

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई  
IN THE INCOME TAX APPELLATE TRIBUNAL  
'D' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं  
श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।  
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND  
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.A. Nos.3397 & 3398/Mds/2016

निर्धारण वर्ष /Assessment years : 2012-13.

Shri. P. Senthil Kumar,  
P-2, HIG Adyar Apartments,  
Kottur Gardens,  
Circular Road, Kotturpuram,  
Chennai 600 086.

**Vs.** The Income Tax Officer,  
Non Corporate Ward 3(3)  
Chennai.

**[PAN ABBPS 1019H]**

**(अपीलार्थी/Appellant)**

**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by : Shri. T. Vasudevan, Advocate

प्रत्यर्थी की ओर से /Respondent by : Shri. Durai Pandian, Sr. A.R

सुनवाई की तारीख/Date of Hearing : 14-02-2017

घोषणा की तारीख /Date of Pronouncement : 28-02-2017

**आदेश / O R D E R**

**PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER**

These appeals filed by the assessee are directed against orders dated 20.10.2016 of Id. Commissioner of Income-tax (Appeals)-4, Chennai for the impugned assessment year.

2. First appeal is against disallowance of ₹38,44,069/- u/s.40A(3) of the Income Tax Act, 1961 (in short "the Act") which was confirmed by the Id. Commissioner of Income Tax (Appeals) whereas second appeal is against levy of penalty u/s.271B of the Act which was also confirmed by the Id. Commissioner of Income Tax (Appeals).

3. Facts apropos in ITA No.3397/Mds/2016 are that assessee engaged in the business of granite blocks had filed return of income for the impugned assessment year disclosing income of ₹13,20,370/-. During the course of assessment proceedings, assessee produced books of accounts which were verified by the Id. Assessing Officer. As per Id. Assessing Officer assessee had withdrawn cash of ₹1,65,79,931/- through self cheques from his account in Punjab National Bank, Mylapore Branch. There were also cash withdrawal from two other bank accounts of the assessee which came ₹8,21,200/- and ₹4,79,645/- respectively. Ld Assessing Officer thereafter made analysis of the expenditure incurred by the assessee through bank. According to him, such expenditure aggregated to ₹2,13,52,886/-. Thereafter he made an analysis to find out purchases made by the assessee during the relevant previous year in cash as under:-

	₹	₹
<i>Total withdrawals in cash from bank accounts</i>		1,78,80,776
<i>Total expenditure other than purchases</i>	2,57,95,106	
<i>Expenditure incurred through banking channels</i>	2,13,52,886	
<i>Less: Expenditure incurred in cash</i>		44,42,220
<i>Less: Cash payments pertaining to purchases made in FY 2010-2011</i>		80,00,000
<i>Less: Cash debited to the capital account</i>		15,94,487
<i>Purchases for which payments have been made in cash</i>		38,44,069

As per Id. Assessing Officer assessee had violated Sec. 40A(3) of the Act in making cash payments of ₹38,44,069/-. He made an addition of the said amount and completed assessment.

4. Aggrieved, assessee moved in appeal before Id. Commissioner of Income Tax (Appeals). Though nobody appeared for the assessee before the Id. Commissioner of Income Tax (Appeals) it seems assessee made written submissions wherein it was argued that bonafide and genuine expenditure could not be disallowed u/s.40A(3) of the Act. As per assessee situations covered by of Rule 6DD of Income Tax Rules was only illustrative and not exhaustive. Reliance was placed on the judgment of Supreme Court in the case of *Attar Singh Gurmukh Singh vs. ITO, 191 ITR 667* and that of Hon'ble Delhi

High Court in the case of *Basu Distributor vs. ITO* 292 ITR 29. Ld. Commissioner of Income Tax (Appeals) disposed of the appeal considering the submissions of the assessee and took a view that assessee's case did not fit in any of the clauses of Rule 6DD of the Income Tax Rules. According to him, judgment of Apex Court in the case of *Attar Singh Gurmukh Singh* (supra) was in favour of Revenue. Ld. Commissioner of Income Tax (Appeals) noted that Hon'ble Delhi High Court in the case of *Basu Distributor* (supra) had highlighted the onus placed on the assessee for substantiating its claim of exceptional circumstances, which would absolve it from application of Sec. 40A(3) of the Act. He thus upheld the order of the Id. Assessing Officer.

**5.** Now before us, Id. Authorised Representative submitted that assessee had produced books of accounts but Id. Assessing Officer had proceeded on an inverse manner for computing the cash payments. According to him, actual expenditure in cash came was much less and none of it were related to purchases. According to him, Sec. 40A(3) of the Act could not be applied.

**6.** Per contra, Id. Departmental Representative strongly supported the orders of the authorities below.

**7.** We have considered the rival contentions and perused the orders of the authorities below. The methodology adopted by the Id.

Assessing Officer for computing cash expenditure of the assessee has been produced by us in para 3 above. Section 40A(3) of the Act which has been applied is reproduced hereunder:-

*'Where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure''.*

It is not disputed that assessee has produced books of accounts before Id. Assessing Officer. In fact the assessment order specifically states so. Rigours of Sec. 40A(3) of the Act is attracted only where payments in relation to expenditure exceeded ₹ 20,000/- in a day to a person. In our opinion, methodology adopted by the Id. Assessing Officer was incorrect and Id. Assessing Officer ought have compiled the instances of cash payments if any in excess of the limits, from the cash book maintained by the assessee. Thereafter he should have called for explanation of the assessee, in each case for which there was excess cash payment. In the facts and circumstances of the case, we are of the opinion that the issue requires a fresh look by the Id. Assessing Officer. We set aside the orders of the lower authorities and remit the question regarding disallowance if any, which is needed u/s.40A(3) of

the Act back to the file of the Id. Assessing Officer for consideration afresh in accordance with law.

**8.** Now, we take appeal of the assessee in ITA No.3398/Mds/2016.

**9.** Ld. Counsel for the assessee submitted that levy of penalty u/s.271B of the Act was not warranted under the facts and circumstances of the case. According to him, assessee had filed return of income electronically on 31.03.2013 alongwith audit reports in form 3CB and 3CD as mandated u/s.44AB of the Act. Contention of the Id. Authorised Representative was that at the time of assessment such audit reports were available with the Id. Assessing Officer. Ld. Authorised Representative submitted that Accountant of the company had resigned in the month of August, 2012 and assessee had to engage a new accountant. As per Id. Authorised Representative the books and accounting papers were in disarray and it took lot of time to prepare the accounts. Thus, according to him, there was no intention nor any deliberate attempt to delay the audit. Contention of the Id. Authorised Representative was that there were reasonable cause for not getting the audit completed in time and therefore levy of penalty u/s.271B of the Act was not warranted.

**10.** Contra, Id. Departmental Representative submitted that assessee was habitually late in filing tax audit report. Even for assessment year 2011-2012, assessee had filed audit report beyond the stipulated time. Further, according to Id. Departmental Representative, resignation of an employee from an organization could hardly be cited as a reason for delay in audit conducted. Thus, according to him, levy of penalty was rightly done by the Id. Assessing Officer.

**11.** We have considered the rival contentions and perused the orders of the authorities below. It is not disputed that assessee had filed Audit report u/s. 44AB of the Act alongwith return of income on 31.03.2013. The reason cited by the assessee for delay in conducting the audit was as under:-

*" My accountant had suddenly resigned and left without notice during the month of August, 2012 (financial year 11-12/Asst. Year 12-13). I had to engage a new account and compile the all accounting data with enormous effort. Many files and accounting papers were in disarray and it took lots of time to prepare the accounts and file the returns for the assessment year 2012-13".*

Section 44AB of the Act is reproduced hereunder:-

*'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 ; or*

*(b) carrying on profession shall, if his gross receipts in profession exceed twenty-five 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 business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business 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 :*

*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 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 further 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 the due date for furnishing the return of income under sub-section (1) of section 139".*

Definition of specified date clearly requires an assessee to file the Audit report before the due date for furnishing the return of income u/s.139(1) of the Act. It is not disputed that assessee had not filed such audit report before the said date. An assessee can very well file the audit report, separately. Filing of such audit report and filing of the return of income are independent requirements. Sec. 271B of the Act is reproduced hereunder:-

*'If any person fails, 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 44AB, the Assessing Officer 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 fifty thousand rupees, whichever is less”.*

Alleviating Sec. 273B is reproduced hereunder:-

*‘Notwithstanding anything contained in the provisions of clause (b) of sub-section (1) of section 271, section 271A, section 271AA, section 271B, section 271BA, section 271BB, section 271C, section 271CA, section 271D, section 271E, section 271F, section 271FA, section 271FB, section 271G, section 271H, section 271-I, clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA or section 272B or sub-section (1) or sub-section 1A) of section 272BB or sub-section (1) of section 272BBB or clause (b) of sub-section (1) or 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”.*

Thus to get out of the rigours of Sec. 271B of the Act, it is required for an assessee to show that there were reasonable cause for the failure to conduct the Audit under section 44AB of the Act and to furnish the reports. The question that has to be answered by us, whether the reason shown by the assessee which has been reproduced by us above is a reasonable one. It is not sufficient that an explanation is given. Such explanation has to be proved and substantiated. Nothing has been brought on record by the assessee to substantiate its argument that its Accountant had resigned or to show that non compliance with the statutory provisions was due to

difficulties beyond the control. Assessee was in the business since many years. For the preceding assessment year also assessee had filed its tax audit report belatedly. We are thus of the opinion that assessee could not bring out any reason which could be termed as reasonable. In our opinion, levy of penalty u/s.271B of the Act was justified. We do not find any reason to interfere with the orders of the lower authorities.

**12.** In the result, appeal of the assessee in ITA No.3397/Mds/2016 is allowed for statistical purpose whereas its appeal in ITA No.3398/Mds/2016 is dismissed.

Order pronounced on Tuesday, the 28th day of February 2017, at Chennai.

Sd/-

(एन.आर.एस. गणेशन)

**(N.R.S. GANESAN)**

**न्यायिक सदस्य/JUDICIAL MEMBER**

Sd/-

(अब्राहम पी. जॉर्ज)

**(ABRAHAM P. GEORGE)**

**लेखा सदस्य/ACCOUNTANT MEMBER**

चेन्नई/Chennai

दिनांक/Dated: 28th February, 2017

**KV**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant   | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT           | 6. गार्ड फाईल/GF        |