

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT
(Conducted Through Virtual Court)

**Before: Ms. Annapurna Gupta, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 228/Rjt/2019
Assessment Year 2015-16**

Shri Jay Nalin Shah, Swaminarayan Nagar, Junavas Madhpar, Bhuj-Kutch PAN No: BCNPS6768K (Appellant)	Vs	The ITO, Ward-2, Bhuj-Kutch (Respondent)
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**Appellant by : Shri Mehul Ranpura, A.R.
Respondent by : Shri B.D. Gupta, D.R.**

Date of hearing : 13-09-2022
Date of pronouncement : 21-10-2022

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

This is an appeal filed by the Assessee against the order dated 29.08.2019 passed by the Commissioner of Income Tax (Appeals)-3, Rajkot as against the confirmation of penalty levied u/s. 271B of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to Assessment Year 2015-16.

2. The brief facts of the case is that the assessee is an individual who has filed the Return of Income for the Assessment Year 2015-16 declaring total income of Rs. 6,11,880/-. The scrutiny assessment u/s. 143(3) was completed on 28.12.2017 assessing the total income at Rs.24,09,640/-. The Assessing Officer initiated penalty proceedings u/s. 271B of the Act on the alleged ground that the assessee had turnover of Rs. 4,79,20,728/- which exceed the limit as per the provisions of Section 44AB of the Act. The A.O. issued a show cause notice for levying penalty u/s. 271B. The assessee submitted that the A.O. himself has accepted the assessee has derived commission income of 2% from M/s. Flamingo Infra Pvt. Ltd. worth of Rs. 75,15,450/- and the assessee is providing huge accommodation entries and earned 2% commission on such transaction. Though the Assessing Officer has not accepted the explanation, however levied penalty of Rs. 1,50,000/- u/s. 271B of the Act.

3. Aggrieved against the same, the assessee filed an appeal before Ld. Commissioner of Income Tax(Appeals)-3, Rajkot. The assessee submitted before the Ld. CIT(A), the assessee was a semi whole seller in confectionery and biscuits. Regular books of accounts were maintained which have been confirmed by the A.O. as well. As per books of accounts, the assessee's turnover was Rs. 40,88,466/-. During the course of assessment proceedings, it was found that the assessee involved in providing accommodation entries on commission of 2% without making any real transaction of purchase or sales. The assessee in order to avoid long term litigation and to

buy peace of mind, accepted the unaccounted income of Rs. 7,26,336/- and paid due tax thereon. Thus it is not a case where turnover exceeds as per books. In this connection, the assessee relied upon decision of the Rajkot Bench in the case of Rajesh Hirabhai Patel in ITA No. 455/Rjt/2014 wherein ITAT held that 271B cannot be levied where no books of accounts have been maintained by the assessee. The assessee further relied upon ITAT Jaipur Bench decision in the case of Shri Nirmaklkumar Joshi and Krishnan Murfari Agarwal vs. ITO in ITA Nos. 73 & 74/JP/2018 wherein penalty has been deleted.

3.1. The Ld. CIT(A) considered the above submissions and held that Section 44AB (a) talks of total sales, turnover or gross receipts and does not distinguish between disclosed or undisclosed turnover. In fact similar view was adjudicated by the Hon'ble Rajkot Bench in the case of Shailesh K. Chauhan vs. ITO in ITA No. 60 & 76/RJT/2014 wherein the business of Trading in mobile recharge vouchers were not disclosed in the books and wherein penalty u/s. 271B was confirmed. Following the above case law, the Ld. CIT(A) dismissed the appeal filed by the assessee and confirmed the levy of penalty u/s. 271B of the Act.

4. Aggrieved against the same, the assessee is in appeal before us. The Ld. Counsel Mr. Mehul Ranpura appearing for the assessee submitted before us a Paper Book and case laws. The Ld. Counsel further submitted that the A.O. has not rejected the books of account. However the A.O. made addition on the accommodation

entries and earning commission thereon which is not forming part of the books of account which has been identified during the course of assessment only and therefore the question of levying penalty u/s. 271B cannot be levied does not arise.

4.1. On this proposition, the Ld. A.R. relied upon Co-ordinate Bench decision of this Tribunal in ITA No. 359 & 455/Rjt/2014 dated 15.02.2018 in the case of Rajesh H Patel vs. ITO wherein it is held as follows:

“10..... It is undisputed facts that that in the original return of income the assessee has declared total income of Rs.1,47,590/- and agricultural income of Rs.1,87,400/-. During the course of assessment proceedings, the assessing officer had detected that there was cash deposit in the undisclosed bank a/c of the assessee as elaborated supra in this order., Thereafter, the assessee has filed revised return of income on 10th August, 2011 disclosing net profit after taking into account the undisclosed cash deposit found in the ICICI bank a/c. The income disclosed in the revised financial statement during the course of scrutiny assessment was not disclosed in the regular books of accounts. It is also undisputed fact that assessee has not maintained account in its books of accounts pertaining to share transactions carried out during the year under consideration. He has also not disclosed jot work income in the books of accounts. After considering the above facts and circumstances, we observe that separate penalty has been provided as per the provisions of section 271A for failure to keep, maintain or retain books of account, documents, etc. as required by section 44AA of the act. In view of the above, the assessee has violated the provision of section 44AA by not maintaining books of accounts and the assessing officer has not initiated any penalty as prescribed u/s. 271A of the act. We observe that section 271B is not attracted in a case where no account has been maintained and instead a recourse u/s. 271A can be taken. Therefore, we consider that in the case of the assessee the imposition of penalty u/s. 271B is not justified. Accordingly, the appeal of the assessee is allowed.”

4.2. Further the Ld. A.R. relied upon Jaipur Bench decision dated 27.03.2018 in ITA Nos. 73 & 74/JP/2018 in the case of Nirmal Kumar Joshi & Others vs. ITO deleting the penalty levied u/s. 271B wherein it is held as follows:

9. We have heard the rival contentions and perused the material available on record. We find that the AO has accepted the income offered in the return of income filed under section 44AD of the Act and at the same time, has brought to tax the undisclosed business receipts of Rs. 43,34,064/- offered for taxation

during the course of assessment proceedings. The AO has thus come to a conclusion that since the combined receipts exceed the prescribed threshold of Rs 60 lacs, the assessee has failed to get his books of accounts audited. We find that by accepting the income offered under section 44AD(1), the AO has thus accepted the assessee's eligibility for presumptive basis of taxation under section 44AD. Once the said eligibility is accepted, if we read the provisions of section 44AD and in particular sub-section (5), it clearly provides that an eligible assessee who claims his income from the eligible business is below the presumptive rate of 8% of total turnover or gross receipts, he shall be required to maintain books of accounts and also get them audited and furnish a report as required under section 44AB of the Act. Therefore, only in a scenario, where such a claim is made by the assessee whereby he claims that his income to be lower than 8% of total turnover or gross receipts, he will be required to maintain books of accounts and get them audited. Corresponding provisions are provided in section 44AA(2)(iv) of the Act as well. In the instant case, the assessee has not made any such claim in his return of income. Further, the Revenue has accepted the claim of the assessee as being eligible for such presumptive taxation where the assessee has reported a net profit of 8.09% on total reported turnover of Rs48,98,269. In such a situation, having not disturbed the said position under section 44AD, it cannot be said that the assessee has failed to get his books of accounts where undisclosed business receipts of Rs.43,34,064/- are brought to tax during the course of assessment proceedings and whereby the prescribed turnover threshold has been breached. Had the Revenue rejected the assessee's claim under section 44AD of the Act and thereafter, taking into consideration the declared turnover of Rs48,98,269 and undisclosed business receipts of Rs43,34,064, had come to a position that the assessee has failed to get offered his books of accounts, that in a such a scenario, the contention of the Revenue could have been accepted. Further, what has been referred in section 44AB is the books of accounts maintained in the regular course of business and where an admission is made by the assessee based on third party statement during the course of survey that the amount found deposited in the bank account belongs to the assessee, it cannot be said that regular books of accounts are maintained even in respect of unaccounted sales or business receipts and the penalty can be levied under section 271B of the Act. In this regard, we refer to the decision of the Coordinate Bench in case of Brij Lal Goyal vs. ACIT (supra) wherein it has been held as under:

"---11. It is evident from the aforesaid observation that books of account maintained in regular course only make the assessee eligible for grant of immunity from penalty and not with reference to any of such books, which have not been maintained in the regular course of business. Admittedly, the additional sales found as a result of search, was not recorded in the books of account regularly kept in the course of business by the appellant. Merely because the appellant accepted the additional sales for the purpose of assessment of the relevant year on the basis of entries in the seized documents, the same would not constitute accounts of the appellant maintained in the regular course of business and on that basis alone liability cannot be fastened on the assessee by holding him to have committed the default. Furthermore, the word "accounts" has not been defined under the IT Act. However, under s. 34 of the Indian Evidence Act, 1872, sanctity is attached to the books of accounts, if the books are indeed "account books", i.e., in original if they show on their face, that they are kept in the 'regular course of business'. So, the accounts under s. 34 of Indian Evidence Act means accounts which are maintained in the regular course of business. Accordingly we are satisfied that the record carrying entries from which the appellant admits of

additional sales are not the accounts as referred to under s. 44AB of the Act. On that basis it was not open to the AO to hold that the sales of the assessee as referred in s. 44AB of the Act have exceeded to Rs. 40 lakhs and by not getting such accounts audited from an accountant, the appellant has committed a default. Such a finding arrived at by the AO is reversed."

10. In light of above discussions and in the entirety of facts and circumstances of the case, the penalty levied u/s. 271B is hereby deleted. In the result, the appeal of the assessee is allowed.

4.3. The Ld. A.R. further submitted that the following the above decision, Jaipur Tribunal in ITA No. 754/JP/2016 dated 23.01.2009 in the case of Satya Prakash Mundra vs. ITO wherein it is held as follows:

"The addition made by the Assessing Officer during the assessment proceedings on the basis of unaccounted sale cannot be regarded as the turnover for the purpose of Section 44AB of the act because the documents relied upon by the A.O. are neither the part of books of account nor would substitute the books of account or constitute the books of account of the assessee regularly maintained. Therefore, the books of account maintained by the assessee in regular course of business cannot be substituted by the material gathered by the Assessing Officer in the course of some survey in the case of third party though the said material may be relevant evidence for making the addition to the income of the assessee. Hence, in view of the facts and circumstances and following the earlier decision of this Tribunal, the penalty levied U/s 271B of the Act is deleted."

4.4. Thus the Ld. Counsel pleaded there is no justification of levying penalty u/s. 271B of the Act and requested to delete the same and allow the assessee appeal.

5. Per contra the Ld. D.R. appearing for the Revenue supported the order of the Lower Authorities and pleaded to confirm the levy of penalty u/s. 271B of the Act.

6. We have heard both sides arguments and perused the materials available on record including the Paper Book and case laws filed by the assessee. The consistent stand of the assessee is that his

business turnover is below sixty lakhs and no question of Audit Report u/s. 44AB of the Act and consequently penalty cannot be levied u/s. 271B of the Act. Further it is seen from the assessment order, unaccounted commission income at 2% by providing accommodation entries were found during the assessment proceedings and appropriate tax thereon was paid by the assessee. Section 44AB of the Act describes the books of accounts maintained in the regular course of business only. When an admission is made by the assessee based on third party statement during the assessment proceedings and that amount found deposited in the bank account belong to the assessee, it cannot be said that the regular books of accounts are maintained even in respect of unaccounted business receipts and penalty cannot be levied u/s. 271B of the Act. Jaipur Bench of this Tribunal has considered, the word “accounts” has not been defined under the Income Tax Act. However, u/s. 34 of the Indian Evidence Act, 1872 means accounts which are maintained in regular course of business. Thus the additional income accepted by the assessee during the course of assessment are indeed “accounts” as referred u/s. 44AB of the Act.

6.1. Further the imposition of penalty under section 271B of the Act is not mandatory, rather it is discretionary, because if the assessee proves that there was a “reasonable cause” for the said failure, then the Assessing Officer ought to have considered the same and then proceed with levying penalty. For better understanding, Section 271B is extracted as follows:

271B. 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], [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 fifty thousand rupees], whichever is less.]

6.2. A perusal of the above provision shows that the Parliament has used the words "may" and not "shall", thereby making their intention clear in as much as that levy of penalty is discretionary and not automatic. The said conclusion is further justified by Section 273B of the Act namely "penalty not to be imposed in certain cases". A careful reading of Section 273B encompasses that certain penalties "shall" be imposed in cases where "reasonable cause" is successfully pleaded. It is seen that penalty imposable u/s 271B is also included therein. By the said provisions, the Parliament has unambiguously made it clear that no penalty "shall be" imposed, if the assessee "proves that there was a reasonable cause for the said failure". As noticed, if the statutory provision shows that the word "shall" has been used in Section 271B, then the imposition of penalty would have been mandatory. Section 271B as extracted above further throws light on the legislative intent as it specifically provides that no penalty "shall' be imposed if the assessee proves "that there was reasonable cause for the said failure".

6.3. In the facts of the present case, it is seen that the explanations offered by the assessee have been ignored by the Assessing Officer

as well as Ld. CIT(A) and levied penalty u/s. 271B of the Act. The discretion available u/s. 273B is not exercised by the Lower Authorities. For the reasons stated in the previous paragraph, we have no hesitation in deleting the penalty levied u/s. 271B of the Act.

7. In the result, the grounds raised by the Assessee is allowed and the assessee appeal is hereby allowed.

Order pronounced in the open court on 21-10-2022

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER True Copy
Ahmedabad : Dated 21/10/2022

Sd/-
(T.R. SENTHIL KUMAR)
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,
राजकोट