

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

ITA No.933/Ind/2018
Assessment Year: 2011-12

Vinay Agrawal, Shop No.E-5, V.D. Cloth Market, Ujjain (Appellant)	<u>बनाम/</u> Vs.	ITO-1(2) Ujjain (Revenue)
PAN: AKSPA0366K		
Appellant by	Shri Sharad Jain, CA	
Revenue by	Shri R.S. Ambedkar, Sr. DR	
Date of Hearing:	23.10.2019	
Date of Pronouncement:	31.10.2019	

आदेश / O R D E R

PER MANISH BORAD, A.M:

This appeal at the instance of Assessee pertaining to A.Y. 2011-12 is directed against the order of Commissioner of Income Tax(Appeals), Ujjain, (in short 'CIT'), dated 26.09.2018 which is arising out of the order u/s 271B of the Income Tax Act 1961(hereinafter called as the 'Act') framed on 29.06.2017 by ITO, Ujjain.

2. The assessee has raised following grounds of appeal:

“That on the facts and circumstances of the case, the Ld. CIT(A) erred in confirming penalty u/s 271B of the Act at Rs.35,830/- Levied by the Ld. ITO-1(2) Ujjain.”

3. Briefly stated facts as culled out from the records are that the assessee is an individual running sole proprietorship concern in the name of M/s Shitla Textiles engaged in the business cloth trading. Assessee's case was re-opened by issuance of notice u/s 148 of the Act duly served upon the assessee on 15.04.2015. In response thereto, the return of income was filed on 15.05.2015 declaring income of Rs.1,79,130/-. Notice u/s 143(2) of the Act duly served upon the assessee. The assessee was asked to explain the source of cash deposit of Rs. 49,48,9900/- in the same bank account hold with IDBI bank. The assessee submitted that the alleged amount was collected from the “Feriwalas” against cloth supplied to them and commission @ 1% was earned on purchased clothes. Income from commission has been duly offered to tax. The total turnover of the assessee including the commission income was below the limit of tax audit provided u/s 44AB of the Act.

4. Ld. Assessing Officer, however, brushed aside the submissions of the assessee and computed net profit of the wholesale business @9.1% on the undisclosed turnover of Rs.49,48,900/- and made addition of Rs.4,50,350/-.

5. Ld. AO also initiated the penalty proceedings u/s 271B of the Act for not getting account u/s 44AB of the Act since the declared

turnover of the assessee was increased by the alleged turnover of cash deposit in the bank account. The instant appeal relates to the levy of penalty of Rs.35,830/- levied u/s 271B of the Act for not getting the accounts audited u/s 44AB of the Act.

6. Against this levy of penalty assessee could not succeed in the appeal before the ld. CIT(A) who confirmed the addition observing as follows:

“Ground Nos.1,2,3 & 4:- Through these grounds of appeal the appellant has challenged the imposition of penalty amounting to Rs.35,830/- u/s 271B of the I.T. Act. As per the provisions of section 44AB, every person carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds forty lakhs rupees, get his accounts audited by an accountant before the specified date and furnishing 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. As gross receipts of the assessee exceeds the prescribed limit given in section 44Ab of the Income Tax Act and the assessee failed to comply with the provisions of section 44Ab read with 271B, penalty u/s 271B is leviable in the case.

The contention of the appellant that when the appellant is not maintaining books of account penalty u/s 271B cannot be levied is not acceptable because both the sections i.e. 44Ab and 44AA are together distinct and separate. There is no provisions that the levy of one penalty shall exclude the levy of the other.

The plain reading of section 44AB makes it very clear that its provisions are mandatory. The appellant not only to get his accounts audited by an accountant before the specified date but also obtain before that date the report of such audit in the prescribed form duly signed and verified by such accountant. Therefore, the AO is justified in imposing the penalty. Therefore, the penalty imposed by the AO amounting to Rs.35,830/- is

confirmed. Therefore, the appeal on these grounds is dismissed.”

7. Now the assessee is in appeal before the Tribunal.

8. At the outset, Ld. counsel for the assessee submitted that the actual turnover of the assessee was Rs.21,66,291/- which was not liable for tax audit u/s 44AB of the Act. Ld. AO has wrongly considered unaccounted turnover at Rs.49,48,900/- for the purpose of section 44AB of the Act. The assessee was engaged in the commission basis work and has already offered the income of commission of Rs.50,000/- being 1% of the alleged deposits of Rs.49,48,9000/- to tax. Reliance was placed on following decisions:

1. Brij Lal Goyal vs. ACIT (I.T.A.T., Del) 88 ITD 413 (2004)
2. Shri Satya Prakash Mundra vs. ITO Kishangarh ITA No. 754/JP/2016 (I.T.A.T. Jaipur)
3. Shri Nirmal Kumar Joshi vs. ITO Kishangarh ITA No.73/JP/2018 (I.T.A.T. Jaipur)
4. Surajmal Parsuram Todi vs. CIT ITR No.27 of 1993(Gauhati High Court)
5. ACIT vs. Ashok Kumar Mohallal Kothari and others in ITANo.166 and 167/Nag/1997(I.T.A.T. Nagpur)

9. Per Contra Ld. Departmental Representative (DR) supported the orders of the lower authorities.

10. We have heard rival contentions and perused the record placed before us. The sole grievance of the assessee relates to levy of penalty u/s 271B of the Act at Rs.35,830/-. The undisputed facts remains that in the return of income, assessee has disclosed turnover of Rs.21,66,292/-. The assessee also disclosed commission income @1% of the turnover of Rs.49,48,900/- being a transactions of cash deposited and withdrawal relating to purchase of clothes for hawkars/Feriwalas. The assessee claim was denied by the Ld. AO and the alleged amount of Rs.49,48,900/- was treated as unexplained turnover.

11. In these given facts where the assessee was in a *bona fide* belief of treating the commission income as turnover along with other turnover accounted in the books of accounts during the year which was below of limit u/s 44AB of the Act, but Ld. AO treated unaccounted turnover as part of total turnover and holding the assessee liable for paying penalty u/s 271B of the Act for not getting books of account audited, we find that the issue stands squarely covered in favour of the assessee by the decision of the Coordinate Bench, Jaipur in the case of *Shri Satya Prakash Mundra vs. ITO vide ITANo.754/JP/2016* dated 23.01.2019. For sake of convenience the grounds raised in the case of *Shri Satya Prakash Mundra*(supra) are mentioned below:

"1. On the facts and circumstance of the case, the Ld. CIT(A) erred in confirming the penalty of Rs.31,607/- levied by Ld. AO u/s 271B of the Income Tax Act, when the turnover declared by assessee was merely Rs.24,80,995/-, i.e. below the limit prescribed u/s 44AB of the Act. Appellant prays the penalty so levied may please be deleted.

1.1 That, the Ld. CIT(A) has further erred in confirming the action of Ld.

AO of including a sum of Rs.38,40,500/-, alleging the same as undisclosed turnover, to determine the limit prescribed u/s 44AB by ignoring the fact that the said amount was not recorded in regular books of accounts thus could not be considered for levy of penalty u/s 44 AB of the Income Tax Act, 1961.

2. That the appellant craves the right to add, delete, amend or abandon any of the grounds of appeal either before or at the time of hearing of appeal."

12. The above grounds were adjudicated by the I.T.A.T., Jaipur Bench in favour of the assessee observing as follows:

We have considered the rival submissions as well as relevant material on record. There is no dispute that the assessee has declared the turnover of Rs. 24,80,995/- and the income was declared U/s 44AD of the Act in the return of income. The turnover declared by the assessee in the books of account and return of income does not exceed the limit provided U/s 44AB of the Act and therefore, there was no mandatory requirement of books of account to be audited U/s 44AB of the Act. The Assessing Officer during the survey U/s 133A of the Act conducted in the case of one Shri P.C. Vijayvargiya and others on 06/11/2011 found that Shri P.C. Vijayvargiya was having bank deposits which according to him was sale consideration of marble traders of Kishangarh. The A.O. proposed to make the addition of 10% of the unaccounted sale of Rs. 38,40,000/- found to be belonging to the assessee. The assessee agreed to the addition of 10% of the said unaccounted sale in the assessment proceedings. Based on the said addition, the Assessing Officer was of the view that the assessee's turnover has exceeded the limit of Rs. 60.00 lacs as provided U/s 44AB of the Act and consequently the assessee has violated the mandatory condition of his books of account to be audited. The penalty U/s 271B of the Act has been levied by the Assessing Officer due to the reason that there was an

addition on account of unaccounted sale. Thus, it is clear that at the time of preparing the books of account, the turnover of the assessee was only Rs. 24,80,995/- and consequently it was not necessary to get the books of account audited as required U/s 44AB of the Act. The A.O. has made the addition based on the survey conducted in the case of one Shri P.C. Vijayvargiya, however, no corresponding material in the possession of the assessee was found by the Assessing Officer to show that at the time of preparing the books of account, the assessee's turnover was exceeding the limit of Rs. 60.00 lacs as provided U/s 44AB of the Act. Hence, the requirement of audit of the books of account as per [Section 44AB](#) of the Act is only in the case when the assessee on its own declared the turnover of more than the minimum amount prescribed U/s 44AB of the Act. The Coordinate Bench of this Tribunal in the case of Nirmal Kumar Joshi & Anr. Vs ITO (Supra) while considering the identical issue has held in para 9 and 10 as under:

"9. We have heard the rival contentions and perused the material available on record. We find that the AO has accepted the income offered in the return of income filed under [section 44AD](#) of the Act and at the same time, has brought to tax the undisclosed business receipts of Rs.43,34,064/- offered for taxation during the course of assessment proceedings. The AO has thus come to a conclusion that since the combined receipts exceed the prescribed threshold of Rs 60 lacs, the assessee has failed to get his books of accounts audited. We find that by accepting the income offered under [section 44AD\(1\)](#), the AO has thus accepted the assessee's eligibility for presumptive basis of taxation under [section 44AD](#). Once the said eligibility is accepted, if we read the provisions of [section 44AD](#) and in particular sub-section (5), it clearly provides that an eligible assessee who claims his income from the eligible business is below the presumptive rate of 8% of total turnover or gross receipts, he shall be required to maintain books of accounts and also get them audited and furnish a report as required under [section 44AB](#) of the Act. Therefore, only in a scenario, where such a claim is made by the assessee whereby he claims that his income to be lower than 8% of total turnover or gross

receipts, he will be required to maintain books of accounts and get them audited. Corresponding provisions are provided in [section 44AA\(2\)\(iv\)](#) of the Act as well. In the instant case, the assessee has not made any such claim in his return of income. Further, the Revenue has accepted the claim of the assessee as being eligible for such presumptive taxation where the assessee has reported a net profit of 8.09% on total reported turnover of Rs 48,98,269. In such a situation, having not disturbed the said position under [section 44AD](#), it cannot be said that the assessee has failed to get his books of accounts where undisclosed business receipts of Rs. 43,34,064/- are brought to tax during the course of assessment proceedings and whereby the prescribed turnover threshold has been breached. Had the Revenue rejected the assessee's claim under [section 44AD](#) of the Act and thereafter, taking into consideration the declared turnover of Rs 48,98,269 and undisclosed business receipts of Rs 43,34,064, had come to a position that the assessee has failed to get offered his books of accounts, that in a such a scenario, the contention of the Revenue could have been accepted. Further, what has been referred in [section 44AB](#) is the books of accounts maintained in the regular course of business and where an admission is made by the assessee based on third party statement during the course of survey that the amount found deposited in the bank account belongs to the assessee, it cannot be said that regular books of accounts are maintained even in respect of unaccounted sales or business receipts and the penalty can be levied under [section 271B](#) of the Act. In this regard, we refer to the decision of the Coordinate Bench in case of [Brij Lai Goyal vs. ACIT](#) (supra) wherein it has been held as under:

"11. It is evident from the aforesaid observation that books of account maintained in regular course only make the assessee eligible for grant of immunity from penalty and not with reference to any of such books, which have not been maintained in the regular course of business. Admittedly, the additional sales found as a result of search, was not recorded in the books of account regularly kept in the course of business by the appellant. Merely because the appellant accepted the additional

sates for the purpose of assessment of the relevant year on the basis of entries in the seized documents, the same would not constitute accounts of the appellant maintained in the regular course of business and on that basis alone liability cannot be fastened on the assessee by holding him to have committed the default. Furthermore, the word "accounts" has not been defined under the IT Act However, under s. 34 of the Indian Evidence Act, 1872, sanctity is attached to the books of accounts, if the books are indeed "account books", i.e., in original if they show on their face, that they are kept in the 'regular course of business'. So, the accounts under s. 34 of Indian Evidence Act means accounts which are maintained in the regular course of business. Accordingly we are satisfied that the record carrying entries from which the appellant admits of additional sales are not the accounts as referred to under s. 44AB of the Act. On that basis it was not open to the AO to hold that the sales of the assessee as referred in s. 44AB of the Act have exceeded to Rs. 40 lakhs and by not getting such accounts audited from an accountant, the appellant has committed a default. Such a finding arrived at by the AO is reversed."

10. In light of above discussions and in the entirety of facts and circumstances of the case, the penalty levied under section 271B is hereby deleted. In the result, the appeal of the assessee is allowed." The addition made by the Assessing Officer during the assessment proceedings on the basis of unaccounted sale cannot be regarded as the turnover for the purpose of Section 44AB of the act because the documents relied upon by the A.O. are neither the part of books of account nor would substitute the books of account or constitute the books of account of the assessee regularly maintained. Therefore, the books of account maintained by the assessee in regular course of business cannot be substituted by the material gathered by the Assessing Officer in the course of some survey in the case of third party though the said material may be relevant evidence for making the addition to the income of the assessee. Hence, in view of the facts and circumstances and following the earlier decision of this Tribunal, the penalty levied U/s 271B of the Act is deleted.

13. After going through the above decision of the Coordinate Bench, we are of the considered view that the issue raised before us is squarely covered by the decision of Coordinate Bench and the impugned penalty of Rs.35,830/- levied u/s 271B of the Act is thus liable to be deleted. Finding of the Ld. CIT(A) is thus *set aside* and appeal of the assessee is allowed.

14. In the result, the appeal of the assessee stands allowed.

Order was pronounced in the open court on 31.10.2019.

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Indore; दिनांक Dated : 31 /10/2019

Patel, P.S./नि.स.

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order
Assistant Registrar