

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

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 43/JP/2023
निर्धारण वर्ष / Assessment Years : 2015-16

Bhawani Shankar Gupta 156, Sindhu Nagar, Murlipura, Jaipur	बनाम Vs.	ITO Ward 4(1), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AEHPG 6497 G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Vishal Gupta (C.A.)
राजस्व की ओर से / Revenue by : Smt Monisha Choudhary (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 16/03/2023
उदघोषणा की तारीख / Date of Pronouncement : 22/03/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by assessee and is arising out of the order of the National Faceless Appeal Centre, Delhi dated 24/11/2022 [here in after (NFAC)/ Id. CIT(A)] for assessment year 2015-16 which in turn arise from the order of the penalty passed u/s. 271B of the Act dated 18.05.2018 by the Income Tax Officer, Ward 4(1), Jaipur [here in after the Id. AO.]

2. In this appeal, the assessee has raised following grounds: -

“1. On the facts and circumstances of the case, the Id. CIT(A) has grossly erred in law by approving action of Ld. AO of levying penalty for not getting the books of accounts audited by the assessee ignoring the facts that no books of accounts have been maintained by the assessee. It is hereby prayed for deleting the said penalty.

2. On the facts and circumstances of the case and without prejudice to other grounds of appeal, the Ld CIT(A) has grossly erred in law and facts by approving the action of the Ld. AO of imposing penalty also on the turnover which was declared by the assessee under Section 44AD of the act. The penalty thus imposed is in alternate excessive and prayed for being reduced.

3. On the facts and circumstances of the case, the notice initiating penalty proceedings under Section 271B was without jurisdiction and invalid. It is hereby thus prayed for quashing the said notice as well as entire proceedings in pursuance thereof.

4. That the appellant hereby craves the leave to add, delete, amend or abandon the grounds of this appeal at the time of or before the hearing of the case.”

3. The fact as culled out from the records is that return declaring an income of Rs. 294800/- was e-filed by the assessee on 31.8.2015 and assessment u/s 143(3) of the I.T. Act was completed on 25.11.2017 assessed at Rs. 294800/-. Penalty proceedings u/s 271B of the I.T. Act were initiated along with the assessment order dated 25.11.2017 for not furnishing the audit report within time allowed as per provisions of section 44AB of the I.T. Act.

3.1 During the year, assessee is engaged in the business of trading bangles and other artificial accessories and shown gross receipt of Rs.55,14,602/- and declared net profit u/s 44AD for an amount of Rs.4,42,314/-. During the year, it is found that assessee has also made transactions of shares and not disclosed the same in his return of income. During the proceedings, assessee was asked to furnish complete details of share transactions. After examination of details filed it is found that assessee has made transactions in various segments and made total sales of Rs. 51,49,169/-. Therefore, assessee has made two business viz trading of bangles and share. Thus, the total turnover of both business of Rs.1,06,63,771/-.

3.2 In view of provision of section 44AB the assessee was required to get audited its accounts before the specified date and furnish by that date the report of such audit in the prescribed form duly signed and verified by such accounts and setting forth such particulars as may be prescribed. As per explanation (ii) of section 44AB specified date in relation to the accounts of the assessee of the previous year relevant to an assessment year, means the due date for furnishing the return of income under sub-section (1) of

section 139. The assessee has failed to get his accounts audited u/s 44AB. Therefore, it is clear that the assessee has violated the provision of section 44AB of I.T. Act, 1961, hence, penalty proceedings u/s 271B was initiated while finalizing the assessment proceedings and show cause notice was issued on 25.11.2017 & 13.4.2018. In response to these notices the assessee filed a detailed reply dated 11.05.2018 which the Id. AO considered but not found acceptable. Finally on 18.05.2018 Id. AO levied the penalty of Rs. 53,518/-.

3.3 Aggrieved from the order of the assessing officer the assessee has preferred an appeal before the Id. CIT(A). The Id. CIT(A) confirmed the levy of the penalty holding that the assessee is not covered under the any reasonable clause and since the assessee has not complied with the statutory provisions, the action of levy of penalty by the AO was confirmed by Id. CIT(A).

4. As the assessee did not get any favour from the appeal filed before the Id. CIT(A) moved this appeal before this tribunal. challenging the levy of penalty on the grounds as raised in para 2 above.

5. To support the various grounds so raised the Id. AR appearing on behalf of the assessee has placed their written submission which is extracted in below;

"The assessee is an individual and was engaged in the business of trading of bangles and other artificial accessories along with trading in securities and derivatives. The assessee filed his return of income claiming loss under the head House Property, showing income under the head Profit and Gains from Business and Profession (covered under section 44AD) and Income from Other Sources. Since, assessee was not aware of the technical provisions of turnover etc. related to shares and securities business and since he also suffered loss, same was not declared in return of income. The case of the assessee was selected for limited scrutiny vide notice dated 26.07.2016 and all the queries raised by the Ld. A.O were duly responded to by the assessee from time to time. The Ld. A.O. completed the assessment proceedings u/s 143(3) of The Income Tax Act, 1961 without making any addition to the declared income of the assessee i.e Rs 294800.00 vide its order dated 25.11.2017 which is enclosed as a part of Paper Book (Page No. 1-2). The Ld. A.O. also issued show cause notices date 25.11.2017 & 18.05.2018 (paper Book Page No. 3-4) for imposition of penalty under Section 271B. The assessee ignoring the vagueness of show cause notice duly replied to the show cause notice issued by the Ld. A.O vide his letter dated 10.05.2018 (paper Book Page No. 5-6). However, without considering the arguments raised by the assessee in his reply, the Ld. A.O levied penalty under section 271A of The Income Tax Act, 1961 of Rs. 25000.00 for non-maintenance of books of accounts as per section 44AA of The Income Tax Act, 1961 vide order dated 18.05.2018 (Paper Book Page No. 7-11) and also levied penalty under Section 271B of The Income Tax Act. 1961 of Rs. 53,320.00 for not getting the books of accounts audited under section 44AB of The Income Tax Act, 1961 vide his order dated 18.05.2018 (Paper Book Page No. 12-17). Aggrieved by the said order, the assessee preferred an appeal before the Ld. CIT(A). The copy of Form 35 filed by the assessee is enclosed with paper book vide Page No. 18-21. The assessee filed his reply duly before the Ld. First appellate authority who dismissed the appeal of the assessee without passing a reasoned order. The copy of written reply of the assessee are enclosed as a part of paper book vide Page No.'s 22-31. Also, the order of the Ld. Appellate authority is enclosed as a part of paper book vide page no. 32-43. Aggrieved by the said order, the assessee is in appeal before the H'ble ITAT, Jaipur bench.

Now we hereby submit ground wise reply as under:

Ground No. 1

On the facts and circumstances of the case, The Ld. CIT(A) has erred in law by approving the action of Ld. A.O of levying penalty for not getting books of accounts audited by the assessee ignoring the fact that no books of accounts have been maintained by the assessee. It is hereby prayed for deleting the said penalty.

1.. As per section 271B of the act,

"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”.

2. Thus, the default mentioned in this penal provision is not getting the accounts audited by the assessee. *Once it has been established that assessee has not maintained any books of accounts, the question of invoking penal provisions under section 271B does not arise.*

We draw the attention of Ld. Appellate authority to definition of books of accounts (Section 2(12A)) as per the act which clearly stipulates as follows:

"books or books of account" includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device;

In the present case, the assessee was not maintaining books of accounts and declared his income under Section 44AD. The issue under question was basically transaction in securities which the assessee did not declare in his return of income owing to loss suffered by him. Thus, the only information which the Ld. A.O was having in respect of these transactions for assessment was the statement of share broker i.e a third party which he might have obtained directly from the broker and which does not constitute books of accounts by any stretch of mind.

The fact that assessee did not maintain any books of accounts can also be confirmed with Page 2 of the assessment order (Also Page 2 of paper book) where Ld. A.O in para 4.3 has admitted that assessee did not maintain any books of accounts. This fact is also confirmed by the fact that the Ld. A.O has imposed penalty under Section 271A upon the assessee for not maintaining books of accounts. A copy of said order has already been submitted by us as a part of paper book.

Thus, in absence of books of accounts, the audit of same is not possible as held in various legal precedents which are mentioned hereunder.

3. We rely upon the decision of the jurisdictional ITAT, Jaipur in the case of Shahnaz Khanam, Jhalawar vs The ITO, Jhalawar, ITA No. 38/JP/2018 where it was held by the H'ble bench that "Accordingly, in view of the binding precedent, we hold that once the assessee found to have not maintaining the regular books of account as contemplated by Section 44AA of the Act the default was completed and therefore, after the default of not maintaining the books of accounts there cannot be a further default for not getting the same audited as required U/s 44AB of the Act. Hence, the penalty of levy by the AO U/s 271B is not justified and the same is deleted”.

We also rely upon the landmark judgements of H'ble Allahabad High Court in the case of CIT Vs. S.K. Gupta and Co. [2010] 322 ITR 86 (All.) where similar findings were given by the honorable court which are as follows:

"We have heard Sri A.N. Mahajan, learned standing counsel for the Revenue and Sri R.R. Kapoor, learned counsel appearing for the respondent assessee. Sri Mahajan contended that the Tribunal has erred in law while upholding order of the CIT(A) cancelling the penalty in as much as the assessee had failed to get its books of account audited. The submission of Sri Mahajan is misconceived for the reason that the requirement of getting the books of account audited could arise only where the books of accounts are maintained. If for some reason the

assessee has not maintained the books of account the appropriate provision under which penalty proceedings can be initiated is under s. 271A of the Act which recourse has also been taken by the assessee as would appear from the order of the Tribunal. The Tribunal was, therefore, justified in upholding the order of the CIT(A) cancelling the penalty imposed under s. 271B of the Act”.

We further place our reliance on the decision delivered in the case of CIT Bareilly v Bisauli Tractors – (2008) 299 ITR 219, the H'ble Allahabad High Court held that:

“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.

15. In view of the foregoing discussions we answer the question referred to us in the affirmative, i.e., in favour of the assessee and against the revenue. There will be no order as to costs”.

We also rely upon the judgement of Hon'ble Gauhati High Court in case of Surajmal Parsuram Todi vs. CIT 222 ITR 691 where it was held by the court that *“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”.*

Similar findings were given by jurisdictional H'ble ITAT, Jaipur in the case of Yogendra Singh Shekhawat vs ITO, Ward 3(1), Jaipur, ITA No. 1001/JP/2016 relying upon the decisions in the case of Hon'ble Gauhati High Court in case of Surajmal Parsuram Todi vs. CIT 222 ITR 691 & h'ble Allahabad High Court in the case of CIT Bareilly v Bisauli Tractors – (2008) 299 ITR 219.

We further place our reliance upon decision of coordinate bench in the case of Roshni Devi vs ITO, Ward 3(1), Jaipur, ITA No. 953/JP/2017 pronounced on 16.05.2018 in which it was held that:

“It is clearly a case of impossibility of performance where it is expected that the assessee should get her books of accounts audited when it is a known and admitted fact that there are no regular books of accounts which have been maintained at first place. Our view is fortified by the decision of the Hon'ble Gauhati High Court in case of Rajmal Parsuram Todi (supra) wherein it was held that when a person commits an offence by not maintaining the books of accounts as contemplated under section 44AA, the offence is complete and after that, there can be no possibility of any offence as contemplated under section 44AB and therefore, the imposition of penalty under section 271B is erroneous.”

We further rely on the judgement passed by coordinate bench in Appeal No. ITA No. 262/JP/2019 in the case of Shri Sharad Kankaria vs ITO, Ward- 6(1), Jaipur wherein it was held that *“Since the issue in question is covered by the decision of the ITAT*

Coordinate Bench in the case of Roshni Devi vs ITO (supra), therefore, respectfully following the decision of this Bench on the issue of deleting the penalty u/s 271B of the Act, we direct the AO to delete the penalty of Rs. 1,50,000/- confirmed by the Id. CIT(A). Thus the solitary ground of the assessee is allowed”.

We further submit that this explanation for not imposing penalty was also submitted before the Ld. A.O as well as the Ld. CIT(A) but they did not consider same while passing the respective orders. It is also pertinent to note here that the assessee has not appealed against the order under Section 271A which may also be checked from records, if required.

We thus hereby pray the Ld. authority to allow this ground raised by the assessee.

Ground No. 2

On the facts and circumstances of the case and without prejudice to the other grounds of appeal, the Ld. CIT(A) has grossly erred in law and facts by approving the action of the Ld. A.O of imposing penalty also on the turnover which was declared by the assessee under section 44AD of the act. The penalty thus imposed is in alternate excessive and prayed for being reduced.

This ground of appeal is not pressed by the appellant.

Ground No. 3

On the facts and circumstances of the case, the notice initiating penalty proceedings under Section 271B was without jurisdiction and invalid. It is hereby thus prayed for quashing the said notice as well as entire proceedings in pursuance thereof.

We hereby draw the attention of the Ld. members to Page No. 3 & 4 of paper book where we have attached the copy of show cause notices dated 25.11.2017 and 18.05.2018 respectively.

We reproduce the relevant extract of the said notices as under;

“ It appears to me that you have

failed to get the accounts audited

or

obtain audit report as required U/s 44AB

or

furnished such report along with return under Section 139(1) or in response to notice issued under Section 142(1)”

Thus, it can be clearly seen that the charge upon the assessee was not even clear as the necessary applicable portion has not been ticked or the irrelevant portions have not been strucked off. It has been held in various judicial pronouncements that penalty cannot be levied on the basis of a vague show cause notice i.e when there is no clear charge upon the assessee so as to enable him to reply. The cases relied upon are as follows:

We rely upon the decision of the Guwahati bench of H'ble ITAT in the case of North Eastern Constructions vs The ITO, ITA 184/Gau/2019 where it was held in Para 10 and succeeding paras of the order as follows:

"We have heard both the parties and perused the records. We note that the assessee had filed return of income for the AY 2015-16 on 31-03-2016 along with TAR. Thereafter, we note the department accepted the return of income filed by the assessee by issuing intimation u/s. 143(1) of the Act on 28-05-2016. After two years on 15-05-2018, the AO had issued notice u/s. 274 read with Section 271B of the Act proposing to levy of penalty u/s. 271B for the following faults:

i) failed to get accounts audited or

ii) failed to furnish a report of such audit as required u/s. 44AB of the Act

Thus, we note that the AO has given a show cause notice, which is per-se vague. Thus, we note that the AO by issuing penalty notice u/s. 271B has not spelt out what was the fault for which the assessee is being proceeded against for levy of penalty. Since the AO has not struck down the irrelevant portion/fault which is not applicable in the facts and circumstances of the case, the notice reproduced (supra) is vague and therefore, bad in law as held by the Co-ordinate Bench of the Tribunal in the case of Parkinson Electrical Corprn (supra). We are of the opinion that notice proposing penalty should clearly spell out the fault/charge for which the assessee is put on notice, so that he can defend the charge properly. The issue of bad/vague penalty notice was adjudicated by the Hon'ble Karnataka High Court [though in a different context i.e notice issued u/s.274 read with section 271(1)(c) of the Act] in the case of CIT vs. SSA's Emerald Meadows in ITA No.380 of 2015 dated 23.11.2015 wherein the Hon'ble High Court following its own decision in the case of CIT vs Manjunatha Cotton and Ginning factory (2013) 359 ITR 565 has held that if the penalty notice is vague, then the penalty order is also bad in the eyes of law. This decision of Karnataka High Court was challenged by the Revenue before the Hon'ble Apex Court, and the Hon'ble Supreme Court has dismissed the SLP. Therefore, applying the ratio-dicendenti in SSA's Emerald Meadows & M/s. Parkinson (supra), we are of the view that the notice issued by AO before levying penalty u/s. 271B of the Act is bad in law".

We further reply upon the decision of Hon'ble Apex Court in case of CIT vs. SSA's Emerald Meadows – (2016) 73 com248 (SC) where dismissing the SLP filed by the Revenue quashing the penalty by the Tribunal as well as Hon'ble High Court on ground of unspecified notice has held as under:-

"Section 274, read with section 271(1)(c), of the Income-tax Act, 1961 – Penalty – Procedure for imposition of (Conditions precedent) – Assessment year 2009-10 – Tribunal, relying on decision of Division Bench of Karnataka High Court rendered in case of CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 1TR 565/218 Taxman 423/35 taxmann.com 250, allowed appeal of assessee holding that notice issued by Assessing Officer under section 274 read with section 271 (1)(c) was bad in law, as it did not specify under which limb of section 271 (1)(c) penalty proceedings had been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income – High Court held that matter was covered by aforesaid decision of Division Bench and, therefore, there was no substantial question of law arising for determination – Whether since there was no merit in SLP filed by revenue, same was liable to be dismissed – Held, yes [Para 2] [In favour of assessee]"

We further rely on the decision of the coordinate bench in the case of Tejpal Singh Nunia vs DCIT, Central Circle – 2, Jaipur, ITA No. 1294 to 1296/JP/2019 where the H'ble bench observed as under:

"6. The law is well settled that penalty u/s 271(1)(c) can be imposed for concealing particulars of income or furnishing inaccurate particulars of income which are two limbs of the section 271(1) (c) but the penalty can be imposed only when the authority is satisfied that either of the two events of limbs exists in a particulars case and this perquisite should invariably be evident from the notice issued u/s 274 r.w.s 271 of the Act, which is a statutory jurisdictional notice. The intent and purpose of this notice is to inform the assessee as to for which specific charge he has been show caused.

7. In the present case, from the notice u/s 274 dated 27.12.2011, neither the assessee nor anyone else could make out as to 'for what precise charge, the assessee was asked to show cause viz. whether the charge is for furnishing inaccurate particulars of income or concealment of particulars of such income. It is further important to note that, in notice, under the point which is intended towards proposed penalty u/s 271(1)(c), the word OR has been used between the charge of concealment of income and furnishing inaccurate particulars of income. These facts and circumstances make it abundantly clear that in the case of assessee, penalty notice is completely vague and ambiguous. The AO simply issued a preprinted notice without striking off the unnecessary charge and not mentioning the precise charge. The above act of the AO clearly shows that the entire exercise of initiation of penalty proceedings has been done without application of mind which resulted into issuing a completely vague jurisdictional notice u/s 274 and the jurisdictional notice being vague, the consequent levy of penalty is illegal and deserves to be deleted in full.

8. In view of above facts and circumstances, the initiation of penalty proceeding is void ab initio. For this purpose, reliance may be placed on the decision of Jaipur Bench of ITAT in the case of Shri Subhash Sharma Vs DCIT in ITA No.205/JP/2020 vide order dated 21.07.2020, wherein it was held as under:

"5.....the notice issued by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961 is bad in law in as much as it did not specify in which limb of section 271(1)(c) of the Income Tax Act, 1961 the penalty proceedings has been initiated, i.e. whether for concealment of income or furnishing of inaccurate particulars of income.

5.1. It is pertinent to note that in the notice, AO has not clearly mentioned the limb, on the basis of which, penalty was proposed to be imposed. The AO in assessment order or penalty notices did not specify the limb under which the penalty was initiated and simply issued a pre-printed notice without striking off the unnecessary portions of the notice. If the AC) was of the view that the assessee has concealed the income or furnishing inaccurate particulars of income then he should have deleted or not mentioned the other limb for imposition of penalty i.e. concealing the particulars of income. The above act of the AO clearly shows that the entire exercise of initiation of penalty proceedings has been done without application of mind. "

Though few of the above the above decisions have been delivered in context of Section 271(1)(c), but the ratio behind the same is that whenever any penal proceedings are initiated against the assessee, there must be a specific charge in the notice by which jurisdiction is assumed. In absence of same, the assessee is not able to reply to same and hence it vitiates the entire proceedings.

Ground No. 4

That the appellant hereby craves the leave to add, delete, amend or abandon the ground of this appeal at the time of or before the actual hearing of the case.

This ground of appeal does not require any submission.

With the above submissions, we hereby pray the Ld. Bench to allow this ground and appeal of the assessee.”

6. The Id. AR of the assessee in support of the written submission filed a paper book containing following records:

S. No.	Brief Description of document	Page No.	Filed/Available before Ld. AO/Ld. CIT(A)/Both
1	Quantum assessment order dated 25.11.2017 passed by the Id. AO	1-2	Both
2	Show cause notice dated 25.11.2017	3	Both
3	Show cause notice dated 18.05.2018	4	Both
4	Reply to show cause notice filed by the assessee.	5-6	Both
5	Order under section 271A dated 18.05.2018	7-11	Both
6	Order under section 271B dated 18.05.2018	12-17	Both
7	Form 35 filed by the assessee	18-21	Ld. CIT(A)
8	Written submission filed by the assessee before Id. CIT(A)	21-31	Ld. CIT(A)
9	Order dated 24.11.2022 passed by Id. CIT(A)	32-43	Ld.CIT(A)

7. The Id. AR of the assessee in addition to the written submission and paper book filed to support the contentions so raised, also filed a compilation of evidences relied upon. Based on these evidences placed on record drawn our attention to the fact

that the department has already levied and confirmed the penalty u/s 271A, being the penalty for failure to keep /maintain or retain books of accounts, documents etc. if so then the levy of penalty u/s 271B is incorrect. Since, the assessee has already been held that he failed to maintain the books of accounts then again, he cannot hold to get the books of accounts audited to support the contentions raised by the Id. AR of the assessee he has relied upon the decision of the Co-ordinate Bench in the case of Shahnaz Khanam, Jhalawar vs. the ITO, Jhalawar, ITA No. 38/JP/2018.

8. Per contra, Id. DR supported the orders of the lower authority and submitted that the assessee has even though liable to get his books of account failed to do and the levy of penalty is correct and the same be upheld.

9. We have heard the rival contentions, perused the material on record and order of the lower authorities. We have also gone through the various judicial decision cited by the Id. AR of the assessee in support his arguments before us. The bench noted from the paper book of the assessee that in the case of the assessee there has been a levy of penalty for non-maintenance of

books of accounts u/s. 271A of the Act and the Id. DR did not controvert the fact the same is not deleted. So, once it has been held the assessee has not maintained the books of account and consequent there upon the penalty has also been levied the separate penalty for not getting the books of account audited cannot be fastened. The penalty u/s. 271B can be levied when the assessee maintains the books and not get them audited but once it is been held and not disputed that the assessee has not maintained the books how the penalty for not getting the books audited be levied. The Id. DR did not controvert these basic facts and the decision of the coordinate bench cited by the Id. AR of the assessee and thus, considering the ratio of decision so relied upon by the Id. AR of the assessee where in the decision of various Hon'ble High Courts and of this Co-ordinate Bench also. This co ordinate bench in the case of Shahnaz Khanan, Jhalawar Vs. ITO in ITA No. 38/JP/2018 held that :

“6. Having considered the rival submissions as well as relevant material on record we note that the assessee has committed the default for not maintaining the regular books of accounts as required U/s 44AA of the Act. The Assessing Officer has already imposed the penalty U/s 271A for violation of the provisions of Section 44AA of the Act. The AO has also imposed the penalty U/s 271B for not getting the books of accounts audited. It is pertinent 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 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.

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 Surajmal 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 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.

1. 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/Del/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.”

Accordingly, in view of the binding precedent, we hold that once the assessee found to have not maintaining the regular books of account as contemplated by Section 44AA of the Act the default was completed and therefore, after the default of not maintaining the books of accounts there cannot be a further default for not getting the same audited as required U/s 44AB of the Act. Hence, the penalty of levy by the AO U/s 271B is not justified and the same is deleted. In the result, the appeal filed by the assessee is allowed.”

10. On being consistent of the view already taken by the Co-ordinate Bench, we are of the view that once the penalty is levied for non-maintenance of book of accounts, there cannot be further

default for not getting the same audited as required u/s 44AB of the Act and therefore, the penalty levied u/s 271B is not justified and thus vacated.

In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 22/03/2023

Sd/-

(डा० एस. सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

Sd/-

(राठोड कमलेश जयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 22/03/2023

*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- Bhawani Shankar Gupta, Jaipur
2. प्रत्यर्थी / The Respondent- Income Tax Officer, Ward 4(4), 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. 43/JP/2023 }

आदेशानुसार / By order

सहायक पंजीकार / Asst. Registrar