

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH : COCHIN**

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

ITA No.287/Coch/2023
Assessment Year : 2017-18

Smt. Anita Yogish Pai, KCP13, 200A M/S. N. S. Pai Petroleum, Keezhur, Iritty, Kannur – 670 703, Kerala. PAN : ANYPP 6710 H	Vs.	ITO, Ward –1 and TPS, Kannur.
APPELLANT		RESPONDENT

Assessee by	:	None
Revenue by	:	Shri. Jayaganesh, DR(ITAT)

Date of hearing	:	05.08.2024
Date of Pronouncement	:	06.08.2024

ORDER

Per George George K, Vice President:

This appeal at the instance of the assessee is directed against the order of CIT(A) dated 11.04.2023, 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, the 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 proprietrix of M/s. N. S. Pai Petrol Pump at Keezhur Iritty, Kannur, trading in the purchase and sale of petrol, diesel and lubricants. For the Assessment Year 2017-18, the return of income was filed declaring total income of Rs.31,75,850/-. 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 stating that assessee's accountant was not well and did not collect the details of other income.

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/-.

5. Aggrieved by the imposition 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) confirmed the order of the AO imposing penalty of Rs.1,50,000/- under section 271B. The relevant finding of the CIT(A) in dismissing the appeal of the assessee reads as follows:

“DECISION :

I have carefully considered the grounds of appeal, statement of facts and the contents of penalty order along with written submission filed by the assessee. The assessee has submitted that there was a small delay of 35

days in submitting the return of income and tax audit report which was due to her accountant not being well and she had misplaced her digital signature. It was also submitted that the assessee has committed only technical venial breach and she should not be penalized. It was also contented that penalty order is barred by limitation since penalty notice was issued on 25.12.2019 and the penalty order was passed on 25.01.2022.

6.1 It is a settled law that the assessee has to show a reasonable cause for its failure to comply with the requirements of section 44AB before the specified date. In the instant case, there is no evidence filed by the assessee to show that the accountant was not well and she has misplaced the digital signature. Moreover, the audit is to be done by the auditor and loss of digital signature, if any, of the assessee has no relevance. The assessee was running the business of petrol pump and its turn over of the fuel trading was to the extent of Rs. 20.59 crores and therefore the assessee was having a proper infrastructure and business setup and even if one person is not well, the other employees could have been utilized for compliance to section 44AB. So far the claim of time barring order concerned. It is found that section 275 contains bar of limitation for imposing penalties and it does not prescribe any time limit for imposition of penalty u/s 271B. Therefore, I do not find any infirmity in the order of the AO levying penalty of Rs. 1,50,000/- u/s 271B and hence the same is confirmed. The grounds of appeal are dismissed.

Accordingly, the appeal is treated as 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. None was present on behalf of the assessee. 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 we proceed to dispose the appeal on merits of the case.

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.e. 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/s271B 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:06.08.2024.

/NS/*

Copy to:

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

By order

Assistant Registrar,
ITAT, Cochin.