

**IN THE INCOME TAX APPELLATE TRIBUNAL  
RAJKOT BENCH, RAJKOT  
(Conducted through E-Court at Ahmedabad)**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &  
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

I.T.A. No.181/Rjt/2023  
(Assessment Year: 2017-18)

Jitendra Majithia Nr. B. M. Taylor Yogeshwar Nagar, Jam Khambhalia, Jamnagar, Gujarat-361305	Vs.	The Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), New Delhi
[PAN No.AOMPM6656E]		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

<b>Appellant by :</b>	Shri Sagar Shah, A.R.
<b>Respondent by:</b>	Shri Abhimanyu Singh, Sr. DR

<b>Date of Hearing</b>	09.08.2023
<b>Date of Pronouncement</b>	18.08.2023

ORDER

**PER SIDDHARTHA NAUTIYAL, JM:**

This appeal has been filed by the assessee against the order passed by the Ld. Commissioner of Income Tax(Appeals), (in short “Ld. CIT(A)”), National Faceless Appeal Centre, (in short “NFAC”), Delhi in Order No. ITBA/NFAC/S/250/2022-23/1051685070(1) vide order dated 30.03.2023 passed for Assessment Year 2017-18.

2. The assessee has taken the following grounds of appeals:-

*“1. On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) under section 250 of the Income Tax Act is bad in law as well as on facts as the order passed is without considering the proper facts on the record and failed*

- 2 -

*to consider that appellant has no mala fide intention to make any noncompliance to the provisions of Income Tax Act.*

2. *On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) has erred in passing order u/s 250 of the Act, dated 30.03.2023 as he has failed to consider that it is the first year when the appellant has takeover the business from his brother and does not aware about the provision of the income tax act and requirement to get books of accounts audited due to the fact that appellant is in bona fide belief that his income does not exceed the maximum income chargeable to tax he is not supposed to filed return of Income and get books of account audited.*

3. *On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) since Ld. CIT (A) has failed to consider that by not doing books of accounts audited during the year under consideration there is no loss to the revenue as there is no adjustment in the books of accounts of the appellant and the breach of provision of section 44AB is just a mistake of the appellant which is no intentional and hence the penalty is required to be waived off.*

4. *On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) has erred in, passing order u/s 250 of the Act, dated 30.03.2023 as he has not appreciate that appellant not even aware about the provision of section 139 of the act and due such reason appellant has not filed the original return of income hence non-compliance with the provision of section*

*44AB is mere inadvertent error and trivial and venial In nature and there is no loss to the exchequer.*

5. *On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) has erred in passing order u/s 250 of the Act, dated 30.03.2023 since he has failed to consider the fact that appellant has no intention to make any non-compliance to the any provision of income tax act as on aware about the provision of Income Tax Act appellant is regularly filling return of income and getting books of accounts audited from A.Y. 2019-20 till date.*

6. *On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) has erred in passing order u/s 250 of the Act, dated 30.03.2023 since Ld. CIT (A) has upheld the decision of AO and failed to consider that penalty provision of section 271B does not empower the AO to mandatorily levy the penalty as there is discretion to 40 to waive the penalty looking into the facts of the case and the same is ignored by the Ld. CIT (A).*

7. *On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) has erred in passing order u/s 250 of the Act, dated 30.03.2023 since during the course of assessment proceedings when appellant aware about the provision he duly certified his books of accounts by independent chartered accountant which was accepted at assessment stage and no discrepancies were found, there is only inadvertent mistake of the appellant that he has failed to file a report in form 3CB and 3CD.*

8. On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) has erred in passing order u/s 250 of the Act, dated 30.03.2023 as CIT (A) has failed to consider the nature of business of appellant that appellant is earning only the commission income from sale of milk bags and maintaining sale and purchase account is only a part of accounting treatment to maintain books of accounts.

9. On the basis of the facts and circumstances of the case the order the penalty amount is still disputed as Ld. JAO has not given the effect to the order passed u/s. 250 of the act by the Honourable Commissioner of Income Tax (Appeals) regarding penalty charged on turnover of the appellant.

10. On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) has erred in passing order u/s 250 of the Act, dated 30.03.2023 since Ld. CIT (A) has failed to note that AO levied the penalty for a mistake which is technical in nature not only that the accounts provided in the assessment proceeding is not defected and income has been determined from that accounts only and there is no adjustment made by the AO In the assessment proceeding this itself suggest that penalty cannot be charged looking to the facts available on record.

11. On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) has erred in passing order u/s 250 of the Act, dated 30.03.2023 since Ld. CIT(A) has failed to appreciate that assessment proceedings initiated and

*completed by passing order u/s. 144 and various notices/questionnaire are issued and based on the responses submitted by the appellant was accepted and no addition was confirmed in the Assessment Order which suggest that there is no loss to revenue and non-filling of Form 3CB-3CD is merely a technical mistake of the appellant.*

12. *On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) has erred in passing order u/s 250 of the Act, dated 30.03.2023 is required to be quashed as the accounts of the appellant produced and relied upon while passing the assessment order has not been found defective and relied upon and even the assessed income is below the maximum amount not chargeable to tax levy of penalty at Rs. 1,28,529/- is unreasonable, illegal and against the set of facts available on record.*

13. *On the basis of the facts and circumstances of the case the order passed by the Ld. Commissioner of Income Tax (Appeals) has erred in passing order u/s 250 of the Act, dated 30.03.2023 is required to be quashed as intention of mandating the compliance of Provision of Section 44AB was to ensure that the books of account and other records are properly maintained and faithfully reflect the true income of the taxpayer. Though this object was achieved and the books of accounts of the appellant was duly accepted by AO when the returned income is considered as assessed income. Though books of accounts were not audited, the object of the law was achieved, which was disregarded by AO. Hence, penalty levied u/s. 271B is bad in law as well as on facts and required to be deleted.*

- 6 -

*The appellant craves leave, to add, amend, alter or delete any of the grounds of appeal at the time of personal hearing in the interest of natural justice.”*

3. The brief facts of the case are that the Assessing Officer observed that during scrutiny assessment, assessee had admitted turnover of Rs. 2,57,05,830/- and the assessee is liable to get its books audited under Section 44AB of the Act as its business turnover exceeded the limit prescribed under Section 44AB of the Act. Accordingly, the Assessing Officer levied a penalty of Rs. 1,28,529/- under Section 271B of the Act.

4. In appeal, Ld. CIT(A) upheld the order passed by the Assessing Officer under Section 271B on the ground that the Assessing Officer has not passed the order mechanically and the assessee was not prevented by any reasonable cause to get its account audited under Section 44AB of the Act. Further, the CIT(A) held that from the Profit & Loss Account, the assessee has reported sales of Rs. 3.41 crores, against which the assessee has debited expenses of Rs. 3.36 crores. Accordingly, the assessee is acting as a trader and not a commission agent. Accordingly, the Assessing Officer has correctly levied penalty under Section 271B as there was no reasonable cause which prevented the assessee to get its account audited. While passing the order, Ld. CIT(A) observed as under:-

*“7.2 The AO has imposed penalty u/s. 271B of Rs. 1,28,529/- for not getting his accounts audited and not furnishing such Audit Report u/s. 44AB within the due date specified therein. The AO has held that the plea of the assessee that the accounts were not audited due to ignorance*

- 7 -

*does not carry any merit as any businessmen has to be aware of prevailing laws and ought to follow the same and this cannot be considered as an inadvertent error. I agree with the view of the AO. As per Section 273B of the Act, no penalty shall be imposed u/s. 271B if the assessee is able to show that there was reasonable cause for the failure alleged on his part. The ignorance of law cannot be considered as a reasonable cause for not getting his accounts audited. Further, the AO has not levied penalty u/s. 271B mechanically but the penalty was levied by stating that by passing speaking order and rejecting the contentions of the assessee. Further, whether there is a loss to the revenue or not on account of accounts not being audited is not a criteria for not levying penalty u/s. 271B. Further, it is not mandatory in law to find defects in the accounts provided in the assessment proceedings and to make adjustment to the returned income by the AO in the assessment proceedings for levying penalty u/s. 271B.*

....

*7.4 In this case, the turnover of the assessee during the FY 2016-17 as per P & L Accounts submitted during the appellate proceedings is Rs. 3,41,66,600/- and it exceeds the limit of one crore rupees specified in section 44AB. In view of the above facts and respectfully following the of Hon'ble Karnataka High Court in the e judgment of Hon case of S.C. Naregal (supra), I agree with the view of the AO that the assessee was not prevented by any reasonable cause to gets his accounts audited u/s. 44AB and therefore, levy of penalty u/s. 271B is upheld. **These grounds of appeal are accordingly dismissed.***

....

- 8 -

*10.1 It is observed from the P&L A/c. of the assessee for the FY 2016-17 that the assessee has reported sales of dairy products amounting to Rs. 3,41,66,600/- and has debited expenses on account of purchases amounting to Rs. 3,36,68,889/-. It proves that the appellant is acting as a trader and not as commission agent. Further, he has not substantiated his claim that he is acting as a commission agent. Therefore, the contention that he earns commission only is false and baseless. As the turnover of the assessee exceeds Rs. 1 crore, the assessee was required to get his accounts audited. As the assessee has not got his accounts audited by an accountant before the specified date u/s. 44AB, the AO has correctly levied penalty u/s. 271B as there was no reasonable cause which prevented him to get his accounts audited. Accordingly, this ground is dismissed.”*

5. Before us the Counsel for the assessee submitted that the assessee is engaged in the business of selling milk and milk products. Earlier the assessee’s brother handled the business but due to illness the assessee for the first time started looking into the business from the impugned assessment year itself. The books of accounts of the assessee firm were duly maintained and it was the first year when the turnover of the assessee’s business exceeded the limit liable to be audited. The assessee was not well-versed with income tax provisions, and on being aware of the same, the assessee complied with law and filed Income Tax Return for the impugned assessment year and later assessment years as well. It was further submitted by the Counsel for the assessee that the scrutiny assessment was carried out in the case of the assessee and the income declared by the assessee in the Return of Income was duly accepted, that in additions. The aforesaid

proves that there was no mala fide intention in not carrying out audit during the impugned assessment year and there was a reasonable cause for not being able to get the accounts audited under Section 44AB of the Act. Further, the Counsel for the assessee submitted that from perusal of the assessment order it is seen that the Assessing Officer has not rejected the accounting records of the assessee during the course of assessment proceedings. Therefore, it was submitted that this is a fit case for setting-aside the levy under Section 271B of the Act since the assessee had a reasonable cause for not getting its account audited.

6. In response, Ld. D.R. relied on the observations made by the Ld. AO and CIT(A).

7. We have heard the rival contentions and perused the material on record. From the facts placed on record before us, we are of the considered view that the assessee has been able to reasonably explained the non-audit of books of accounts during the impugned assessment year. The assessee is engaged in business of selling milk and milk products. This was the first year when the assessee started managing the affairs of the business. Further, this was the first year when the turnover of the assessee's business exceeded the statutory limit under Section 44AB of the Act. It is further observed that in the scrutiny assessment, the accounts of the assessee have not been rejected and also that during the course of assessment proceedings, no additions have been made to the returned income filed by the assessee. Therefore, evidently there is no mala fide intention in not getting the books of accounts audited during the impugned year under consideration.

8. In the case of **Koramangala Club 81 [taxmann.com](#) 270 (Karnataka)**, the Hon'ble High Court held that where assessee was under bona fide belief that provisions of section 44AB were not applicable to a club, while supplying beverages, liquor, etc., to its members as it was not engaged in any business, but only a mutuality, it constituted reasonable cause to absolve it from levy of penalty. In the case of **Dr. K. Satish Shetty 188 Taxman 32 (Karnataka)**, assessee was proprietor of three concerns and his assessment was completed on total income of all three concerns. The assessee obtained an audit report required under section 44AB only in respect of one concern. For the other two businesses, he did not obtain audit reports under a bona fide belief that he was required to obtain audit report only in respect of that business, turnover of which crossed limit of Rs. 40 lakhs and for relevant assessment year turnover of other two businesses did not exceed Rs. 40 lakhs. The Assessing Officer, however, levied penalty under section 271B on assessee. The High Court held that since section 44AB as such does not show or contemplate that all businesses are to be consolidated together for working out aggregate of turnover and, on facts, it was clear that assessee had acted in a bona fide belief and had no dishonest intention in not obtaining audit report for all three businesses carried on by him, Tribunal was justified in deleting penalty imposed on assessee. In the case of **Nanak Singh Guliani 124 Taxman 650 (Madhya Pradesh)**, the assessee, who was engaged in business of contractorship, sub-contracted work of substantial amount. The gross receipts attributable to him personally became less than Rs. 40 lakhs. The High Court held that the assessee being under bona fide belief that amount obtained by sub-contractor was not to be accounted towards his income, was a reasonable

- 11 -

cause for not getting accounts audited under section 44AB of the Act. In the case of **Staywell Hotels (P.) Ltd. 155 Taxman 603 (MP)**, the Hon'ble High Court held that where delay in filing audit report in Form No. 3CD, was not due to any deliberate intention on part of assessee, nor could its conduct be regarded as contumacious or with a view to evade payment of tax, no case for penalty under section 271B was made out.

9. In view of the assessee's set of facts (which we have discussed in the foregoing paragraphs), and the judicial precedents on the subject, we are of the considered view that this is a fit case when penalty under Section 271B of the Act is liable to set-aside.

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

**This Order pronounced in Open Court on**

**18/08/2023**

**Sd/-**  
**(WASEEM AHMED)**  
**ACCOUNTANT MEMBER**  
Ahmedabad; Dated 18/08/2023

*TANMAY, Sr. PS*

**TRUE COPY**

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :**

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

**Sd/-**  
**(SIDDHARTHA NAUTIYAL)**  
**JUDICIAL MEMBER**

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asstt.Registrar)  
आयकर अपीलीय अधिकरण, राजकोट / ITAT, Rajkot