

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.136/Bang/2023
Assessment Year: 2016-17

Udapi Narayana Rao Padmanabh Rao #Geetha Nilaya Rastrapathi Road Nanjangud Karnataka 571301  <b>PAN NO : ADNPP6641C</b>	<b>Vs.</b>	ACIT Circle-2(10 Mysore
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	N O N E
<b>Respondent by</b>	:	Shri Srinivas Rao B., D.R.

<b>Date of Hearing</b>	:	20.04.2023
<b>Date of Pronouncement</b>	:	20.04.2023

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

This appeal by the assessee is directed against order of NFAC dated 2.2.2023 for the assessment year 2016-17, wherein NFAC confirmed the levy of penalty u/s 271B of the Income-tax Act,1961 [the Act' for short] at Rs.1,48,019/-. The assessee has raised following grounds:

1. *“On the facts and circumstances of the case, the order U/s.250of the Income Tax Act, 4961, by the Learned CIT(A) dated 02.02.2023 and upheld the order of 271(B) passed by the assessing authority is against the law for the said assessment year2016-17and the same is not maintainable in Law.*

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2. *On the facts and circumstances of the case Learned CIT(A) failed to appreciate that, the appellant has explained the bonafide reasons on account of Ill Health the appellant was unable to meet the concerned Auditor to get audit report under section 44AB the situation is beyond control of the appellant, thus without appreciating the bonafide reasons the CIT(A) upheld the order of the Assessing Authority under section 271(B) of IT Act is bad in law and against the principle of natural of justice thus both order are liable to be set aside.*
3. *On the facts and circumstances of the case, from the concerned CA the appellant was obtained the Audit report on 25.09.2016 with great difficulty on account of his problem and ill health and the same could have been appreciated by the both Authorities. But failed to appreciate the same and passed order by the CIT(A) is bad in law and the same order is liable to be set aside in the interest of justice.*
4. *On the facts and circumstances of the case the learned CIT(A) failed to appreciate that, the condition of section 271 (B) of the IT Act cannot be implemented in the appellant case on account of his circumstances which is beyond control of the appellant, thus order of both assessing authorities is liable to be set aside.*
5. *On the facts and circumstances of the case, the appellant had submitted the Medical Certificate which was ignored and levied penalty under section 271(B) by the Assessing Authority and the same is upheld by the CIT(A), thus both Orders is against the natural justice and liable to be set aside*
6. *On the facts and circumstances of the case, the appellant<sup>4</sup>relied on the reported judgments which is squarely applicable in the appellant case, but with considering the same passed order by the CIT(A) is against the law, hence the orders of Assessing Authority and CIT(A) is liable to be quashed in the interest of justice.*
7. *Without prejudice, the levy of penalty of the Income Tax Act, 1961 is excessive, arbitrary, and liable to be deleted, in the interest of justice.*
8. *For such other grounds that may be raised at the time of hearing of the appeal, and it is prayed before this Hon'ble Authority to consider the above made submissions and allow the appeal in the interest of justice and equity.”*

2. Facts of the case are that the assessee has filed return of income for the assessment year 2016-17 on 17.3.2017 declaring total income of Rs.31,39,880/-. The same was accepted by the department while framing assessment u/s 143(3) of the Act vide

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order dated 23.11.2018. Later it was found that assessee's annual turnover from contract business was at Rs.2,96,63,862/-. Originally, the assessee is required to file the audit report in prescribed format u/s 44AB of the Act on or before 30.9.2016. Later CBDT extended the due date for obtaining and furnishing the tax audit report u/s 44AB of the Act for the AY 2016-17 from 30<sup>th</sup> Sept'16 to 17<sup>th</sup> Oct'16. However, in this case, the C.A. certified the financial accounts and audit report on 25.9.2016 and filed the return of income on 17.3.2017. As per penalty order, the audit report u/s 44AB of the Act was filed on 17.3.2017. Thus, there was a delay of 214 days in filing the report u/s 44AB of the Act before the AO. The audit report u/s 44AB of the Act was prepared on 25.9.2016 and the same has been filed on 17.3.2017 i.e. well before the framing of assessment order u/s 143(3) of the Act dated 23.11.2018. The assessment of the assessee has been completed without any addition and the declared income has been accepted by the AO. The assessee before the lower authorities has explained that the delay was due to ill health of the assessee from 5<sup>th</sup> August, 2016 to 30<sup>th</sup> April, 2017 for which he has produced a medical certificate. The AO has not given credence to this certificate by observing that this certificate is not backed by any medical records to show how serious the illness was and whether the assessee was really incapacitated as to make him unable to file his return of income and the audit report in time. Accordingly, he levied the penalty u/s 271B of the Act at ½ % of the total turnover which works out at Rs.1,48,019/-. Against this assessee went in appeal before NFAC where the assessee has not participated in the first appellate proceedings and the levy of penalty u/s 271B of the Act was confirmed by the NFAC by observing that the assessee inspite of giving opportunities has not made any effort to offer any explanation during the first appellate proceedings by producing requisite evidences in support of assessee's case. Against

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this assessee is in appeal before us. None appeared for the assessee in spite of giving notice of hearing to the assessee vide notice dated 3.3.2023.

3. We have heard the ld. D.R. The ld. D.R. submitted that the assessee is not serious about his appeal and also not produced any evidence in support of the medical certificate produced by the assessee before the AO and also has not participated before first appellate authority and hence the levy of penalty is to be confirmed. In our opinion, in case the assessment has been framed u/s 143(3) of the Act on 23.11.2018, wherein returned income has been accepted and there was no additions of income whatsoever made by AO. There was only a delay in filing the audit report which ought to have been filed on or before 17<sup>th</sup> Oct'16. However, the same has been filed before AO on 17.3.2017. Thus, it means that the tax audit report was made available to the AO before the completion of assessment i.e. 23.11.2018. However, the AO levied penalty at Rs.1,48,019/- on the reason that the assessee has not filed the audit report along with audited financials u/s 44AB of the Act within the due date for filing the return of income i.e. on or before 17.10.2016. However, as seen from the records, the audit report has been filed with the department on 25.9.2017, which was prior to the completion of assessment on 23.11.2018. There was no addition of whatsoever made by the AO while framing assessment u/s 143(3) of the Act on 23.11.2018. The assessee has given reason for delay in filing tax audit report that the assessee has been suffering from illness during the period from 5.8.2016 to 30.4.2017. The AO is not ready to accept this medical certificate on the reason that the certificate is not backed up by any medical records to show how serious the illness was and whether assessee was really incapacitated to make him unable to file his return of income and the audit report in time. This observation

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of the AO is unwarranted when the qualified medical practitioner gave the medical certificate regarding illness of the assessee. The AO is not bound to question the genuineness of such medical certificate unless he had some material in his hand to counter it. This observation cannot be appreciated. Therefore, we are of the considered view that when the tax audit report was made available to the AO before completion of assessment proceedings, then for venial technological breach without any malafide intention, penalty cannot be levied u/s 271B of the Act. A similar issue came for consideration before the coordinate bench of the Tribunal in case of Balaji Logistics Vs. ACIT in ITA No.2248/Cheny/2019 dated 7.9.2022 wherein held as under:

*“6. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. It is an admitted fact that although the assessee has filed Tax Audit Report in Form 3CB as required u/s.44AB of the Act, beyond due date specified u/s.139(1) of the Act, but such Tax Audit Report was made available to the AO before completion of assessment proceedings u/s.143(3) of the Act, on 22.11.2017. It is evident from the fact that the assessee has obtained Tax Audit Report from an Accountant on 28.03.2016 and furnished before the AO during the course of assessment proceedings. Therefore, we are of the considered view that when the Tax Audit Report was made available to the AO before completion of assessment proceedings, then for venial technical breach without any mala fide intention, penalty cannot be levied u/s.271B of the Act. Further, a similar issue has been considered by the co-ordinate Bench of the Tribunal in the case of M/s.T P D 101 Uthangarai Milk Producers Co-operative Society Ltd.(supra), where on identical set of facts, penalty levied u/s.271B of the Act, has been deleted. The relevant findings of the Tribunal are as under:*

*“...7. We have heard both the parties and perused the materials available on record and gone through the orders of the authorities below. The assessee supposed to have been filed audit report as required u/s.44AB of the Act, on or before 31.10.2015. However, such audit report has been filed on 05.03.2016, which is before the date of completion of assessment proceedings u/s.143(3) of the Act. In other words, although the assessee has filed tax audit report beyond the stipulated period, but such tax audit report was made available to the AO before he completes assessment proceedings. The assessee has*

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*given reasons for delay in filing tax audit report. As per which, the audit of accounts of society done by the Dept. of Cooperative Audit, could not be completed on or before 31.10.2015 and said delay was not in the hands of the assessee. Therefore, there is a reasonable cause for not filing the tax audit report within prescribed time limit and thus, penalty cannot be levied. We find merits in the submission of the assessee for the simple reason that non-filing of audit report within the due date is a venial technical breach without any mala fide intention on the part of the assessee. Because, completion of audit of books of accounts of the society is under the control of Dept. of Cooperative Audit and thus, unless the Dept. of Cooperative Audit completes audit, the assessee cannot file return of income along with tax audit report. Therefore, we are of the considered view that reasons given by the assessee for not filing tax audit report prescribed u/s.44AB of the Act, is neither intention nor any mala fide intention, but it is venial technical breach and for this reason, penalty u/s.271B of the Act, cannot be levied. This principle is supported by the decision of the Hon'ble jurisdictional High Court in the case of P.Senthil Kumar v. PCIT reported in 416 ITR 336, where an identical issue had been considered by the Court and held that for venial technical breach without any mala fide intention, penalty cannot be levied. The ITAT Cochin Bench in ITA No.411/Cochin/2018 vide order dated 05.02.2019 had held that once audit report has been made available before the AO, when the assessment proceedings were completed, then, there is no reason for levy of penalty.*

*8. In this view of the matter and considering the facts and circumstances of the case, we are of the considered view that reasons given by the assessee for not filing tax audit report within due date comes under reasonable cause as provided u/s.271B of the Act, and thus, the AO is erred in levying penalty u/s.271B of the Act. Hence, we direct the AO to delete penalty levied u/s.271B of Act.”....*

*7. In this view of the matter and by following the decision of the coordinate Bench of the Tribunal in the case of M/s. T P D 101 Uthangarai Milk Producers Co-operative Society Ltd.(supra), we direct the AO to delete penalty levied u/s.271B of the Act.*

*8. In the result, the appeal filed by the assessee is allowed.”*

3.1 In view of this, we are of the opinion that levy of penalty u/s 271B of the Act is not justified. Accordingly, order of the lower authorities is reversed and the appeal of the assessee is allowed.

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

Order pronounced in the open court on 20<sup>th</sup> Apr, 2023

**Sd/-**  
**(Beena Pillai)**  
**Judicial Member**

**Sd/-**  
**(Chandra Poojari)**  
**Accountant Member**

Bangalore,  
Dated 20<sup>th</sup> Apr, 2023.  
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(Judicial)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,**  
**ITAT, Bangalore.**