

आयकर अपीलीय अधिकरण, रायपुर न्यायपीठ, रायपुर
IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR
श्री रविश सूद, न्यायिक सदस्य एवं श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।
BEFORE SHRI RAVISH SOOD, JM & SHRI ARUN KHODPIA, AM
आयकर अपील सं./ITA No.113/RPR/2018

(निर्धारण वर्ष / Assessment Year :2011-2012)

M/s Vijendra Singh & Associates, C/o-Bedford Earthmovers Inc. Rajeev Gandhi Chowk, Jarhabhata, Bilaspur (CG)	Vs	ITO, Ward-1(2), Bilaspur
PAN No. : AAA AV 6865 H		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by	:	Shri Nilesh Jain, CA
राजस्व की ओर से /Revenue by	:	Shri Choudhary N.C.Roy, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	05/01/2023
घोषणा की तारीख/ Date of Pronouncement	:	27/03/2023

आदेश / O R D E R

Per Arun Khodpia, AM:

This appeal is filed by the assessee against the order passed by the CIT(A), Bilaspur, dated 02.04.2018 for the assessment year 2011-2012, on the following grounds :-

- 1. In the facts and circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) has erred in sustaining penalty of Rs.73,250/- imposed u/s. 271B of the Income-tax Act, 1961 by wrongly construing that the appellant failed to maintained books of accounts and get his accounts audited.*
- 2. In the facts and circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) has erred in not following the principles of law laid down in the case of Exque Finmark Pvt. Ltd. vs. ACIT-9(1), Mumbai in ITA Appeal No. 1624/MUM/2011 dtd. 11/07/2014.*
- 3. The impugned order is bad in law and on facts.*
- 4. The appellant reserves the right to add, alter, amend or omit all or any of the grounds of appeal.*

2. Brief facts of the case are that the assessee is an Association of Persons constituted by Shri Vijendra Singh, Shri Vinod Patel and Shri Ravi Shrivastava. In this case, assessment for the assessment year 2011-12 was made under section 147 of the Income Tax Act, 1961, read with section 143(3) of the Income Tax Act, 1961, on 31/03/2015. During the course of the assessment proceedings, penalty proceedings under section 271B of the Income Tax Act, 1961, read with section 274 of the Income Tax Act, 1961 has been initiated and accordingly show cause notice under section 271B of the Income Tax Act, 1961 was issued on 31/03/2015 and served upon the assessee. The AO noticed that the assessee has failed to furnish the return of income for the Assessment year 2011-12 as required under section 139 of the Income Tax Act, 1961. He noted that there were reasons to believe that income chargeable to tax has escaped assessment within the meaning of section 147 of the Income-tax Act, 1961. For failure on the part of the assessee to furnish return of income for the above assessment year, notice under Section 148 of the Act was issued on 31/03/2014 duly served upon it on 31/03/2014. In view of said notice the assessee was required to furnish their return of income for the above assessment year within 30 days of receipt of the notice. Subsequently, the AO found that the assessee has not complied with the requirement as per the above notice under section 148 dated 31/03/2014. Consequently, the AO framed the assessment u/s.147 r.w.s.143(3) of the Act assessing the total income of the assessee at Rs.

Nil and levied penalty u/s.271B of the Act for non-compliance of getting accounts audited u/s.44AB of the Act.

3. Against the assessment order, wherein the Ld AO has observed that assessee has entered into a transaction of sale of 100 acre land to Koyla Karamchari Grih Nirman Evam Kalyan Sahakari Samiti Maryadit on 18/10/2008 @ Rs. 13,25,000/- per acre, an advance of Rs. 5000/- by cheque was also received by the assessee AOP on 18/10/2008. It is further noticed by the AO that during the relevant assessment year 2011-12, the Assessee has received an amount of Rs. 1,46,44,225/-, thus, the Ld AO has considered the amount of consideration received as sale for the year under consideration. As per Ld AO the amount received is more than the stipulated turnover required u/s 44AB of Act to get assessee's books Audited and for this non-compliance penalty u/s 271B for Rs. 73250/- was imposed. Aggrieved by the order of AO, the assessee preferred an appeal before the Id. CIT(A) and the Id. CIT(A) dismissed the appeal of the assessee. Assessee's submission and observations of the Ld CIT(A) extracted from the order of Ld CIT(A) were as under:-

2.2 Appellant Submission-

The Action of Id. Assessing Officer is not justified. In view of brief facts narrated above and in the statement of facts the appellant was following project completion method in respect of the one and only projected starred as per agreement. Initially the agreement was to be completed with in one year but later on the terms were enlarged changing the requirement of land from 100 acres to 130 acres and contract period from one year to five years.

The appellant maintained regular books of account. There was no sales or receipts of the nature of revenue recognized by appellant as per the method of accounting employed by him. Hence, he was under the bona fide belief that he was not required to get Audit of the Books of Account and obtain audit Report u/s 44AB of the Act.

As per provisions of sec. 44AB as applicable to relevant assessment year an assessee is required to get audit of its books of account if the sales, turnover or gross receipts exceed Rs. 40 lakhs in the relevant previous year. In this case since the appellant did not recognize any sales revenue, audit was not conducted.

2.3. Facts being as above, appellant did not file Ra!. As per agreement with M/s Koyala Karmachari appellant received Rs 1A6A4,225/- therefore he was liable to maintain books' of accounts and get these audited. However no books of accounts were maintained and no audit was done. Therefore the AO levies penalty u/s 271B. The profit of assessee's business will depend when the assessee will closed his books as per payment completion method. However so far as turnover of business is concerned, there is no doubt that Rs 1A6A4,225/- was received during the year on sale of 10.13 acres of land. Therefore assessee was liable to maintain books of accounts and get his accounts audited. Having failed in doing so, I find that AO was justified in levying the penalty u/s 271B. Sustained.

In the result; the Appeal is dismissed.

4. Now, the assessee is in further appeal to challenge the findings in order of Ld CIT(A).

5 Ld. AR before us reiterated its submission as were made before the Ld CIT(A) . It was the submission of the Ld AR of the appellant that the assessee AOP was following project completion method in respect of its one and only project started as per agreement, which initially was supposed to completed within one year but subsequently due to enlargement in the project from 100 acre to 130 acre, the terms of contract period was changed from 1 year to 5 years. Appellant maintains regular books of accounts and was in bona fide belief that the advance received from society is not a turnover, thus, turnover in terms of provisions of section 44AB, which is required to be more than Rs. 40 Lac as against the turnover of the assessee, which was recognised at NIL for

the relevant AY, accordingly, the assessee was not liable to be audited u/s 44AB of the IT Act.

6. Ld AR of the assessee relied on the following case laws:-

a. *Exque Finmark Pvt. Ltd. vs. ACIT-9(1), Mumbai in ITA Appeal No. 1624/MUM/2011 dtd. 11/07/2014*

4. We have heard the parties, and perused the material on record, giving our careful consideration to the matter.

*4.1 We find considerable merit in the Revenue's case. This is for the reason that the Legislature has provided three parameters, viz. 'sales', 'turnover' or 'gross receipts', as the case may be, in defining the criteria for determining the legal obligation for tax audit u/s.44AB of the Act. The word 'gross receipts' would include the amounts received by the assessee-builder toward construction from its customers. The same are only in pursuance to a contract of sale, and of revenue character. Further, the same stands excluded in reckoning the assessee's income for the year only for the reason that it adopts a particular method, i.e., the project completion method, for recognizing income, and which by itself, even as found by the tribunal in *Gopal Krishan Builders (supra)*, would be of no consequence; there being no reference to 'income' or any income criteria in the relevant provision. In fact, but for the same, as where the assessee were to follow percentage completion method, the receipt would give rise to profit (or loss). It is the nature of the receipt, and not the profit element therein, that is relevant. As such, the assessee's contention with regard to its exclusion, i.e., as not bearing a profit element, is without merit both on facts and in law.*

4.2 So, however, we are nevertheless unable to agree with the Revenue that the assessee is liable to penalty u/s.271B of the Act. Our reasons for the same are as follows.

*ITA No.1624/Mum/2011 (A.Y. 2005-06) Esque Finmark Pvt. Ltd. vs. Asst. CIT The word 'gross receipt' is liable to be construed in more than one way; the matter in fact having travelled to the tribunal in the case of *B.K. Jhala & Associates (supra)* and *Gopal Krishan Builders (supra)*, both at the instance of the Revenue, so that the assessee had succeeded at the first appellate stage. The matter, accordingly, cannot be considered to be without an element of contentiousness associated therewith, so that it is liable to be considered as giving rise to a debatable question, constituting a reasonable cause within the meaning of [section 273B](#) of the Act, saving penalty. We say so as the words 'sales', 'turnover' as well as 'gross receipts' give rise to connotation of receipts of revenue nature, forming part of the income statement for the relevant year.*

The assessee, it may be noted, is a company. It is, therefore, in compliance of [s. 44AB](#) of the Act, required to get its accounts audited and, further, obtain and furnish an audit report both under the [Companies Act](#), 1956 as well as under the Act, i.e., in terms of the said provision. The audit report u/s.224 of the [Companies Act](#), which stands duly furnished, is thus itself toward and in compliance of [section 44AB](#), albeit partly. Non obtaining another audit report from its Auditors, i.e., in Form 3CA, under the circumstances, is, therefore, only on account of a bona fide belief that its turnover not exceeding the qualifying monetary limit, stands to be excluded. Further, the purpose of verification of accounts, including purchases, cited by the A.O. as the underlying reason for the legal obligation of audit while explaining the rationale of the provision, stands thus satisfied in the facts and circumstances of the case.

The explanation that receipts from customers were only in the nature of advance/s is not technically incorrect in-as-much as it is only when the same shall stand adjusted against sale price on the completion or near completion of the project, that the same is liable to be considered as 'sales'. The notice of penalty and the basis for the A.O. in levying the penalty was that the assessee's work-in-process (WIP) had witnessed an increase during the year for an amount beyond the prescribed limit. Though, therefore, we do not regard the Id. CIT(A) to have, in confirming the penalty, based it on a different cause; the default being the same, it does amount to a different view being adopted on the ITA No.1624/Mum/2011 (A.Y. 2005-06) Esque Finmark Pvt. Ltd. vs. Asst. CIT same set of facts, confirming the view, if one was required, that the matter is liable to be considered in more ways than one.

The inclusion of 'purchases', as stated by the A.O. with reference to the decision by the apex court in the case of George Oks Pvt. Ltd. under the [Sales Tax Act](#), for the purpose of invoking [s. 44AB](#), is without merit. This is for the simple reason that the word 'turnover' stands clearly and separately defined under the sales-tax legislation to include purchases as well. Even following the legal principles on the basis of the legal maxims ejusdem generis and noscitur a Sociis would operate to exclude 'purchases' from forming part of the qualifying criterion. Rather, a provision, for the purpose of levy of penalty, is to be even otherwise strictly construed. It is perhaps for the reason of the same not finding approval of the Id. CIT(A) that she chose not to advert thereto in the impugned order. As explained by the apex court in [Hindustan Steel Ltd. vs. State of Orissa](#) [1972] 83 ITR 26 (SC), a penalty, even where the provision stands attracted, may lawfully be not levied where the default is not found to be a result of a conscious disregard by the tax payer of his legal obligations or a conduct contumacious, which is clearly not the case in the instant case.

5. In view of the foregoing, we are of the clear and unambiguous view that the assessee's case, despite a default of [s. 44AB](#) of the Act, is not liable in law for penalty u/s.271B in the facts and circumstances of the case. We, accordingly, direct its deletion.

6. In the result, the assessee's appeal is allowed.

b. *M/s Shree Balaji Construction, 2020 (2) TMI 77-ITAT Indore following the order of ITAT Mumbai in Exque Finmark Pvt. Ltd. (supra) has held as under :-*

Penalty u/s 271 B - failure of getting the books of accounts audited u/s 44AB - HELD THAT: -There is a reasonable cause on the part of the assessee in not getting the books of accounts audited since it adopted the percentage completion method and that the advance received from customers is not part of turnover but in the shape of liability which can be crystallized to the sale turnover only when the project is completed and the possession is handed over along with registered sale deed to the customer.

Therefore in our view the assessee succeeds on two counts firstly that it was not required to get books of accounts audited and if for sake of discussion if the alleged advance received from customers is presumed to be turnover then also the assessee will succeed on account of Section 273B of the Act which provides for "penalty not to be imposed in certain cases" where the assessee proves that there was a reasonable cause for the said failure and thus covers the situation of the assessee too. We, thus delete the penalty levied u/s 271 B of the Act at Rs.1,50,000/- each for Assessment Year 2010-11 to 2012-13 and allow all three appeals raised by the assessee.

7. On the other hand, Id. Sr.DR submitted that Ld CIT(A) has rightly decided the issue considering the receipt during the year, categorically defining the same as turnover within the meaning of section 44AB and thus liable to be levying of penalty u/s 271B of the Act. Ld Sr. DR vehemently supported the orders of revenue authorities.

8. We have considered the rival contentions and submissions. Have perused the case laws placed before us.

9. Admittedly, the assessee AOP has receipts from its customers in the nature of trade advance, which is discernible from the copy of balance sheet, trading and profit and loss account of the assessee for AY 2011-12. It is also evident from the balance sheet of the subsequent year i.e AY 2015-16 the impugned advances got converted into sale / turnover of the assessee, when the project was completed. Undisputedly, accounts of the assessee were prepared under project completion method. The assessee was under bona fide belief that the advances received in the relevant year, though are exceeded the limit prescribed u/s 44AB for getting the accounts audited, but since the advances are not turnover within the meaning of section 44AB, till the same are crystalized as sale on completion of the project, the same cannot be held liable for levy of penalty u/s 271B of the Act.

10. In view of the foregoing discussion, respectfully following the decision of Hon'ble ITAT, Mumbai in the case Exque Finmark Pvt. Ltd. (supra) followed by ITAT Indore (supra) wherein judgment of Hon'ble Apex court in the case of Hindustan Steel Ltd. (Supra) was quoted **“a penalty, even where the provision stands attracted, may lawfully be not levied where the default is not found to be a result of a conscious disregard by the tax payer of his legal obligations or a conduct contumacious.”**

11. Ostensibly, the assessee was under bona fide belief that the advance are not turnover, which was a right contention, according to project completion method of accounting. No deliberate act or defiance of

law or guilty conduct was observed by either of the revenue authority neither the revenue has produced any such evidence or decision contrary to what is transpired by the submission of the assessee and its reliance on the case laws. The case of the assessee AOP is covered by decisions in the judgements referred to supra, thus, under identical circumstances in the instant case, we are of the considered opinion that penalty imposed by the Ld AR and confirmed by the Ld CIT(A) is liable to be deleted and we direct to do so.

12. In the result the appeal of the assessee is allowed.

Order pronounced in pursuance to the Rule 34(4) of ITAT Rules,1963 on 27/03/2023.

Sd/-
(RAVISH SOOD)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(ARUN KHODPIA)

लेखा सदस्य / ACCOUNTANT MEMBER

रायपुर/Raipur; दिनांक Dated 27/03/2023

Prakash Kumar Mishra, Sr.P.S

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

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर/ DR, ITAT, Raipur
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, रायपुर/ITAT, Raipur