

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“RANCHI BENCH, RANCHI**  
**VIRTUAL HEARING AT KOLKATA**

**Before Shri Sanjay Garg, Judicial Member and Shri Rajesh Kumar, Accountant Member**

**I.T.A. No.72/Ran/2022**  
Assessment Year: 2008-09

**Rakesh Kumar Jha..... Appellant**  
**6, Shatabdi Tower, 1,**  
**SNP Area, Sakchi,**  
**Jamshedpur-831001.**  
**[PAN: ADKPJ7309N]**

**vs.**

**ITO, Ward-2(1), Jamshedpur..... Respondent**

**Appearances by:**

Shri P. S. Paul, AR, appeared on behalf of the appellant.

Shri Pranob Kumar Koley, Sr. DR, appeared on behalf of the Respondent.

Date of concluding the hearing : March 02, 2023

Date of pronouncing the order : May 15, 2023

**ORDER**

**Per Sanjay Garg, Judicial Member:**

The present appeal has been preferred by the assessee against the order dated 27.06.2022 of the National Faceless Appeal Centre [hereinafter referred to as ‘CIT(A)’] passed u/s 250 of the Income Tax Act (hereinafter referred to as the ‘Act’).

2. As per the statement of facts furnished by the assessee, the assessee has been running the business of imparting tuition classes. The assessment was made for the year under consideration on estimation basis on account of non-maintenance of books of accounts applying provisions of section 145(3) of the Income Tax Act. That the ITAT, Ranchi Bench vide order passed in ITA No.209/Ran/2019 dated 07.06.2019 has estimated the income of the assessee at Rs.7,61,261/-

being 8% of gross receipts u/s 145(3) of the Act on account of non-maintenance of books of accounts and on estimation of net profit.

The assessee, admittedly, was required to get his books of account audited as required u/s 44AB of the Act and on account of failure to do so, the Assessing Officer levied penalty u/s 271B of the Act which has been confirmed by the CIT(A).

3. Now, the contention of the ld. Counsel for the assessee is that where the assessee did not maintain books of account, the penalty u/s 271B could not be levied for failure of the assessee to get books of account audited as the question of audit of books of account does not arise where the books of accounts have not been maintained at all. The ld. Counsel for the assessee in this respect has relied upon the decision of the Hon'ble Allahabad High Court in the case of CIT vs. Bisauli Tractors reported in (2007) 165 taxman 0001.

4. We have gone through the order of the ITAT, Ranchi Bench, in the own case of the assessee in respect of quantum appeal for the year under consideration. We find that the assessee has not presented the true and correct facts. A perusal of para 5 of the order of ITAT dated 07.06.2019 (supra) would show that the Tribunal has categorically noted, "The A.O considering the submissions of the assessee and material placed on record, rejected the books of accounts of assessee estimating @10% of the total gross receipts". Therefore, the case of the assessee is not of maintenance of books of account, rather, the case of the assessee was that of rejection of books of account. The decision cited by the ld. counsel in the case of CIT vs. Bisauli Tractors (supra), therefore, is not applicable to the facts and circumstances of the present case.

5. Even otherwise, we find that the provisions of section 44AA and 44AB are separate and distinct provisions. Section 44AA and 44AB are reproduced as under:

*“44AA. (1) Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified<sup>4</sup> by the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the<sup>5</sup>[Assessing] Officer to compute his total income in accordance with the provisions of this Act.*

*(2) Every person carrying on business or profession [not being a profession referred to in sub-section (1)] shall,—*

*(i) if his income from business or profession exceeds<sup>6</sup>[one lakh twenty] thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds<sup>7</sup>[ten lakh] rupees in any one of the three years immediately preceding the previous year; or*

*(ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceed<sup>8</sup>[one lakh twenty] thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession are or is likely to exceed<sup>9</sup>[ten lakh] rupees,<sup>10</sup>[during such previous year; or*

*(iii) where the profits and gains from the business are deemed to be the profits and gains of the assessee under<sup>11</sup>[section 44AE] <sup>12</sup>[or section 44BB or section 44BBB], as the case may be, and the assessee has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, during such<sup>13</sup>[previous year; or]]*

*<sup>14</sup>[(iv) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business and his income exceeds the maximum amount which is not chargeable to income-tax during such previous year,]*

*keep and maintain such books of account and other documents as may enable the<sup>15</sup>[Assessing] Officer to compute his total income in accordance with the provisions of this Act.*

*(3) The Board may, having regard to the nature of the business or profession carried on by any class of persons, prescribe<sup>16</sup>, by rules, the books of account and other documents (including inventories, wherever necessary) to be kept and maintained under sub-section (1) or sub-section (2), the particulars to be contained therein and the form and the manner in which and the place at which they shall be kept and maintained.*

(4) Without prejudice to the provisions of sub-section (3), the Board may prescribe, by rules, the period for which the books of account and other documents to be kept and maintained under sub-section (1) or sub-section (2) shall be retained.]”

“**44AB.** Every person,—

(a) carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds one crore rupees in any previous year<sup>89</sup>[\*\*\*]:

<sup>90</sup>**Provided** that in the case of a person whose—

(a) aggregate of all amounts received including amount received for sales, turnover or gross receipts during the previous year, in cash, does not exceed five per cent of the said amount; and

(b) aggregate of all payments made including amount incurred for expenditure, in cash, during the previous year does not exceed five per cent of the said payment,

this clause shall have effect as if for the words "one crore rupees", the words "five crore rupees" had been substituted; or]

(b) carrying on profession shall, if his gross receipts in profession exceed fifty lakh rupees in any previous year; or

(c) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AE or section 44BB or section 44BBB, as the case may be, and he has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, in any previous year; or

(d) carrying on the profession shall, if the profits and gains from the profession are deemed to be the profits and gains of such person under section 44ADA and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his profession and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year; or

(e) carrying on the business shall, if the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year,

get his accounts of such previous year audited by an accountant before the specified date and furnish by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed :

**Provided** that this section shall not apply to the person, who declares profits and gains for the previous year in accordance with the provisions of sub-section (1) of section 44AD and his total sales, turnover or gross receipts, as the case may be, in business does not exceed two crore rupees in such previous year:

**Provided further** that this section shall not apply to the person, who derives income of the nature referred to in section 44B or section 44BBA, on and from the 1st day of April, 1985 or, as the case may be, the date on which the relevant section came into force, whichever is later :

**Provided also** that in a case where such person is required by or under any other law to get his accounts audited, it shall be sufficient compliance with the provisions of this section if

*such person gets the accounts of such business or profession audited under such law before the specified date and furnishes by that date the report of the audit as required under such other law and a further report by an accountant in the form prescribed under this section.*

*Explanation.—For the purposes of this section,—*

- (i) "accountant" shall have the same meaning as in the Explanation below sub-section (2) of section 288;*
- (ii) "specified date", in relation to the accounts of the assessee of the previous year relevant to an assessment year, means <sup>21</sup>[date one month prior to] the due date for furnishing the return of income under sub-section (1) of section 139."*

6. As per Section 44AA of the Act, the maintenance of books has been made compulsory in respect of persons carrying out certain profession and as mentioned above and further in cases of persons or business or profession if their turnover crosses the prescribed limit then such persons are required to maintain books of account, whereas, the condition prescribed for compulsory audit of accounts are different as prescribed u/s 44AB of the Act. Under section 44AA(1) the persons carrying on the notified professions irrespective of their annual receipts are required to maintain books of accounts, whereas the condition of carrying on of specified profession as not there u/s 44AB of the Act requiring compulsory auditing of the books of account. Similarly u/s 44AA(2) in case of persons carrying on business or profession other than the specified professions, are required to maintain their books of account if their annual receipt/turnover exceeds the prescribed limit. However u/s 44AB, the auditing of books has been made mandatory only in case of persons carrying on business activity only if their turnover increases the prescribed limit, however the prescribed limit for business is different than that for person carrying on profession. Further the limit prescribed u/s 44AA relating to annual receipts/turnover is very less as compared to that u/s 44AB of the Act. An person covered u/s 44AB is of course also covered u/s 44AA of the Act but not the vice-versa

may not be true. The penalty u/s 271A is levied for non-compliance of the provisions of section 44AA of the Act, whereas, the penalty u/s 271B is levied for non-compliance of the provisions of section 44AB of the Act. Neither section 44AA and 44AB are in substitution of each other and nor the penalty levied u/s 271A and 271AB are in alternate or in substitution to each other. The separate and distinct provisions of section 44AA and 44AB of the Act not only apply on different class of persons but also on the different threshold of income/sales turnover. It is to be further noted here that the rate of penalty u/s 271A for non-maintenance of books of account u/s 44AA are lesser than that is prescribed u/s 271B for non-auditing of the books of account. Allowing a person who is required to get his books of audited to escape with lesser penalty or for no penalty for committing his wrongful act of even not maintaining his books of account will amount to allowing a person to take the benefit of his own wrong. The person, who have different class being their turnover very high has been assigned double responsibility i.e. firstly, maintaining their books of account and secondly get their books of account audited. Whereas the persons with lesser receipts or turnover have been given single responsibility of maintaining their books of accounts. Under the circumstances, the persons with lesser responsibility have been subjected to lesser penalty for non-compliance of the statutory requirement. However, the persons having higher turnover have been given the responsibility of also get their books of account audited and are subjected to higher penalty. In our humble view, the persons who have been given double responsibility of maintaining books of account and audit of the accounts are liable to be subjected to penalty on both counts and they cannot be equated with the persons given single/lesser responsibility for their own wrongful act or omission.

This can be explained by an example. Suppose there are two persons namely Ram & Shyam. Both are required to maintain their books of accounts and also get those audited as required u/s 44AA and 44AB. Ram maintains his books of account but did not get those audited, whereas, Shyam did not maintain his book of accounts at all and there was no question of audit of the same as the books did not exist at all. Under these circumstances, if the contention of the Id. Counsel is to be accepted, Ram will be subjected to higher penalty u/s 271B of the Act, whereas, Shyam who has committed double default would escape with lesser penalty. This proposition, in our humble view, is neither legally justified nor it can pass the test of application of principles of justice, equity and good conscience.

7. We may at this stage refer to the decision of the Hon'ble Madhya Pradesh High Court in the case of Bharat Construction Co. v. ITO reported in [1999] 106 Taxman 460 (MP), wherein, the Assessing Officer had earlier levied penalty u/s 271A of the Act for non-maintenance of books, thereafter the Assessing Officer issued another notice for levy of penalty u/s 271B of the Act for not getting the books of accounts audited. The assessee challenged the levy of penalty u/s 271B of the Act on the ground that the same was barred by limitation. The Hon'ble Madhya Pradesh High Court has held that the defaults contemplated by section 271A and section 271B are separate and distinct. Under the latter provision, if the assessee fails to get his accounts audited u/s 44AB, he is liable to penalty. The object is to get a clear picture of the assessee's accounts whose turnover exceeds the prescribed limit. The rates envisaging two types of defaults are also different. The Hon'ble High Court also took notice the fact that earlier penalty levied by the Assessing Officer only for non-maintenance of

accounts by the assessee and not for its failure to have its accounts audited u/s 44AB of the Act. Therefore, the Hon'ble High Court held that the earlier penalty levied by the Assessing Officer u/s 271A of the Act was only for non-maintenance of books of account and the same did not cover the penalty for not getting the books audited u/s 271B of the Act and that the second notice issued by the Assessing Officer for levy of penalty u/s 271B of the Act was not barred by limitation by reckoning the limitation period from the date of issue of earlier notice for levy of penalty u/s 271A of the Act. The relevant part of the order of the Madhya Pradesh High Court is reproduced as under:

*“7. Applying all this to the present case, it emerges that the Assessing Officer had initiated penalty proceedings in his assessment order dated 30-5-1986 only for non-maintenance of account books by the assessee and not for its failure to have its accounts audited under section 44AB. That is why he firstly issued notice dated 11-11-1987 under section 271A and passed the final penalty order on 28-12-1988. He did not record default of non-audit of accounts in his order and, consequently, his direction for initiation of penalty proceedings contained in his assessment order would not cover his second notice dated 11-9-1989 issued under section 271B. The second notice, accordingly, cannot be held time-barred by reckoning the limitation period from 30-3-1987 and expirable on 3-8-1989.*

*8. It remains to be seen whether proceedings under section 271B were necessarily required to be initiated in the assessment proceedings of the relevant assessment year. But as it is, the defaults contemplated by section 271A and section 271B are separate and distinct. Under the latter provision if the assessee fails to get his accounts audited under section 44AB, he is liable to penalty as laid down in this section. The object is to get a clear picture of the assessee's accounts whose turnover exceeds the prescribed limit. The rates envisaging two types of defaults are also different. Therefore, without dilating on the issue further we find no difficulty in holding that the impugned second notice dated 11-9-1989 cannot be ascribed to the direction of the Assessing Officer for initiation of penalty proceedings in his assessment order dated 30-5-1986. Since it is not covered by that order, it should be treated as initiating penalty proceedings under section 271B from the date it was issued and this was not barred by time under section 275B. This shall not, however, be construed to validate this impugned notice for all*

*purposes, should it be suffering from some other infirmity. But it surely is not barred by time under section 275B.”*

8. The object of requiring the assessee to get his books of accounts audited u/s 44AB is to get a clear picture of the assessee's accounts so as to enable the Income Tax Authorities to assess true and correct income of the assessee. The penalty u/s 271B is attracted for failure of the assessee to get the books of account audited. Since, the case in hand, the assessee did not get his books of account audited, therefore, as per the provisions of section 44AB read with section 271B of the Income Tax Act, the Assessing Officer rightly levied the penalty u/s 271B of the Act. We, therefore, do not find any merit in the appeal of the assessee and the same is accordingly dismissed.

9. In the result, the appeal of the assessee stands dismissed.

***Kolkata, the 15<sup>th</sup> May, 2023.***

Sd/-  
**[Rajesh Kumar]**  
**Accountant Member**

Sd/-  
**[Sanjay Garg]**  
**Judicial Member**

Dated: 15.05.2023.

RS

*Copy of the order forwarded to:*

1. Rakesh Kumar Jha
2. ITO, Ward-2(1), Jamshedpur
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches