

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"SMC" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष  
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. Nos. 280 & 281/JP/2023  
निर्धारण वर्ष/Assessment Years : 2010-11

Uma Mandal 754, Lodho Ka Maohalla M. D. Road, Ward No. 34, Jaipur	बनाम Vs.	Income Tax Officer, Ward-5(2), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: APSPM 2419 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : None  
राजस्व की ओर से / Revenue by : Smt Monisha Choudhary (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 13/09/2023  
उदघोषणा की तारीख / Date of Pronouncement : 21/09/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

These two appeals are filed by the assessee aggrieved from the order of the National Faceless Appeal Centre (NFAC), Delhi [ Here in after referred as Ld. (NFAC)/ CIT(A) ] for the assessment year 2010-11 dated 03.03.2023, which in turn arises from the order passed by the ITO, Ward 5(2), Jaipur passed under Section 271B and 271A of the Income tax Act, 1961 (in short 'the Act') dated 29.06.2018 respectively.

2. In ITA No. 280/JP/2023, the assessee has marched this appeal on the following grounds:-

*“1. On the facts and circumstances of the case, the Id. CIT(Appeals) grossly erred in law and facts by approving the action of the Id. AO of imposing penalty for not getting the books of accounts audited by the assessee ignoring the admitted fact that no books of accounts have been maintained by the assessee and as such question of audit thereof does not arise. It is hereby thus prayed to delete the penalty so imposed.*

*2. On the facts and circumstances of the case, the Ld. CIT(Appeals) grossly erred in law and facts by approving the action of the Ld. AO of imposing penalty ignoring the fact that the notice by which the jurisdiction has been assumed by Ld. AO is vague and invalid. It is hereby thus prayed to delete the penalty so imposed.*

*3. On the facts and circumstances of the case, the Ld. CIT(Appeals) grossly erred in law and facts by approving the action of the Ld. AO of calculating turnover wrongly (by reckoning total deposits as turnover in place of commission receipts) and thus invoking Section 271A of the Income Tax Act, 1961. It is hereby thus prayed to delete the penalty so imposed.*

*4. On the facts and circumstances of the case, the Ld. CIT(Appeals) grossly erred in approving the action of the Ld. AO of imposing penalty without considering the fact that the order has been passed without affordable reasonable opportunity of being heard to the assessee and hence against the principles of natural justice. It is hereby thus prayed to delete the penalty thus imposed.*

*5. On the facts and circumstances of the case, the Ld. CIT(Appeals) grossly erred in law and facts by approving the action of Ld. AO of imposing penalty ignoring the settled legal position that no penalty can be levied where the assessment has been made on estimation basis. Further, the assessee being only a lender of his account was not in a position to maintain books of accounts and hence eligible for immunity under section 273B. It is hereby thus prayed to delete the penalty thus imposed.*

*6. On the facts and circumstances of the case, the Ld. CIT(Appeals) grossly erred in approving the action of the Ld. AO of imposing penalty on the basis of reliance on altogether wrong facts in his order. It is hereby thus prayed to delete the penalty thus imposed.*

*7. That the appellant craves leave to add, delete, amend or abandon any or all grounds of this a appeal at the time or before the actual hearing of the case.”*

2.1 In ITA No. 281/JP/2023, the assessee has marched this appeal on the following grounds:-

“1. On the facts and circumstances of the case, the Id. CIT(Appeals) grossly erred in law and facts by approving the action of Ld. AO of holding that the assessee was liable to maintain books of accounts as per Section 44AA of the Income Tax Act, 1961 without considering the fact that in case of commission income, only commission is treated as turnover. It is hereby thus prayed to delete the penalty thus imposed.

2. On the facts and circumstances of the case, the Ld. CIT(Appeals) grossly erred in law and facts by approving the action of Ld. A.O of imposing penalty ignoring the settled legal position that no penalty can be levied where the assessment has been made on estimation basis. It is hereby thus prayed to delete the penalty thus imposed.

3. On the facts and circumstances of the case, the Ld. CIT(Appeals) grossly erred in approving the action of the Ld. A.O of imposing penalty without considering the fact that the order has been passed without affordable reasonable opportunity of being heard to the assessee and hence against the principles of natural justice. It is hereby thus prayed to delete the penalty thus imposed.

4. On the facts and circumstances of the case. the Ld. CIT(Appeals) grossly erred in approving the action of the Ld. A.O of imposing penalty on the basis of reliance on altogether wrong facts in his order. It is hereby thus prayed to delete the penalty thus imposed.

5. That the appellant craves leave to add, delete. amend or abandon any or all grounds of this appeal at the time or before the actual hearing of the case.”

3. The fact as culled out from the records is that as per information available with the department that the assessee had

deposited cash at Rs. 2,90,000/- in her bank account for FY 2009-10 but no return of income was filed for AY 2010-11. After recording reasons and taking prior approval from the Pr. CIT-2, Jaipur, notice u/s 148 was issued on 27.03.2017. The notice was served through post/AD. In response thereto, assessee filed return of income on 13.10.2017 declaring total income of Rs 1,01 860/- under the head "business income" but she has disclosed as commission income. During the proceedings, notice u/s 133(6) was issued to bank and obtain the bank account and other details. On perusal of details received from bank, it is found that assessee is maintained a current bank account in the name of M/s Jaipur Vision Prop. M/s Uma Mandal wherein she has made total credits of Rs 4,07 45.628/- including cash deposit of Rs 2.90 locs on 31.7.2009. Apart from above, it is also revealed that the amount deposited is immediately withdrawn by cash either on same day or in a couple of days leaving negligible balance. During the proceedings, assessee was asked to explain the nature and source of these deposits. In response thereto, AR of the assessee has explained that she was proprietor of M/s Jaipur Vision and the concern was engaged in issue of bogus bills to different parties on commission basis, AR has also submitted that cheques were received and

thereafter cash was immediately withdrawn and return back the money after charging some commission. It has also been claimed by the AR that assessee was charged 0.25% commission for these accommodation entries and disclosed the said commission in her return of income in response to notice u/s 148. For verification of above submission, the AR of the assessee has produced her husband Shri Bankim Mandal and one neighbor namely Shri Vicky Dabi for examination Statements of these persons including assessee were also recorded on 7.12.2017. After verification of these persons as well as material evidences available on record, it was established that assessee has received credits through cheques/clearings of Rs.4,07,45,628/-on account of receipts/sales of her proprietorship concern and this being of the turnover of assessee's concern. A net profit @ 5% was estimated at Rs. 20,37,281/- and the profit is treated as assessee's income from business for the year consideration.

3.1 Penalty proceeding was initiated for non-maintenance of books of account u/s. 271A and 271B was also initiated as the assessee failed to get her books of accounted audited u/s. 44AB of the Act. The assessee was asked to show cause for both these

defaults and the assessee has submitted that she has filed the appeal for the quantum additions made and has not satisfactorily explained the reasons for both the defaults for non maintenance of books of accounts and in turn failure to get them audited. Consequently, the Id. AO passed two separate order u/s. 271A & 271B for levy of penalty for an amount of Rs. 25,000/- and Rs. 1,00,000/- respectively for both these defaults.

4. Aggrieved from both the order for levy of penalty the assessee has preferred the appeal before the Id. CIT(A) who has dismissed the appeal of the assessee. The relevant finding of the Id. CIT(A) on both the appeal is reproduced here in below

#### Finding of Id. CIT(A) for levy of penalty u/s. 271A

I have considered the written submission filed by the appellant. It is an undisputed fact that the appellant is doing business by name M/s. Jaipur Vision which is engaged in the business of issuing bogus bills to different parties on commission basis. This is also admitted in the return of income filed in response to notice u/s 148, wherein, the appellant has declared commission income at the rate of 0.25%. This is only that the AO increased the commission to 5% as per assessment order. However, the fact remains that the appellant is in the business and the turn over exceeded the prescribed limit. Therefore, I am in agreement with the AO that the appellant failed to maintain books of accounts as required u/s 44AA of the Act During the appellate proceedings, the appellant has also filed additional ground of appeal, wherein, it is stated that no penalty can be levied where the assessment has been made on estimation basis in this regard, it is stated that the penalty under consideration is not penalty u/s 271(1)(c),

wherein, the penalty is directly linked to the quantum of addition. The penalty under consideration is U/s 271A which is not directly linked to the addition made in the assessment order. The penalty is leviable irrespective of the addition made and if the assessee was required to maintain books of accounts u/s 44AA of the Act. Therefore, the contention of the appellant that she is eligible for the immunity u/s 273B is not acceptable. In view of this, I am of the considered opinion that the AO has rightly levied penalty of Rs 25,000/- u/s 271A of the Act. Therefore, the penalty levied of Rs 25,000/- u/s 271A is hereby confirmed. Accordingly, the grounds of appeal are dismissed.

#### Finding of Id. CIT(A) for levy of penalty u/s. 271B

After considering the facts and circumstances of the case as well as the decision in the penalty order u/s 271A of the Act, I am of the considered opinion that the appellant has failed to audit the books of accounts and also file the requisite audit report within the prescribed time. Having not done so, penalty u/s 271B is leviable. Therefore, the action of the AO is upheld and penalty levied of Rs.1,00,000/- u/s-271B is hereby confirmed. Accordingly, the grounds of appeal including the additional ground of appeal is dismissed.

5. As the assessee did not find any favour from the appeal so filed before the Id. CIT(A) the assessee has preferred this appeal before the tribunal on the grounds as reiterated here in above. The bench noted that the assessee was given as much as seven opportunities but non appeared on the last date of hearing nor any adjournment application was filed. Thus, the bench feels that the assessee is not serious but considering the material available on record we proceeded to decide these appeals after hearing the Id. DR representing the revenue.

6. A propose to the grounds of appeal raised by the assessee the Id. DR representing the revenue vehemently argued that the assessee has filed return of income only after issuance of notice u/s. 148 even though the receipts in this case is for an amount of Rs. 4,07,45,628/-. Even in this appeal the assessee is not serious to persue the appeal it shows that the assessee admits the benefit and the penalty levied being statutory under the Act be confirmed by dismissing the appeal of the assessee.

7. We have perused the arguments of the assessee made before the lower authorities, gone through the orders of the lower authorities and heard the Id. DR representing the revenue. The bench noted that the Id. AO has levied two penalty one for non-maintenance of books of account and another for not getting the books of accounts audited u/s. 271A & 271B respectively. The bench noted that in the case of the assessee there has been a levy of penalty for non-maintenance of books of accounts u/s. 271A of the Act and the Id. DR did not controvert the fact and finding of the lower authorities. So, once it has been categorically held that the assessee failed to maintained the books of account and consequent there upon the penalty has also been levied the

separate penalty for not getting the books of account audited cannot be fastened. The penalty u/s. 271B can be levied when the assessee maintains the books and does not get them audited but once it is been held and not disputed that the assessee has not maintained the books of accounts how the penalty for not getting the books audited be levied. The Id. DR did not controvert these basic facts. This co ordinate bench in the case of Shahnaz Khanan, Jhalawar Vs. ITO in ITA No. 38/JP/2018 held that :

“6. Having considered the rival submissions as well as relevant material on record we note that the assessee has committed the default for not maintaining the regular books of accounts as required U/s 44AA of the Act. The Assessing Officer has already imposed the penalty U/s 271A for violation of the provisions of Section 44AA of the Act. The AO has also imposed the penalty U/s 271B for not getting the books of accounts audited. It is pertinent to note that when the assessee did not maintain the regular books of account then the question of getting of books of accounts audited does not arise. Once, there is a violation of provisions of section 44AA of the Act the said violation cannot be extended to section 44AB of the Act. The provisions of Section 44AB of the Act can be invoked only when the assessee has complied with the provisions of Section 44AA of the Act. Therefore, the violation of Section 44AA of the Act cannot continue because once it is found that the assessee did not maintain the regular books of account the said violation cannot travel beyond the provisions of Section 44AA and hence, cannot be held as a further violation of Section 44AB of the Act. The Hon’ble Allahaband High Court in case of CIT Vs. Bisauli Tractors (supra) while dealing with this issue as held in paras 11 to 14 as under:-

“11. In the case of S. Narayanappa & Bros. v. CIT [1961] 41 ITR 125 the Mysore High Court has held as follows :

"What was urged before us was that in a case where an assessee has furnished no return at all before the Income-tax Officer, it should be presumed for the purposes of section 28(1)(b) that he has furnished a return of his income intimating the Income-tax Officer that his income is nil. It seems to me that the language of section 28(1) does not admit of any such construction since the clear requirement of the provisions of this sub-section is that an assessee on whom a penalty is proposed to be imposed under section 28(1)(b) should have in the first instance

furnished his return. That, in my opinion, is the ordinary and grammatical meaning of the words occurring in the Act. To interpret the language of this provision in the manner suggested by the learned Government Pleader would, in my opinion, be too artificial and too far-fetched to commend itself for acceptance. Although it is true that the provisions of a statute like those contained in section 28(1)(b) have to receive to construction so as to promote the object of the statute, it is clear that when we interpret a penal provision like that contained in section 28(1)(b), the interpretation we should place upon it must accord with reason and justice and must be in accordance with the plain ordinary and rational meaning of the words contained in those provisions. So interpreted, I would not, in my opinion, be right in placing on section 28(1)(b) the construction for which the learned Government Pleader contends." (p. 133)

12. The Madras High Court in the case *S. Santhosa Nadar v. First Addl. ITO* [1962] 46 ITR 411 has gone to the extent that a voluntary return filed after the period of four years from the close of the assessment year is not a valid return and such a case should be regarded as if no return has been filed at all and it cannot be said in such a case that there has been a concealment of the particulars of income or deliberate furnishing of inaccurate particulars and section 28(1)(c) of the Income-tax Act, 1922 would not be applicable. The Madras High Court has held as follows :

"When we come to section 28(1)(c) , it deals specifically with the concealment of 'particulars' of income or the deliberate furnishing of inaccurate 'particulars' of income. In the setting in which this subsection finds place it is impossible to construe section 28(1)(c) except as relating to a case where a return has been filed but from which return particulars of income have been omitted or any particulars have been deliberately inaccurately furnished. The use of the expression 'particulars of his income' and 'particulars of such income' would be wholly inapposite in a case where no return has at all been filed; such a case would clearly come within the scope of section 28(1)(a) alone."

13. This Court in *CWT v. Yadu Raj Narain Singh* [2006] 286 ITR 564 also taken the same view. It has held as follows :

"Thus applying the strict construction of penalty provisions contained in clause (1) of sub-section (c) of section 18 of the Act, we find that prior to the amendment in Explanation 3 by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1-4-1989 in a case where the person who has previously been assessed under the Act does not file any return in response to the notice or even where time for filing the return has expired has not filed any return there cannot be any concealment for which penalty provision can be imposed. In view of the foregoing discussions, we are of the considered opinion that in the present case the respondent assessee has not concealed the particulars of his income for which wealth no penalty under clause (1) of sub-section (c) of section 18 of the Act is exigible.

14. Therefore, section 271B of the Act is not attracted in a case where no account has been maintained and instead recourse under section 271A can be taken.”

7. A similar view has been taken by the Hon'ble Gauhati High Court in case of Surajmal Parsuram Todi vs. CIT (supra) and held in para 6 as under:-

“6. We have gone through the provisions of sections 44AA, 44AB, 271A and 271B of the Act. Maintenance of accounts is envisaged under section 44AA and on failure to do so the assessee shall be guilty and liable to be penalised under section 271A. Even after maintenance of books of account the obligation of the assessee does not come to an end. He is required to do something more, i.e., by getting the books of account audited by an accountant. But when a person commits an offence by not maintaining the books of account as contemplated by section 44AA the offence is complete. After that there can be no possibility of any offence as contemplated by section 44AB and, therefore, in our opinion, the imposition of penalty under section 271B is erroneous. The Tribunal has overlooked this aspect of the matter. Of course, it is apparent from the records that the assessee failed to maintain the books of account as required under section 44AA and for that penalty is prescribed under section 271A. It is for the Tribunal to take action in accordance with law.

The Delhi Benches of the Tribunal in case of Nirmal Kumar Jain vs. ITO (supra) has held in paras 3 & 4 as under:-

“3. In so far as the penalty u/s 271B is concerned, it is noticed that the AO has recorded a categorical finding on page 2 of the assessment order that no books of account were maintained by the assessee. Under such circumstances, a question arises as to whether any penalty can be imposed u/s 271B for not getting the books of account audited. The Hon'ble Gauhati High Court in Surajmal Parasuram Todi vs. CIT (1996) 222 ITR 691 (Gau.), has held that where no books of account are maintained, penalty should be imposed for non-maintenance of books of account u/s 271A and no penalty can be imposed u/s 271B for violation of section 44AB requiring ITA Nos.6696 & 6645/Del/2014 audit of accounts. Similar view has been taken by the Hon'ble Allahabad High Court in CIT vs. Bisauli Tractors (2008) 299 ITR 219 (All). The Hon'ble Allahabad High Court reiterated the similar view in CIT and Anr. Vs. S.K. Gupta and Co. (2010) 322 ITR 86 (All) by holding that requirement of getting the books of account audited can arise only where the books of account are maintained. In the absence of the maintenance of books of account, there can be no penalty u/s 271B of the Act. In view of the foregoing legal position emanating from the judgment of the two Hon'ble High Courts, we are convinced that penalty u/s 271B ought not to have been levied because the assessee admittedly did not maintain any books of account as has been recorded in the assessment order itself. We, therefore, order for the deletion of penalty.

1. As regards the imposition of penalty u/s 271(1)(c) of the Act on the addition of Rs.7.50 lac, we find that this addition has resulted on

estimation of income at 5% on estimated sales ITA Nos.6696 & 6645/De1/2014 of Rs.1.50 crore. Except that there is no other basis for imposition of penalty. The Hon'ble Delhi High Court in CIT vs. Aero Traders P. Ltd. (2010) 322 ITR 316 (Del) has upheld the view taken by the Tribunal in deleting penalty u/s 271(1)(c) which was imposed on the basis of addition made by the AO on estimated profit. Similar view has been taken in a series of judgments including the Hon'ble Punjab & Haryana High Court in CIT vs. Dhillon Rice Mills (2002) 256 ITR 447 (P&H). In this case also, the Hon'ble Punjab & Haryana High Court approved the view taken by the Tribunal in deleting the penalty u/s 271(1)(c) which was based on an estimate of income made by the AO. In view of the foregoing decisions, it is clear that the penalty so confirmed in the instant case cannot be sustained because it was imposed by the AO on the estimate of income made by him. We, therefore, order for the deletion of penalty.”

Accordingly, in view of the binding precedent, we hold that once the assessee found to have not maintaining the regular books of account as contemplated by Section 44AA of the Act the default was completed and therefore, after the default of not maintaining the books of accounts there cannot be a further default for not getting the same audited as required U/s 44AB of the Act. Hence, the penalty of levy by the AO U/s 271B is not justified and the same is deleted. In the result, the appeal filed by the assessee is allowed.”

8. On being consistent of the view already taken by the Co-ordinate Bench, we are of the view that once the penalty is levied for non-maintenance of book of accounts, there cannot be further default for not getting the same audited as required u/s 44AB of the Act and therefore, the penalty levied u/s 271B is not justified and thus vacated. Based on these observations the appeal in ITA No. 280/JPR/2023 stands allowed.

9. So, far as regards the appeal of the assessee in ITA No. 281/JPR/2023 is concerned the assessee has neither before the

lower authority nor before us justified as to why the penalty is not leviable for non-maintenance of books of accounts and inspite of seven opportunities were given the assessee neither appeared nor filed any written submission so as to controvert the finding of the lower authorities. Therefore, in view of the matter we not find any infirmity in the order of the Id. CIT(A) and the thus, the levy of penalty u/s 271A stands confirmed. In the light of these observations the appeal of the assessee in ITA No. 281/JPR/2023 stands dismissed.

In the result the appeal of the assessee in ITA No. 280/JPR/2023 is allowed and appeal in ITA No. 281/JPR/2023 stands confirmed.

Order pronounced in the open Court on 21/09/2023

Sd/-

( डा० एस. सीतालक्ष्मी )  
(Dr. S. Seethalakshmi)  
न्यायिक सदस्य / Judicial Member

Sd/-

( राठोड कमलेश जयन्तभाई )  
(Rathod Kamlesh Jayantbhai)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 21/09/2023

\*Ganesh Kumar, PS

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Uma Mandal, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward 5(2), Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File { ITA Nos. 280 & 281/JP/2023 }

आदेशानुसार/ By order

सहायक पंजीकार/ Asst. Registrar