

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'F' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.1716/Mum/2023
(Assessment Year :2015-16)**

Varadagovind Parthasarthy Iyer (through legal heir Arvind Iyer) D-702, Asha Nagar Phase-2 Off. P.K.Road Mulund West Mumbai-400080	Vs.	Income Tax Officer Ward 41(2)(5) Mumbai
PAN/GIR No.AALPI0617E		
(Appellant)	..	(Respondent)

Assessee by	Shri Aditya Ramchandran
Revenue by	Shri Mahesh Parwani
Date of Hearing	01/08/2023
Date of Pronouncement	23/08/2023

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against order dated 16/03/2023 passed by NFAC, Delhi in relation to the penalty proceedings u/s.271B for the A.Y.2015-16.

2. The assessee is mainly aggrieved by levy of penalty of Rs.1,50,000/- u/s. 271B. The brief facts are that in this case assessee has filed return of income of Rs.12,50,340/-. He is

engaged in the business of trading, financing, reality and commodities etc. Assessee has declared short term capital loss of Rs.34,94,555/- from trading in future and option and loss was arrived from business of trading in shares and derivatives. AO has treated this loss as business loss instead of short term capital loss declared by the ld. AO on the ground that assessee was trading in F & O and it is not sale of asset. The AO noted that the total turnover from transaction in future and option was of Rs. 89,78,78,650/- which is more than the limit prescribed in Section 44AB of the Act. Since, the assessee has failed to submit the report of the auditors and has not got the accounts audited, therefore, there was a contravention of Section 44AB and accordingly, penalty u/s.271 B was initiated.

3. In response to the show-cause notice, assessee submitted that he has done all the investment considering himself as an investor and not as a trader. However, the ld. AO held that assessee has not given plausible reason for not auditing the accounts and therefore, he levied penalty at Rs.1,50,000/- u/s.271B. This penalty has been confirmed by the ld. CIT (A) also.

4. Before us ld. Counsel submitted that assessee has not maintained any books of accounts and once assessee has not maintained any books of accounts, then there is no question of the getting the books of accounts audited and therefore, no penalty u/s.271B can be applied. In support, he relied upon the following decisions of the Hon'ble High Court:-

1. *CIT vs SK. Gupta and Co. [2010]322 ITR 86 (Allahabad)*
2. *CIT, Bareilly vs. Bisauli Tractors [2007] 165 Taxman (All)*
3. *CIT vs Surajmal Parsuram Todi [1996] 222 ITR 691 (Gauhati)*

5. On the other hand, ld. DR submitted that turnover was more than Rs.1 Crore and assessee was required to get the accounts audited.

6. After considering the relevant facts placed on record and also the orders passed by the authorities below, we find that the penalty has been levied u/s. 271B for violation of Section 44AB, i.e., failure to get the accounts audited. It is not in dispute that assessee has not maintained any books of accounts as required u/s.44AA. For violation of non maintenance of books of account u/s 44AA, there is a separate penal provision for levying penalty for non-maintaining of books of accounts prescribed u/s. 271A and therefore if at all penalty should have been levied under this section. The Hon'ble Allahabad High Court in the case of **CIT vs. Bisauli Tractors reported in 299 ITR 219** had held that Section 271B of the Act is not attracted in the case where no account has been maintained and instead recourse u/s.271A can be taken. This principle has again been reiterated by the Hon'ble Allahabad High Court in the case of **CIT vs. S.K Gupta reported in 322 ITR 86**. Similar view has been taken by the Hon'ble Guahati High Court in the case of *CIT vs. Surajmal Parsuram Todi supra*. Accordingly, we hold that no penalty u/s.271B is leviable when assessee has not maintained the books of accounts. Accordingly, penalty is deleted.

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

Order pronounced on 23rd August, 2023.

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai; Dated 23/08/2023
KARUNA, sr.ps

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai