IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, AccountantMemberand
Shri Manomohan Das, Judicial Member

ITA No. 181/Coch/2023
(Assessment Year: 2014-15)

Ojin Bakes 1/4780, A.B.C.D.E.G. Dhana Plaza, West Nadakkavu Kozhikode 673011 [PAN:ABJFS8500K] **(Appellant)**	vs.	The Income Tax Officer Ward – 1(1), Kozhikode **(Respondent)**

ITA No. 182/Coch/2023
(Assessment Year: 2014-15)

Ojin Bakers, Medical College 30/72/F, Kozhikode Medical College, Kozhikode 673008 [PAN:AACFO6978M] **(Appellant)**	vs.	The Income Tax Officer Ward – 1(1), Kozhikode **(Respondent)**

ITA No. 183/Coch/2023
(Assessment Year: 2014-15)

Ojin Bakes & Restaurant 213761/F-5,G36, Happy Tower Vattakkinar, Post Arts College Meenchanda, Kozhikode 673011 [PAN: AABFO8886D] **(Appellant)**	vs.	The Income Tax Officer Ward – 1(1), Kozhikode **(Respondent)**

Appellant by: Shri R. Krishnan, CA
Respondent by: Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing: 12.07.2023
Date of Pronouncement: 28.08.2023

O R D E R

Per: Sanjay Arora, AM

This is a set of three Appeals by related assessees, agitating confirmation of penalty under section 271B of the Income Tax Act, 1961 ('the Act') on account of delayed submission of the Tax Audit Report (TAR) under section 44AB of the Act for Assessment Year (AY) 2014-15 by the National Faceless Appeal Centre, Delhi (NFAC), the first appellate authority (FAA) under the Act. The facts and circumstances being common, the appeals were heard together, and are being disposed of per a common order.

2. Each of the three appellant firms, in the business of bakery and restaurant at Kozhikode, forming part of Ojin group, was subject to survey u/s.133A of the Act at it's business premises on 21.5.2014. Duplicate set of accounts, disclosing actual turnover much higher than that reflected per the regular books of account, were found and impounded. Assessments were subsequently completed u/s.143(3) of the Act. Penalty proceedingsu/s. 271B of the Act for non-furnishing the tax audit report u/s. 44AB of the Act within the time specified therein, i.e., as applicable for filing the return of income u/s. 139(1) of the Act, were initiated. The assessee's explanation toward the same being found unacceptable, penalty u/s.271B of the Act was levied at Rs.1.50 lakhs each, being lower than 0.5% of the disclosed turnover, which was in each case higher than the threshold limit of Rs.100 lakhs for audit. The assessee's case in appellate proceedings rested largely on the availability of TAR at the time of assessment, so that there was in effect substantial compliance of the provision. The assessee/s failing before the FAA, is in second appeal before us.

3. We have heard the rival contentions, and perused the material on record.

3.1 The default of delay in filing the TAR being admitted, the issue arising is if the assessee/s has been able to demonstrate reasonable cause for the said delay

which, where so, would save a penalty u/s. 273B of the Act. We shall take up the assessees' legal plea first as, where approved, it might not be necessary to examine the levy of penalty from the stand-point of reasonable cause u/s. 273B. The requirement of furnishing TAR u/s.44AB stands delinked from the filing of the return of income by Finance Act, 1995, w.e.f. 01.07.1995. Reference to section 139(1) in s.44AB of the Act is only for the purpose of the due date applicable to the assessee's case for filing the return there-under. The obligation to file TAR is thus independent of the filing of the return of income and obtains even where no return u/s.139(1) is, or is required to be, filed, as where an assessee, not being a company or firm, has no income for the relevant year. There is no legal basis, therefore, to contend that the TAR was available at the time of assessment. Why, as queried by the Bench during hearing, to no answer, or possibly so, assessment proceedings may not be initiated in a given case, while the obligation to get the accounts audited and furnish the TAR, still obtain.*That is, the argument of the TAR being available at the time of assessment is a false plea in view of the obligation as cast by law and, consequently, the penalty arising on a default in its compliance*. Besides, it reduces the legal requirement, or the legal obligation on the assessee, to a technical breach. We, accordingly, regard it as without merit. Reference in this context may be made to the decisions by the Tribunal,viz. *Chavakkad SCB Ltd. v. ITO* (in ITA Nos. 29 & 30/Coch/2023, dated 12/6/2023);*Paravur SCB Ltd. v. ITO* (ITA 105/Coch/2023, dated 05/6/2023); *The Kundayam SCB Ltd. v. ITO* (in ITA No. 951/Coch/2022, dated 28/4/2023), etc. rendered relying, rather, on the decision by the Hon'ble jurisdictional High Court, as in *Peroorkkada SCB Ltd. v. ITO* [2020] 424 ITR 422 (Ker), rubbishing the objection of it being a venial breach. The cause advanced in that case was that the assessee had obtained, instead, the audit report under the Cooperative Societies Act, which was not regarded as sufficient, being, rather, itself required to be also furnished along with the audit report u/s. 4AB under second *proviso* thereto.

In all cases, therefore, the validity or otherwise in law of the levy is on the factual findingof the existence or otherwise of a reasonable cause, so that it boils down to evidence/s being led by the assessee who is to prove the reasonable cause. This represents the clear law in the matter, and toward which we may cite some decisions, viz. *K. Ravindranathan Nair vs. Dy. CIT*[2009] 319 ITR 108 (Ker);*Koramangala Club vs. ITO*[2016]387ITR630(Kar); *CIT vs. Khubi Ram Om Prakash*[2004] 275 ITR 131 (Raj); *Shri Swastik Steels Pvt. Ltd. vs. Asst. CIT*[2003] 264 ITR 477 (Bom); *ITO vs. Nanak Singh Guliani*[2002] 257 ITR 677 (MP). It would, we may add, be a different matter where a deduction postulates the condition of audit, in which case the requirement being satisfiedat the time of assessment, the same may not operate to oust the assessee's case for the relevant deduction.

3.2 Next, we may tabulate the relevant dates:Table A

Name	Due Date of filing the TAR	Date of obtaining TAR	Date of furnishing TAR	Date of filing Return	Remarks
Ojin Bakes	30.09.2014	07.02.2015 12.03.2015	12.03.2015	07.02.2015	Note 1
Ojin Bakers (Medical College)	30.09.2014	03.11.2014	23.01.2015	23.01.2015	
Ojin Bakers and Restaurant	30.09.2014	19.02.2015	09.03.2015	09.03.2015	

Note 1: While para 3 of the penalty order states of TAR being obtained on 07.2.2015, the assessee's reply filed on 21.05.2016, reproduced below the said para, states of it being obtained only on 12.3.2015 (so that it can be filed earliest by that date)

The assessee's explanation for the delayed furnishing of TAR is as under:

(a) survey u/s.133A of the Act, impounding the books of account;

(b) two employees (common in all cases) leaving service; and

(c) change of Auditor (in Ojin Bakes).

The same being unsubstantiated,or otherwise untenable, was found as of no consequence and, thus, rejected by the Revenue. We, for the reasons hereinafter stated, could not agree more.

A. There is, to begin with, no explanation for the delayed furnishing of the TAR, i.e.,*after obtaining the same*. The said furnishing, already delayed by months as on the date of obtaining the TAR, irrespective of the reasons leading to the said delay, would therefore be filed immediately on receipt. A gap of a day or two, to organize the same, can be understood. However, the delay is for weeks and, in case of Ojin Bakers,over two months. *No explanation for the same has been furnished at any stage*. Shri Krishnan, the ld. counsel for the assessee, would, on being queried for the same, state that there was no provision with the Department to file the TAR except with the return of income. These, he reminded, were not the times of online filing. The plea only needs to be stated to be rejected. Section 44AB of the Act, in the amended form, requiring an assessee to obtain and furnish the TAR by the date specified u/s. 139(1) in his case; the said provision providing different dates for corporate and non-corporate assessees, is operative since 01.07.1995. Not only that, the law requires the proof of filing the TAR to be furnished along with the return of income [*Explanation (bb)* below section 139(9)]. And to consider that the assessee, in 2014, nearly 20 years later, states of no mechanism available for filing the TAR other than along with the return of income! All that is required is to file the TAR with a covering letter, addressed to the assessee's AO, indicating it's PAN and correct address, and obtaining a receipt for furnishing the same, copy of which accordingly is to form part of the documents to be submitted along with the return of income. The penalty would stand justified on this ground alone, i.e., non-explanation for the delay in furnishing the TAR after obtaining the same. We shall

however, for the sake completeness of our order, discuss assessee's case, as made out, as well.

B. Even the assessee's explanation, i.e., for the delay in obtaining the TAR is, as afore-stated, completely unsubstantiated. The assessee claims the books of account to have been misplaced. And to consider it as so for all the 3 firms together! The same, besides being without any evidence or corroborating material, is ludicrous. Where we wonder the books of accounts disappeared, only to surface again after an unspecified period of time. Where were they eventually found? The reason of impounding of books is, again, false. As clarified by the Revenue authorities, only the duplicate accounts, recording the actual turnover, and not the 'regular accounts', were impounded. The next reason stated, again a lame excuse, is the leaving service by two of it's staff members. There is nothing to show that they were on the assessee's rolls; doing accounting work – for all the firms, and, further, no other person/s in the organisation to carry out the said responsibility. The date/s of leaving service has also not beenspecified, which, again, would be borne out by the record. Further, the books of account are maintained in the regular course of business, which only qualify them to be regarded as regular accounts. The same would therefore be complete, at least in all material respects, and are only to be presented to the Auditor for audit. No reason for the same, where not so, stands advanced, while if not complete, the plea does not arise in the first place. The survey itself was nearly 2 months after the end of the previous year. The assessee, rather, maintains duplicate accounts, implying it to have sufficient staff.

3.3 We, accordingly, have no hesitation in holding the Revenue to have rightly rejected the assessee's case. The position in the case of Ojin Bakes, however, stands on a different footing. It is, firstly, not clear as to when the TAR was filed, i.e., immediately on obtaining it, or, as for the other two firms, with a delay. If at a delay, which would in that case be for 35 days, the same, as in the other two cases,

being unexplained, would justify the penalty. The assessee would though need to lead evidence *qua* the correct date of obtaining the TAR. As regards the delayed obtaining of the audit report, a change in Auditor – implying him to be different for the other two firms, where so, may make the obtaining of the audit report – only whereupon could the same be furnished, and thus it's case, as materially different.

The assessee's case is *sans* any details. When did the Auditor resign? When was the new Auditor appointed, with an explanation for the time lag, where not reasonable, considering that the assessee is aware of the date of filing the TAR?*When were the books of account presented to the new Auditor for audit*? As afore-stated, the books of account could technically be furnished to the Auditor in the first week of April following the previous year itself. All these are pertinent. Though it was incumbent on the assessee advancing this reason for the delay, to furnish the relevant details with evidence, the Revenue, in our opinion, should have, rather than dismissing the same outright, called upon the assessee to explain and substantiate it's claim, seeking further details, if any, in satisfaction of the existence or otherwise of a*bona fide* and reasonable cause leading to the delay.Whether, for example, the assessee's accounts for the relevant previous year, i.e., f.y. 2013-14, were complete or materially so on the date of survey, i.e., 21.5.2014, nearly two months after the close of the year? Why, the date of obtaining the TAR being the same as that for the other two firms, or in any case close thereto, what impact did the change in Auditor, where so, therefore make?

We, accordingly, consider it proper to, setting aside the impugned penalty, restore the matter in this case (ITA No. 181/Coch/2023) to the file of the AO for allowing the assessee a reasonable and final opportunity to prove it's claim/s of being prevented by a reasonable cause/s in furnishing the TAR by 30.9.2014.

3.4 We decide accordingly.

4. In the result, ITA No. 181/Coch/2023 is allowed for statistical purposes, and ITA Nos. 182 & 183/Coch/2023 are dismissed.

Order pronounced on August 28, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: August 28, 2023
n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin