

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE: HON'BLE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 278/JP/2022
निर्धारण वर्ष/Assessment Year : 2012-13.

Shri Lokesh Kumar Sharma, 2 Ward No. 54 Govind Nagar W. Opp. Madhovilas Hospital, Jaipur.	बनाम Vs.	The Income Tax Officer, Ward 4(2), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AUUPS 4680 G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Ms Suhani Meharwal, CA

राजस्व की ओर से / Revenue by : Ms Monisha Choudhary (JCIT)

सुनवाई की तारीख / Date of Hearing : 22/11/2022

उद्घोषणा की तारीख / Date of Pronouncement: 15/02/2023

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

This appeal by the assessee is directed against the order of Id. CIT(A), National Faceless Appeal Centre (NFAC), Delhi dated 13.06.2022 for the assessment year 2012-13. The assessee has raised the following grounds of appeal :-

1. On the facts and in the circumstances of the case Id. AO (NFAC) as well as Id. CIT (NFAC) erred in impose the penalty u/s 271B for Rs. 75297/- without considering the facts of the case which is illegal, unjustified and liable to be quashed.
2. Assessee deserves right to amend, alter, modify and delete any ground of appeal on or before the date of hearing.

2. The brief facts of the case are that the assessee filed his return of income on 27.06.2019 declaring total income of Rs. 26,260/- from business. The assessment was completed under section 143(3) read with section 147 of the Income Tax Act, 1961 considering the income as Rs. 2,26,620/-. Apart from this, the AO initiated penalty proceedings under section 271B of the IT Act and consequently after providing opportunity of hearing to the assessee penalty of Rs. 75,297/- was imposed under section 271B of the Act on 27.01.2022. Aggrieved by the order of the AO, assessee filed appeal before the Id. CIT (A). However, considering the submissions of both the parties, the Id. CIT (A) dismissed the appeal filed by the assessee and upheld the imposition of penalty. Aggrieved by the order of the Id. CIT (A), the assessee preferred the present appeal before the Tribunal on the ground mentioned hereinabove.

3. The solitary ground raised by the assessee before me is with regard to the challenging the order of Id. CIT (A) (NFAC) in upholding the imposition of penalty under section 271B of the Act.

4. Before me, the Id. A/R appearing on behalf of the assessee has reiterated the same arguments as made by him before the Id. CIT (A) and also relied upon his detailed written submissions which are reproduced herein below :-

"Your honor, this appeal was filed against the order u/s 271B of the Income Tax Act, 1961 for A.Y. 2012-13.

Assessee has filed return of income u/s 148 on 27/06/2019, declaring total income of Rs. 26260/- from business, the assessment was completed u/s 143(3)/147 of IT Act 1961 considering income as 226620/-. AO initiated penalty u/s 271B in his order and thereafter Ld.AO passed the order u/s 271B imposing penalty for Rs. 75297/- on dated 27/01/2022 aggrieved by the AO order assessee file appeal with CIT(A) where Ld.CIT(A) dismissed the appeal.

Ground of appeal: - "On the facts and in the circumstances of the case Ld AO impose the penalty of rs 75297 on account of sec 271B without considering the facts available with the AO which is unjustified and liable to be quashed"

Your honour it is worthy to note that assessee during the year suffered from huge losses and various cases under RBI Act for cheque dishonored were filed against the assessee, he could not settle his liabilities in due time that's why he absconding from Jaipur for a year copy of FIR already submitted with AO at the time of assessment proceedings.

Your honour's AO himself accepted the truth of not maintaining proper books of accounts and not producing such books of accounts for the year under consideration which can be easily verified from the assessment order passed by Ld.AO (page no 4 of AO order) reproduced here under:

Assessee was insolvent and could not settle his liabilities in due time that's why he absconding from Jaipur for a year. Since he was not here in Jaipur and the trail of expenses debited to P and L were not available, tax auditor refused to sign the audit report. Further, the assessee has not produced the books of accounts and relevant bills/vouchers for verification.

Also, your honours Tax consultant of the assessee filed his ITR by collecting the information available with him i.e., sales, purchases and bank book but as no formal book were maintained by assessee therefore, he refused to sign the tax audit report mainly due to no books of accounts were maintained by assessee and also, he was not available in Jaipur.

Your honours Ld, AO himself accepted the fact to failed to produce books of accounts and bills/vouchers for verification in his order page no 5 of AO order which is reproduced as under: -

That the assessee failed to produce books of accounts and bills/vouchers for verification of purchases and other expenditures claimed in P&L account and hence the net profit arrived at by the assessee is not verifiable.

Also, your honours assessee himself admitted the fact of not maintaining the proper books of accounts in his earlier reply filed with AO as well as Ld.CIT(A).

Your honour it is worthy to note that "when the assessee did not maintain the regular books of account then the question of getting of books of accounts audited does not arise. Once, there is a violation of provisions of section 44AA of the Act the said violation cannot be extended to section 44AB of the Act. The provisions of Section 44AB of the Act can be invoked only when the assessee has complied with the provisions of Section 44AA of the Act. Therefore, the violation of Section 44AA of the Act cannot continue because once it is found that the assessee did not maintain the regular books of account the said violation cannot travel beyond the provisions

of Section 44AA and hence, cannot be held as a further violation of Section 44AB of the Act. The Hon'ble Allahabad High Court in case of CIT Vs. Bisauli Tractors (supra) while dealing with this issue as held in paras 11 to 14 as under: -

"11. In the case of S. Narayanappa & Bros. v. CIT [1961] 41 ITR 125 the Mysore High Court has held as follows: "What was urged before us was that in a case where an assessee has furnished no return at all before the Income-tax Officer, it should be presumed for the purposes of section 28(1)(b) that he has furnished a return of his income intimating the Income-tax Officer that his income is nil. It seems to me that the language of section 28(1) does not admit of any such construction since the clear requirement of the provisions of this sub-section is that an assessee on whom a penalty is proposed to be imposed under section 28(1)(b) should have in the first instance furnished his return. That, in my opinion, is the ordinary and grammatical meaning of the words occurring in the Act. To interpret the language of this provision in the manner suggested by the learned Government Pleader would, in my opinion, be too artificial and too far-fetched to commend itself for acceptance. Although it is true that the provisions of a statute like those contained in section 28(1)(b) have to receive to construction so as to promote the object of the statute, it is clear that when we interpret a penal provision like that contained in section 28(1)(b), the interpretation we should place upon it must accord with reason and justice and must be in accordance with the plain ordinary and rational meaning of the words contained in those provisions. So interpreted, I would not, in my opinion, be right in placing on section 28(1)(b) the construction for which the learned Government Pleader contends." (p. 133) 12. The Madras High Court in the case S. Santhosa Nadar v. First Addl. ITO [1962] 46 ITR 411 has gone to the extent that a voluntary return filed after the period of four years from the close of the assessment year is not a valid return and such a case should be regarded as if no return has been filed at all and it cannot be said in such a case that there has been a concealment of the particulars of income or deliberate furnishing of inaccurate particulars and section 28(1)(c) of the Income-tax Act, 1922 would not be applicable. The Madras High Court has held as follows: "When we come to section 28(1)(c), it deals specifically with the concealment of 'particulars' of income or the deliberate furnishing of inaccurate 'particulars' of income. In the setting in which this subsection finds place it is impossible to construe section 28(1)(c) except as relating to a case where a return has been filed but from which return particulars of income have been omitted or any particulars have been deliberately inaccurately furnished. The use of the expression 'particulars of his income' and 'particulars of such income' would be wholly inapposite in a case where no return has at all been filed; such a case would clearly come within the scope of section 28(1)(a) alone." 13. This Court in CWT v. Yadu Raj Narain Singh [2006] 286 ITR 564 also taken the same view. It has held as follows: "Thus applying the strict construction of penalty provisions contained in clause (1) of sub-section (c) of section 18 of the Act, we find that prior to the amendment in Explanation 3 by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1-4-1989 in a case where the person who has previously been assessed under the Act does not file any return in response to the notice or even where time for filing ITA No. 38/JP/2018 Shahnaz Khanam vs. ITO 7 the return has

expired has not filed any return there cannot be any concealment for which penalty provision can be imposed. In view of the foregoing discussions, we are of the considered opinion that in the present case the respondent assessee has not concealed the particulars of his income for which wealth no penalty under clause (1) of sub-section (c) of section 18 of the Act is exigible. 14. Therefore, section 271B of the Act is not attracted in a case where no account has been maintained and instead recourse under section 271A can be taken.” 7.

A similar view has been taken by the Hon'ble Gauhati High Court in case of Surajmal Parsuram Todi vs. CIT (supra) and held in para 6 as under: - “6. We have gone through the provisions of sections 44AA, 44AB, 271A and 271B of the Act. Maintenance of accounts is envisaged under section 44AA and on failure to do so the assessee shall be guilty and liable to be penalised under section 271A. Even after maintenance of books of account the obligation of the assessee does not come to an end. He is required to do something more, i.e., by getting the books of account audited by an accountant. But when a person commits an offence by not maintaining the books of account as contemplated by section 44AA the offence is complete. After that there can be no possibility of any offence as contemplated by section 44AB and, therefore, in our opinion, the imposition of penalty under section 271B is erroneous. The Tribunal has overlooked this aspect of the matter. Of course, it is apparent from the records that the assessee failed to maintain the books of account as required under section 44AA and for that penalty is prescribed under section 271A. It is for the Tribunal to take action in accordance with law. ITA No. 38/JP/2018 Shahnaz Khanam vs. ITO 8 The Delhi Benches of the Tribunal in case of Nirmal Kumar Jain vs. ITO (supra) has held in paras 3 & 4 as under:- “3. In so far as the penalty u/s 271B is concerned, it is noticed that the AO has recorded a categorical finding on page 2 of the assessment order that no books of account were maintained by the assessee. Under such circumstances, a question arises as to whether any penalty can be imposed u/s 271B for not getting the books of account audited. The Hon'ble Gauhati High Court in Suraj Mal ParasuramTodi vs. CIT (1996) 222 ITR 691 (Gau.), has held that where no books of account are maintained, penalty should be imposed for non- maintenance of books of account u/s 271A and no penalty can be imposed u/s 271B for violation of section 44AB requiring ITA Nos.6696 & 6645/Del/2014 audit of accounts. Similar view has been taken by the Hon'ble Allahabad High Court in CIT vs. Bisauli Tractors (2008) 299 ITR 219 (All). The Hon'ble Allahabad High Court reiterated the similar view in CIT and Anr. Vs. S.K. Gupta and Co. (2010) 322 ITR 86 (All) by holding that requirement of getting the books of account audited can arise only where the books of account are maintained. In the absence of the maintenance of books of account, there can be no penalty u/s 271B of the Act. In view of the foregoing legal position emanating from the judgment of the two Hon'ble High Courts, we are convinced that penalty u/s 271B ought not to have been levied because the assessee admittedly did not maintain any books of account as has been recorded in the assessment order itself. We, therefore, order for the deletion of penalty. 4. As regards the imposition of penalty u/s 271(1)(c) of the Act on the addition of Rs.7.50 lac, we find that this addition has resulted on estimation of income at 5% on estimated sales ITA Nos.6696 & 6645/De1/2014 of

Rs.1.50 crore. Except that there is no other basis for imposition of penalty. The Hon'ble Delhi High ITA No. 38/JP/2018 Shahnaz Khanam vs. ITO 9 Court in CIT vs. Aero Traders P. Ltd. (2010) 322 ITR 316 (Del) has upheld the view taken by the Tribunal in deleting penalty u/s 271(1)(c) which was imposed on the basis of addition made by the AO on estimated profit. Similar view has been taken in a series of judgments including the Hon'ble Punjab & Haryana High Court in CIT vs. Dhillon Rice Mills (2002) 256 ITR 447 (P&H). In this case also, the Hon'ble Punjab & Haryana High Court approved the view taken by the Tribunal in deleting the penalty u/s 271(1)(c) which was based on an estimate of income made by the AO. In view of the foregoing decisions, it is clear that the penalty so confirmed in the instant case cannot be sustained because it was imposed by the AO on the estimate of income made by him. We, therefore, order for the deletion of penalty.”

Also, your honour I want to rely on case of ITAT Jaipur Shahnaz Khanam vs. The ITO, Ward, Jhalawar ITA No. 38/JP/2018.

Hence, that when the assessee has not maintained the regular books of account and the penalty then no penalty can be levied for violation of Section 44AB of the Act.

I therefore request you to drop the penalty and oblige us.”

5. On the other hand, the Id. D/R appearing on behalf of the Department relied on the orders of the Revenue authorities and submitted that since there is a clear violation of provisions of section 44AB of the Act, therefore, the Revenue authorities have rightly imposed penalty by invoking provisions of section 271B of the Act.

6. I have heard Id. Counsels for both the parties and have also perused the material available on record and the judgments cited by the respective parties and the orders passed by the revenue authorities. From the record, it is noticed that it is an undisputed fact that order of assessment was passed under section 143(3) read with section 147 of the Act considering the income of the assessee at Rs. 2,26,620/- and consequently penalty proceedings under section 271B of the Act was initiated. It is important to mention here that the assessee from the day one had been submitting before the Revenue authorities that the assessee had suffered huge

losses and was booked in various cases under RBI Act for cheque dishonor and since the assessee could not settle his liabilities in due time, therefore, he was absconding from Jaipur and in this regard an FIR has already been registered against the assessee. Apart from this, assessee also had categorically mentioned that he was not maintaining any books of accounts and even the Tax Consultants of the assessee filed his ITR by collecting information available with him i.e. sales, purchases and bank book. But the said Tax Consultants has refused to sign the Tax Audit Report mainly on the ground that no books of accounts were maintained by the assessee.

6.1. I have also gone through meticulously the orders passed by the revenue authorities and in the order passed by the AO, I noticed that he also categorically mentioned that assessee has failed to produce books of accounts and bills/vouchers for verification of purchases and other expenditures claimed in the Profit & Loss account and hence the net profit arrived at by the assessee is not verifiable. Thus from the conjoint reading of the defence as set up by the assessee before the revenue authorities, I conclude that when assessee did not maintain regular books of accounts, then the question of getting the books of account audited does not arise at all. I am also of the view that since there is a violation of provisions of section 44AA of the Act and the said violation cannot be extended to section 44AB of the Act. The provisions of section 44AB of the Act can only be invoked when the assessee had first complied with the provisions of section 44AA of the Act. Therefore, in my view the violation of section 44AA of the Act cannot continue because once it is found that assessee did not maintain the regular books of account then the said violation cannot travel beyond the provisions of section 44AA and

hence cannot be held as further violation of section 44AB of the Act. In this regard, the Hon'ble Allahabad High Court in the case of CIT vs. Bisauli Tractors, 299 ITR 219 (All.) has held in paras 11 to 14 as under :-

"11. In the case of S. Narayanappa & Bros. v. CIT [1961] [41 ITR 125](#) the Mysore High Court has held as follows :

"What was urged before us was that in a case where an assessee has furnished no return at all before the Income-tax Officer, it should be presumed for the purposes of section 28(1)(b) that he has furnished a return of his income intimating the Income-tax Officer that his income is nil. It seems to me that the language of section 28(1) does not admit of any such construction since the clear requirement of the provisions of this sub-section is that an assessee on whom a penalty is proposed to be imposed under section 28(1)(b) should have in the first instance furnished his return. That, in my opinion, is the ordinary and grammatical meaning of the words occurring in the Act. To interpret the language of this provision in the manner suggested by the learned Government Pleader would, in my opinion, be too artificial and too far-fetched to commend itself for acceptance. Although it is true that the provisions of a statute like those contained in section 28(1)(b) have to receive to construction so as to promote the object of the statute, it is clear that when we interpret a penal provision like that contained in section 28(1)(b), the interpretation we should place upon it must accord with reason and justice and must be in accordance with the plain ordinary and rational meaning of the words contained in those provisions. So interpreted, I would not, in my opinion, be right in placing on section 28(1)(b) the construction for which the learned Government Pleader contends." (p. 133)

12. *The Madras High Court in the case S. Santhosa Nadar v. First Addl. ITO [1962] [46 ITR 411](#) has gone to the extent that a voluntary return filed after the period of four years from the close of the assessment year is not a valid return and such a case should be regarded as if no return has been filed at all and it cannot be said in such a case that there has been a concealment of the particulars of income or deliberate furnishing of inaccurate particulars and section 28(1)(c) of the Income-tax Act, 1922 would not be applicable. The Madras High Court has held as follows :*

"When we come to section 28(1)(c), it deals specifically with the concealment of 'particulars' of income or the deliberate furnishing of inaccurate 'particulars' of income. In the setting in which this sub-section finds place it is impossible to construe section 28(1)(c) except as relating to a case where a return has been filed but from which

return particulars of income have been omitted or any particulars have been deliberately inaccurately furnished. The use of the expression 'particulars of his income' and 'particulars of such income' would be wholly inapposite in a case where no return has at all been filed; such a case would clearly come within the scope of section 28(1)(a) alone."

13. *This Court in CWT v. Yadu Raj Narain Singh [2006] [286 ITR 564](#) also taken the same view. It has held as follows :*

"Thus applying the strict construction of penalty provisions contained in clause (1) of sub-section (c) of section 18 of the Act, we find that prior to the amendment in Explanation 3 by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1-4-1989 in a case where the person who has previously been assessed under the Act does not file any return in response to the notice or even where time for filing the return has expired has not filed any return there cannot be any concealment for which penalty provision can be imposed. In view of the foregoing discussions, we are of the considered opinion that in the present case the respondent assessee has not concealed the particulars of his income for which wealth no penalty under clause (1) of sub-section (c) of section 18 of the Act is exigible.

14. *Therefore, section 271B of the Act is not attracted in a case where no account has been maintained and instead recourse under section 271A can be taken."*

A similar view has been taken by the Hon'ble Gauhati High Court in the case of Surajmal Parsuram Todi vs. CIT, 222 ITR 691 (Gauhati) and has held in para 6 as under :-

"6. We have gone through the provisions of sections 44AA, 44AB, 271A and 271B of the Act. Maintenance of accounts is envisaged under section 44AA and on failure to do so the assessee shall be guilty and liable to be penalised under section 271A. Even after maintenance of books of account the obligation of the assessee does not come to an end. He is required to do something more, i.e., by getting the books of account audited by an accountant. But when a person commits an offence by not maintaining the books of account as contemplated by section 44AA the offence is complete. After that there can be no possibility of any offence as contemplated by section 44AB and, therefore, in our opinion, the imposition of penalty under section 271B

is erroneous. The Tribunal has overlooked this aspect of the matter. Of course, it is apparent from the records that the assessee failed to maintain the books of account as required under section 44AA and for that penalty is prescribed under section 271A. It is for the Tribunal to take action in accordance with law.

The Delhi Benches of the Tribunal in case of Nirmal Kumar Jain vs. ITO (supra) has held in paras 3 & 4 as under:-

"3. In so far as the penalty u/s 271B is concerned, it is noticed that the AO has recorded a categorical finding on page 2 of the assessment order that no books of account were maintained by the assessee. Under such circumstances, a question arises as to whether any penalty can be imposed u/s 271B for not getting the books of account audited. The Hon'ble Gauhati High Court in Suraj Mal Parasuram Todi vs. CIT (1996) 222 ITR 691 (Gau.), has held that where no books of account are maintained, penalty should be imposed for non-maintenance of books of account u/s 271A and no penalty can be imposed u/s 271B for violation of section 44AB requiring ITA Nos.6696 & 6645/Del/2014 audit of accounts. Similar view has been taken by the Hon'ble Allahabad High Court in CIT vs. Bisauli Tractors (2008) 299 ITR 219 (All). The Hon'ble Aliahabad High Court reiterated the similar view in CIT and Anr. Vs. S.K. Gupta and Co. (2010) 322 ITR 86 (All) by holding that requirement of getting the books of account audited can arise only where the books of account are maintained. In the absence of the maintenance of books of account, there can be no penalty u/s 271B of the Act. In view of the foregoing legal position emanating from the judgment of the two Hon'ble High Courts, we are convinced that penalty u/s 271B ought not to have been levied because the assessee admittedly did not maintain any books of account as has been recorded in the assessment order itself. We, therefore, order for the deletion of penalty.

4. As regards the imposition of penalty u/s 271(1)(c) of the Act on the addition of Rs.7.50 lac, we find that this addition has resulted on estimation of income at 5% on estimated sales ITA Nos.6696 & 6645/De1/2014 of Rs.1.50 crore. Except that there is no other basis for imposition of penalty. The Hon'ble Delhi High Court in CIT vs. Aero Traders P. Ltd. (2010) 322 ITR 316 (Del) has upheld the view taken by the Tribunal in deleting penalty u/s 271(1)(c) which was imposed on the basis of addition made by the AO on estimated profit. Similar view has been taken in a series of judgments

including the Hon'ble Punjab & Haryana High Court in CIT vs. Dhillon Rice Mills (2002) 256 ITR 447 (P&H). In this case also, the Hon'ble Punjab & Haryana High Court approved the view taken by the Tribunal in deleting the penalty u/s 271(1)(c) which was based on an estimate of income made by the AO. In view of the foregoing decisions, it is clear that the penalty so confirmed in the instant case cannot be sustained because it was imposed by the AO on the estimate of income made by him. We, therefore, order for the deletion of penalty."

Similar view has been taken by the Co-ordinate Bench of the ITAT Jaipur in the case of Shahnaz Khanam vs. ITO in ITA No. 38/JP/2018 dated 30.05.2018.

7. Therefore, looking to the entirety of facts and circumstances of the case, I find that since the AO himself has recorded a categorical finding in the order of assessment that no books of accounts were maintained by the assessee, therefore, in my view in such circumstances a question arises as to whether any penalty can be imposed under section 271B for not getting the books of accounts audited. In this regard, I rely upon the decision of Hon'ble Gauhati High Court in the case of Suraj Mal Parasuram Todi vs. CIT (supra) wherein it was held that where no books of account are maintained, penalty should be imposed for non maintenance of books of account u/s 271A of the Act and in such circumstances no penalty can be imposed under section 271B for violation of section 44AB of the Act. Therefore, while summing up the entire discussion and while relying upon the different decisions as mentioned supra, I am also of the view that in the instant case since assessee was not found to have maintained the books of account, therefore, no penalty can be imposed for not getting the books of accounts audited as prescribed under section 271B of the Act for violation of section 44AB of the Act. Thus keeping in view the binding precedent and principles laid down by the Hon'ble High Courts, I set aside

the order of the Id. CIT (A) and direct the AO to delete the penalty levied under section 271B of the Act. The ground of the assessee is allowed.

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

Order pronounced in the open court on 15/2/2023.

Sd/-
(संदीप गोसाईं)
(SANDEEP GOSAIN)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 15/2/2023.

Das/

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

1. अपीलार्थी / The Appellant-Shri Lokesh Kumar Sharma, Jaipur.
2. प्रत्यर्थी / The Respondent- The ITO Ward 4(2), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 278/JP/2022}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

