

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'E', NEW DELHI**

**BEFORE DR. B.R.R. KUMAR, ACCOUNTANT MEMBER  
AND  
SH. SUDHIR KUMAR, JUDICIAL MEMBER**

ITA No.286/Del/2024  
Assessment Year: 2017-18

<b>Odeon Builders Private Limited M-116, 2<sup>nd</sup> Floor, Connaught place, Central, Delhi-110001 PAN No.AAACO0155H (APPELLANT)</b>	<b>Vs.</b>	<b>ACIT Circle – 19 (1) Delhi (RESPONDENT)</b>
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Appellant by	Sh. Suresh Gupta, CA
Respondent by	Sh.M. G. Joseph Gangte, CIT DR

Date of hearing:	21/05/2024
Date of Pronouncement:	11/06/2024

**ORDER**

**PER SUDHIR KUMAR, JM:**

This appeal by the assessee is directed against the order of the National Faceless Appeal Centre, [hereinafter referred to as "NFAC"], Delhi vide order dated 29.12.2023 pertaining to A.Y. 2017-18 and arises out of the order dated 15.03.2022 passed by the Income Tax Department, National Faceless Assessment Centre, Delhi under Section 271B of the Act, 1961 [hereinafter referred to as 'the Act'].

2. Aggrieved by the order of the lower authorities, the assessee is in appeal before us by raising the following grounds of appeal:-

*1. On facts and circumstances of the case, the authorities below have erred in upholding the levy of penalty of Rs. 1,50,000/- u/s 271B of IT Act ignoring the fact that the same has been initiated and completed without complying with provisions of sec 271B of IT Act and therefore the penalty of Rs.1,50,000/- imposed needs be deleted.*

*2. On facts and circumstances of the case, the authorities below have erred in upholding the levy of penalty of Rs. 1,50,000/- u/s 271B of IT Act ignoring the fact that above penalty order has been passed without taking prior approval of Joint Commissioner of Income Tax and therefore, such order needs to be deleted.*

*3. On facts and circumstances of the case, the authorities below have erred in upholding the levy of penalty of Rs.1,50,000/- u/s 271B of IT Act ignoring the fact that there is ambiguity in the show cause notice about the default attributable to the appellant and therefore, such order needs to be deleted.*

*4. On facts and circumstances of the case, the authorities below have erred in upholding the levy of penalty of Rs. 1,50,000/- u/s 271B of IT Act ignoring the fact that the penalty order is barred by limitation within the meaning of sec 275(1)(a) of IT Act for the reason that the above order was required to be passed on or before extended date of 31.03.2022 and the above order although dated 15.03.2022 has never been served upon appellant. In view of the trite law, the orders*

*passed without service on the appellant are deemed to have never been passed.*

*5. The appellant craves leave to add, delete, modify / amend the above grounds of appeal with the permission of the Hon'ble appellate authority.*

3. Brief fact of the case is that the assessee has filed the return of income for the assessment year 2017-18 on 30.03.2018 declaring loss of Rs 55208552/- u/s. 115JB of the Act. The case was selected for scrutiny through CASS. The notice under Section 143(2) of the Act was issued on 30-08-2018 to the assessee and he has filed the necessary details. The AO disallowed the business loss of Rs 43,20,090/- and allowed the depreciation loss of Rs.5,52,08,552/-to carry forward. The AO has directed the assessee company to file the Tax Audit Report u/s 44 AB of the Act in Form No. 3CB and 3CD but he has failed to file the audit report u/s. 44AB of the Act on the stipulated date of filing the audit report, after that penalty proceeding under Section 271B was initiated. The order of penalty levied of Rs.150000/- against the assessee was passed on 15-03-2022.

4. Upon assessee's appeal the Ld. CIT(A) confirmed the order under section 271B of the Act on the pretext that assessee

could not submit any reasonable cause for not furnishing the audit report within the due date before the appellate authority.

5. Before us at the outset Ld. DR supported the order of the AO and Ld CIT(A) and submitted that required details were furnished by the assessee company in the compliance of the notice. The AO therefore, for the reasons noted in the order levied the penalty. He submitted that before CIT(A), the assessee has not submitted written submission or documents. The Ld CIT(A) thereafter for the reasons noted in the order has dismissed the appeal. Therefore, he submitted that the order of AO and CIT(A) be upheld.

6. Before us the Ld. AR for assessee has submitted that alleged notice is vague because the AO has not struck down the irrelevant portion /fault which was not applicable in this case. He has further submitted that the proceeding was time barred. It is also submitted that impugned penalty order was not served on the assessee within the stipulated time limit. He has further submitted that penalty of more than Rs.20,000/- can be imposed with the prior approval of the Joint Commissioner. In this case no such prior approval has been taken from the Joint Commissioner.

7. Ld. AR relied the various judgment as follows under :-

- i. *Parkinson Electrical Crop v ITO 84 Taxman 82 (Del) (Mag) PB9***
- ii. *Jasbir singh vs CIT 344 ITR 324 (P&H)***
- iii. *North Eastern Construction ITA NO 184 GAU/1019***

8. We have heard both the parties and perused the relevant material available on record.

9. As regard as notice concern the notice given by AO was valid because assessee has failed to file the audit report within stipulated time limit even than he was not succeed to file the audit report in appeal which shows that he was failed to get accounts audited. He has not submitted any reason not to submit the audit report. The assessee has committed two defaults which were mentioned in the notice firstly had failed to got accounts audited, secondly had not submitted the audit report as required u/s 44B of the Act. Assessee has not given any reason why he has not submitted the audit report. The authority relied by the assessee is distinguishable because in that case assessee had filed the audit report with plausible reasons of delay but in instant case assessee has failed to give the reasons for not filing the audit report.

10. It is submitted that penalty order has not been served upon the assessee only screen shot was uploaded on the e-portal. Perusal from the order of the AO it reveals that notice was served on the assessee by the verification unit through the post ID no ED 4991853091N , which shows that the notice was properly served.

11. The Ld. AR has submitted that penalty order was barred by limitation. The penalty order was passed on 15-03-2022 by NFAC when the due date for limitation was 31-03-2022 .Therefore this argument is not tenable.

12. Ld AR has submitted that order imposing penalty does not disclose that prior approval of the Joint Commissioner was obtained in this case.

13. Section 44AB reads as under :-

*“Every person carrying on business shall, if his total turnover exceeds Rs.1 crore is required to get his accounts audited and the same should be furnished before specified date for filing of return of income.”*

14. Section 271B reads as under :-

*“If any person fails [\*\*\*] to get his accounts audited in respect of any report of such audit as required under section 44AB], the [Assessing] officer may direct that such person shall pay, by way of penalty, a sum equal to one-half per cent of the total sales, turnover or gross receipts, as the case may be, in business or of the gross receipts in profession, in such previous year or years or a sum of [one hundred fifty thousand rupees], whichever is less.]”*

15. Section 274 is as under :-

*“No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard.”*

*[(2) No order imposing a penalty under this Chapter shall be made-*

*(a) by the Income-tax Officer, where the penalty exceeds ten thousand rupees;*

*(b) by the Assistant Commissioner [or Deputy Commissioner] where the penalty exceeds twenty thousand rupees.*

*except with the prior approval of the [Joint] Commissioner.]”*

16. From the perusal of the penalty order it is evident that it was not mentioned in the penalty order that was passed with

the prior approval of the Joint Commissioner. Ld DR is unable to show that the prior approval was obtained before passing the penalty order. In the case **Sagar Dutta vs CIT (2014) 44 taxman.com 311 (Cal) the Calcutta High Court held as under :-**

*"The Income Tax Officer had no jurisdiction to impose penalty exceeding a sum of Rs. 10,000/- except with the approval of the Deputy Commissioner. Mr. Agarwal submitted that it is a question of fact. We are unable to accept this submission. It was the obligation of the Income Tax Officer to indicate in his order that he passed the order after obtaining requisite approval. Since the order passed by the Income Tax Officer does not contain the requisite recital, it has to be held that no such approval was obtained. The order itself is incompetent. An incompetent order is a nullity and the point as regards nullity can be taken at any stage. It can even be taken at the stage of execution. Even if the orders imposing penalty were not set aside by us, which we propose to do, the order could not have been executed. Therefore, the third question is answered in the affirmative."*

*Mr. Biswas, therefore, contended that the order imposing penalty is altogether bad and cannot be sustained. Mr. Bhowmik, learned Advocate submitted, in fairness the*

*appellant should have raised this point at an earlier stage, which they did not do. He added that the matter in that case has to be remanded to the Assessing Officer for passing an order under Section 271B de novo after obtaining prior approval of the Joint Commissioner.”*

17. We have given a thoughtful consideration to the submission of the Ld AR, we are of the considered opinion that the penalty order of Rs.150000/- was passed without prior approval of the Joint Commissioner which is liable to be set aside. We therefore, set aside both the penalty orders. If the revenue finds that prior approval was obtained from the Joint commissioner in that case revenue will be at liberty to approach the Tribunal.

18. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 11.06.2024.

**Sd/-**  
**(DR. B R R KUMAR)**  
**ACCOUNTANT MEMBER**

\*NEHA, Sr. PS\*

Date:- .06.2024

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(Appeals)
- 5.DR: ITAT

**Sd/-**  
**(SUDHIR KUMAR)**  
**JUDICIAL MEMBER**

ASSISTANT REGISTRAR  
 ITAT NEW DELHI