IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR

BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER

I.T.A. Nos. 31 to 34/Asr/2023
Assessment Years: 2014-15 & 2015-16

Sh. Santokh Singh, H. No. 169 VDO Wadali Dogra, Talwandi Dogra, Amritsar-143001 [PAN: DEFPS 1336D]	**V.**	Income Tax Officer, NFAC Delhi/ITO Ward 2(1), Amritsar
(Appellant)		**(Respondent)**

Appellant by	Sh. Rohit Kapoor, CA & Sh. Vir Sain Aggarwal
Respondent by	Dr. Vedanshu Tripathi, Sr. DR

Date of Hearing : 23.05.2023
Date of Pronouncement : 30.05.2023

ORDER

Per Dr. M. L. Meena, AM:

This bunch of appeals has been filed by the assessee against the order of the Ld. CIT(A) National Faceless Appeal Centre (NFAC) Delhi even dated 22.11.2022 in respect of Assessment Years 2014-15 & 2015-16

arising out of the assessment order passed ex-parte qua the assessee u/s 144 r.w.s 147 of the Income Tax Act.

2. **In ITA Nos. 31 & 32/Asr/2023:** The appellant has raised the following common grounds in the appeal.

"1. That the Ld. CIT(A) has erred in dismissing the appeal by passing order u/s 250(6) and sustaining the addition made by the AO.

2. That the order passed u/s 250(6)of the Income Tax Act, is bad in law as the same has been disposed off without examining the merits of the case and without following principles of law.

3. That the CIT(A) has erred in confirming the addition of Rs. 1095406/- on account of NP @ 5% on cash deposited to the tune of Rs. 25286429/- in ICICI Bank Account No 202105000180 assuming the total cash deposited as turnover without giving the benefit of rotation of funds.

4. That the CIT(A) has erred in confirming the addition of Rs. 1095406/- by estimating 5% profit on cash deposited in ICICI Bank Account No 202105000180 without appreciating that the assessee is a Kachha Ahartiya dealing as commission agent of fresh vegetables. That CIT(A) has failed to appreciate that rate of profit/ commission in such a trade is limited to 1% subject to further reduction on account of expenses.

5. That the CIT(A) has erred in confirming the addition made by the AO in assessment order passed u/s 147 r.w.s 144 as the same has been passed without providing the copy of reasons recorded and sanction letter u/s 151.

6. That the Ld. CIT(A) has erred in not appreciating that the assessee has been regularly filing income tax returns and has duly disclosed commission income.

7. That the appellant craves leave to add or amend the grounds of appeal before the appeal is heard and disposed off."

3. **In ITA Nos. 33 & 34/Asr/2023:**

The appellant has raised common grounds of appeal in respect of confirming levy of penalty u/s 271(1)(b) of the Act for noncompliance of notices.

4. At the outset, the Ld. counsel for the appellant submitted that the Ld. CIT(A) has erred in law and on facts in confirming the addition of Rs. 10,95,406/- in each appeal on account of excess NP @ 5% on estimating turn over comprising of cash deposited in ICICI Bank Account No. 202105000180 to the tune of Rs.2,52,86,429/- without appreciating the fact that the rate of profit/commission in this line of *Kachha Ahartiya* business is limited to 1% subject to incidental expenses. He argued that the CIT(A) has not appreciated the facts that the assessee was a Kachha Ahartiya dealing as commission agent of fresh vegetables and that rate of profit/ commission in such a trade is limited to 1% subject to further reduction on account of expenses. In support, he has filed a written synopsis and relevant part of which reads as under:

> *"2. That the appellant had filed return of income u/s 139(1) for the year under consideration on 27.02.2015 at an income of Rs. 173110/-. That the appellant has duly declared income under the head 'Income from Business and profession'. The copy of return for A.Y. 2014-15 is enclosed at page no* ***01-02 of PB.*** *That there is no dispute in respect of the fact that the appellant is engaged in sale and purchase of fruits on Arhatiya basis.*

That the commission in this trade is 1% and the returns filed by the appellant for other years have duly been accepted by the department.

3. *That a kachha arahtia brings a privity contract between his constituent and the third party so that each becomes liable to the other. The pacca arahtia, on the other hand, makes himself liable upon the contract not only to the third party but also to his constituent. In the present case, the assessee is a Kachcha Aharitya for which there is no dispute. The same has been accepted by the AO in para no 9 [Page 11] of the assessment order dated 22.03.2022 enclosed at page no 06-12 of the paper book.*

6. *Subsequently, the appellant filed an appeal before the Hon'ble CIT(A) against the said order of AO. That the Hon'ble CIT(A) passes an ex-parte order u/s 147 r.w.s 144 on 22.11.2022 confirming the addition made by the Ld. AO. It is pertinent to bring to your kind attention that the Ld. CIT(A) passed an ex-parte order u/s 250(6) on account of failure of the appellant to respond to notices dated 11.10.2022 and 15.11.2022 without adjudicating the case on merits.*

9.2 BENEFIT OF EXEPENSES NOT GIVEN AND HAS ERRED IN APPLYING COMMISSION RATE OF 5%

a) That the Ld. AO has failed to appreciate that the total amount withdrawn was consumed for making payment in respect of purchases made on behalf of the customer. The income which the appellant has earned was only the commission income and not the trading profits. The Ld. AO has accepted the fact that the appellant is a broker. However, while making the assessment, the AO realized the mistake that the reasons recorded are incorrect and therefore, while making the addition, the AO has taken into consideration the entire deposits amounting to Rs. 25327125/-. The Ld. AO has erred in applying the commission @ 5% as against standard rate of 1.1%. That if the rate of 1.1% is applied on the total credits in bank account of Rs. 2.53 crores, then also, no addition is called for on the basis of the following working: -

Cash Deposited	*25327125*
Commission @ 1.10%	*253271*
Less: Bank Charges	*-51206*

Less: Returned income	*-173110*
Less: Other Indirect Expenses	*-28955*
Net Income	*0*

As regard the benefit of bank charges taken above, the copy of bank statement is enclosed at page no 46-47 of the PB.

b)That the appellant Santokh Singh having PAN DEFPS1336D is a Kacha Arhtiya/ Commission agent of fresh fruits and vegetables in Vallah Mandi. The appellant has been declaring income from brokerage on commission earned for sale and purchase made on year to year basis.

c) That the same facts have been admitted by the AO that the deposits in the bank account are not the turnover of the assessee which is visualized from the fact that the AO has not invoked the penalty u/s 271B i.e. failure to get the accounts audited meaning thereby that the AO has taken into consideration the binding circular no 452 dated 17.03.1986 while making the assessment. Therefore, the only dispute is whether the commission rate applied by the AO @5% is justified taking into consideration the facts and circumstances of the case.

(d) That being a Kachha Arhtiya, the appellant only acts as an agent and earns commission from sale of fruits/ vegetables. As such, the appellant is not making independent sale and is only acting as an agent on behalf of the principle. The said contention is further proved from the fact that the cash has been deposited at different locations where the buyer is placed and the payment is made to the vendor in Mandi on behalf of buyer. In these circumstances, the turnover of a Kachha Arhtiya does not include the sale consideration and only includes the commission earned by him. In this regard your Honor's kind attention is drawn towards the circular No 452 dated 17.03.1986 in which it has been duly stated that in the case of Kachha Arhtiyas, only the commission has to be considered while working out the turnover. The relevant text of the circular is being produced hereunder: -

1. Section 44AB, as inserted by the Finance Act, 1984, casts an obligation on every person carrying on business to get his accounts audited, if his total sales, turnover or gross receipts, as the case may be, exceed Rs. 40 lakhs in any previous year relevant to the assessment year commencing on 1-4-1985 or any subsequent assessment year.

2. The Board have received representations from various persons, trade associations, etc., to clarify whether in cases where an agent effects sales/turnover on behalf of his principal, such sales/turnover have to be treated as the sales/turnover of the agent for the purpose of section 44AB.

3. The matter was examined in consultation with the Ministry of Law. There are various trade practices prevalent in the country in regard to agency business and no uniform pattern is followed by the commission agents, consignment agents, brokers, kachha arahtias and pacca arahtias dealing in different commodities in different parts of the country. The primary necessity in each instance is to ascertain with precision what are the express terms of the particular contracts under consideration. Each transaction, therefore, requires to be examined with reference to its terms and conditions and no hard and fast rule can be laid down as to whether the agent is acting only as an agent or also as a principal.

4. The Board are advised that so far as kachha arahtias are concerned, the turnover does not include the sales effected on behalf of the principals and only the gross commission has to be considered for the purpose of section 44AB. *But the position is different with regard to pacca arahtias. A pacca arahtia is not, in the proper sense of the word, an agent or even del credere agent. The relation between him and his constituent is substantially that between the two principals. On the basis of various Court pronouncements, following principals of distinction can be laid down between a kachha arahtia and a pacca arahtia:*

(1) ***A kachha arahtia acts only as an agent of his constituent and never acts as a principal****. A pacca arahtia, on the other hand, is entitled to substitute his own goods towards the contract made for the constituent and buy the constituent's goods on his personal account and thus he acts as regards his constituent.*

(2) A kachha arahtia brings a privity contract between his constituent and the third party so that each becomes liable to the other. The pacca arahtia, on the other hand, makes himself liable upon the contract not only to the third party but also to his constituent.

(3) Though the kachha arahtia does not communicate the name of his constituent to the third party, he does communicate the name of the third party to the constituent. In other words, he is an agent for an unnamed principal. The pacca arahtia, on the other hand, does not inform his constituent as to the third party with whom he has entered into a contract on his behalf.

(4) The remuneration of a kachha arahtia consists solely of commission and he is not interested in the profits and losses made by his constituent as is not the case with the

pacca arahtia.

(5) The kachha arahtia, unlike the pacca arahtia, does not have any dominion over the goods.

(6) The kachha arahtia has no personal interest of his own when he enters into transaction and his interest is limited to the commission agent's charges and certain out of pocket expenses whereas a pacca arahtia has a personal interest of his own when he enters into a transaction.

(7) In the event of any loss, the kachha arahtia is entitled to be indemnified by his principal as is not the case with pacca arahtia.

5. The above distinction between a kachha arahtia and pacca arahtia may also be relevant for determining the applicability of section 44AB in cases of other types of agents. In the case of agents whose position is similar to that of kachha arahtia, the turnover is only the commission and does not include the sales on behalf of the principals. In the case of agents of the type of pacca arahtia, on the other hand, the total sales/turnover of the business should be taken into consideration for determining the applicability of the provisions of section 44AB.

Circular : No. 452 [F. No. 201/3/85-IT(A-II)], dated 17-3-1986.

JUDICIAL ANALYSIS

EXPLAINED IN - In Jeyar Consultant & Investment (P.) Ltd. v. Assistant Commissioner [1993] 46 ITD 71 (Mad.-Trib.), it was observed that it is ex facie clear from the CBDT Circular No. 452 of 17-3-1986 which came to be issued in relation to kacha and pacca arhatias, who are an integral part of the trading sector, that instructions issued by the Board as respects kacha and pacca arhatias could not be applied to the case of the assessee who has arranged finances for other for a fee. The assessee may choose to label the fee as brokerage or even as commission. But the fee—or to use a generic expression 'receipt'—could not be regarded as turnover proper.

RELIED ON IN - The above circular was relied on in ITO v. Shantilal Chuni-lal & Co. [1993] 45 ITD 581 (Pune - Trib.), with the following observa-tions :

". . . Further, reference was made by assessee to pages 52 to 54 which contains Board's Circular No. 452, dated 17-3-1986 which has been issued in connection with section 44AB of the Income-tax Act, 1961. Reliance was placed on para 4 of the said circular according to which the Board were advised that so far as kachha arahatias were concerned, the turnover did not include sales effected on behalf of the principals

and only gross commission has to be considered for the purpose of section 44AB. The submis-sion of the learned counsel for the assessee was that the case of the assessee is one of kachha arahatia and not a pucca arahatia and, therefore, only gross commission has to be considered for the purpose of section 44AB of the Income-tax Act, 1961. . . . The CIT (Appeals) has excluded the adat receipt as well as interest receipt from the purview of turnover for the purpose of section 44AB. Relying on the clarifications given by the Board in its Circular No. 452, dated 17-3-1986, he has categorised the assessee as kachha arahatia and he has charged expenses incurred on such business which resulted in gross profit rate of 1.09 per cent. Therefore, it is very much relevant to clinch the issue whether the assessee is a kachha arahatia or not. Going by the clarifica-tion issued by the Board in the aforesaid Circular No. 452, dated 17-3-1986 the case of the assessee fits in with the kachha araha-tia vis-a-vis case of pucca arahatia. . . ." (pp. 585-586). *REFERRED TO IN - Manish Textiles v. ACIT [1991] 38 ITD 365 (Bom.).*

e) It is pertinent to mention here that in the case of the appellant, the Ld. AO has made an addition of Rs. 1095406/- i.e. net profit @ 5% by treating the entire alleged bank deposits of Rs. 25327125/- as turnover. That, on perusal of the aforesaid circular, your Honor will find that the said action of the AO as also affirmed by the worthy CIT(A) is non tenable. This is in view of the fact that the appellant acts as a Kachha Arhtiya and does not have any share in the sale proceeds realized from sale of fruits and vegetable on behalf of the principle. Even otherwise, the commission of 5% adopted by the AO is against the facts and circumstances of the case and over and above the standard market rates.

f) As regard the higher commission rate of 5% applied by the AO as against the standard rate of 1-1.5%, reliance is being placed upon the following case laws: -

2021 (3) TMI 826 - ITAT CHANDIGARH *SHRI GURU NANAK TRUCK OPERATORS UNION VERSUS THE ITO*	*Estimation of income - Rejection of books of accounts - AO estimated the net profit @ 2% of the gross receipts holding that the assessee has failed to account for the receipts appearing in Form 26AS - CIT(A) restricted the addition to 1.5% of the gross receipts - HELD THAT:- As pointed out by the Ld. counsel, in the past three years, the gross commission of the total receipts remained below 1%. CIT(A) has determined the addition @ 1.5% and as per settled law when the books of account are rejected, the profit is determined on estimation basis* *In determining the profit on estimation basis, the past*

	history plays a vital role. Therefore, we are of the considered view that the net profit rate of 1.5% sustained by the Ld. CIT(A) is on higher side in view of the past history. Hence, we find merit in the contention of the Ld. counsel that 1.5% profit rate estimated by the Ld. CIT(A) is on higher side. Accordingly, in the interest of justice, we partly allow the appeal of the assessee and modify the order passed by the Ld. CIT(A) and restrict the net profit rate to 1% of the gross receipts, which is more than the percentage in the last 3 years. We therefore, direct the Assessing Officer to compute the addition @ 1% of the gross receipts. Appeal filed by the assessee is partly allowed.

5. Per contra, the Ld DR although supported the impugned order, however, he failed to rebut the contention raised by the counsel.

6. We have heard rival contentions, perused the material on record, impugned order, written submission and case law cited before us. Admittedly, the appellant being a Kachha Arahtiya, can only acts as an agent and earns commission from sale of fruits/ vegetables. Meaning thereby, the appellant is not making independent sale and is only acting as an agent on behalf of the principle. The said contention of the appellant is further proved from the fact that the cash has been deposited at different locations where the buyer is placed and the payment is made to the vendor in Mandi on behalf of buyer. In these circumstances, the turnover of a Kachha Arhtiya would not include the sale consideration and only includes

the commission earned by him. The CBDT circular No 452 dated 17.03.1986 make it apparently clear that in the case of Kachha Arhtiyas, only the commission has to be considered while working out the turnover, as above.

7. In our view, so far as kachha arahtias are concerned, the turnover does not include the sales affected on behalf of the principals and only the gross commission has to be considered for the purpose of section 44AB. A kachha arahtia acts only as an agent of his constituent and never acts as a principal. The remuneration of a kachha arahtia consists solely of commission as he is not interested in the profits and losses made by his constituent as it is not the case with that of the pacca arahtia.

8. In the case of "ITO v. Shantilal Chuni-lal & Co.", (Supra) ITAT, Pune Bench, considering the Board's Circular No. 452, dated 17-3-1986 has observed as under:

> *". . . Further, reference was made by assessee to pages 52 to 54 which contains Board's Circular No. 452, dated 17-3-1986 which has been issued in connection with section 44AB of the Income-tax Act, 1961. Reliance was placed on para 4 of the said circular according to which the Board were advised that so far as kachha arahatias were concerned, the turnover did not include sales effected on behalf of the principals and only gross commission has to be considered for the purpose of section 44AB. The submis-sion of the learned counsel for the assessee was that the case of the assessee is one of kachha arahatia and not a pucca arahatia and, therefore, only gross commission has to be considered for the purpose of section 44AB of the Income-tax Act, 1961. . . .*

The CIT (Appeals) has excluded the adat receipt as well as interest receipt from the purview of turnover for the purpose of section 44AB. Relying on the clarifications given by the Board in its Circular No. 452, dated 17-3-1986, he has categorised the assessee as kachha arahatia and he has charged expenses incurred on such business which resulted in gross profit rate of 1.09 per cent. Therefore, it is very much relevant to clinch the issue whether the assessee is a kachha arahatia or not. Going by the clarifica-tion issued by the Board in the aforesaid Circular No. 452, dated 17-3-1986 the case of the assessee fits in with the kachha araha-tia vis-a-vis case of pucca arahatia. . . ." (pp. 585-586).

9. It is pertinent to mention here that in the present case of the appellant; the Ld. AO has made an addition of Rs. 1095406/- as net profit @ 5% by treating the entire alleged bank deposits of Rs. 25327125/- as turnover, in contradiction to the Board's Circular No. 452, dated 17-3-1986. In our view, the CIT(A)'s decision in affirming the said action of the AO, by passing *ex parte* order would be liable to be set aside. However, the assesse has earned commission income as a kachha Arahtia ought to be estimated either at the rate given in the aforesaid Board Circular or on the basis of past history of commission percentage receipt on such turn over or else comparative case of the other commission agents/Kachha Arahtias to decide the net profit rate applicable in the present case.

10. Following the Board's Circular No. 452, dated 17-3-1986 and Pune Bench (Supra), and considering peculiar facts of the case, we hold that admittedly, the appellant being a Kachha Arahtiya, it would be justified to

apply a net profit rate of 1.5% as against 5% applied by the AO, on the Total Turn Over estimated at Rs. 2,53,27,125/-. Thus, the grounds of appellant on the issue of applicability of net profit rate is partly allowed.

11. Accordingly, the AO is directed to apply a net profit rate of 1.5% as against 5%, on the Total Turn Over estimated at Rs. 2,53,27,125/-. Thus, the impugned order of the CIT(A) stands modified in the terms indicated as above, in both the quantum appeals.

ITA Nos. 32 & 34/Asr/2023

12. On identical facts, in these two appeals, the appellant has challenged the CIT(A)'s orders in confirming the levy of penalties u/s 271(1)(b) of the act amounting to Rs. 30,000/- in each, on account of non-compliance to notice u/s 142(1) on 29.11.2022, 10.02.2022 and 18.02.2022 without appreciating the fact and circumstances of the matter that non-compliance has been caused due to the reasons beyond the control of the appellant. In support, he filed a written synopsis which reads as under:

1. That the appellant Santokh Singh having PAN DEFPS1336D is a Kacha Arhtiya/ Commission agent of fresh fruits and vegetables in Vallah Mandi. The appellant has been declaring income from brokerage on commission earned from sale made on year to year basis.

2. That the appellant had filed return of income u/s 139(1) for the year under consideration on 27.02.2015 at an income of Rs. 173110/-. That the appellant has duly declared income

under the head 'Income from Business and profession'. The copy of return for A.Y. 2014-15 is enclosed at page no **01-02 of PB**.

3. The case of the appellant was re-opened u/s 148 vide notice dated31.03.2021 on the basis of information that the appellant had high value transactions in the nature of cash deposits to the tune of Rs. 25286429/- in his ICICI Bank Account No 202105000180. (Please refer page no 16-45) Thereafter notices u/s 142(1) were issued on 29.11.2022, 10.02.2022 and 18.02.2022 requesting the assessee to furnish explanation in regard to nature of income, business activities, source of cash deposits, etc. Your Honor will appreciate that the email address on the online portal was that of the accountant who expired on 19.04.2021 and the appellant as not aware about any proceedings. The copy of death certificate is enclosed at page no 27.

4. That the assessment was completed under section 147 r.w.s 144 of the Income Tax Act, 1961 ('the Act') vide order dated 22.03.2022 making an addition of Rs. 1095406/- i.e. net profit @ 5% by treating the total bank deposits of Rs. 25327125/- as turnover. The copy of **assessment order u/s 147 r.w.s 144 r.w.s 144B is enclosed at page 06-12 of PB** for your ready reference.

5. The appellant was not served with any notice and the same is evident from the fact that the order u/s 147 has been served by way of affixture. The copy of order of affixture is enclosed at page no 18.
6. That the appellant was served with notice u/s 274 r.w.s 271(1)(b) asking the appellant as to why the penalty in default of notice u/s 142(1) should not be levied. In response to the said notice, the appellant submitted that he is a senior citizen and illiterate person who cannot operate computers and is not aware of Information technology. Furthermore, it was also submitted that he has no knowledge of ongoing IT proceedings against him. [Refer page no. 19-26]

7. Subsequently, penalty u/s 271(1)(b) of an amount of Rs. 30000/- was levied vide order passed by the AO on 19.09.2022 against three defaults in respect of not replying to notice u/s 142(1) dated 29.11.2022, 10.02.2022 and 18.02.2022.

8. That the imposition of penalty u/s 271(1)(b) is not mandatory rather is discretionary provided the appellant proves that there was a reasonable cause for the said failure. In the present case, it was duly informed to the AO that the appellant was not served with any notice and moreover, the email id on the online portal was that of the accountant who expired on 19.04.2021 and the copy of death certificate is enclosed at page no 27.

9. A perusal of the above provisions of u/s. 271(1)(b) shows that the Parliament has used the words "may" and not "shall", thereby making their intention clear in as much as that levy of Penalty is discretionary and not automatic. The said conclusion is further justified by Section 273B of the Act namely “Penalty not to be imposed in certain cases”. A careful reading of Section 273B encompasses that certain penalties "shall" not be imposed in cases where "reasonable cause".

10. It is seen that penalty imposable u/s. 271(1)(b) is included in the provisions of section 273B. By the said provisions, the Parliament has unambiguously made it clear that no penalty "shall be" imposed, if the assessee "proves that there was a reasonable cause for the said failure". As noticed, if the statutory provision shows that the word "shall" has been used in Section 271(1)(b), then the imposition of penalty would have been mandatory. Section 273B as mentioned above further throws light on the legislative intent as it specifically provides that no penalty "shall’ be imposed if the assessee proves "that there was reasonable cause for the said failure".

a) 2023 (2) TMI 418 - ITAT AHMEDABAD HAKIM KHAN SUMERGADH BIBALSAR, JALORE VERSUS THE ITO, WARD-3, PALANPUR

Levy of penalty u/s 271(1)(b) - non-compliance of the notices issued u/s. 142(1) - Penalty u/s 271F - non-filing of the Return of Income - HELD THAT:- Parliament has used the words "may" and not "shall", thereby making their intention clear in as much as that levy of Penalty is discretionary and not automatic. The said conclusion is further justified by Section 273B of the Act namely “Penalty not to be imposed in certain cases”. A careful reading of Section 273B encompasses that certain penalties "shall" not be imposed in cases where "reasonable cause" is successfully pleaded.

In the facts of the present case, it is seen that the explanation offered by the assessee have been ignored by the A.O. as well as the Ld. CIT(A)-NFAC but confirmed the levy of penalties u/s. 271(1)(b) and u/s. 271F of the Act without considering u/s. 273B - Applying the provisions of Section 273B we have no hesitation in deleting the penalties levied u/s. 271(1)(b) and u/s. 271F of the Act since “reasonable cause” is clearly demonstrated by the assessee. Therefore the penalties levied u/s. 271(1)(b) and u/s. 271F are deleted. - Appeal of assessee allowed.

b) 3 SOT 414 (KOL.)IN THE ITAT KOLKATA BENCH ‘B’Mrs. Manju Katarukav.Income-tax Officer

Section 271F, read with section 273B, of the Income-tax Act, 1961 - Penalty - For failure to furnish return of income - Assessment year 2000-01 - Whether penalty under section 271F is to be imposed as per law prevailing on date of default - Held, yes - Whether

mere failure to furnish return within due date as required under section 139(1) is not sufficient to warrant penalty provided under section 271F but it is imposable only when default continues even after end of relevant assessment year - Held, yes - Whether no penalty is imposable under section 271F on person or assessee for any failure referred to in section 271F if he proves that there was reasonable cause for said failure - Held, yes - Whether in context of penalty provisions, including provisions of section 271F, words 'reasonable cause' would mean a cause which prevents a reasonable man of ordinary prudence acting under normal circumstances without negligence or inaction or want of bona fides from doing act of which he, called on to act reasonably, knows or ought to know - Held, yes - Assessing Officer imposed penalty under section 271F upon assessee for failure to file return before end of assessment year - Whether belief of assessee that she was not required to file return before end of relevant assessment year because of reason that entire liability of tax payable on total income was covered by TDS amount and ultimately there was a refund due to assessee was a bona fide one and such bona fide belief was to be treated as reasonable cause for not furnishing return before end of assessment year - Held, yes - Whether, therefore, penalty imposed upon assessee was liable to be cancelled - Held, yes

11. Without prejudice to the aforesaid, the penalty cannot be imposed for each and every notice which remains un-complied. In the present case, the penalty u/s 271(1)(b) has been imposed for same default. Furthermore, the Ld. AO has failed to appreciate that there was a nationwide severe pandemic of COVID and everyone in the country was duly taking abundant precaution. Moreover, in the peculiar case, the accountant of the assessee has expired and as such, it is very humbly submitted to drop the penalty levied u/s 271(1)(b). In this regard reliance is being placed upon the following case laws: -

a) 2023 (2) TMI 1114 - ITAT SURAT CHANDRAKANT HARSHADBHAI GOHEL VERSUS D.C.I.T., CENTRAL CIRCLE-2, SURAT

Penalty levied u/s 271(1)(b) - assessee failed to comply notice u/s 142(1) - scope of bonafide reason - HELD THAT:- Division Bench of Delhi Tribunal in Akhil Bhartiya Prathmik Shmshak Sangh Bhawan Trust [2007 (8) TMI 386 - ITAT DELHI-G] held that where assessee had not complied with notice under Section 142(1) but assessment order was passed under Section 143(3) and not under Section 144, that meant that subsequent compliance in the assessment proceedings was considered as a good compliance and defaults committed earlier were ignored by Assessing Officer and, therefore, penalty under Section 271(1)(b) was not justified.

As find that similar view was followed in a series of decisions as has been relied by the ld. AR for the assessee in his submission. Thus, considering the fact that assessment in the present case was completed u/s 153A/143(3) in accepting return of income, find

that it was sufficient compliance, merely because the assessee could not make compliance due to some bonafide reason, no penalty under Section 271(1)(b) of the Act could be levied on the assessee. In view of aforesaid factual and legal position, direct the Assessing Officer to delete the entire remaining impugned penalty. In the result, ground of appeal raised by assessee is allowed.

b) 2015 (5) TMI 1100 - ITAT DELHI SMT. REKHA RANI, VERSUS DEPUTY COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE-8, NEW DELHI.

Penalty levied under Section 271(1)(b) - non appearing on the different dates of hearing before the Assessing Officer in response to notice issued under Section 143(2) - Held that:- The penalty under Section 271(1)(b) could not be imposed for each and every notice issued under Section 143(2), which remained not complied with on the part of the assessee. The provision of Section 271(1)(b) is of deterrent nature and not for earning revenue. Any other view taken shall lead to the imposition of penalty for any number of times (without limits) for the same default of not appearing in response to the notice under Section 143(2) of the Act. This does not seem to be the intention of the legislature in enacting the provisions of Section 271(1)(b) of the Act. In case of failure of the assessee to comply with the notice under Section 143(2) of the Act, the remedy with the Assessing Officer lies with framing of "best judgement assessment" under the provisions of Section 144 of the Act and not to impose penalty under Section 271(1)(b) of the Act again and again. In this view of the matter, we restrict the penalty levied under Section 271(1)(b) of the Act to the first default of the assessee in not complying with the notice under Section 143(2) of the Act.

Accordingly, the penalty imposed is restricted to ₹ 10,000/- . The grounds of appeal of the assessee are thus partly allowed.

From the above submission your honor is very humbly submitted to delete the penalty of Rs. 30000/- confirmed by CIT(A).

13. Per Contra, Ld. DR stands by impugned order, however, he didn't file any rebuttal the contention raised by the Ld. AR.

14. Heard rival contentions, perused the material on record, impugned order, written submission and case law cited before us. It is seen from the record that notices u/s 142(1) were issued by the AO, on 29.11.2022,

10.02.2022 and 18.02.2022 requesting the assessee to furnish explanation in regards to nature of income, business activities, source of cash deposits, etc. on the email address and that on the online portal, email address was given that of the accountant who expired on 19.04.2021(The copy of death certificate is enclosed at page no 27). The Ld. AR contended that the appellant assesse was not aware about either the assessment proceedings and thus, he was unaware about the notices issued u/s 142(1) of the Act. The AR further argued that the assessment was completed ex parte qua the assesse under section 147 r.w.s 144 of the Income Tax Act, 1961 ('the Act') vide order dated 22.03.2022 making an addition of Rs. 1095406/- i.e. net profit @ 5% by treating the total bank deposits of Rs. 25327125/- as turnover(APB, Pgs. 06-12) which has been served by way of affixture (APB, Pg. No. 18).

15. The AO was not satisfied with the reply of the appellant in response to notice u/s 274 r.w.s 271(1)(b) whereby the appellant was asked as to why the penalty in default of notice u/s 142(1) should not be levied and consequently, penalty u/s 271(1)(b) of an amount of Rs. 30000/- was levied vide order passed by the AO on 19.09.2022 against three defaults in

respect of not replying to notice u/s 142(1) dated 29.11.2022, 10.02.2022 and 18.02.2022.

16. It is settled law that the imposition of penalty u/s 271(1)(b) is not mandatory rather is discretionary provided the appellant proves that there was a reasonable cause for the said failure of non-compliance. In the present case, it was duly informed to the AO that the appellant was not served with any notice u/s 142(1) of the act and moreover, the email id given on the online portal was that of the accountant who was expired on 19.04.2021(the copy of death certificate at APB, page no 27).

17. It is apparently clear, on perusal of the above provisions of u/s. 271(1)(b) that the Parliament has used the words "may" and not "shall", thereby making legislative intention clear in as much as that levy of Penalty is discretionary and not automatic. The said conclusion is further justified by Section 273B of the Act which provides that “Penalty not to be imposed in certain cases”. A careful reading of Section 273B encompasses that certain penalties "shall" not be imposed in cases where "reasonable cause" is established.

18. Thus, in the said provisions, the Parliament has unambiguously made it clear that no penalty "shall be" imposed, if the assessee "proves that there was a reasonable cause for the said failure". As noticed, if the statutory provision shows that the word "shall" has been used in Section 271(1)(b), then the imposition of penalty would have been mandatory. Section 273B as mentioned above further throws light on the legislative intent as it specifically provides that no penalty "shall' be imposed if the assessee proves "that there was reasonable cause for the said failure".

19. In the case of "HAKIM KHAN SUMERGADH BIBALSAR, JALORE Vs. ITO (Supra), ITAT Ahmedabad Bench has deleted the levy of penalties u/s. 271(1)(b) of the Act by observing as under:

> *"……In the facts of the present case, it is seen that the explanation offered by the assessee have been ignored by the A.O. as well as the Ld. CIT(A)-NFAC but confirmed the levy of penalties u/s. 271(1)(b) and u/s. 271F of the Act without considering u/s. 273B - Applying the provisions of Section 273B we have no hesitation in deleting the penalties levied u/s. 271(1)(b) and u/s. 271F of the Act since "reasonable cause" is clearly demonstrated by the assessee. Therefore the penalties levied u/s. 271(1)(b) and u/s. 271F are deleted. - Appeal of assessee allowed."*

20. It is pertinent to mention that the Ld. AO has failed to appreciate that there was a nationwide severe pandemic of COVID and everyone in the country was duly taking abundant precaution. Moreover, in the peculiar

facts of the instant case, the accountant of the assessee has expired. In our view, the nationwide COVID Pandemic and death of the account whose email ID was given for correspondence, certainly demonstrate reasonable cause on the part of the appellant assesse for the said non-compliance of notices issued under section 142(1) of the Act. The impugned order of the Ld. CIT(A) in confirming the levy of penalties u/s 271(1)(b) of the act amounting to Rs. 30,000/- in each appeal, on account of non-compliance to notice u/s 142(1) on 29.11.2022, 10.02.2022 and 18.02.2022 are set aside.

21. In the above view, we accept the grievance of the appellant genuine and therefore, the levy of penalties u/s 271(1)(b) of the act amounting to Rs. 30,000/- in each of the captioned appeal are hereby deleted.

22. In the backdrop of the aforesaid discussion, the appeals of the assessees are disposed of in the terms indicated as above.

Order pronounced in the open court on 30.05.2023

Sd/-	**Sd/-**
(Anikesh Banerjee)	**(Dr. M. L. Meena)**
Judicial Member	**Accountant Member**

GP/Sr./P.S.

Copy of the order forwarded to:

(1)The Appellant
(2) The Respondent

(3) The CIT
(4) The CIT (Appeals)
(5) The DR, I.T.A.T.

True Copy

By Order