

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

**BEFORE,
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
MS. MADHUMITA ROY, JUDICIAL MEMBER**

**ITA No.122/De1/2023
(ASSESSMENT YEAR 2017-18)**

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| Sh. Naresh Kumar, S/o Sh. Maha Singh VPO: Rssiawas, Distt. Charki Dadri Haryana-123401 PAN:AQVPK7413Q (Appellant) | Vs. | Income Tax Officer Charkhi dadri Haryana (Respondent) |
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| Assessee by | Sh. Naresh Aggarwal, Adv. |
| Respondent by | Sh. Anshul, Sr. DR |

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| Date of Hearing | 30/05/2024 |
| Date of Pronouncement | 14/08/2024 |

ORDER

PER S.RIFAUR RAHMAN, AM:

1. This appeal has been filed by the Assessee against the order of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC) Delhi, ["Ld. CIT(A)", for short], dated 29/11/2022 for Asst. Year 2017-18.

2. The brief facts of the case are, the case of the assessee was selected on the basis of cash deposited of Rs.25,59,000/- during the demonetization period in his bank account maintained with

State Bank of India, Greater Kailash, New Delhi. During the assessment proceedings, the Assessing Officer observed that assessee derives income from running of a Mother Dairy Booth, Greater Kailash, New Delhi. After verification of the cash deposits made by the assessee that cash deposited in the banks during the demonetization period was out of daily sale of milk and other products from the Booth. However, the Assessing Officer observed that the gross turnover of the assessee for the year was Rs.1,70,47,140/- which is more than 1 Crore, the provisions of section 44AB are attracted in this case. Accordingly, penalty the proceedings u/s 271B was a failure to get accounts audited or initiated. During the penalty proceedings, several notices were issued to the assessee but no response from the assessee side, accordingly, the Assessing Officer proceeded to levy of penalty of Rs.85,236/- is $\frac{1}{2}$ of the turnover, which is less than Rs.1,50,000/-. Therefore, penalty of Rs.85,236/- was levied u/s 271D of the Act.

3. Aggrieved with the above order, assessee preferred an appeal before the Ld. CIT(A) and filed detailed submissions before him. After considering the details submissions, the Ld. CIT(A) sustained the penalty levied by Assessing Officer.

4. Aggrieved, the assessee is in appeal before us raising following grounds of appeal:-

“ 1. That the appellant reiterates all the facts and grounds of appeal raised before the Ld. CIT (A) herein. The CIT(A) has blindly confirmed the Penalty Order passed by AO. The CIT(A) erred in upholding the penalty order passed by AO.

2. *That the penalty order passed is bad in law and facts under the specific circumstances. The Penalty Order has been passed without jurisdiction*

3. *That it is not mandatory, but a discretionary power conferred upon the AO to levy the penalty under Section 271B of the Act. That the penalty under Section 271B is neither automatic nor obligatory.*

4. *That the appellant has not file ITR as the income was below the basic exemption limit and the reply submitted during the assessment proceedings was based on the simple notebook maintained by the assessee. One cannot get the books of account audited, until and unless such books are maintained. So, the question of levying penalty for not getting the books audited must not be considered in isolation.*

5. *That it is apparent and transpired from the record that no prior approval / sanction has been obtained from Jt. CIT before passing a penalty order u/s 271B.*

6. *The appellant has suffered on account of his illiteracy of financial and tax laws. That, therefore, appellant could not understand the implications regarding his financial transactions and unable to comply with provisions.*

7. *That it is well known and standard practice of the income tax department (supported by CBDT Circulars) the Department Officers are not supposed to act as Executive or Judicial Official only but to act as both. That they are supposed to help and inform the taxpayer about their rights and liabilities well within in advance. They should not take disadvantages of the appellant ignorance of law.*

8. *That the appellant hereby requests to please allow him to raise / delete or amend the any other grounds. That the appellant hereby requests to please allow him to amend any grounds raised hereinbefore.*

Under the circumstances it is prayed that the penalty Order passed u/s 271B is not fair and just. Hence the appeal has been preferred before your Honour.

It is prayed that the penalty imposed on the appellant may be deleted and/or grant any other relief as your Honour may deem fit to meet the end of the justice.”

5. At the time of hearing, the Ld. AR submitted as under:-

“1. The appellant is an ex-serviceman. The appellant had the income from the pension and commission from Mother Dairy. That he was allotted the Milk booth on the ground that he is a ex-servicemen as per policy of the Mother Dairy. (Page 25-28). The appellant was an army personnel before it and now a member of Haryana Police.

2. That during the Assessment Year the assessee has been agent of Mother Dairy for sale of its dairy products. That in the consideration of his services he was paid a fixed percentage commission by the Mother Dairy. That it has been held in various decisions by the ITAT that the Milk booth agents working on commission are not subject to penal proceedings u/s 271B. The appellant relied on the case Laws as follows:-

1. Ved Singh Vs ITO Charkhi Dadri (ITAT, New Delhi) dt. 15th Jan 2024 ((2024) 159 Taxmann.com 1568) (Page 29-32)

2. Sh Nikki Tyagi Vs. Income Tax Officer (ITA No. 5508/Del /2019 dt 30th June 2022) (ITAT, New Delhi). (Page 33-36)

3. Mohd Javed Vs Income Tax Officer (ITA 916/Del/2022 dt. 3rd March 2023) (ITAT, New Delhi). (Page 37-40).

4. Mohammad Daud Vs ITO Ward 58(1) Delhi (ITA 1691/Del /2022 dt 22 May 2023) (ITAT New Delhi) (Page 41-43).

5. Haresh Amarsinh Zala Vs ITO (ITA 305/RJT/2019 dt. 14th Sept 2019)(ITAT Rajkot). (Page 44-47).

3. That it was first and last assessment year when he acted as agent of the Mother Dairy. The appellant hereby relied upon the following rulings in support of its contention.

1. (2004) 3 SOT 144(Delhi): Madan Lal Gupta Vs Income Tax Officer. (Page 48-49)

2. Jitenera Majitha Vs The Commissioner of Income Tax (Appeals) (ITA 181/RJT/2023 dt. 18 August 2023) (ITAT Rajkot) (Para 7). (Page 50-60) (Page 58)

4. That in view the mentioned facts and circumstance therefore he is not expected to be having knowledge as to the relevant laws applicable to a Business. It was a bonafide belief on his part of the appelland constituted a reasonable cause under the Section 2736.

5. The AO passed the assessment order by accepting the appelland income Rs.81582 (Appelland version). (Assessment Order: Page 19-21). The AO has not raised any issue as to difficulty in assessing income. The appelland has relied upon following case Laws:

1. Haresh Amarsinh Zala Vs ITO (ITA 305/RJT/2019 dt. 14th Sept 2019)(ITAT Rajkot). (Para 9.3 and 9.4). (Page 47).

2. Jitenera Majitha Vs The Commissioner of Income Tax (Appeals) (ITA 181/RJT/2023 dt. 18 August 2023) (ITAT Rajkot) (Para 8). (Page 59).

6. That it is not mandatory, but a discretionary power conferred upon the AO to levy the penalty under Section 271B of the Act. That the penalty under Section 271B is neither automatic nor obligatory. The appelland has relied upon the following case laws:

1. Shri Damjibbhai D. Vagnai Vs ITO (ITA 284/RJT/2018 dt 28th Feb 2020) (ITAT Rajkot). (Para 8.1). (Page 61-63)

2. Haresh Amarsinh Zala Vs ITO (ITA 305/RJT/2019 dt. 14th Sept 2019) (ITAT Rajkot). (Para 9.1) (Page 46).

7. The appelland submitted reply during the assessment proceedings was based on the simple notebook maintained. The appelland did not maintain any books of account. One cannot get the books of account audited, until and unless such books are maintained. So, the question of levying penalty for not getting the books audited must not be considered in isolation. There is no mention in the assessment order (Pages 22-24) that the appelland has produced any books of accounts. The appelland hereby relied upon the following case laws:

1. Yogendera Singh Shekhwat Vs ITO (ITA 1001/JP/2016) Order dt 24th April 2017 (ITAT Jaipur) (Page 64-68) following and approving the case laws:

(i) CIT Vs Bisauli Tractors (299 ITR 219) (Allahabad).

- (ii) CIT Vs. S K Gupta (2010) 322 ITR 86(Allahabad).
- (iii) CIT Vs. Surajmal Parsuram Todi (1996)222 ITR 691 (Gauhati).

That it is apparent and transpired from the record that no prior approval / sanction has been obtained from Jt. CIT before passing a penalty order u/s 271B. (CIT Appeal Order Page 18). The relevant para speaks of the procedure, but no document has been placed on the assessment record. That it is apparent from the Penalty Order under Section 271B (Page 20-21) that the no prior approval has been obtained by the department before levying penalty under Section 271B.

The appellant has suffered on account of his Illiteracy of financial and tax laws. That, therefore, appellant could not understand the implications regarding his financial transactions and unable to comply with provisions.

Under the circumstances it is prayed that the penalty Order passed u/s 271B is not fair and just. Hence the appeal has been preferred before your Honour.

It is prayed that the penalty imposed on the appellant may be deleted and/or grant any other relief as your Honour may deem fit to meet the end of the justice.

6. On the other hand, the Ld. DR relied on the orders of lower authorities.

7. Considered the rival submissions and material placed on record, we observed from the facts on record that assessee is a Mother Dairy agent selling milk from the commission on sale of milk, due to huge cash deposits in his bank account, the case was selected for scrutiny, however, after considering the nature of business of the assessee, it was found that the cash deposits are out of milk collections, however, it was observed that the assessee is earned commission income out of gross sales of Rs.1,70,47,140/. It was noticed that the assessee has not followed the provisions of section 44AB in order to get them audited. Since, no response from

the assessee penalty was levied. On careful consideration of facts on record, we observed that levy of penalty is discretion on the part of the Assessing Officer, in the current case, it is fact on record that the main income of the assessee is only earning of commission out of sales of milk, therefore, the assessee is getting only agency commission from the mother dairy and the gross sales reported by the assessee are not the actual sales of the assessee and it is the sales of mother dairy. Since, the assessee is a small time agent working for the mother dairy, he purchases milk pockets in bulk and sells the same on daily basis. His real income is only percentage of commission received from mother dairy, therefore, as per assessee is concern, the gross income is only the commission income. As per the facts on record even the Assessing Officer observed that the assessee has not maintained any books of account and he merely purchases milk on daily basis and sell the same on daily basis remitting the amount collected to the mother dairy and retains the commission income with him. Therefore, as per the facts on record it is not possible on the part of the assessee to maintain any books based on the nature of activities carried on by the assessee. In order to maintain the books and requirement to get his book audited depends upon the gross income, in this case, it is only the gross commission not the sales, therefore, we do not see any reason to levy the penalty u/s 271B of the Act. When the authorities observed that impossibility of performance in the case of the assessee, the authorities should have applied the discretionary power at their disposal, therefore, we are inclined to direct the

Assessing Officer to delete the penalty levied in this case.
Accordingly, appeal filed by the assessee is allowed.

8. In the result, the appeal filed by the Assessee is allowed.

Order pronounced on 14th August, 2024.

Sd/-

(MS. MADHUMITA ROY)
JUDICIAL MEMBER

Dated: 14/08/2024

Pk/sps

Copy forwarded to:

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

Sd/-

(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI