

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणेमें।
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "A" :: PUNE

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकरअपीलसं. / ITA No.1396/PUN/2019
निर्धारणवर्ष / Assessment Year : 2015-16

Benchmarrk Realty LLP, Sr.No.17/19, Near Balaji Temple, Kate Wasti, Punawale, Pune – 411033.	V s	The DCIT, Circle-8, Pune.
PAN: AANFB 7064 Q		
Appellant/ Assessee		Respondent /Revenue

Assessee by	Shri Kishor B Phadke – AR
Revenue by	Shri Ramnath P Murkunde – DR
Date of hearing	09/12/2022
Date of pronouncement	22/12/2022

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This appeal filed by the Assessee is directed against the order of Id.Commissioner of Income Tax(Appeals)-6, Pune dated 25.07.2019 emanating from order of Assessing Officer dated 22.03.2018 under section 271B of the Act, 1961 for the A.Y.2015-16. The Assessee has raised the following grounds of appeal:

“1. The learned CIT(A) erred in confirming penalty levied by learned AO u/s 271B of ITA, 1961, for not complying with the provisions of section 44AB of ITA, 1961. Learned IT authorities ought to have appreciated appellant's bonafide belief, that, provisions of section 44AB of ITA, 1961 are not applicable to appellant for A.Y 2015-16.

2. Appellant contends that, in absence of any "Sale to

customers", provisions of tax audit u/s 44AB of ITA, 1961 are not applicable for A.Y 2015-16.

3. *The learned AO erred in levying & learned CIT(A) erred in confirming, penalty u/s 271B of ITA, 1961, without appreciating that appellant had reasonable cause (for not complying with provisions of section 44AB of ITA, 1961), as so envisaged u/s 273B of ITA, 1961.*

4. *The appellant craves leave to add / amend / alter / delete any of the above grounds of appeal."*

2. Brief facts of the case as per the assessment order, are that the assessee had filed return of income electronically for A.Y.2015-16 declaring total income of Rs.33,80,870/-. Assessee was in the business of Builder and developer. During the scrutiny assessment the Assessing Officer (AO) asked the assessee to file copy of Audit report, along with certain other documents. The Assessee replied that No Tax Audit done for the year as there was only Work in Progress (WIP) and no sale. The AO initiated penalty proceedings u/s 271B and then levied the penalty. Aggrieved by the same, the assessee filed appeal before the Commissioner of Income tax (Appeal). The Id.CIT(A) confirmed the penalty.

Submission of Ld.AR:

3. The Ld.AR submitted paper book. The Ld.AR submitted that during the year there was only work in progress, hence, the assessee was under bonafide belief that audit is not required and hence audit was not done. The Ld.AR submitted that there was no complete sale

during the year. There were only advances from the customers. Hence, the Ld.AR submitted that penalty was not leviable. The Ld.AR relied on certain case laws.

Submission of Ld.DR:

4. The Ld.DR relied on the order of the lower authorities. Ld.DR submitted that assessee is builder and follows Percentage Completion Method of Accounting. The Assessee in the Profit and Loss Account has shown Profit following Percentage Completion Method of accounting. During the year the WIP was Rs.81.46 Crores, out of that the work carried during the year was Rs.17.81 crores. The Ld.DR took us through the Assessment Order to explain that during the year 134 Sale Agreement have been executed valuing at Rs.88,37,83,270/- . The Assessee itself has accepted that 37.74% work was completed. After allowing the proportionate cost of construction the assessee offered Gross Profit of Rs.4,03,06,216/-. The L.DR submitted that assessee's turnover was more than the prescribed limit of Rs.1 crores under section 44AB. Hence it was mandatory for the assessee to audit the books of accounts.

Findings :

5. We have heard both the parties and perused the records. The AO has levied penalty u/s 271B vide order dated 22.03.2018 .The assessee has filed appeal against the Penalty order dated 22.03.2008

before the Id.CIT(A).Thus, the impugned order under dispute is Penalty Order u/s 271B dated 22.03.2008.

5.1 It is an admitted fact that the assessee is in the business of builder and developer. The assessee has not got its books of account audited for the year under consideration. It is also admitted fact that the assessee was maintaining books. The only reason submitted by the assessee is that the assessee was under bonafide belief as according to the assessee ,there was no sale and assessee had only received advances from customers against the bookings. However, it is an admitted fact that the assessee follows Percentage completion method of accounting, accordingly in the Profit and Loss account the assessee has shown as under :

Closing Stock Rs. 81,46,10,345/-,

Purchases Rs. 7,97,41,215/-,

Gross profit Rs.4,03,06,216/-

Net Profit Rs.71,81,557/-

In the B/S the assessee has shown Booking Money Rs.39,81,55,978/-.

5.2 For the sake of clarity the relevant provisions of the Act as applicable for AY 2015-16 are reproduced as under :

44AB. Every person,—

(a) carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds one crore rupees in any previous year; or

(b) carrying on profession shall, if his gross receipts in profession exceed twenty-five lakh rupees in any previous year; or

- (c) *carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AE or section 44BB or section 44BBB, as the case may be, and he has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, in any previous year; or*
- (d) *carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year, get his accounts of such previous year audited by an accountant before the specified date and furnish by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed*

Failure to get accounts audited.

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, the 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.*

5.3 Thus, it is mandatory for an assessee whose Total Sales, Turnover, or Gross receipts exceeds Rs.1 crores to get books of accounts audited. Thus, as per the provision of the Act, either Turnover, Sales, or Gross receipts shall exceed Rs. 1 crores. The legislature has used three words, Sales, Turnover, Gross receipts. So while analyzing the business of the assessee the AO has to find out whether the Sale, Gross Receipt or turnover is more than Rs. 1 crores then provisions of Section 44AB will be applicable. Therefore, if any one of Sale, Turnover or gross receipts is more than prescribed limit

the provision of Section 44AB will be applicable. In this context, we refer to following decisions of Hon'ble High Courts.

5.4 The Hon'ble Rajasthan High Court in the case of Bajrang Oil Mills Vs.ITO [2007] 163 TAXMAN 154 (RAJ.):

Quote, “ 23.Having given our careful consideration to the rival submissions and looking to the object with which the provisions have been enacted, it appears thatthe maximum limit of Rs. 40 lakhs has been fixed in the case of every person who is carrying on business and whose total receipts exceed (sic) from hisbusiness activity, which come under the head ‘Income from the profit and gains from the business’, has to be viewed as one integrated whole and notindependently. The assessment of a person is on the total income and not on the income derived from the different sources separately. The threexpressions used by the legislation, the total "sales", "turnover" or "gross receipts" though not defined under the Act, in the ordinary sense refers to thevolume of the business to which it relates and which is/are carried on by the assessee and in making assessment of profits and gains from the businesswhether such volume is a part of the business concerns trading in commodities or otherwise the business activities where the assessee has to indulge inincurring cost before receiving the amount in relation to that business or he is carrying on other business activities in which the cost factor is excluded bythe assessee and what he is receiving as charges for the work done by him, like job work, where the raw material is provided by the other manufacturer,the assessee is merely to relate his receipts to labour charges or procuring cost incurred by him along with part of his profit. It is in that sense thatbusiness which is carried on by the assessee has to be taken into totality. It may be noticed that the "sales", "turnover" or "gross receipts" are not words ofart used in relation to any individual transaction independently but has been

used as "sales", "turnover" or "gross receipts". The expression 'total' qualifies all the other three expressions, viz., 'sales', 'turnover, and 'gross receipts'. Total sales indicate the aggregate price of the sales of commodities carried out by the assessee as a trading business.

Obviously, it would not include such transfer of immovable or movable property by way of investment. Similarly, where the assessee is not merely selling the movable commodities, but relating to other trading activities, e.g., where assessee is a land developer and he is engaged in business of acquiring land developing it and selling houses or purchasing or is indulged in leasing business or is indulged in stock market so on and so forth, the expression "turnover" is made out to denote receipts from such activities. There may be third or residuary category which may not be termed properly a trading activity yet it is carrying on as business activity like job works for others, without himself being the manufacturer and selling such manufactured goods, or running a motor service garage, for the receipts of such business can aptly termed as receipts of firm. However, integral relation of receipts by a person from business, does indicate that it refers to revenue receipts only and do not include capital receipts and certainly not the receipts which are not relatable to business and may fall under the expression income to be subjected to tax as income from sources other than profits or gains from business, profession or vocation.”
Unquote.

5.5 ITAT Mumbai in the case of Anahaita Nalin Shah ITA No.7972/Mum/2010, has held as under :

Quote “Undisputed facts of the case are that the assessee had entered in to speculative business of the shares, that the transactions entered in to by her were more than the prescribed

monetary limit as envisaged by the provisions of section 44AB of the Act, that no bonafide reasons was furnished by the assessee, for not getting the books of accounts audited, before the AO or the FAA. We are of the opinion that words total turnover indicate the aggregate price of the commodities received by an assessee during the course of his trading or business activities. It does not differentiate between commodities sold under the head speculative business/normal business. Transfer of immovable or movable property by way of investment is not included by the provisions of the section 44AB of the Act. Provisions of the Act are clear that all revenue receipts are covered by the words turnover, wherever capital receipts are not to be considered a part of the turnover for the purposes of the said section. In other words, receipts which are not relatable to business and may fall under the expression 'income to be subjected to tax as income from sources' do not form part of total turnover. Considering the principles governing the imposition of penalty u/s. 271 B and the facts of the case we are of the opinion that AO was justified in levying penalty for not her books of accounts audited. We find that the cases relied upon by the AR are not relevant to decide the issue as the facts of the case are totally different. Secondly, while deciding the case at that point of time Tribunal did not have the benefit of the decision of the Hon'ble High court of Rajasthan delivered in the case of Bajarang Oil Mills (supra). So, confirming the order of the FAA, we decide the effective ground of appeal against the assessee." Unquote.

5.6 In the case under consideration , it is an admitted fact by the assessee that assessee had earned Gross Profit of Rs.4,03,06,216/-. When Gross profit is more than Rs.4 crores, it means the Gross Receipts were definitely more than Rs.1 crores. Applying the above-mentioned decision of Hon'ble High Court, the assessee in the case has receipts more than Rs.1 crores. Therefore, the assessee was under

obligation to audit the books of account as per section 44AB of the Act. Admittedly the assessee failed to do so. There is penalty prescribed in the Section 271B of the Act for failure to comply provisions of Section 44AB.

5.7 The Hon'ble Bombay High Court, (the Hon'ble jurisdictional High Court) in the case of Shri Swastik Steels (P.) Ltd. Vs ACIT 264 ITR 447 has held as under :

Quote, " From the minutes, it appears that Shri Gandhi had objected to the holding of meetings on Sundays and at places outside the city limits. Secondly, the reasons given before the Commissioner of Income-tax (Appeals) show that there was an inter se fight between the Gandhigroup and the Jaju group. That, the Jaju group was keen to acquire the controlling stakes in the shareholding of the Gandhi group. In the circumstances, the Tribunal was right in holding that such disputes cannot be termed as a reasonable cause for waiving or dispensing with the penalty under section 271B of the Income-tax Act. " Unquote.

6. In the case under consideration, the assessee has merely stated that it was under bonafide belief. This explanation is not acceptable as the assessee is a builder, having advice of professionals like CA. Therefore, the explanation seems to be mere eye wash. The assessee has got its Balance Sheet prepared, Profit and Loss Account prepared from professionals and these are duly signed by CA. Therefore, the explanation of the assessee is not acceptable. The AO has levied

minimum penalty of Rs.1,50,000/-. As per provisions of Section 44AB r.w.s 271B, the minimum penalty of Rs.1,50,000/- is for default in not getting books audited when turnover, gross receipts or sales is above Rs.1 crores. Thus, any amount above Rs.1 crores will attract minimum penalty of Rs.1,50,000/-. Therefore, on the facts and circumstances of the case the penalty levied by the AO u/s 271B is upheld. Accordingly, grounds of appeal of the assessee are dismissed.

7. In the result, appeal of the Assessee is Dismissed.

Order pronounced in the open Court on 22nd December, 2022.

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 22nd Dec, 2022/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकरअपीलीयअधिकरण, पुणे/ITAT, Pune.