

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

**BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER**

ITA No.843/Coch/2024
AssessmentYear:2017-18

Abdulla Kattil Kottur Mp3/562 Selected Plaza Near Panchayath Mannarkad Palakkad District Kerala 678 582 PAN NO :AZRPA9183C	Vs.	ITO Ward-1 & TPS Palakkad
APPELLANT		RESPONDENT

Appellant by	:	None
Respondent by	:	Smt. Leena Lal, Sr. D.R.

Date of Hearing	:	19.02.2025
Date of Pronouncement	:	16.05.2025

O R D E R

PERKESHAV DUBEY, JUDICIAL MEMBER:

This appeal at the instance of the assessee is directed against the order of CIT(A)/NFAC dated 26.7.2024 vide DIN & Order No.ITBA/NFAC/S/250/2024-25/1067077218(1) for the AY 2017-18 passed u/s 250 of the Income Tax Act, 1961 (in short "The Act").

2. The assessee has raised the following grounds of appeal:

1. The order of the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, New Delhi, in so far as it is prejudicial to the appellant is opposed to the law, facts and circumstances of the case.
2. That the order passed by the Commissioner of Income Tax (Appeals) is illegal and unsustainable since no personal hearing was afforded which is a statutory right and hence mandatory.

3. It is submitted that the delay in filing audit report was unintentional and does not involve any dereliction of duty. The return was filed along with audit report on 22-11-2017 though the due date was 07-11-2017 (due date extended by CBDT). There was thus a small delay of 15 days in filing the audit report as per section 44AB of the Act. The delay had occurred as the auditors raised some queries and it took some time to respond to the same by the appellant. The delay was caused also due to heavy rush in the office of the auditor (because rush in their office due to audits and tax return filing etc). It is to be noted that there was a delay in obtaining the currency details from Bank during the demonetisation period leading to delay in filing of the income tax return as well as audit report. Though these reasons were submitted before the lower authorities, all those reasons were rejected in an unreasonable manner instead of taking a lenient view especially considering the fact that the delay is only 15 days. The CIT(A) also rejected the plea on the ground that the appellant was a habitual defaulter. Hence it is submitted that this Hon Tribunal may take a very lenient view of the matter and absolve the appellant from the penal consequences.
4. Be that as it may, the AO has imposed maximum penalty under section 271B amounting to Rs. 1,50,000/-. The submission that the delay in getting the accounts audited under Income Tax Act and filing the audit report in Form No.3CD was completely unintentional from the appellant's part was not even considered by the AO before passing the final order. Therefore, there is no warrant for maximum penalty in the facts and circumstances of the case.
5. It is to be noted that the return of income for the AY 2016-17 was filed on 17.10.2016 i.e., within the due date for the relevant assessment year. Even then the same was not considered by the AO and branded the assessee as a "Habitual Late Filer".
6. It is to be noted that as per the law, a personal hearing is to be granted to the appellant even though the same has not been requested. Granting of personal hearing is a statutory right of the assessee as well as a natural right. In this case, even though opportunity for submitting reply was given by the AO, a personal hearing was not provided.

7. It may be noted that the cardinal rule amongst the different rules of natural justice is the rule of "Audi alteram partem" which means "No one shall be condemned unheard". Nobody should be burdened with anything without affording him an opportunity of being heard in person. In this regard, it is submitted that the appellant may be granted one more opportunity to explain his position and furnish evidences before the appellate authority.
8. It is to be noted that the demand notice was issued much before the issuance of the penalty order. The order was passed on 16-03-2022 whereas the demand notice was issued on 09-03-2022. The proceedings are vitiated and such a demand notice cannot be sustained in the eyes of law. The CIT(A) discussed the point but he was referring to the assessment order instead of penalty order (it was partly due to the mistake committed by the appellant in so far as he mentioned "assessment order" by mistake instead of "penalty order")
9. For these amongst other grounds that may raise and evidence adduced at the time of hearing it is prayed that the impugned order be set aside or appropriate relief be granted by modifying the impugned order of assessment. Prayed accordingly.

3. The assessee for the AY 2017-18 filed his Return of Income on 22/11/2017 declaring a total income of Rs.13,55,180/- vide acknowledgement no: 311757641221117 which consist of income declared under Profits and Gains from Business or Profession at Rs. 14,81,949/- and Income from Other Sources amounting to Rs. 37,231/- totalling to Rs. 15,19,180/- as Gross Total Income and Rs. 13,55,180/- as Total Income after claiming appropriate deductions u/s 80D and 80C of the Act. The case was selected for scrutiny under CASS and the assessment was completed on 20.11.2019 u/s 143(3) of the Act after verification of documents produced by the assessee. Since the assessee had not filed Audit Report within time, the AO also proposed to impose penalty u/s 271B of the Act by issuing notice dated 16/03/2022 and DIN: ITBA/PNUF/271B/2021-22/1040862460(1). The show Cause notices dated 20/11/2019, 12/05/2021 were issued to the assessee. A letter dt 12/01/2022 was also issued and for the same the assessee filed its reply on 14/01/2022. In the reply, the assessee submitted that the delay occurred was unintentional and as the auditors raised some queries it took time to respond to the

same along with heavy rush in the office of the auditors. AO pointed out that the assessee has the habit of submitting ITR and AuditReport after the prescribed due date for the relevant assessment years. Therefore, the pleadings of the assessee were not taken into consideration and penalty proceedings u/s 271B of the Act was completed by imposing penalty of Rs.1,50,000/-vide order dt 16/03/2022.

4. The assessee, being aggrieved by the aforesaid order of AO, went in appeal before the ld. CIT(A)/NFAC, Delhi.

5. The ld. CIT(A)/NFAC dismissed the appeal of the assessee on the ground that assessee has not provided sufficient reason/explanation before the appellate authority to prove that there was reasonable cause for the failure as referred to in the provision of section 273B of the Act and accordingly confirmed the penalty of Rs.1,50,000/- being the minimum penalty leviable as per the provisions of section 271B of the Act.

6. Aggrieved by the order of ld. CIT(A)/NFAC, the assessee has filed the present appeal before this Tribunal.

7. Before us, ld. A.R. of the assessee vehemently submitted that the delay in filing the audit report was unintentional and does not involve any dereliction of duty. Further, ld. A.R. of the assessee submitted that there was a small delay of just 15 days in filing the audit report u/s 44AB of the Act due to the fact that the delay occurred as the auditor raised certain queries at the very last moment and it took some time to respond to the same by the assessee. The delay was caused also due to the fact that there was heavy rush in the office of the auditor due to audit and tax return filing and there was also delay in obtaining the currency details

from the bank during the demonetization period leading to a short delay in filing of income tax return as well as audit report. The Id. A.R. of the assessee also pleaded that the authorities below did not consider this reasonable cause and rejected the plea on the ground that the assessee is a habitual defaulter and accordingly pray to delete this penalty.

8. Ld. D.R. on the other hand vehemently submitted that as observed by the lower authorities the assessee is a habitual late filer and as rightly pointed out by the Id. CIT(A)/NFAC the assessee has not provided any sufficient reason/explanation to prove that there was reasonable cause in belatedly filing the audit report.

9. We have heard the rival submissions and perused the materials on record. The main contention as pleaded by the Id. A.R. of the assessee is that there was a small delay of just 15 days in filing the audit report u/s 44AB of the Act due to the fact that the delay occurred as the auditor raised certain queries at the very last moment and it took some time to respond to the same by the assessee. The delay was caused also due to the fact that there was heavy rush in the office of the auditor due to audit and tax return filing and there was also delay in obtaining the currency details from the bank during the demonetization period leading to a short delay in filing of income tax return as well as audit report.

9.1 Before proceeding further, we may take note of the provisions of section 44AB, 271B and 273B of the Act for the purpose of this case, which reads as follows:

“44AB. Audit of accounts of certain persons carrying on business or profession.

Every person,—

*(a) carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds one crore rupees in any previous year [***]:*

[Provided that in the case of a person whose—

(a) aggregate of all amounts received including amount received for sales, turnover or gross receipts during the previous year, in cash, does not exceed five per cent of the said amount; and

(b) aggregate of all payments made including amount incurred for expenditure, in cash, during the previous year does not exceed five per cent of the said payment, this clause shall have effect as if for the words "one crore rupees", the words "[ten] crore rupees" had been substituted.]

[Provided further that for the purposes of this clause, the payment or receipt, as the case may be, by a cheque drawn on a bank or by a bank draft, which is not account payee, shall be deemed to be the payment or receipt, as the case may be, in cash; or]

(b) carrying on profession shall, if his gross receipts in profession exceed fifty lakh rupees in any previous year; or

(c) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AE or section 44BB or section 44BBB, as the case may be, and he has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, in any previous year; or

(d) carrying on the profession shall, if the profits and gains from the profession are deemed to be the profits and gains of such person under section 44ADA and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his profession and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year; or

(e) carrying on the business shall, if the provisions of sub-section (4) of section 44AD are applicable in his case and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year,]

get his accounts of such previous year audited by an accountant before the specified date and furnish by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed:

Provided that this section shall not apply to the person, who declares profits and gains for the previous year in accordance with the provisions of sub-section (1) of section 44AD and his total sales, turnover or gross receipts, as the case may be, in business does not exceed two crore rupees in such previous year:

Provided [further] that this section shall not apply to the person, who derives income of the nature referred to in section 44B or section 44BBA, on and from the 1st day of April, 1985 or, as the case may be, the date on which the relevant section came into force, whichever is later:

Provided [also] that in a case where such person is required by or under any other law to get his accounts audited , it shall be sufficient compliance with the provisions of this section if such person gets the accounts of such business or profession audited under such law before the specified date and furnishes by that date the report of the audit as required under such other law and a further report by an accountant in the form prescribed under this section.

Explanation.—For the purposes of this section,—

(i) "accountant" shall have the same meaning as in the Explanation below sub-section (2) of section 288;

(ii) "specified date", in relation to the accounts of the assessee of the previous year relevant to an assessment year, means [date one month prior to] the due date for furnishing the return of income under sub-section (1) of section 139.

271B. [Failure to get accounts audited. [Inserted by Act 21 of 1984, Section 30 (w.e.f. 1.4.1985).]

- If any person fails][* *] [Omitted by Act 46 of 1986, Section 21 (w.e.f. 10.9.1986).] to get his accounts audited in respect of any previous year or years relevant to an assessment year or [furnish a report of such audit as required under section 44-AB] [Substituted by Act 22 of 1995, Section 48, for certain words (w.e.f. 1.7.1995).], the [Assessing Officer] [Substituted by Act 4 of 1988, Section 2, for " Income-tax Officer" (w.e.f. 1.4.1988).] may direct that such person shall pay, by way of penalty, a sum equal to one-half per cent. of the total sales, turnover or gross receipts, as the case may be, in business, or of the gross receipts in profession, in such previous year or years or a sum of one hundred thousand rupees, whichever is less.*

273B. [Penalty not to be imposed in certain cases.

- Notwithstanding anything contained in the provisions of [clause (b) of sub-section (1) of] [section 271, section 271-A] [Substituted by Act 4 of 1988, Section 114, for " section 270, clause (a) or Clause (b) of sub-Section (1) of section 271, section 271-A, section 271-B, sub-Section (2) of section 272-A, sub-Section (1) of section 272-AA, sub-Section (1) of section 272-B" (w.e.f. 1.4.1989).][, section 271-AA] [Inserted by Act 14 of 2001, Section 94 (w.e.f. 1.4.2002).][, section 271 B,] [Inserted by Act 46 of 1986, Section 26 (w.e.f. 10.9.1986).][section 271-BA] [Inserted by Act 14 of 2001, Section 94 (w.e.f. 1.4.2002).][, section 271-BB.] [Inserted by Act 12 of 1990, Section 50 (w.r.e.f. 1.4.1990).] [section 271-C, section 271-CA] [Substituted by Act 21 of 2006, Section 55, for " section 271-C" (w.e.f. 1.4.2007).][, section 271-D, section 271-E,] [Inserted by Act 46 of 1986, Section 26 (w.e.f. 10.9.1986).][section 271-F,] [Substituted by Act 26 of 1997, Section 55, for " section 271-F" (w.r.e.f. 1.4.1997).][section 271-FA,] [Substituted by Act 18 of 2005, Section 61, for " Section 271-FA" (w.e.f. 1.4.2006).] [section 271FAB, section 271FB, section 271G, section 271GA] [Substituted 'section 271-FB, section 271-G' by Finance Act, 2015 (No. 20 of 2015), dated 14.5.2015.][, clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272-A, sub-section (1) of section 272-AA or] [Inserted by Act 46 of 1986, Section 26 (w.e.f. 10.9.1986).][section 272-B or] [Inserted by Act 20 of 2002, Section 106 (w.e.f. 1.6.2002).] [sub-section (1) or sub-section (1-A) of] [Substituted by Act 21 of 2006, Section 55, for " sub-section (1) of section 272-BB" (w.e.f. 1.6.2006).][section 272-BB] [Substituted by Act 20 of 2002, Section 106, for " section 272-BB or" (w.e.f. 1.6.2002).][or sub-section (1) of section 272-BBB or] [Substituted by Act 21 of 2006, Section 55, for " sub-section (1) of section 272-BB" (w.e.f. 1.6.2006).] [clause (b) or clause (c) of sub-section (2) of section 273, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure.]”.

9.2 An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances.

9.3 Section 273B starts with the non obstante clause and provides that notwithstanding anything contained in several provisions enumerated therein including section 271B, no penalty shall be imposable on the person or the assessee, as the case may be, for failure referred to in the said provisions, if he proves that there was reasonable cause for the said failure. A clause beginning with 'notwithstanding anything' is sometimes appended to a section in the beginning with a view to give the enacting part of the section in case of conflict, an overriding effect over the provision or Act mentioned in the non obstante clause. A non obstante clause may be used as a legislative device to modify the ambit of the provision or law mentioned in the non obstante clause, or to override it in specified circumstances. The true effect of the non obstante clause is that in spite of the provision or the Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment. Therefore, in order to bring in application of section 271B in the backdrop of section 273B, absence of reasonable cause, existence of which has to be established by the assessee, is the sine qua non.

9.4 Levy of penalty under section 271B is not automatic. Before levying penalty, the concerned officer is required to find out that even if there was any failure referred to in the concerned provision, the same was without a reasonable cause. The initial burden is on the assessee to show that there existed reasonable cause which was the reason for the failure referred to in the concerned provision. Thereafter the officer dealing with the matter has to consider whether the explanation offered by the assessee or the person, as the case may be, as regards the reason for failure, was on account of reasonable cause. 'Reasonable cause' as applied to human action is that which would constrain a person of average intelligence and ordinary prudence. It can be described as a probable cause. It means an honest belief founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the person concerned, to come to the conclusion that the same was the right thing to do. The cause shown has to be considered and only if it is found to be frivolous, without substance or foundation, the prescribed consequences will follow.

9.5 Taking into cumulative effect of the explanations offered by the assessee and from a reading of the relevant provisions of Section 271B read with Section 44AB of the Act, we are of the considered opinion that assessee demonstrated that there was a reasonable cause for the said failure as per the provisions contained in section 273B of the Act. From the conduct, behavior and attitude of the assessee, it is clear that the delay in audit report was unintentional and there is a short delay of 15 days in filing the audit report as per section 44AB of the Act. This Tribunal have taken a consistent view that when the tax audit report was made available to the AO on or before the completion of assessment

proceedings, then for the technical venial breach without any malafide intention the penalty cannot be levied u/s 271B of the Act.

9.6 Further there is nothing contrary that has been brought on record by the Id. D.R. at the time of hearing. We are of the considered opinion that the assessee has only committed a technical breach without any loss to the exchequer of the government.

9.7 Above being the position, the Id. CIT(A)/NFAC non-consideration of plea raised by the assessee about the existence of reasonable cause vitiate the order. On that score, we find that the order passed by the Id. CIT(A)/NFAC to be non-maintainable and accordingly, we annul the order of the authorities below and cancel the penalty levied u/s 271B of the Act.

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

Order pronounced in the open court on 16th May, 2025

Sd/-
(Inturi Rama Rao)
Accountant Member

Sd/-
(Keshav Dubey)
JudicialMember

Bangalore,
Dated 16th May, 2025.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5. Guard file

By order

Asst. Registrar,
ITAT, Cochin.