

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW 'B' BENCH, LUCKNOW**

**BEFORE SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER**

ITA No.200/Lkw/2022
A.Y. 2016-17

Makashood Asharaf, 98-Moh. Seikh Sarain, Kheri Town, Distt.- Lakhimpur Kheri-1 (U.P.)	vs.	The Income Tax Officer, Range-3(4), Lakhimpur Kheri- 1
PAN:BKWPA9250R		
(Appellant)		(Respondent)

Assessee by:	Sh. Shubham Rastogi, C.A.
Revenue by:	Sh. Sunil Kumar Rajwanshi, Addl. CIT DR
Date of hearing:	29.08.2024
Date of pronouncement:	25.10.2024

ORDER

PER SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER:

This is an appeal filed against the order of the Id. CIT(A), NFAC under section 250 of the Income Tax Act, 1961 on 28.07.2022 upholding the penalty levied under section 271B by the ITO-3(4), Lakhimpur-1 vide his order dated 25.11.2019. The grounds of appeal preferred are as under:-

"1.That the Ld. C.L.T: (A) erred on facts and in law in confirming the penalty of Rs. 1,50,000/- imposed u/s 271B of I. T. Act without appreciating that there was a reasonable cause for non filing of Audit Report within the due date prescribed under the Act.

2- That the authorities below erred on facts and in law in not considering that the assessee is a small supplier of Eggs and living in Rural Area and it was first year of audit and the assessee was not fully aware of the requirements for filing of Tax Audit Report electronically.

3- That the Authorities below erred on facts and in law in not appreciating that there was no failure on the part of the Assessee to get the accounts audited u/s 44AB which was obtained on 28.09.2016 and was electronically uploaded on 31.03.2017 and thus, there was no delay in conducting of Audit.

4- The present penalty imposed is highly excessive, contrary to the facts, law and principle of natural justice and without provide sufficient time and opportunity to have its say on the reasons relied upon by Ld. A. O.”

2. Subsequently the assessee filed an additional ground of appeal as under:-

“1. That the Authorities erred on facts and law in not considering that the basis of the initiation of penalty proceedings was not Identical with the ground on which the penalty had been imposed and thus penalty levied u/s 271B of I. T. Act is illegal and liable to be quashed.”

And prayed that the same had been raised at this stage as this was a purely legal ground that went to the very root of the case. The assessee placed reliance on the following cases for proposition that he was entitled to raise the fresh legal ground at any stage of the proceedings.

- i. National Thermal Power Co. Ltd. vs. CIT 229 ITR 383 SC.
- ii. Orissa Cement Limited vs. CIT 250 ITR 856 (Delhi)
- iii. Wilson Industries vs. CIT 259 ITR 318 (Madras)
- iv. Vimal Kishore Kapoor, Kanpur vs. ITO, Salary Ward-3(1), Kanpur ITA No. 658/Alld/1996 & ITA No. 730/Alld/1996
- v. V.K. Brahmankar vs. Joint Commissioner of Income Tax, ITAT, Indore Bench reported in 90 TTJ 821.

3. We have duly considered this additional ground raised by the assessee and since the ground involved is a purely legal ground, we allow the same in view of the decision of Hon'ble Supreme Court in the case of NTPC vs. CIT (supra).

4. The facts of the case are that the assessee filed e-filed his return for the assessment year 2016-17 on 4.04.2017 showing a total income of Rs. 2,81,320/-

from the business of sale and purchase of eggs. As the assessee failed to furnish an audit report in Form 3CB before the specified date i.e. before 30.09.2016 as per the provisions of section 44AB of the Income Tax Act, despite the fact that the total turnover from sales was shown at Rs. 5,52,26,920/-, the ld. AO issued a show cause notice under section 271B on 12.07.2019. The ld. AO records that the assessee did not comply with the show cause notice. The ld. AO thereafter observed, that the assessee had got his accounts audited for the assessment year 2016-17 and e-filed his audit report on 31.03.2017 vide Acknowledgment No.739598661310317, which was after the due date of 30.09.2016. Therefore, since the default was apparent, he held that penalty under section 271B was clearly attracted in this case. It was, therefore, a fit case for levy of penalty. Since the half percent of turnover amounted to Rs.2,76,135/-, he imposed a penalty of Rs.1,50,000/-, which was the lower amount under section 271B of the Act, vide his order dated 15.11.2019.

5. Aggrieved with the levy of this penalty, the assessee filed an appeal with the ld. CIT(A), NFAC. Before the ld. CIT(A), it was submitted that the assessee was an individual trading in eggs. He had maintained proper books of accounts and got it audited by a Chartered Accountant. The report was obtained on time and was produced before the ld. AO during the assessment proceedings under section 143(3). The assessment had been completed on returned income and no adverse inference had been drawn by the ld. AO. The ld. AO proceeded to initiate the penalty proceedings as an afterthought (and not in the body of the assessment order passed by him) and therefore, it was against the principles of natural justice. The ld. CIT(A) considered these submissions, but did not find the same to be having any merits. He opined that the penalty under section 271B was not imposed on the basis of any finding by the ld. AO during scrutiny assessment, but was on account of violation of a statutory liability arising out of the provisions of section 44AB and the ld. AO had no discretion with regard to the same. He quoted from section 271B to demonstrate this. He further opined that despite being given an opportunity, the assessee had

failed to provide any reasonable cause to the Id. AO for the delay in the filing of the audit report. Therefore, the provisions of section 271B was squarely applicable to the assessee. He also rejected the plea of the assessee that failure to initiate the penalty during the course of assessment proceedings vitiated the penalty. Quoting from the judgment of the ITAT, Allahabad in the case of **Income Tax Officer vs. Rama Medical Stores** 59 ITD 110, he pointed out that the ITAT, Allahabad had clearly made a distinction between the penalties initiated under section 271, which had to be initiated in the course of any proceedings and section 271B where such condition did not prevail. The Id. CIT(A) further pointed out that this finding of the ITAT, Allahabad had been upheld by the Hon'ble Allahabad High Court vide its order dated 29.06.2016 in the case of Rama Medical Store vs. CIT (2016-TIOL-2750-HC-ALL-IT), wherein it had been held that for the purposes of imposing penalty under section 271B, its initiation in the course of assessment proceedings was not necessary within the meaning of section 275(1)(c). He, therefore, upheld the levy of penalty and dismissed the appeal of the assessee.

6. Aggrieved with the said dismissal, the assessee has come before us. Shri Shubham Rastogi, C.A. (hereinafter referred as the "Id. AR") submitted, with respect to the additional ground, that in this case penalty was initiated vide show cause notice dated 12.07.2019, where the penalty was initiated on the following grounds:- *"whereas in the course of proceedings before me, for the assessment year 2016-17, it appears to me that during the previous year relevant to the assessment year under consideration, you have not got your books of accounts audited as required under section 44AB of the Income Tax Act, 1961"*. However, when the penalty order was passed, the ground on which the penalty was finally imposed, was as mentioned in the assessment order as under:- *"it is evident that the assessee has failed without reasonable cause to furnish audit report in Form 3CB on or before the specified date i.e. 30.09.2016."* Ld. AR submitted that it was clearly evident that the basis on which the penalty proceeding was initiated, as per show cause notice dated 12.07.2019

was not identical with the ground on which penalty was finally imposed. It was prayed that the penalty under section 271B could be imposed on account of two separate defaults viz., failure to get accounts audited or failure to furnish a report of such audit before the specified date. Thus, there were two separate offences in section 271B of the Act for which penalty could be imposed and both the offences were distinct and different. It was prayed that the grounds for initiation of proceeding under section 271B were invalid, as it was not a case where the assessee had not got the account audited, since the audit report was duly furnished in the course of assessment proceedings under section 143(3) of the Act, but rather a case of non-furnishing of the report on time. It was further prayed that the initiation of the proceedings on different grounds and levy of penalty on different grounds deprived the assessee of a reasonable opportunity to show cause against the penalty proceeding in a quasi-criminal matter. It was, therefore, prayed that since the initiation was itself invalid, the penalty was liable to be quashed. In support of this proposition, the Id. AR relied upon the judgments of Hon'ble Madras High Court in the case of **Commissioner of Income Tax vs. Apex Laboratories Pvt. Ltd.**, 284 ITR 364 (Mad), the jurisdictional Hon'ble Allahabad High Court in the case of **CIT-Luknow vs. Jagat Rice Mill** [2006] 150 taxman 5 (All), Hon'ble Gauhati High Court in the case of **Padma Ram Bharti vs. CIT** 110 ITR 54 (Gau), Hon'ble Supreme Court in the case of **CIT vs. SSA's Emerald Meadows** 242 taxman 180 (SC) and the judgment of the ITAT, Surat Bench in the case of **Jigneshbhai Rasikbhai Savalia vs. Income Tax Officer** 2023 149 taxman.com 276. Copies of these judgments are also filed in the paper book. Subsequently, another paper book was filed containing the orders of the Hon'ble ITAT, Kolkata Bench in the case of **Calcutta Urology Research Centre (P.) Ltd. vs. ACIT** [2017] 82 taxman.com 242 (Kol-Trib), Hon'ble ITAT Hyderabad Bench in the case of **ASR Engineering and Projects Limited** 111 taxman.com 49 and copy of order of ITAT, Gauhati Bench in **North Eastern**

Constructions vs. Income Tax Officer, Ward-1(2), Dibrugarh (2020) 117
taxman.com 321 (Gau-Trib).

7. With regard to the other grounds of appeal, it was submitted that the assessee was an individual residing in a rural area of Lakhimpur Kheri and doing the wholesale business of sale and supply of eggs under the proprietary concerned M/s National Egg Store. During the year, the assessee filed its return of income on 11.06.2017 under section 139(4) of the Income Tax Act showing a total income of Rs.2,81,320/-. The assessee had shown turnover of Rs.5,52,26,920/- and the books of the accounts of the assessee were audited under section 44AB of the I.T. Act by the Chartered Accountant. This tax audit report in Form No. 3CB and 3CD was e-filed on 31.03.2017 with e-filing Acknowledgment No.739598661310317. Subsequently, the case was selected for scrutiny and after examining all details, the ld. AO completed the assessment under section 143(3) at the returned income. Subsequently, however, a show cause notice under section 271B was issued on 12.07.2019, on the grounds that the assessee had not got the books audited. Subsequently, the penalty was levied for failure to furnish the audit report before the specified date on 30.09.2016, as per the provisions of section 44AB of the Act, 1961. It was submitted that before the ld. CIT(A), the assessee had submitted that he had obtained the audit report before the due date specified under section 139(1) of the Act and it is also been filed electronically on 31.03.2017 at the time of filing of return of income and also placed before the ld. AO during the course of assessment proceedings. No adverse finding was given in the tax audit report and the returned income was accepted. Despite this, the ld. CIT(A) had confirmed the levy of penalty without appreciating that there was no loss to Revenue and the audit report was duly available before the ld. AO during assessment. It was submitted that the assessee being a vendor of eggs in a rural area, and it being a first year of audit, he was not having knowledge of technical and procedural compliance laid down under the act and Rule. He was, therefore, under the bona fide belief that since he had

obtained the audit report, it was sufficient compliance under the Act and he was not aware that the report ought to have been e-filed before 30.09.2016. It was only at the time of filing of the return, when the tax counsel of the assessee informed about the non-furnishing of tax audit report electronically, that the assessee asked the tax auditors to electronically upload the audit report on 30.03.2017. It was prayed that the electronic filing of the audit report was the responsibility of the auditor and once the audit report was furnished on 28.09.2016, it ought to have been uploaded by the auditors on the same date or before 30.09.2016. It was, therefore, prayed that there was reasonable cause for non-furnishing of audit report within the due date being lack of knowledge of technical and procedural compliance of the assessee in his first year of tax audit and the delay in the electronic furnishing of tax report before due date, was entirely on the part of the auditor, who even after submitting the audit report on 28.09.2016, did not furnish it electronically. It was, therefore, submitted that the delay in furnishing of the audit report was unintentional and beyond the control of the assessee. It was, therefore, prayed that the penalty may kindly be deleted. Reliance was placed on the judgment of Hon'ble Madras High Court in the case of **Commissioner of Income Tax vs. Apex Laboratories Pvt. Ltd.**, 284 ITR 364 (Mad), Hon'ble Allahabad High Court in the case of **CIT-Lukcnaw vs. Jagat Rice Mill** [2006] 150 taxman 5 (All) and the ITAT, Surat Bench 'SMC' in **Jigneshbhai Rasikbhai Savalia vs. Income Tax Officer** 2023 149 taxman.com 276 (Surat-Trib). A copy of a certificate from the auditor S.K. Jadia & Co., Chartered Accountants was also filed that the tax audit had been completed on 28.09.2016 and the audited balance-sheet and audit report was handed over to Shri Makashood Asharaf on 28.09.2016. It was acknowledged, with regret, that due to the shifting of office premises, the tax audit report could only be electronically uploaded on 31.03.2017.

8. On the other hand, Shri Sunil Kumar Rajwanshi, ld. Addl CIT DR, argued that the provisions of the act were crystal clear i.e. the assessee had to both obtain the

audit report and upload the same before the due date of the filing of the return. In the case of the assessee, while the assessee had obtained the report, he had not uploaded it before the due date of the filing of return and therefore, penalty was leviable upon him. With regard to the defect in the notice under section 271B, it was pointed out that the assessee was well aware of his default and therefore was not prejudiced on account of this defect on this notice. He further submitted that the defect in the notice could not be held to be invalid in view of the provisions of section 292B of the Act because the notice was in conformity with the intent and purposes of the Income Tax Act.

9. We have duly considered the facts and circumstances of the case. Ongoing through the notice under section 271B dated 12.07.2019, it is seen that the officer has categorically initiated the penalty proceedings on account of the failure to get the books of accounts audited under section 44AB of the Act, 1961. This is not a case where he has failed to strike out one limb, which may create ambiguity in the mind of the assessee, but rather a case when he has quite categorically initiated the penalty for a specific default. It also transpires that the said default had never happened or at least no findings had been recorded that the assessee had failed to get his books of accounts audited, as required under section 44AB of the Income Tax Act, before the due date of the furnishing of the return. Thus, the penalty notice is seen to have been issued on account of a non-existing infringement. The notice can therefore, not be held to be valid in accordance with section 292B of the I.T. Act, 1961 because of this. Consequently, it follows that when the notice has never been issued to the assessee asking him to show cause as to why he failed to furnish the audit report before the due date of filing of return, any levy of penalty upon him for such infringement, is against the principles of natural justice and invalidated on that account. This matter has also been considered by the Hon'ble ITAT Gauhati Bench in the case of ***North Eastern Constructions vs. Income Tax Officer, Ward-1(2), Dibrugarh*** (2020) 117 taxman.com 321 (Gau-Trib), wherein the Hon'ble ITAT held

that where the ld. AO, in the penalty notice under section 271B, had not spelt out what was the fault for which the assessee was being proceeded for the levy of penalty, the notice was vague and therefore, bad in law as held by the ITAT Delhi Bench in the case of **Parkinson's Electrical Corporation vs. ITO**, [1996] 84 taxman 82 (Del)(Mad). The Hon'ble Bench held that a notice proposing penalty should clearly spell out the fault / charge for which the assessee is put on notice so that he can defend the charge properly. It relied upon the judgment of Hon'ble Karantaka High Court in the case of **CIT vs. SSA's Emerald Meadows** [2016] 73 taxman.com 241 (Kar) in the context of notice issued under section 274 r.w.s. 271(1)(c) of the Act, wherein the Hon'ble High Court following its own decision in the case of **CIT vs. Manjunatha Cotton Engineering Factory** [2013] 35 taxman.com 250 held that, if the penalty notice is vague, then the penalty order is also bad in law. It, therefore, held the notice issued by the ITO without striking of one of the two limbs of section 271B to be bad in law and accordingly, invalidating the subsequent penalty levied. In the present case, the issue is even more stark. In this case, the ld. AO has issued a notice on a wrong charge i.e. failure to get the accounts audited and thereafter, proceeded to levy the penalty on another charge i.e. the failure to furnish the audit report before the due date. Therefore, it is clear that the notice issued on the basis of non-existing infringement is bad in law and cannot be the basis of levy of penalty on another charge. Accordingly, the penalty is also held to be bad in law and liable to be struck down. The additional ground of appeal is accordingly held to be allowed.

10. Be that as it may, we have also taken note of the fact that the jurisdictional High Court in the case of **CIT-Luknow vs. Jagat Rice Mill** [2006] 150 taxman 5 (All) has followed its earlier decision in **CIT vs. Jai Durga Construction** [2000] 245 ITR 857, in which it has been held that where the assessee has got its accounts audited before the specified date, no penalty can be levied under section 271B, even though the assessee has not filed such audit report before the ld. AO before the specified date. We further observe that the ITAT, Surat Bench in the case of **Jigneshbhai**

Rasikbhai Savalia vs. Income Tax Officer [2023] 149 taxman.com 276 (Surat-Trib) has held that where the accounts were audited and the assessee got the audit report but the same was filed along with the returned belatedly, penalty could not be imposed under section 271B of the Act, by relying on the judgment of the Hon'ble Allahabad High Court in the case of **Jagat Rice Mills** (supra) and the Hon'ble Madras High Court in the case of **Commissioner of Income Tax vs. Apex Laboratories Pvt. Ltd.**, 284 ITR 364 (Mad). Therefore, in the present case, there is a certificate on record from the Chartered Accountant that he had completed the audit before the due date and could not upload the same due to the shifting of his office. In view of the aforesaid judgments of the Hon'ble High Court and Tribunals which had been brought to our notice, the penalty under section 271B is therefore, even otherwise not leviable upon the assessee. Accordingly, the penalty is deleted.

11. In the result, the appeal of the assessee is allowed.

Order pronounced on 25.10.2024 at Allahabad, U.P.

Sd/-

**[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER**

DATED:25/10/2024

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Copy forwarded to:

1. Appellant -
2. Respondent -
3. CIT DR, ITAT,
4. CIT,
5. The CIT(A)

Sd/-

**[NIKHIL CHOUDHARY]
ACCOUNTANT MEMBER**

By order
Sr. P.S.