

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT “SMC” BENCH,
SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

आ.अ.सं./ITA No.133/SRT/2023 (AY 2015-16)

(Hearing in Virtual Court)

Jigneshbhai Rasikbhai Savalia, B/1 Bombay Market, Umarwada, Surat-395003 PAN No: AOBPS 3537 D	Vs	Income Tax Officer, Ward No.1(2)(2), Aayakar Bhavan, Majura Gate, Surat-395001
अपीलार्थी/ Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से /Assessee by	Shri Sapnesh R Sheth, C.A
राजस्व की ओर से /Revenue by	Shri Vinod Kumar, Sr-DR
Date of filing appeal	21.02.2023
सुनवाई की तारीख/Date of hearing	09.03.2023
उद्घोषणा की तारीख/Date of pronouncement	09.03.2023

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee is directed against the order of National Faceless Appeal Centre, Delhi [for short to as “NFAC/Ld. CIT(A)”] dated 18.01.2023 for assessment year 2015-16, which in turn arises out against the penalty levied by Assessing Officer/ Income tax Officer Ward-1(2)(2) Surat, under section 271B of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) dated 27.02.2018. The assessee has raised the following grounds of appeal:-

“1. On the facts of the case as well as law on the subject, the learned Commissioner of Income-Tax (Appeals), has erred in confirming the action of assessing officer in imposing penalty of Rs.69,210/- u/s 271B of the I.T.Act, 1961.

2. It is therefore prayed that penalty imposed by assessing officer and confirmed by Commissioner of Income-tax (Appeals) may please be deleted.

4. The Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.”

2. Brief facts of the case are that assessee is engaged in the trading of sarees and embroidery hand work in the name and style of Shyam Enterprise. In the present case the return of assessee was filed on 29.02.2016 declaring income of Rs.4,93,320/-. The case was selected for scrutiny and assessment was completed under section 143(3) of the Act on 03.11.2017 in accepting returned income. Subsequently Assessing Officer levied penalty under section 271B by holding that during the course of assessment, it was noted that total turnover of assessee was at Rs.1.38 crores, which was in exceeding of Rs.1.00 crores and assessee was required to furnish audit report under section 44AB on or before due date of filing return of income under section 139(1) of the Act. Notice under section 271B r.w.s 274 dated 03.11.2017 was issued to the assessee as to why penalty @ 0.5% of turnover should not be imposed upon him. The assessee filed his reply dated 04.12.2017. In reply, assessee stated that Accountant, Kuldeep Dathiriya (Patel) left service

on 01.09.20015, without finalizing assessee's account for the year under consideration. The assessee engaged another Accountant, which resulted in delay in finalising accounts. The assessee also stated that affidavit of Mr. Kuldeep Dathiriya (Patel) will be filed in due course. The reply of assessee was not accepted by Assessing Officer by holding that no documentary evidence that the Accountant, Mr. Kuldeep Dathiriya (Patel) left the job was filed. Therefore, the explanation of assessee that Accountant, Kuldeep Dathiriya (Patel) left the job is after thought and to avoid the consequence. The assessee has not filed audit report before the due date of filing the returned income under section 139(1). Thus, penalty @ 0.5% on the total sales of assessee is leviable. The Assessing Officer levied the penalty of Rs.69,210/- on gross receipt of Rs.1.38 crores in his order dated 27.02.2018.

3. Aggrieved by the penalty order, the assessee filed appeal before Ld. CIT(A). The case of assessee migrated to NFAC/Ld. CIT(A). Before NFAC/Ld. CIT(A). Before Ld CIT(A), the assessee filed his submission. The submission of assessee is recorded in para-4 of the order of NFAC/Ld.

CIT(A). The assessee in his submission, submitted that assessee was required to upload audit report before due date of filing return of income under section 139(1). The audit report was prepared by auditor on 24.09.2015, however, the same was not uploaded on the income-tax web portal and auditor was uploaded it at the time of filing assessee's return of income on 29.02.2016. The assessee was not aware of such technical provision, which requires uploading of audit report before due date. The auditor completed his audit report and handed over the copy to assessee on 24.09.2015. The assessee ought to have uploaded on the system of Department and such mistake was committed on the part of earlier auditor. The assessee further submitted that returned income of assessee was accepted without any variation. The assessee has given bona fide explanation for not getting his books of account timely as his earlier accountant Kuldeep Kathiriya has left the job before finalizing assessee's books of account during the year under consideration. During assessment, the Assessing Officer in due course assessment considered the audit report and passed assessment order under section

143(3) of the Act accepting returned income of assessee. There was no loss to the revenue on account of delay in uploading the audit report on e-portal of department. The assessee prayed in such circumstances, no penalty should be imposed. The assessee has no *mala fide* intention for violating the provision of law. It was the first year, in which there was delay in uploading audit report in e-portal of department. To support assessee's submission, the assessee relied upon the decisions of Hon'ble Allahabad High Court in the case of CIT vs. Jagat Rice Mills (2006) 160 TAXMAN 0005 (All) and Hon'ble Madras High Court in the case of CIT vs. Apex Laboratories (P.) Ltd. (2006) 284 ITR 364 (Mad) and CIT vs. Apex Laboratories (P.) Ltd. 320 ITR 498 (Mad).

4. The NFAC/Ld. CIT(A) after considering the submission of assessee held that turnover of assessee was exceeding Rs.1.00 crore of the specified limit as per provision of Section 44AB. The assessee failed to comply the said Section 44AB and accordingly liable for penalty under section 271B of the Act. The NFAC/ Ld. CIT(A) confirmed the action of Assessing Officer by referring the decision of Hon'ble Punjab & Haryana High Court in the case of Kwality

Skin vs. ACIT (2001) 254 ITR 386 (P&H), Hon'ble Kerala High Court in the case of K. Ravindranathan Nair (2009) 319 ITR 108 (Kerala) and further decision of Hon'ble Rajasthan High Court in the case of Madhuban Chemicals & Fertilizers Ltd. vs. CIT (157 TAXMAN 374 (Raj). Further aggrieved the assessee has filed present appeal before Tribunal.

5. I have heard the submission of Ld. Authorized Representative (Ld.AR) for the assessee and learned Senior Departmental Representative (ld. Sr DR) for the Revenue. The Ld. AR for the assessee submits that in case of assessee, the audit report was filed belatedly i.e. on 29.02.2016, which was filed at the time of filing returned income though assessee was required to file such audit report on or before 30.09.2015. The delay in uploading such audit report was due to the fact that assessee's earlier accountant, left his job. The assessee further engaged new accountant, who prepared such audit report on 24.09.2016, however, same should not be uploading immediately as assessee was not aware of such technical and procedural compliance. The assessment was completed after

considering the audit report filed with return of income and no variation in the return of income was made at the time of passing the assessment. The Ld. AR for the assessee submits that there was no deliberate or intentional act on the part of assessee in not uploading the audit report in due time rather was due to the fact that earlier accountant has left the job and no prejudice was caused to the revenue rather the Assessing Officer completed the assessee after going through the audit report in accepting the returned income of assessee. To support his submission, Ld. AR for the assessee relied on the case law which was relied before NFAC/Ld. CIT(A).

6. On the other hand, Ld. Sr-DR for the Revenue supported the order of lower authorities. The Ld. Sr-DR for the Revenue submits that assessee has not given any evidence that his earlier account left the job or not and no affidavit of such accountant was filed either before Assessing Officer or before NFAC/Ld. CIT(A). Further there is no evidence that audit report was prepared before 30.09.2015. The Ld. Sr-DR for the Revenue submits that in **para-5 to 5.2** has given categorically finding after relying on case law of Hon'ble

Punjab & Haryana High Court in the case of Kwality Skin (supra) and Hon'ble Kerala High Court in the case of K. Ravindranathan Nair (supra). The ld Sr DR for the revenue submits that the assessee has not shown good cause for not levying the penalty under section 271B.

7. In short rejoinder, Ld. AR for the assessee submits that once the accountant has left the job, the assessee could not obtain his affidavit despite pursuing. The date mentioned on the audit report is clear and self-explanatory that it was ready of 24.09.2015. Even otherwise there as sufficient cause within the scope of Section 273B explained before assessing officer.

8. I have considered the rival submissions of both the parties and have gone through the orders of lower authorities carefully. I have also deliberated on the case law cited by Ld. AR for the assessee. I find that there is no dispute that audit report was filed along with return of income under section 139(1) of the Act on 29.02.2016 and date of filing return under section 139(1) was 30.09.2015, the audit report was filed along with returned income. It is a matter of fact that Assessing Officer passed assessment order under

section 143(3) on 03.11.2017 in accepting the returned income of assessee.

9. I find that Hon'ble Madras High Court in the case of CIT vs. Apex Laboratories (P.) Ltd. (320 ITR 498-Mad) held when accounts were audited and the assessee got audit report but the same was filed along with returned income which was filed belatedly, penalty could not be imposed under section 271B of the Act. Therefore, I direct the Assessing Officer to delete the penalty under section 271B. the Hon'ble Allahabad High Court in CIT VS Jagat Rice Mills (supra) by following its earlier decision in CIT Vs Jai Durga Construction (245 ITR 857 –All) also held that penalty under section 271B was not leviable for delay in filing audit report as the assessee had got its accounts audited and obtained the audit report within the time allowed under section 139(1). I find that the ratios of the above decisions are squarely applicable on the facts of the present case.

10. I find that the case law relied by Ld. Sr-DR for the Revenue while confirming the penalty under section 271B, are at variance, in the case of Kwality Skin (supra), Hon'ble Punjab & Haryana High Court held that penalty was levied as there

was failure on the part of assessee to get the accounts audited. In case of K. Ravindranathan Nair (supra), the penalty under section 271B was upheld as no evidence to justify the delay in filing audit report was given. Similarly in the case of Madhuban Chemicals & Fertilizers Ltd. (supra) the audit report was not obtained within a specified date. Thus, the facts of all case laws relied by ld CIT(A) are at variance. Even otherwise when there are conflicting decisions of different Hon'ble High Courts on similar issue, as per the decision of Hon'ble Apex Court in the case of CIT Vs Vegetable Products, 88 ITR 192 (SC), the decision favourable to the assessee may be followed. Considering the fact that ratio of decisions of Hon'ble Madras High Court in the case of Apex Laboratories (P.) Ltd. (supra) and Allahabad High Court in CIT Vs Jagat Rice (supra) are directly applicable on the fact of the present case. Respectfully following the law laid down by Hon'ble Apex Court in the case of Vegetable Products (supra), the decision of Hon'ble Madras High Court in CIT Vs Apex Laboratories (P) Limited 320 ITR 498, is followed. In view of the aforesaid factual and

legal discussion, the ground of appeal raised by assessee is allowed.

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

Order pronounced on 09th March, 2023 in the open court.

Sd/-
(PAWAN SINGH)
[न्यायिक सदस्य JUDICIAL MEMBER]

सूरत/Surat, Dated: 09/03/2023
Dkp. Out Sourcing Sr.P.S

Copy to:

1. Appellant-
2. Respondent-
3. CIT
4. DR
5. Guard File

By order

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Senior Private Secretary/ Private
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Surat