

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENT AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

ITA No.1181/Bang/2024
Assessment Year : 2017-18

Shri. Dawalsaheb Babusaheb Sultanbhai, 1A, Mehaboobnagar, Dharwad – 580 008. PAN : AQZPS 4249 L	Vs.	ITO, Ward – 1(1), Hubli.
APPELLANT		RESPONDENT

Assessee by	:	None
Revenue by	:	Shri. Ganesh R. Gale, Standing Counsel for Department

Date of hearing	:	23.07.2024
Date of Pronouncement	:	24.07.2024

ORDER

Per George George K, Vice President:

This appeal at the instance of the assessee is directed against the order of CIT(A) dated 05.04.2024, passed under section 250 of the Income Tax Act, 1961 (hereinafter called ‘the Act’). The relevant Assessment Year is 2017-18.

2. Several grounds are raised in the memorandum of appeal. However, solitary issue that requires our adjudication is whether CIT(A) is justified in confirming the penalty imposed under section 271B of the Act, amounting to Rs.1,50,000/-.

3. Brief facts of the case are as follows:

Assessee is a proprietor of a wholesale poultry business. For the Assessment Year 2017-18, the return of income was filed declaring total income of Rs.4,63,300/-. Assessment was selected for scrutiny by issuance of notice under section 143(2) of the Act. Further, to the notice issued under section 142(1) of the Act, assessee had furnished necessary explanation with regard to issues raised during the course of assessment proceedings. It was noticed that assessee had failed to furnish the audit report under section 44AB of the Act within the due date prescribed. Accordingly, a show cause notice was issued directing the assessee to explain as to why penalty under section 271B of the Act ought not to be imposed in the instant case. In response to the same, assessee furnished reply as under:

“Further it is submitted that it is the first time of furnishing the audit report by me. I was unaware of the procedure for auditing of the books of accounts as it is first time and my accountant was also unaware of the same and due to his late furnishing, the books of accounts the delay has happened. Since, I am not well versed with accountancy knowledge. I have appointed the accountant and got completed the books of accounts audited and filed the return and furnished the audit report. Hence, there is delay in furnishing the audit report. I have no malafide intention whatsoever to make any delay in furnishing the audit report after the due date for furnishing the same however; I have filed the audit report before the completion for the assessment. The delay in furnishing the audit report is due to reason stated above as it is first time of furnishing of audit report and delay in finalizing the books of accountant and getting them audited.

Therefore, I request you good self to kindly drop the proposed penalty u/s 274 read with section 271B for the delay in furnishing the audit report for the assessment year 2017-18 as mentioned in your above notice in the best interest of justice and equity”.

4. However, the reply submitted by the assessee was not accepted by the AO and he imposed penalty under section 271B of the Act, amounting to Rs.1,50,000/-. The

relevant observation of the AO in imposing penalty under section 271B of the Act, reads as follows:

“The reply of the assessee has been considered but not acceptable as the assessee has not filed the audit report in time. Moreover, the unawareness of the procedure for auditing of the books of accounts on the part of the assessee is not acceptable because ignorance of law is not an excuse in this country.

In the light of the foregoing Para, the default of the assessee is without reasonable cause. I am thus satisfied that the case of the assessee is a fit case and warrants a penalty, Accordingly, the penalty is calculated as under:

<i>Total turnover/sales</i>	<i>Rs. 4,75,63,315/-</i>
<i>Penalty calculated 0.5% of turnover/sales</i>	<i>Rs. 2,37,816/-</i>
	<i>Or</i>
	<i>Rs. 1,50,000/-</i>
	<i>(Whichever is less)</i>

I hereby impose a penalty of Rs. 1,50,000/- u/s 271 B of the Act. Notice of demand and challan are issued accordingly.”

5. Aggrieved by the imposing of penalty under section 271B of the Act, amounting to Rs.1,50,000/-, assessee preferred appeal before the First Appellate Authority (FAA). The CIT(A) passed an ex-parte order since there was no response to the notice issued from the Office of the FAA. The relevant finding of the CIT(A) in dismissing the appeal of the assessee reads as follows:

“Notices u/s 250 of the Act were issued on 10.01.2024, 05.02.2024, 28.02.2024 and 21.03.2024 to the appellant to support his grounds of appeal but the appellant has not furnished any written submission. Besides, the statement of facts and the grounds of appeal, there is nothing on record from the side of the appellant. There is nothing on record to even suggest that he was prevented by any reasonable cause to claim immunity u/s 273B of the Act. I have gone through 13 grounds taken in this appeal. The appellant has made averments without corresponding documentary evidence. I find no reason to differ with the finding recorded by the AO. It

is, therefore held that the AO has rightly levied penalty u/s 271 B of the Act for default u/s 44AB. The penalty is confirmed and all the grounds are dismissed.”

6. Aggrieved by the Order of the CIT(A) confirming the imposition of penalty under section 271B of the Act, assessee has preferred the present appeal before the Tribunal. Assessee had filed a letter dated 22.07.2024 requesting for an adjournment of the case which is posted for hearing today i.e., on 23.07.2024. On going through the material available on record, we find that this case can be disposed off even in the absence of assessee / AR, hence the adjournment application is rejected.

7. We have heard the learned DR and perused the material on record. Admitted facts of this instant case is that tax audit report in Form 3CB as required under section 44AB of the Act was filed beyond due date specified under section 139(1) of the Act. However, tax audit report was made available to the AO before completion of assessment under section 143(3) of the Act. On facts on record, it is clear that the AO has taken note of the Audit Report filed under section 44AB of the Act and has accordingly completed the assessment. Therefore, there is no monetary loss to the Revenue. In such circumstances, it has been held by the Bangalore Bench of the Tribunal in the case of Udapi Narayana Rao Padmanabh Rao Vs. ACIT in ITA No.136/Bang/2023 (Order dated 20.04.2023) that delay in filing the audit report is only a venial technical breach without any malafide intention and penalty cannot be imposed under section 271B of the Act. In this context, the Bangalore Bench of the Tribunal had also relied on the Order of the Chennai Bench of the Tribunal in the case of Balaji Logistics Vs. ACIT in ITA No.2248/Cheny/2019 (Order dated 07.09.2022). The relevant finding of the Bangalore Bench of the Tribunal in the case of Udapi Narayana Rao Padmanabh Rao Vs. ACIT (supra) reads as follows:

“3. We have heard the ld. D.R. The ld. D.R. submitted that the assessee is not serious about his appeal and also not produced any evidence in support of the medical certificate produced by the assessee before the AO and also has not participated before first appellate authority and hence the levy of penalty is to be confirmed. In our opinion, in case the assessment has been framed u/s 143(3) of the Act on 23.11.2018, wherein returned income has been accepted and there was no additions of income whatsoever made by AO. There was only a delay in filing the audit report which ought to have been filed on or before 17th Oct'16. However, the same has been filed before AO on 17.3.2017. Thus, it means that the tax audit report was made available to the AO before the completion of assessment i.c. 23.11.2018. However, the AO levied penalty at Rs.1,48,019/- on the reason that the assessee has not filed the audit report along with audited financials u/s 44AB of the Act within the due date for filing the return of income i.e. on or before 17.10.2016. However, as seen from the records, the audit report has been filed with the department on 25.9.2017, which was prior to the completion of assessment on 23.11.2018. There was no addition of whatsoever made by the AO while framing assessment u/s 143(3) of the Act on 23.11.2018. The assessee has given reason for delay in filing tax audit report that the assessee has been suffering from illness during the period from 5.8.2016 to 30.4.2017. The AO is not ready to accept this medical certificate on the reason that the certificate is not backed up by any medical records to show how serious the illness was and whether assessee was really incapacitated to make him unable to file his return of income and the audit report in time. This observation of the AO is unwarranted when the qualified medical practitioner gave the medical certificate regarding illness of the assessee. The AO is not bound to question the genuineness of such medical certificate unless he had some material in his hand to counter it. This observation cannot be appreciated. Therefore, we are of the considered view that when the tax audit report was made available to the AO before completion of assessment proceedings, then for venial technological breach without any malafide intention, penalty, cannot be levied u/s 271B of the Act. A similar issue came for consideration before the coordinate bench of the Tribunal in case of Balaji Logistics Vs. ACIT in ITA No.2248/Cheny/2019 dated 7.9.2022 wherein held as under:

"6. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. It is an admitted fact that although the assessee has filed Tax Audit Report in Form 3CB as required u/s.44AB of the Act, beyond due date specified u/s.139(1) of the Act, but such Tax Audit Report was

made available to the AO before completion of assessment proceedings u/s.143(3) of the Act, on 22.11.2017. It is evident from the fact that the assessee has obtained Tax Audit Report from an Accountant on 28.03.2016 and furnished before the AO during the course of assessment proceedings. Therefore, we are of the considered view that when the Tax Audit Report was made available to the AO before completion of assessment proceedings, then for venial technical breach without any mala fide intention, penalty cannot be levied u/s.271B of the Act. Further, a similar issue has been considered by the co-ordinate Bench of the Tribunal in the case of M/s. T P D 101 Uthangarai Milk Producers Co-operative Society Ltd. (supra), where on identical set of facts, penalty levied u/s.271B of the Act, has been deleted. The relevant findings of the Tribunal are as under:

"... 7. We have heard both the parties and perused the materials available on record and gone through the orders of the authorities below. The assessee supposed to have been filed audit report as required u/s.44AB of the Act, on or before 31.10.2015. However, such audit report has been filed on 05.03.2016, which is before the date of completion of assessment proceedings u/s.143(3) of the Act. In other words, although the assessee has filed tax audit report beyond the stipulated period, but such tax audit report was made available to the AO before he completes assessment proceedings. The assessee has given reasons for delay in filing tax audit report. As per which, the audit of accounts of society done by the Dept. of Cooperative Audit, could not be completed on or before 31.10.2015 and said delay was not in the hands of the assessee. Therefore, there is a reasonable cause for not filing the tax audit report within prescribed time limit and thus, penalty cannot be levied. We find merits in the submission of the assessee for the simple reason that non-filing of audit report within the due date is a venial technical breach without any mala fide intention on the part of the assessee. Because, completion of audit of books of accounts of the society is under the control of Dept. of Cooperative Audit and thus, unless the Dept. of Cooperative Audit completes audit, the assessee cannot file return of income along with tax audit report. Therefore, we are of the considered view that reasons given by the assessee for not filing tax audit report prescribed u/s.44AB of the Act, is neither intention nor any mala fide intention, but it is venial

technical breach and for this reason, penalty u/s.271B of the Act, cannot be levied This principle is supported by the decision of the Hon 'ble jurisdictional High Court in the case of P.Senthil Kumar v. PCIT reported in 416 ITR 336, where an identical issue had been considered by the Court and held that for venial technical breach without any mala fide intention, penalty cannot be levied The ITAT Cochin Bench in ITA No.411/Cochin/2018 vide order dated 05.02.2019 had held that once audit report has been made available before the AO, when the assessment proceedings were completed, then, there is no reason for levy of penalty.

8. In this view of the matter and considering the facts and circumstances of the case, we are of the considered view that reasons given by the assessee for not filing tax audit report within due date comes under reasonable cause as provided u/s.271B of the Act, and thus, the AO is erred in levying penalty u/s.271B of the Act. Hence, we direct the AO to delete penalty levied u/s.27 I B of Act."

7. In this view of the matter and by following the decision of the coordinate Bench of the Tribunal in the case of M/s. T P D 101 Uthangarai Milk Producers Co-operative Society Ltd (supra), we direct the AO to delete penalty levied u/s.271B of the Act.

8. In the result, the appeal filed by the assessee is allowed "

3.1 In view of this, we are of the opinion that levy of penalty u/s 271B of the Act is not justified. Accordingly, order of the lower authorities is reversed and the appeal of the assessee is allowed."

8. In light of the above Orders of the Tribunal, since audit report was made available to the AO prior to the Assessment Order being completed and same have been taken note of in completion of the assessment, we are of the view that penalty cannot be imposed under section 271B of the Act. Therefore, the penalty under section 271B of the Act, amounting to Rs.1,50,000/- is deleted. It is ordered accordingly.

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

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(WASEEM AHMED)
Accountant Member

Sd/-

(GEORGE GEORGE K)
Vice President

Bangalore.

Dated: 24.07.2024.

/NS/*

Copy to:

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|---------------|-------------------------|
| 1. Appellants | 2. Respondent |
| 3. DRP | 4. CIT |
| 5. CIT(A) | 6. DR, ITAT, Bangalore. |
| 7. Guard file | |

By order

Assistant Registrar,
ITAT, Bangalore.