purpose of filing of appeal before ITAT. Meanwhile, the assessee during the intervening period got preoccupied with the illness of his mother. Subsequently, the assessee came to know that his accountant had misplaced the appeal papers and accordingly, the appeal could not be filed in time. The counsel for the assessee submitted that it is for the foregoing reasons, owing to the mistake of the accountant of the assessee, that the appeal could not be filed within time. Considering the explanation offered by the assessee by way of affidavit and also considering that there is only a minor delay of 21 days in filing of appeal, we are hereby condoning the delay in filing of appeal by the assessee in the interest of justice. The Ld. DR has also not objected to our condoning the delay in filing the appeal.

4. Coming to the merits of the case, the brief facts of the case are that the assessee filed return of income declaring total income of ₹ 4,96,890/- on 08-04-2013. Order under section 144 of the Act was passed on 28-03-2015 determining income at ₹ 60,25,470/-. During the course of assessment proceedings, the Ld. Assessing Officer observed the assessee had carried out transactions through commodity exchange to the tune of Rs. 477 crores. From the data obtained from the MCX Exchange, the Assessing Officer observed that the assessee had incurred a net loss in the above transaction. However, the assessee had not disclosed details of the above business transaction in the return of income and also concealed the information from the Department. As the transactions were huge, the assessee was asked to furnish audit report in Form 3CD for the impugned assessment year. The Ld. Assessing Officer further initiated penalty proceedings u/s 271B of the Act on the ground that the assessee's turnover had exceeded the prescribed limit u/s 44AB of the Act and he had failed to carry out audit u/s 44AB of the Act. The Ld. Assessing Officer thereafter levied penalty of Rs. 1,50,000/- u/s 271B of the Act for the reason that the turnover of the assessee from business of commodity exchange was Rs. 477 crores and the assessee failed to get his books audited as provided in section 44AB of the Act. The Ld. CIT(Appeals) dismissed the assessee's appeal (which was passed ex-parte on account on non-appearance on behalf of the assessee). Thereafter, the ITAT vide order dated 05-04-2018 in ITA number 3472 and 3488/ Ahd/ 2016 restored the matter to the file of Ld. CIT(Appeals) to hear the matter on merits afresh after giving reasonable opportunity of hearing to the assessee. In remand proceedings before Ld. CIT(Appeals), despite several notices,

again none appeared for the assessee, and accordingly, Ld. CIT(Appeals) confirmed the penalty u/s 271B of the Act with the following observations:

“Decision:

5.3 I have carefully considered the penalty order and facts available on record. It is seen that the A.O. levied the penalty on the ground that the assessee has failed to get his books of accounts audited as provided in section 44AB of the I.T. Act. For the detailed reasoning given at paras-2 to 6 of the penalty order, impugned penalty was levied. In the statement of facts filed along with the appeal has been duly considered. Appellant’s contentions in the statement facts, as reproduced above, are general, vague and unsubstantiated therefore the A.O’s observations remain uncontroverted. Considering the above discussion, no interference is called for. Accordingly, the penalty levied by the A.O. of Rs. 1,50,000/- under section 271B of the Income-tax Act, 1961 is confirmed.”

5. The assessee is in appeal before us against the aforesaid order of Ld. CIT(Appeals). The Ld. Counsel for the assessee submitted that the assessee is earning income from Salary, House Property and Income from Other Sources and hence he is not required to maintain books of accounts. The assessee was under the bona-fide belief that he had entered into a capital gains transaction from which he had incurred a loss and he was not required to declare such loss in the return of income. Since the assessee is not required to maintain any books of accounts, there is evidently no requirement of audit u/s 44AB of the Act as well. The Ld. Counsel for the assessee drew our attention to page 74 of Paper-Book in the case of Bisauli Tractors 299 ITR 219 (All), in which it was held that if a person has not maintained any books of accounts, the question of audit does not arise. Hence, no penalty can be imposed u/s 271B of the Act.

6. In response, the Ld. DR submitted that it is evidently not clear whether the assessee has earned capital gains or engaged in a business transaction. It is further not clear whether the assessee has entered into a speculative or non-speculative transaction on the commodity exchange. Accordingly, the issue may be restored to the file of the Ld. Assessing Officer to ascertain the nature of transaction and to decide whether there was necessity to maintain books of account in the instant facts.

7. We have heard the rival contentions and perused the material on record. While the assessee is arguing that it has entered into a capital gains transaction, the Ld. DR is of the view that the true nature of the transaction needs to be decided for purpose of determining whether penalty may be imposed u/s 271B of the Act. Further, Ld. D.R. argued that it also needs to be ascertained whether the assessee has been engaged in the speculative or non-speculative transaction. In the case of **Om Stock & Commodities (P.) Ltd.**[2014] 48 taxmann.com 186 (Mumbai - Trib.), the ITAT held that value of sale transactions of commodity through MCX without delivery cannot be considered as turnover for purpose of section 44AB and, therefore, failure on part of assessee to get its accounts audited in such a case, would not lead to levy of penalty under section 271B of the Act. The Pune Tribunal in the case of **Banwari Sitaram Pasari HUF** [2013] 29 taxmann.com 137 (Pune - Trib.) held that where 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, total transactions booked with such commodity exchange could not be considered as 'turnover' for purposes of considering liability of assessee to get accounts

audited under section 44AB of the Act. In the present case, in absence of the assessee causing appearance before the Revenue Authorities, either at this stage of assessment proceedings nor at the stage of penalty proceedings under section 271B of the Act and neither at the appellate proceedings before Ld. CIT(Appeals) (It has been observed that the matter has been fixed twice before Ld. CIT(Appeals), once against the original penalty order and then subsequently again pursuant to directions of orders of ITAT vide order dated 05-04-2018 and on both occasions, the assessee did not cause appearance before Ld. CIT(Appeals), and therefore, the Department did not get any opportunity to ascertain the true nature of transaction carried out by the assessee and also whether there was requirement to maintain books of accounts. Accordingly, by way of final opportunity, matter is being restored to the file of the Ld. Assessing Officer to decide the nature of transaction and whether the assessee was required to maintain books of accounts. The assessee is also directed to cooperate in the matter. In case of further non-cooperation on part of the assessee, the Ld. Assessing Officer may kindly proceed on the basis of materials available on record.

8. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 31-08-2022

Sd/-
(P.M. JAGTAP)
VICE PRESIDENT
Ahmedabad : Dated 31/08/2022

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद