

**IN THE INCOME TAX APPELLATE TRIBUNAL,
AGRA (SMC) BENCH, AGRA**

BEFORE : SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

**ITA No. 34/Agr/2023
Assessment Year: 2018-19**

Gopal Agarwal, 207, Durga Nagar, Firozabad (U.P.) 283203	v.	Income-tax Officer, Ward 2(2)(1), Firozabad.
PAN :APVPA2198H		
(Appellant)		(Respondent)

Assessee by	Adjournment application rejected
Revenue by	Sh. Shailendra Srivastava, Sr. DR

Date of hearing	13.12.2024
Date of pronouncement	15.01.2025

ORDER

This appeal in ITA No.34/Agr/2023 for the assessment year 2018-19 has arisen from the appellate order dated 10.02.2023 [DIN & Order No. ITBA/NFAC/S/250/2022-23/1049615591(1)], passed by learned Commissioner of Income-tax (Appeals), NFAC, Delhi, which, in turn, has arisen from the penalty order dated 16.03.2022 passed by Assessing Officer u/s. 271B of the Income-tax Act, 1961.

2. Brief facts of the case are that the assessee e-filed return of income for the assessment year 2018-19 on 25.07.2018 ,declaring income of Rs.4,28,200/-. The case of the assessee was selected by Revenue for framing scrutiny assessment under CASS. Notices u/s.

143(2) and 142(1) were issued by the Assessing Officer to the assessee, during the course of assessment proceedings. There was a cash deposit to the tune of Rs.5,21,89,264/- in the bank accounts of the assessee with the ICICI Bank. The assessee submitted during the course of assessment proceedings that the assessee is engaged in commission business of cash handling. The assessee submitted that Firozabad, being a glass industries city, the customers from different parts of the country come to Firozabad to buy bangles and other glass hardware. To mitigate the risks, the assessee handles cash of customers and make payments for purchases effected by them on their behalf. The AO called for the details of customers who deposited cash in the assessee's account. The assessee expressed its inability in submitting details of customers who deposited cash in the assessee's bank account , and the assessee submitted that the assessee has not maintained books for cash handling business. The Assessing Officer applied the rate of 8% on the cash deposit and accordingly computed the income of the assessee and added Rs.44,76,376/- to the income of the assessee, vide assessment order dated 01.12.2021 passed by the AO u/s 143(3) r.w.s. 143(3A) and 143(3B). Penalty Proceedings u/s. 271B of the Act were initiated by the AO against the assessee on the ground that the assessee failed to get its accounts audited under the 1961 Act, and failed to furnish the audit

report u/s. 44AB of the Act. The assessee submitted that the assessee has filed appeal before the Id. CIT(Appeals) against the quantum assessment order and prayers were made to keep the penalty proceedings in abeyance. The Assessing Officer observed that the gross receipts of the assessee are Rs.5,83,35,487/- and the assessee is liable to get its accounts audited u/s 44AB and to furnish the report in prescribed form within prescribed time, but the audit report has not been filed by the assessee and hence, the assessee did not get its account audited within the prescribed time. The AO observed that no reasonable cause has been submitted by the assessee for non-compliance of statutory provisions and hence, the Assessing Officer levied penalty of Rs.1,50,000/- u/s. 271B of the Act against the assessee as the assessee's turnover/gross receipts of the assessee are to the tune of Rs. 5,83,35,487/-, vide penalty order dated 16.03.2022 u/s 271B.

3. Aggrieved, the assessee filed first appeal with the learned CIT(Appeals). During first appellate proceedings, the Id. CIT(Appeals) issued only one notice dated 29.12.2022 asking the assessee to submit reply latest by 06.01.2023. The assessee did not file any reply and hence, Id. CIT(Appeals) dismissed the appeal of the assessee on the ground that the assessee has nothing to submit in this regard and the penalty order passed by the AO was upheld by Id. CIT(A).

4. Aggrieved, the assessee has now filed second appeal with the Tribunal. When this appeal was called for hearing before the Tribunal, none appeared on behalf of the assessee. The adjournment application filed on behalf of the assessee stands rejected.

4.2 The Learned Sr. DR appeared and has filed status of the quantum appeal by way of screen shot from ITBA portal, in which it is reflected that the appeal of the assessee filed against the assessment order passed by the AO u/s. 143(3) is still pending for disposal with the Id. CIT(Appeals). Ld. Sr. DR submitted that the first appeal filed by the assessee against quantum assessment is pending before the Id. CIT(Appeals).

5. I have considered the contentions of Id. Sr. DR and perused the material on record. I have observed that the assessee filed its return of income for the impugned assessment year on 25.07.2018 declaring income of Rs.4,28,200/-. The case of the assessee was selected for framing scrutiny assessment by Revenue under CASS. Statutory notices u/s. 143(2) and 142(1) were issued by the Assessing Officer during the course of assessment proceedings. The assessee participated in the assessment proceedings. It was observed by the Assessing Officer in quantum assessment proceedings that the assessee has deposited cash of Rs.5,21,89,264/- in the bank accounts with ICICI Bank. The AO

observed that the assessee has gross receipts/turnover of Rs. 5,83,35,487/- during the assessment year. The assessee was asked by the AO to explain the same . The assessee submitted during the course of assessment proceedings that the assessee is engaged in commission business of cash handling. The assessee submitted that Firozabad, being a glass industries city, the customers from different parts of the country come to Firozabad to buy bangles and other glass hardware. To mitigate the risks, the assessee handles cash of customers and make payments for purchases effected by them on their behalf. The AO called for the details of customers who deposited cash in the assessee's account. During quantum assessment proceedings , the assessee expressed its inability in submitting details of customers who deposited cash in the assessee's bank account , and the assessee submitted that the assessee has not maintained books for cash handling business. The AO applied profit rate of 8% to the cash deposits,and made additions to the tune of Rs. 44,76,376/- as income of the assessee. The penalty proceedings u/s 271B were initiated by the AO against the assessee, for failure to get accounts audited or failed to furnish a report of such audit as is required u/s 44AB of the 1961 Act. During penalty proceedings u/s 271B conducted by the AO, the assessee submitted that the first appeal filed by the assessee against quantum assessment is pending before Id.

CIT(A) , and the penalty proceedings u/s 271B be kept in abeyance. The AO observed that the gross turnover/receipts of the assessee are exceeding threshold limits as prescribed u/s 44AB, and the assessee is liable to get its accounts audited u/s 44AB. The Assessing Officer observed that the assessee has not filed any tax audit report nor has got its accounts audited u/s. 44AB of the Act, which led to imposition of penalty u/s. 271B of the Act to the tune of Rs.1,50,000/-.

5.2 On being asked by the Bench, Id. Sr. DR has filed status report of the first appeal filed by the assessee against the assessment order in quantum, which as per the status vide IT portal, the Id. Sr. DR submitted is still pending for disposal before the Id. CIT(Appeals). As per portal , the assessee has also filed an first appeal before Id. CIT(A) against the penalty imposed by the AO u/s 271A against the assessee, which is also still pending for disposal before Id. CIT(A). Section 271A concerns itself with imposition of penalty for failure to keep, maintain or retain books of accounts, documents etc. . As per provisions of section 44AB, the tax audit , inter-alia, is applicable only when gross receipts ,total sales or turnover from business exceed one crore of rupees. The assessee in its first appeal filed before the Id. CIT(Appeals) vide ground No. 2 has stated that the assessee was not carrying on any business activities, which require maintaining of books of account/audit in terms of section 44AB

and the Assessing Officer has erred in holding entire receipts from business and holding the assessee in default for not getting the accounts audited in terms of section 44AB of the Act. This plea of the assessee is required to be adjudicated by the Id. CIT(Appeals) in the first appeal . Thus, in nut-shell, the Id. CIT(A) has to first adjudicate in the first appeal filed against quantum assessment as to what is the business turnover or gross receipt or total sales from business of the assessee, and whether or not the assessee falls within the four corner and/or ambit of tax-audit as is prescribed u/s 44AB. The assessee has raised legal challenge before Id. CIT(A) that the assessee did not fall within the ambit of tax-audit u/s 44AB and hence there is consequently no default u/s 44AB , thus, no penalty is leviable u/s 271B, thus, this plea is to be adjudicated firstly by the Id. CIT(A) to give conclusive finding on the same to ascertain conclusively whether or not the assessee falls within the threshold limits of tax-audit u/s 44AB , before penalty u/s 271B is confirmed by Id. CIT(A). Thus, this legal challenge is required to be adjudicated first by Id. CIT(A) in appeal against quantum assessment . The first appeal filed by the assessee against the quantum assessment is still pending for disposal with Id. CIT(Appeals). The Id. Sr. DR has filed screen short of IT portal wherein it is reflected that the first appeal filed by the assessee against quantum assessment is still pending with Id.

CIT(A). However, Id. CIT(Appeals) has dismissed the appeal filed by the assessee against levy of penalty of Rs.1,50,000/- u/s. 271B of the Act, without first deciding the first appeal filed by the assessee against quantum assessment . The assessee has raised grounds before the ITAT raising legal challenge that the assessee's was not liable to tax-audit u/s 44AB ,vide ground of appeal number 2 raised in memo of appeal filed with ITAT . The assessee has also raised vide ground of appeal vide ground number 3 in memo of appeal filed before ITAT that provisions of Section 271B cannot be invoked before finalization of the quantum appeal by Id. CIT(A). In any case, the Id. CIT(A) has passed an ex-parte appellate order dated 10.02.2023 confirming the penalty of Rs. 1,50,000/- levied by the AO u/s 271B by dismissing the appeal of the assessee. During appellate proceedings conducted by Id. CIT(A), only one notice dated 29.12.2022 was issued by the Id. CIT(A) to the assessee . The principles of natural justice are clearly breached as proper opportunity of being heard was not granted to the assessee. The assessee has also raised this ground of not providing proper opportunity of being heard and breach of principals of natural justice by Id. CIT(A), vide ground of appeal number 4 raised in the memo of appeal filed with ITAT. Thus, in the interest of justice and fairness to both the parties, it will be fit and appropriate to set aside the first appellate order passed by Id.

CIT(A) confirming penalty of Rs. 1,50,000/- u/s 271B. I direct that the Id. CIT(Appeals) first adjudicate the appeal filed by the assessee against quantum assessment , and to give its conclusive finding as to the business turnover , gross receipts of sales achieved by the assessee, and whether or not the assessee falls within four corners and ambit of provisions of Section 44AB, so as to determine/adjudicated the imposition of penalty u/s 271B. It is only when there is a conclusive finding of the CIT(Appeals) on the issue of business turnover or gross receipts or sales achieved by the assessee (which is disputed by the assessee before Id. CIT(Appeals)), the appeal against penalty order u/s. 271B be adjudicated accordingly by Id. CIT(A), keeping in view the threshold limit u/s. 44AB of the Act. Thus, in the interest of justice and fairness to both the parties, the appellate order dated 10.02.2023 passed by Id. CIT(Appeals) is set aside and the matter is restored back to the file of Id. CIT(Appeals) to adjudicate afresh the first appeal filed by the assessee against the penalty levied by the AO u/s 271B , which appeal shall be decided after the adjudication of the first appeal filed by the assessee against quantum assessment , after providing reasonable opportunity of hearing to both the parties. I clarify that I have not commented upon the merits of the issues arising in this appeal. I also direct the assessee to co-operate in the first appellate proceedings , and

does not seek un-necessary adjournments, otherwise the Id. CIT(A) shall be free to adjudicate the first appeal(s) of the assessee on merits in accordance with law.I order accordingly.

6. In the result, appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 15/01/2025.

Sd/-

**(RAMIT KOCHAR)
ACCOUNTANT MEMBER**

Dated: 15/01/2025

*aks/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, Agra