

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

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष  
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ ITA. No. 149/JP/2023  
निर्धारण वर्ष / Assessment Years : 2017-18

Sushila Devi SH 8A, Village Daulapura Post Katrathal, Sikar	बनाम Vs.	ACIT, Circle, Sikar
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AGVPD 6837 B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

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

सुनवाई की तारीख / Date of Hearing : 26/04/2023  
उदघोषणा की तारीख / Date of Pronouncement : 03/05/2023

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 13/02/2023 [here in after (NFAC)/ Id. CIT(A) ] for assessment year 2017-18 which in turn arise from the order of the penalty passed u/s. 271B of the Act dated 29.12.2021 by the National Faceless Assessment Center, Delhi [ here in after the Id. AO./NeFAC ]

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

“1. The Ld. CIT(A), NFAC has erred on facts and in confirming the levy of penalty of Rs. 1,50,000/- u/s 271B of the IT Act, 1961 only for the delay of 1 day in filing the tax audit report.”

3. The fact as culled out from the records is that the assessee filed her return of income for AY 2017-18 on 20.01.2018 declaring an income of Rs. 22,11,260/-. She deals in retail sale of Petrol & Diesel. The case was selected for complete scrutiny under CASS and assessment was completed u/s 143(3) of the Income Tax Act, 1961 at an assessed income of Rs. 23,11,260/- on 21.12.2019. As per assessment order, the total turnover of the assessee is Rs. 20,88,24,297/-, therefore, she was under obligation to get her books of accounts audited as per provisions of section 44AB of the Income Tax Act, 1961 and submit the audit report within stipulated time. The assessee furnishes the said audit report on 08.11.2018 i.e. after the due date, thereby, failing to comply with the provisions of section 44AB of the Income Tax Act, 1961. Accordingly, a notice u/s 271B was issued to the assessee on 21.12.2019 for not complying with the statutory provisions of the Act. The Id. AO while levying the penalty u/s. 271B noted that the reason offered by the assessee is not correct and just and afterthought and merely an

excuse to escape the penal proceedings. She was not prevented by an reasonable cause to comply the with the mandatory provision of the Act, as such the reply of the assessee is not tenable. Based on these observation order of levying penalty u/s. 271B for an amount of Rs. 1,50,000/- was passed by the NeFAC.

4. Aggrieved from the order of the National Faceless Assessment Center, assessee preferred and appeal before the Id. CIT(A). A propose to the grounds so raised the relevant finding of the Id. CIT(A) is reiterated here in below:

“Thus it can be observed from the above order that the tax audit was not completed on or before the due date 07.11.2017. The Tax audit u/s 44AB was completed only on 08.11.2017 with the signing of the accountant and thereafter it was submitted online. Thus, in view of the fact that tax audit was not done within the specified date as per section 44AB, the Appellant becomes liable for penalty u/s 271B of the Act. In view the same and in absence any explanations/details submitted by the Appellant in the course of the present proceedings, I uphold the action of the AO in levying a penalty of Rs. 1,50,000/- u/s 271B of the Act. Ground No 1 is, thus, dismissed.”

5. As 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 the statutory provisions, the action of levy of penalty by the AO was confirmed. Aggrieved from the said order of the Id. CIT(A) the assessee preferred this appeal solely on the levy of the penalty u/s. 271B of the Act. To

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

“1. The assessee is running a petrol pump in the name & style ‘M/s Sushila Indian Oil Filing Station’. Against returned income of Rs.22,11,260/-, assessment was framed u/s 143(3) on 21.12.2019 at total income of Rs.23,11,260/-. Penalty proceedings u/s 271B was initiated for the reason that due date of filing the audit report was 07.11.2017 but auditor has signed & verified the audit report on 08.11.2017.

2. In course of penalty proceedings assessee explained that it got the accounts audited and obtained tax audit report on 07.11.2017 but due to some technical glitches it was submitted on 08.11.2017. However, the AO held that audit report has been submitted by the assessee on 08.11.2017 which was signed by the auditor and assessee at 09.27.38 PM and at 09.27.54 PM respectively and therefore, the reasons submitted by the assessee is not correct and an afterthought. Accordingly, he imposed penalty of Rs.1,50,000/- u/s 271B of the Act.

3. The Ld. CIT(A) held that the tax audit was not completed on or before the due date of 07/11/2017. The Tax audit u/s 44AB was completed only on 08/11/2017 with the signing of the accountant and thereafter it was submitted online. Thus, he upheld the levy of penalty u/s 271B.

4. It is submitted that the audit report in Form 3CB was signed by the tax auditor on 07.11.2017 as per Form No.3CB as downloaded from the e-portal of the assessee (**copy enclosed**). Thus, the audit was completed & audit report was obtained on 07.11.2017. However, it was digitally signed by the auditor and assessee on 08.11.2017 at 09.27 PM and uploaded. The assessee explained such delay of 1 day due to technical glitches. This constitutes a reasonable cause. Section 273B provides that no penalty shall be imposable on the person or the assessee for any failure referred to in section 271B if he proves that there was reasonable cause for the said failure. The AO has otherwise considered this audit report in completing the assessment. Never in past or in subsequent years there is any delay in obtaining & filing the

audit report. Therefore, default if any, is only a technical venial breach and not due to any contumacious conduct. Hence, for such meagre delay of 1 day, no penalty should be imposed. Reliance in this connection is placed on the following cases:-

**Hindustan Steel Ltd. Vs. State of Orissa in (1972) 83 ITR 26 (SC)**

where it was held as under:-

*“An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation—Penalty will not also be imposed merely because it is lawful to do so—Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances—Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.”*

**Staywell Hotels (P) Ltd. Vs. CIT (2006) 283 ITR 92 (MP) (HC)**

The held part of the decision reads as under:-

*The use of expression ‘may’ in s. 271B confers discretion on the AO to impose penalty for the breach of s. 44AB. This, therefore, contemplates as to whether explanation sought from assessee in not complying with the requirement of s. 44AB is to be accepted or not by AO. In other words, though compliance of s. 44AB is mandatory for assessee its non-compliance within time attracts rigour of s. 271B, i.e., penalty. However, on a sufficient cause being shown, the AO is vested with the discretion to condone the delay and relieve the assessee from payment of penalty amount. It then depends upon facts of each case as to whether case for acceptance of explanation is made out by the assessee, or not? The explanation offered by the assessee in this case ought to have been accepted being a sufficient one. The delay in filing certain form was not inordinate. It was hardly of two months. Secondly, there was explanation offered for such delay. The delay thus did not have any deliberate intention on the part of assessee, nor could their conduct be regarded as*

*contumacious or with a view to evade payment of tax. If at all there is any breach, it was technical or venial in nature. In the facts of this case, no case of penalty under s. 271B was made out. Impugned order passed by Tribunal is set aside.*

**John Biwheelers Vs. ACIT (2019) 70 ITR 325 (Cochin) (Trib.)**

The head note of the decision reads as under:-

*Penalty—Failure to get accounts audited—Assessee filed return of income—During assessment proceeding, AO noted that assessee was liable to get its accounts audited as per provisions of s. 44AB on or before due date of filing of return of income—However, assessee got its accounts audited only on 28/03/2014—Therefore, there was delay in getting accounts audited and therefore, penalty u/s 271B was levied for failure to comply with provisions of s. 44AB subject to provisions of s. 273B—CIT(A) confirmed AO's action—Held, assessee got his books of accounts audited on 28/03/2014 which was made available to AO and no prejudice was caused to Revenue—Assessee had only committed technical venial breach which does not create any loss to exchequer as audit report was available to AO before completion of assessment proceedings—High Court in case of CIT vs. A.N. Arunachalam in context of filing of audit report for claiming deduction u/s. 80J observed that once audit report was made available before AO before completion of assessment proceedings, assessee should be granted deduction u/s 80J—Said analogy could very well be drawn and used in penalty proceedings like that of assessee—Assessee had committed only technical venial breach for which he could not be penalized—Thus, penalty made u/s 271B was deleted—Assessee's appeal allowed.*

In view of above, AO be directed to delete the levy of penalty of Rs.1,50,000/- u/s 271B of the IT Act, 1961.”

6. The Id. AR of the assessee in addition to the written submission submitted that there is only one day delay in submission of the audit report. He relying the judgement of the Hon'ble Supreme Court of India in the case of Hindustan Steel Limited Vs. State of Orissa [ 83 ITR 26 (SC) ] submitted that an

order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

7. Per contra, Id. DR supported the orders of the lower authority and stated that once there is delay it is delayed. The Id. DR further submitted that the assessee has even though liable to get his requisite audit report failed to do and the levy of penalty is correct

and the same be upheld as the contentions raised by the assessee is nothing but the afterthought.

8. We have heard the rival contentions, perused the material on record and order of the lower authorities. We have also gone through the judicial decision cited by the Id. AR of the assessee in support his arguments before us. The Id. DR did not controvert the fact there is delay of only one day in filling the audit report by the assessee. The Id. AR of the assessee contended that the assessee explained that it got the accounts audited and obtained the tax audit report on 07.11.2017 but due to some technical glitches it was submitted on 08.11.2017 so there is one day delay. The Id. CIT(A) hold a view that the audit was completed on 08.11.2017 and therefore confirmed the penalty. Be it may so, the bench noted that there is only one day delay in filling the audit report by the assessee. The provision related to the levy of penalty reads as under :

**Failure to get accounts audited.**

**271B.** 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.

Here the law dictate with the word may levy the penalty for the breach of provision of section 44AB of the Act. The word may contemplates as to whether the explanation sought from the assessee in not complying the provision of the penal in nature is required to be read with the facts and circumstances of each case. Here in this case the bench noted that there is only one day delay in submission of the audit report and that too only the technical glitches and latches on the portal which can be a reasonable cause for not complying the law. The similar view has been taken by the Hon'ble Madhya Pradesh Court in the case o Staywell Hotels Private Limited Vs. CIT where in the court has condone the delay in filling the audit report by two months. The relevant finding of the said decision is reiterated here in below:

5. Having heard learned counsel for the parties and having perused record of the case, we are of the view that appeal deserves to be allowed.

6. In our opinion, the use of expression 'may' in section 271B confers discretion on the Assessing Officer to impose penalty for the breach of section 44AB. This, therefore, contemplates as to whether explanation sought from assessee in not complying the requirement of section 44AB is to be accepted or not by Assessing Officer ? In other words, though compliance of section 44AB is mandatory for assessee its non-compliance within time attracts rigour of section 271B, *i.e.*, penalty. However, on a sufficient cause being shown, the Assessing Officer is vested with the discretion to condone the delay and relieve the assessee from payment of penalty amount. It then depends upon facts of each

case as to whether case for acceptance of explanation is made out by the assessee, or not ?

7. In our opinion, the explanation offered by the assessee in this case ought to have been accepted being a sufficient one. The delay in filing certain Form was not inordinate. It was hardly of two months. Secondly, there was explanation offered for such delay. The delay, thus, did not have any deliberate intention on the part of assessee, nor could their conduct be regarded as contumacious or with a view to evade payment of tax. If at all, there is any breach it was technical or venial in nature. In the facts of this case, no case of penalty under section 271B was made out.

9. Respectfully following the said decision of the Hon'ble Madhya Pradesh High Court and observation of the apex court on levy of penalty we are of the view that levy of penalty for delay in filling the audit report by one day did not have any deliberate intention on the part of the assessee, nor could the conduct of the assessee be regarded as to breach the provision of the law. The delay if any is on account the reasons on the technical latches on the portal and the same is venial in nature based on the provision of the Act as reiterated here in below. Based on these deliberation of the facts as well as provision of the law and judicial precedence cited, we hold that 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 03/05/2023

Sd/-

( संदीप गोसाई )

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

Sd/-

( राठौड कमलेश जयंतभाई )

(Rathod Kamlesh Jayantbhai)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 03/05/2023

\*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- Smt. Sushila Devi, Sikar
2. प्रत्यर्थी / The Respondent- ACIT, Circle, Sikar
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. 149/JP/2023 }

आदेशानुसार / By order

सहायक पंजीकार / Asst. Registrar