

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES “A”, HYDERABAD**

**BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND
SHRI V. DURGA RAO, JUDICIAL MEMBER**

ITA No.	Asst. Year	Appellant	Respondent
856/Hyd/16	2008-09	M/s. Sri Sai Prasanthi Realtors, HYDERABAD [PAN: ABIFS8348G]	Deputy Commissioner of Income Tax, Central Circle-5, HYDERABAD
857/Hyd/16	2009-10		
858/Hyd/16	2007-08	M/s. Sri Sai Eswar Real Estates & Developers, HYDERABAD [PAN: ABBFS0824N]	Deputy Commissioner of Income Tax, Central Circle-5, HYDERABAD
859/Hyd/16	2008-09		

For Assessee : Shri P. Murali Mohan Rao, AR
For Revenue : Smt Suman Malik, DR

Date of Hearing : 16-05-2017
Date of Pronouncement : 26-05-2017

ORDER

PER B. RAMAKOTAIAH, A.M. :

These are appeals by two assessees for the AYs. 2007-08, 2008-09 & 2009-10 against the order(s) of the Commissioner of Income Tax (Appeals)-12, Hyderabad. Since common issues are involved on the issue of penalty u/s. 271B, these appeals are heard together and decided by this common order. For the sake of

convenience, we are discussing the facts in ITA No. 856/Hyd/2016 for AY. 2008-09.

2. Briefly stated, assessee is engaged in the business of purchase of land and conversion of land into plots (real estate business). Search & Seizure operations were conducted in the case of the M/s. Sri M. Sambasiva Rao and others, Hyderabad and its group of cases on 16-07-2008. During the course of search operations conducted in the case of Mr. S. Yellaiah, partner of the assessee-firm, M/s. Sri Sai Prasanthi Realtors, where certain information related to assessee-firm was noticed/found and seized and consequent to search proceedings, assessee filed its return of income for the AY.2008-09 admitting an income of Rs.11,80,000/-, in response to the notice issued u/s. 153C of the Income Tax Act [Act]. During search proceedings, the partner of the assessee-firm Sri S. Yellaiah stated that the firm did not file its returns of income for the A.Ys. 2008-09 yet and admitted to offer an undisclosed income of Rs. 11,80,000/- for the year. Total sales made during the relevant assessment year was shown at Rs. 1,17,31,100/- on which the income of Rs.11,80,000/- was admitted. The total income was assessed at Rs. 11,80,000/- but AO initiated penalty proceedings u/s.271B.

3. AO was of the opinion that though assessee has mentioned that the accounts of the assessee-firm got audited on 15-09-2008, as evidenced from the ROI filed the same has not been enclosed, while filing the return of income for the assessment year and as per the provisions of the Section 44AB of the Act, assessee was under obligation to not only get its books of accounts audited but also to

enclose/furnish a copy of the Report to the Income Tax Authorities on or before the due date of filing of return of income for the relevant assessment year. In this case, assessee should have filed its audited report on or before 31-10-2008, which was not done and assessee filed its return of income only on 25-03-2010 in consequence of search proceedings. AO did not take cognizance of the submissions of assessee that audit report dt.15-09-2008 (as mentioned in assessment order), was obtained before due date, which was shown to have furnished along with return of income furnished on 25-03-2010. AO was of the opinion that it clearly attracts the penalty proceedings u/s.271B of the Act. Accordingly, levied penalty of Rs.64,088/-, which was equivalent to 0.5% of turnover/gross sales of Rs. 1,71,31,100/-, for the year.

4. Before the Ld.CIT(A), assessee objected the said levy of penalty. After considering the explanation of assessee, CIT(A) dismissed the appeal of assessee by stating as under:

“6.0 perused of submissions of the appellant and the observations of the AO, both in the assessment order as well as the penalty order. As could be seen from the facts of the case, the appellant shown to be engaged in the business of real estate and has recorded gross receipts of Rs.1.17 crores for the year under reference, but no return of Income was furnished before the due date which is 31-10-2008. Return for the year was shown to have filed only on 25-03-2010 and in consequence of search proceedings in this group on 16-07-2008. As per the AO neither the audit report was furnished before the due date nor along with the return of Income filed on 25-03-2010 or during assessment proceedings, though it was obtained on 15-09-2008, but due to the fact that the said report was misplaced on account of absence of accountant. The AO had arrived the conclusion that as the said report was not furnished either before the due date or at the time of assessment, as such the assessee is liable to be visited with the provisions of Sec.271B, since the assessee is failed to explain with justifiable reasons. Accordingly, the penalty of Rs. 64,088/- being 0.5% on total receipts/gross receipts of Rs.1,17,31,100/-, was levied. The reasons explained by the assessee are too vague to explain the

failure in explaining the delay in submitting of Audit Report, which was claimed to be obtained on dtd.15-09-2008 and assessee failed to file it before the due date or furnish a copy before the AO, during assessment proceedings. The provisions of Sec.271B stipulate that the assessee would be liable for penalty of amount equal to one half percent of total sales/turnover or gross receipts or business or profession as the case may be, if assessee fail to get his/it's accounts audited in respect of any previous year or years relevant to the assessment year, or furnish a report of such audit as required u/s.44AB. As could be seen from the language used in the said provision, the assessee is required to get accounts audited or furnish such report as stipulated u/s.44AB, which stipulate that the accounts of previous year related to assessment year are required to be audited before the due date and furnish the report in prescribed format by that date. In this case the due date for getting the accounts audited was 31-10-2008, where as the audit report is shown to be dtd.15-09-2008. However, no such report was furnished by that date and in this case the return of income was furnished only on 25-03-2010, where there was only reference to the audit report and no such report was shown to have been either filed or made available to the AO. This is quite in violation of the provisions of Sec.44AB and 271B. The case laws and circulars relied upon by the assessee was only referring to a situation where the Audit Report could have been filed, even after the due date, if it was obtained before the said due date. In this case, no such information was available to indicate that such Audit was done and report was obtained before the due date, though it was mentioned that such report was obtained on 15-09-2008. There was no occasion for the assessee to prove that such Audit Report was furnished along with return of income, by the due date, which is 31-10-2008 for the year under reference, with no return of income was furnished before 25-03-2010 and no Audit Report was furnished separately by that date i.e., 31-10-2008. Further, the said report was also established to have not been filed/furnished at the time of assessment proceedings, with no such report available before the AO at the time of penalty proceedings. In fact, the assessee was on record to show that such report was not available with them, due to misplacement of the said report by accountant. Part of the Statement of Facts (SOF) furnished along with appeal clearly indicates this factual position. For sake of clarity, the relevant position is reproduced runs as under:

"At the time of assessment of the assessee's case, the above tax audit report could not be furnished due to misplacement of the same due to non availability of the concerned accountant and hence could not produced/submitted which may please be considered and penalty may not be levied."

6.1 Thus, as could be seen from the facts of the case, the appellant could neither prove that the accounts were audited before the due date nor establish that copy of Audit Report was obtained, with such report neither

filed by due date or even afterwards. Thus on the facts of the case, it clearly attracts the penalty u/s. 271B of I.T.Act and as per the said provisions penalty of Rs.64,088/-, being 0.5% of total sales of Rs.1,17,13,100/- for the year under reference is held to be sustained, The main grounds related to the issue, thus are treated as Dismissed”.

5. Aggrieved by the said order of the Ld.CIT(A), assessee has filed an appeal before us with the following grounds:

“1. The order of the Ld. CIT (A)-12, Hyderabad is erroneous both on facts and in law.

2. The Ld. CIT (A) erred in upholding the decision made by the AO in imposing the penalty u/s. 271B, which is not correct and not justified.

3. The Ld. CIT (A) ought to have appreciated the fact that the accounts of the company have duly been, audited under the provisions of section 44AB of the LT. Act, 1961 within the specified time limit therein and the tax audit reports are available with the assessee.

4. The Ld. CIT (A) ought to have appreciated the fact that the company has not made any deliberate defiance of law or a conscious disregard to the obligations cast u/s 44AB and 139(1) of the I.T. Act, 1961.

5. The Ld. CIT (A) ought to have appreciated the fact that imposing of penalty u/s. 271B is not automatic or mandatory and the assessing officer is vested with the discretion either to impose or not to impose the penalty depending upon the facts and circumstances of the case.

Ground No. 6 is general in nature.

6. Ld. Counsel initially filed additional evidence in the form of audit report but in the course of present proceedings, withdrew the additional evidence. It was the submission of the Ld. Counsel that there is no need to enclose the audit report when the returns were filed, as per the Board Circular No. 5 of 2007 dt. 26-07-2007. He referred to para 6 of the said Circular particularly Item No. (i) which is as under:

“(i) The report of audit under section 44AB is not to be attached with the return. It should not be furnished separately also before or after the due date. However, an assessee should get the report of audit from an accountant under said section before the due date of the furnishing of the return and shall fill out the relevant columns of these forms on the basis of such report. The assessee should retain the report with himself. It may be furnished in original during the assessment proceedings. No penalty under section 271B shall be initiated or levied for not furnishing the tax audit report on or before the due date. However, if the audit report has not been obtained before the due date, provisions of section 271B shall be attracted”.

(ii).....”

6.1. It was the submission that assessee has filed the return which was not treated as *defective* and AO has completed the assessment u/s. 153C and initiated the penalty only on the reason that audit report was not enclosed to the return of income, which was not required as per the Board Circular. He further submitted that there is no allegation by the AO that assessee-firm has not completed the audit and obtained report but the issue before the AO was only that assessee should have filed its audit report, which was not done. It was the submission that as there is no requirement to file the audit report, assessee has not filed the same along with the return though assessee obtained the audit report before the due date.

7. Ld. DR, however, submitted that assessee has not placed audit report on record and CIT(A) has given a finding on that and confirmed the penalty on the reason that the audit was not even conducted.

8. We have considered the rival contentions and perused the orders of the authorities. As seen from the order of the AO u/s. 153C, it is very clear that AO has initiated penalty proceedings for not enclosing the audit report, but not for completing the audit before the due date. Board Circular No. 5 of 2007 clearly states that while uploading the return, no audit report should be attached to the return and also further states that it should not be furnished separately also before or after due date. Non-enclosure of audit report to the return of income does not attract any penalty u/s. 271B, as specified in the Board Circular extracted above. Since AO has initiated the penalty proceedings only for non-enclosure of audit report along with the Return, we are of the opinion that the same is not attracting penalty, on the facts of the case, as assessee has complied with the Board Circular. If the audit report was not enclosed to the return of income filed by assessee subsequently in response to proceedings u/s. 153C, AO should have treated the return as *defective return*. No such action was taken by the AO, which indicates that the return is complete in all respects. Since prior approval of the Addl. CIT u/s. 153D was also taken by the AO before completion of assessment, we are of the opinion that non enclosure of audit report to the return of income does not attract penalty proceedings u/s. 271B. Accordingly, penalty levied is cancelled.

9. In the result, this appeal of assessee is allowed.

10. The facts in other three appeals are similar and the penalty was initiated only for non-enclosure of audit report to the return of income. Since Board Circular specifically states that enclosure of

audit report was not required, we are of the opinion that penalty proceedings u/s. 271B are not attracted on the facts of the case. Accordingly, penalties in other three appeals are also cancelled and appeals are allowed.

11. To sum-up all the appeals are allowed.

Order pronounced in the open court on 26th May, 2017

Sd/-
(V. DURGA RAO)
JUDICIAL MEMBER

Sd/-
(B. RAMAKOTAIAH)
ACCOUNTANT MEMBER

Hyderabad, Dated 26th May, 2017

TNMM

Copy to :

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- 2. M/s. Sri Sai Eswar Real Estates & Developers, Hyderabad. C/o. P. Murali & Co., Chartered Accountants, 6-3-655/2/3, 1st Floor, Somajiguda, Hyderabad.*
- 3. The Deputy Commissioner of Income Tax, Central Circle-5, Hyderabad.*
- 4. CIT (Appeals)-12, Hyderabad.*
- 5. Pr.CIT-(Central), Hyderabad.*
- 6. D.R. ITAT, Hyderabad.*
- 7. Guard File.*