

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH : COCHIN**

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
Ms. PADMAVATHY S., ACCOUNTANT MEMBER**

ITA No.676/Coch/2022
Assessment Year : 2016-17

Mr. B. Hameed, Shop No.24, New Vegetable Stores, N.V. Market, Palayam, Kozhikode – 2. PAN :	Vs.	The Income Tax Officer, Ward 1(2), Kozhikode.
APPELLANT		RESPONDENT

Assessee by	:	Shri A.V. Muralidharan, Advocate
Revenue by	:	Smt. J M Jamuna Devi, Sr. AR

Date of hearing	:	01.03.2023
Date of Pronouncement	:	08.03.2023

ORDER

Per Padmavathy S, Accountant Member:

This appeal is against the order of the CIT(A), National Faceless Assessment Centre (NFAC), dated 25.05.2022 for AY 2016-17

2. The assessee raised the following grounds of appeal –

“1. The order of the Commissioner of Income Tax (Appeals), NFAC, Delhi confirming the order imposing penalty issued by the Income Tax Officer, ward 1 (2) Kozhikode imposing penalty under Section 271B of the Income Tax Act, 1961 for the year 2016-17 is arbitrary against law, facts and circumstances of the case.

2. Considering the fact that the appellant has filed the audit report under section 44AB of the Income Tax Act 1961 and complied with the directions as mentioned in the section the levy of penalty is unjust and arbitrary on the ground that the belated Act on the part of the assessee to get either or both the pieces of work done is not punishable under this particular provision as held in the case of Bangalore Steel Distributors vs Income Tax Officer reported in 1994 49 ITD 668.

3. The learned officer ought to have appreciated the fact that there was a short delay of only 4 months in filing the audit certificate under section 44AB and therefore the penalty being discretionary could not have been levied since the delay was short and an explanation was also furnished for the delay and considering the circumstances of the case that there have been no deliberate intention on the part of the assessee to make delay in filing the audit report and in the absence of any deliberate intention on the part of the assessee as held in the case of Staywell Hotels Pvt. Ltd vs. Commissioner of Income Tax (2006) 283 ITR 92 (MP) and where there is lack of deliberate delay in getting the accounts audited penalty could not be levied as held in Gramin Vidyut Sahkari Samithi Maryadit v. Assistant Commissioner of Income Tax reported in 2008 35 ITR 89 (MP).

4. Considering the fact that the explanation regarding the circumstances in which the delay in getting the books of accounts audited which was beyond the control of the appellant, was duly submitted no penalty shall be impossible on person for any failure under section 271B of the Income Tax Act when the appellant has proved that there was a reasonable cause to file the audit report in time.

5. In view of the fact that the assessment order was disputed in appeal by the time the proposal to impose penalty is made the penalty should not have been imposed when the appeal is pending for disposal as provided under section 274 of the Income Tax Act 1961.

6. The imposition of penalty on the basis of making comparison of the date of filing of the audit report of the previous years which have got different circumstances and facts governing the filing of the audit report imposition of penalty under section

271B of the Income Tax Act 1961 holding that the audit report was filed belatedly during the previous years is arbitrary and unjust.

7. The learned officer erred in not considering the fact that the total turnover for the assessment year 2015-16 was only Rs.91,19,739/-which do not come under the provisions of section 44AB of the Income Tax Act 1961 and nevertheless the audit report was filed on 31.03.2016 along with the return of income filed.

8. On the above facts and grounds and such other grounds to be urged at the time of hearing the appellant prays that the Honarble Tribunal may be pleased to set aside order of the Income Tax Officer Ward 1 (2 Kozhikode and allow the appeal.”

3. The assessee is an individual and filed the return of income for the assessment 2016-17 on 18.02.2017 declaring a total income of Rs.4,68,420. The case was selected for scrutiny. The assessment was completed by making additions to the tune of Rs.26,22,745 on various grounds. Subsequently the AO initiated penalty proceedings u/s.271B for the reason that the assessee failed to furnish the audit report as required u/s.44AB before the specified date i.e.17.10.2016 and that the assessee has filed the report only on 18.02.2017. The assessee submitted before the AO that the finalisation of books of accounts for the purpose of audit was entrusted to a part-time accountant who could not attend office due to his illness and he finally succumbed to his illness. The assessee further submitted that the replacement could not be found immediately which resulted in delay in finalising the books of accounts and the audit of the same. The AO did not accept the submissions of the assessee and held that the assessee should have made serious efforts to replace the accountant and that the assessee has

been regularly delaying the filing of the audit report for earlier assessment years also. Accordingly the AO levied the penalty of Rs.69,787 u/s.271B of the Act.

4. Aggrieved the assessee preferred an appeal before the CIT(A) who upheld the levy of penalty on the same ground. The assessee is in appeal before the Tribunal against the order of the CIT(A).

5. The Id AR reiterated the submissions made before the lower authorities. The Id AR submitted that the accountant who was managing the maintenance of books of accounts was not regular due to his illness and that is the reason why the books of accounts could not be finalised on time for the purpose of audit. The Id AR further submitted that though there was delay in filing the audit report, it was filed before the commencement of the assessment proceedings and was part of the records based on which the AO completed the assessment. The Id AR therefore submitted that there is no hardship caused to the revenue due to the delay in filing the audit report and accordingly prayed that the penalty u/s.271B be deleted.

6. The Id DR on the other hand supported the order of the lower authorities by stating that the assessee has been a regular defaulter in filing the audit report on time and hence the penalty is levied correctly.

7. We heard the rival submissions and perused the material on record. The lower authorities have levied penalty under section 271B of the Act on the ground that the assessee failed to furnish the audit

report within the time and the failure was voluntary and intentional. We notice that the coordinate bench in the case of T T Kuruvilla vs ACIT (ITA No504/Coch/2018) has considered a similar issue and held that filing of the audit report though delayed before the completion of assessment is only a technical venial breach and that the assessee cannot be penalized for the same. The coordinate bench in this case has relied on the decision of Hon'ble Madras High Court in the case of CIT vs A N Arunachalam (2018 ITR 481).

8. It is an undisputed fact that the assessee has got its accounts audited and filed the same on 18.02.2017 i.e. well before the commencement of the assessment proceedings by issue of notice u/s.143(2) which was issued on 18.09.2017. It is also noticed that the AO has completed the assessment taking cognizance of the audit report and there was no difficulty caused to the AO for want of audit report while completing the assessment. Further, we see merit in the submission the delay was due to the fact that the accountant who was maintaining the books of accounts of the assessee passed away due to prolonged illness which resulted delay in getting the accounts audited and the fact that assessee filed the audit report subsequently proves that the delay is not intentional. Accordingly in our considered view by not getting the accounts audited in time, the assessee has committed only a technical or venial breach of the provisions of the Act that has not resulted in any loss to the revenue. In view of the facts and circumstances of the case we are of the view that the delay is not intentional that has not caused any adverse effect to the exchequer. We

therefore delete the penalty levied under section 271B of the Act and allow the appeal in favour of the assessee.

9. In the result, appeal filed by the assessee is allowed.

Pronounced in the open court on this 8th day of March, 2023.

Sd/-

Sd/-

(GEORGE GEORGE K)
JUDICIAL MEMBER

(PADMAVATHY S)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 8th March, 2023.

/Desai S Murthy/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar,
ITAT, Bangalore/Cochin.