

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" DELHI**

**BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.6645/DEL/2019
Assessment Year 2010-11

Shri Priyavarat, C/o CA Sanjay Kumar Gupta, 661-A, Gaushala Road, Near Vishwakarma Dwar Najafgarh, New Delhi	Vs.	ITO, Ward-42(1), Delhi.
TAN/PAN: AQWPP8066F		
(Appellant)		(Respondent)

Appellant by:	None		
Respondent by:	Shri S.M. Singh, Sr.DR		
Date of hearing:	17	11	2022
Date of pronouncement:	25	11	2022

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed by the Assessee against the order of the Commissioner of Income Tax (Appeals)-XIV, New Delhi ['CIT(A)' in short] dated 10.05.2019 arising from the penalty order dated 28.06.2018 passed by the Assessing Officer (AO) under Section 271B of the Income Tax Act, 1961 (the Act) concerning AY 2010-11.

2. As per the captioned appeal, the assessee has challenged the penalty levied by the Assessing Officer under Section 271B of the Act amounting to Rs.1 lakh for not furnishing tax audit report enjoin by Section 44AB of the Act.

3. When the matter was called for hearing, none appeared for the assessee. Accordingly, the matter was proceeded *ex-parte*.

4. The Assessing Officer while passing the assessment order relevant to Assessment Year 2009-10 in question, *inter alia* alleged that the gross turnover of the assessee stands upto Rs. 80,74,91,625/- which apparently exceeds the threshold provided by Section 44AB of the Act and therefore the assessee was under statutory obligation to get the account audited under Section 44AB of the Act. The Assessing Officer thus imposed penalty of Rs.1 lakh by invoking Section 271B of the Act for default in compliance of Section 44AB of the Act. In the first appeal, the CIT(A) confirmed the aforesaid action of the Assessing Officer.

5. Aggrieved, the assessee preferred appeal before the Tribunal.

6. We have perused the penalty order and the first appellate order thereon passed under Section 271B of the Act. We have also taken into account the contentions raised on behalf of the Revenue.

7. To begin with, it is observed that the expression turnover or gross receipt and sales form the qualifying criteria to determine whether a tax payer is liable to tax audit as contemplated under Section 44AB of the Act.

8. It is the stand of the assessee before the Revenue Authorities that the aggregate of Mark to Market (MTM) loss and MTM profit is the 'total turnover' for the purposes of Section 44AB of the Act as against the total value of transactions executed on the platform of the commodities exchange. Thus, the gross value of transactions which are settled without any delivery would not be

regarded as turnover of the assessee but instead net result of such derivative transactions would be taken to ascertain the turnover. We find substance in the aforesaid plea of the assessee raised before the Revenue. It is the aggregate of both positive and negative difference in the case of intraday trading of commodities (speculative transaction without delivery) is to be regarded as turnover. Similarly, the aggregate of both positive and negative difference is to be considered as turnover in the case of 'futures' (in the derivative segment). Likewise premium received on sale of 'options' is regarded as turnover in the case of 'options' trading.

9. On perusal of the submissions placed by the assessee before the Revenue Authorities, it is noted that the assessee was under *bona fide* believe that as per guidance net issued by ICAI on tax audit under Section 44AB, net result in derivative is to be considered as turnover in distinction to the gross value of such transactions. The Co-ordinate Bench of Tribunal in the case of *Sachin Marotrao Rangari vs. ACIT (2022) 143 taxmann.com 318 (Rajkot)* held in the similar circumstances that reasonable cause exists in the case for not undergoing the tax audit where the turnover does not surpass the threshold limit when only net difference, i.e., profit or loss in speculative and derivative transactions are taken into account. The Co-ordinate Bench while coming to such conclusion has taken into account several other judgments as well as circular no. 6 of 2016 issued by the CBDT. In parity with the decision of Co-ordinate Bench, we find merit in the case of the assessee for giving benefit of mitigating circumstances in the absence of definition of expression 'Turnover' etc. provides in the Act. We thus set aside the order of the CIT(A) and direct the Assessing Officer to delete penalty so

imposed under Section 271B of the Act.

10. In the result, the appeal of the assessee is allowed *ex-parte*.

Order pronounced in the open Court on 25/11/2022.

Sd/-

**[CHALLA NAGENDRA PRASAD]
JUDICIAL MEMBER**

DATED: /11/2022

prabhat

Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**