

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G" DELHI**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.48/DEL/2023
Assessment Year 2016-17

Sanjeev Kumar Gupta, 1/6018, Kabool Nagar, Shahdara Delhi.	Vs.	The Income Tax Officer Ward-56(4) New Delhi
TAN/PAN: AAJPG4093N		
(Appellant)		(Respondent)

Appellant by:	None		
Respondent by:	Shri Anuj Garg, Sr.DR		
Date of hearing:	08	06	2023
Date of pronouncement:	24	08	2023

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed by the Assessee against the order of the Commissioner of Income Tax (Appeals), NFAC Delhi ('CIT(A)' in short) dated 31.10.2022 arising from the assessment order dated 28.12.2018 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning Assessment Year 2016-17.

2. The captioned appeal has been filed by the assessee against the imposition of penalty of Rs.1,50,000/- under Section 271B of the Act alleging that assessee has not filed tax audit report in terms of provisions of Section 44AB of the Act despite the total value of transactions made in multi commodity exchange of Rs.69,17,25,042/- which far exceeds the limit prescribed for audit

of the books of account under Section 44AB of the Act.

3. When the matter was called for hearing, none appeared for the assessee. Having regard to nature of issue, the adjournment request was declined. The matter was accordingly proceeded *ex-parte*.

4. From the case records, it is seen that the appeal filed belated by six days. Considering the minor delay, the same is condoned.

5. From the perusal of the case records, it appears that it is a case of the assessee that he has not crossed the threshold of prescribed turnover to attract the provisions of Section 44AB of the Act. On perusal of the records, it is seen that the assessee has reported Long Term Capital Gain at Rs.2,56,304/- and Short Term Capital Loss of Rs.4,97,542/-. This apart, the assessee has also undertaken transactions in futures and options (derivatives). The resultant income was shown at Rs.2,50,904/-. As per the 'Guidance Note of Tax Audit under Section 44AB of the Act' issued by ICAI the expression 'sale, turnover and gross receipts' used in Section 44AB of the Act, such expression only represents the sum total of favourable and unfavourable differences arising from such transactions in derivatives, futures and options segment. Since such transactions are traded without delivery of shares or securities or the transaction are squared up by payment of differences and therefore, only such differences, be it profit or loss has to be summed up for the purposes of determination of turnover etc. Thus when only resultant differences being profit or loss is taken into account as against the gross value of transaction incorrectly adopted by Assessing Officer, the turnover for the purposes of Section 44AB of the Act would be far lower than the

threshold limit applicable to Assessment Year 2016-17 in question.

6. The issue is no longer *res integra*. Identical issue came up for consideration before the Tribunal in the case of *Parag Jain vs. ITO in ITA No.278/Del/2022 order dated 23.05.2023*. The relevant operative paragraph of the order is reproduced hereunder:

“5. We have carefully considered the rival submissions and straightway find ourselves in agreement with the plea raised on behalf of the assessee on first principles. As per the Guidance Note issued by the ICAI for the purposes of tax audit under Section 44AB of the Act, the turnover in the case of derivative and speculative transactions (which are non delivery based transactions), only the resultant difference arising to the assessee from such transaction has to be taken for the purposes of turnover instead of gross amount. The Assessing Officer has wrongly adopted the gross amount instead of the differences. While the approach of the assessee towards non-attendance and non-cooperation before the lower authorities is highly improper and cannot be countenanced but however in the same vein, we notice that the total turnover as per the Guidance Note stands at Rs.4,59,321/- only, as per the material placed before the Revenue Authorities in the course of the assessment proceedings. Such turnover arising from derivative / speculative transactions are far lower than the threshold limit prescribed under Section 44AB of the Act. Consequently, a reasonable cause has been shown by the assessee for non compliance of provisions of Section 44AB of the Act. The issue is squarely covered in favour of the assessee by the decision of the Co-ordinate Bench in the case of Sachin Marotrao Rangari vs. ACIT (2022), 143 taxmann.com 318 (Rajkot) (Trib.)

6. While holding in favour of Assessee, we also advert to the contention of the Revenue that no material has been placed apparently placed in the penalty proceedings. We simultaneously observe that the relevant material was made available in the course of the assessment proceedings itself and therefore, application of Section 44AB was out of a contention in the assessment proceedings itself. In such a situation, instead of remitting the matter back to the file of the Assessing Officer, we consider it expedient to adjudicate the issue on merits without encouraging the protracted litigation on such small issue.

7. In the light of the delineations, the penalty imposed under Section 271B is reversed and cancelled.

8. In the result, the appeal of the assessee is allowed.”

7. In consonance with the decision taken in *Parag Jain (supra)*, we observe that the Revenue has misdirected itself in taking gross figures of transaction value in derivative segment instead of sum of resultant profits and losses flowing from such transactions. Based on sum total of profit/loss on such non-delivery transactions, the turnover for the purposes of Section 44AB of the Act is far lower than what is prescribed under Section 44AB of the Act at the relevant time.

8. Hence, in the absence of statutory obligation to obtain Tax Audit Report under Section 44AB of the Act by the assessee, consequent penal action under Section 271B of the Act is devoid of legitimacy. We thus set aside the order of the CIT(A) and direct the Assessing Officer to cancel the penalty of Rs.1,50,000/- so imposed.

9. In the result, the appeal of the assessee is allowed *ex-parte*.

Order pronounced in the open Court on 24/08/2023

Sd/-

[CHANDRA MOHAN GARG]
JUDICIAL MEMBER

DATED: /08/2023
prabhat

Sd/-

[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER