

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER
AND SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

S.No.	ITA No.	AY	Appellant	Respondent
1 & 2	1659 & 1660/H/17	2007-08	Naveen Kumar Kaparthi, Hyderabad. PAN-AGFPK 3931M	Income-tax Officer, Ward – 4(1), Hyderabad.

Assessee by : Shri S. Rama Rao
Revenue by : Shri Nilanjan Dey

Date of hearing : 15/10/2019.
Date of pronouncement : 23/10/2019.

ORDER

PER V. DURGA RAO, J.M.:

ITA No. 1659/H/17

This appeal by the assessee is directed against the order of Commissioner of Income Tax (A) - 1, Hyderabad, dated 01/06/2017 for AY 2007-08.

2. Brief facts of the case are that the assessee, an individual engaged in the business of running a Kirana and General Stores, filed his return of income for the AY 2007-08 on 28/08/2007 declaring total income of Rs. 1,68,370/-. The AO observed that assessee's total gross receipts from business were Rs. 58,62,880/- and no audit was done in assessee's case, as total sales turnover or gross receipts of business exceed Rs. 40 lakhs, the assessee should have got his accounts audited by an Accountant before the specified date in the prescribed form duly signed and verified by such Account but, the assessee failed to get his accounts audited as required u/s 44AB of the Act.

2.1 The AO, accordingly, issued penalty notice u/s 271B on 24/12/2012. Against the said notice, the assessee submitted that the assessee is running a Kirana & General Stores and he is filing return of income in which showing business income u/s 44AF on the basis of presumption and not maintaining books of account. During the scrutiny proceedings, the department made addition of turnover on estimate basis, which could be real turnover or not, for which the assessee agreed and paid tax due on the income resulting on the basis of estimation of turnover. He, therefore, submitted that the audit cannot be made applicable on the basis of estimated turnover. For this proposition, he relied on the decision of the ITAT Bangalore, in the case of Suresh Shet Vs. ACIT (2010 6 ITR (Trib 30 (Bang.)).

2.2 Rejecting the submissions of the assessee, the AO levied penalty u/s 271B of Rs. 29,315/- on the ground that assessee failed to comply with the provisions of section 44AB of the Act.

3. When the assessee preferred an appeal before the CIT(A), the CIT(A) upheld the penalty levied by the AO.

4. Aggrieved, the assessee is in appeal before us raising the following grounds of appeal:

"1) The order of the learned Commissioner of Income-tax (Appeals) is erroneous both on facts and in law.

2) The learned Commissioner of Income-tax (Appeals) erred in confirming the action of the Assessing Officer in arriving at the turnover at Rs.58,62,880/- and further erred in holding that there is any violation of the provisions of Sec.44AB of the I.T.Act.

3) The learned Commissioner of Income-tax (Appeals) erred in confirming levy of penalty of Rs.29,315/- u/s 271B of the I.T. Act.

4) Any other ground or grounds that may be urged at the time of hearing."

5. Considered the rival submissions and perused the material on record. Admittedly, the assessee before the revenue authorities submitted that he is filing return of income in which showing business income u/s 44AF on the ground that he is not maintaining books of account. A Separate penalty has been provided for non maintenance of accounts, i.e. under section 271A of the Act and for not getting the accounts audited and not furnishing the audit report, i.e. under section 271B. If a person has not maintained account books or any accounts the question of audit does not arise. In such an event the imposition of penalty under the provision contained in section 271A for alleged non-compliance with section 44AA may arise but the provisions of section 44AB do not get violated in a case where accounts have not been maintained at all and therefore the penal provisions of section 271B of the Act would not apply.

5.1 In the instant case, when the books of account are not maintained, the AO did not initiate any proceedings for not maintaining the books of account. The AO obviously satisfied that the books of account were not maintained for good and sufficient reasons. When the AO accepted the fact that the books of account are not maintained, there is no reason for him to levy penalty u/s 271B of the Act. In view of the above observations, we set aside the order of CIT(A) and delete the penalty levied u/s 271B of the Act.

6. In the result, appeal of the assessee is allowed.

7. As regards the appeal in ITA No. 1660/Hyd/2017 wherein the AO levied penalty u/s 271(1)(c), which was confirmed by the CIT(A).

8. The AO observed that the assessee suppressed the gross receipts of Rs. 12,87,882/- as the assessee failed to explain the deposits in bank account to the tune of the said amount. Accordingly, the AO estimated

the income at 6% on such suppressed gross receipts, at Rs. 77,273/- and added to the income returned.

8.1 As regards credit card payments to the tune of Rs. 17,00,000/-, the AO estimated the income at 6% which comes to Rs. 1,02,000/- and added to the income returned.

8.2 Thereafter, the AO initiated penalty proceedings u/s 271(1)(c) on the ground that the assessee concealed his income by suppressing the gross receipts and hence, worked out the penalty on the amount of tax sought to be evaded at Rs. 46,532/- u/s 271(1)(c) of the Act.

9. When the assessee preferred an appeal before the CIT(A), the CIT(A) upheld the penalty levied by the AO u/s 271(1)(c).

10. Considered the rival submissions and perused the material on record. In the instant case, the additions on which the penalty was imposed was estimated after applying the net profit rate and that it was a settled law that penalty on *ad hoc* disallowance or addition made on estimate basis was not attracted. The Hon'ble Delhi High Court in CIT vs. Aero Traders Pvt. Ltd., reported in 322 ITR 316 (Del), has held that no penalty u/s 271(1)(c) can be imposed when income is determined on estimate basis. Similar view has been taken by the Hon'ble Punjab & Haryana High Court in the case of Harigopal Singh vs. CIT reported in 258 ITR 85 (P&H) and the Hon'ble Gujarat High Court in the case of CIT vs. Subhash Trading Company reported in 221 ITR 110 (Guj). In view of the foregoing precedents including the one from the Hon'ble Jurisdictional High Court, it is apparent that when the bedrock of instant penalty is the estimate of net profit, the same cannot be sustained. Accordingly, we set aside the order of the Ld. CIT (Appeals) and direct the AO to delete the penalty.

11. In the result, appeal of the assessee is allowed.

Order Pronounced in open Court on this 23rd day of October, 2019.

Sd/-
(D.S. SUNDER SINGH)
ACCOUNTANT MEMBER

Sd/-
(V. DURGA RAO)
JUDICIAL MEMBER

Hyderabad, Dated: 23rd October, 2019.

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Copy to:

1. *Naveen Kumar Kaparthy, 1-1-379/57, SRT-152, Jawahar Nagar, Chikkadpally, Hyd. – 500 020*
2. *ITO, Ward – 4(1), IT Towers, AC Guards, Hyderabad.*
3. *CIT(A) - 1, Hyderabad.*
4. *Pr. CIT – 1, Hyd.*
5. *The D.R., ITAT, Hyderabad.*
6. *Guard file.*