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आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"SMC" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 330/JP/2022
निर्धारण वर्ष/Assessment Years : 2012-13

Rakesh Kumar Agarwal Plot No. A17, 1st, Govind Nagar A Marble Mandi Road, Jhotwara, Jaipur	बनाम Vs.	Income Tax Officer, Ward 4(4), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AIFPA 6015 J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Vishal Gupta (C.A.)
राजस्व की ओर से/ Revenue by : Smt Monisha Choudhary (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 02/03/2023
उदघोषणा की तारीख/Date of Pronouncement : 06/03/2023

आदेश/ ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by assessee and is arising out of the order of the National Faceless Appeal Centre, Delhi dated 29/06/2022 [here in after (NFAC)/ ld. CIT(A)] for assessment year 2012-13 which in turn arise from the order of the penalty passed u/s. 271B of the Act dated 06.01.2022 by the National Faceless Center, Delhi [here in after the ld. AO.]

2. In this appeal, the assessee has raised following grounds: -

"1. On the facts and circumstances of the case, the ld. CIT(A) has erred in law and facts by confirming the action of the Ld. AO of imposing penalty under section 217B for not getting the books audited when it was admitted and undisputed fact that the assessee did not maintain any books of accounts. The penalty is thus against the provisions of law and hereby prayed for being deleted.

2. On the facts and circumstances of the case, the Ld. AO grossly erred in assuming jurisdiction and hence imposing penalty upon the assessee on the basis of an invalid show cause notice dated 01.04.2021 which even did not specify the actual charge upon the assessee. Similarly, there was an alleged show cause notice dates 19.12.2019 which was never served upon the assessees on portal or otherwise. Hence, it is hereby prayed that in absence of proper jurisdictional notice, proceedings in pursuance thereof may kindly be declared void.

3. On the facts and circumstances of the case the Ld. CIT(A) has erred in approving the action of the Ld. AO where the Ld. AO passed the said order against the provisions of law by making allegation that assessee has committed default within the meaning of explanation to section 271B of the act whereas no such explanation exists in law. Thus the order passed on the basis of such false allegation is void ab initio and hence prayed for being quashed.

4. On the facts and circumstances of the case, the Ld. CIT(A) has erred in passing order without considering the adjournment application of the assessee and on the basis of assumption that assessee has filed his reply whereas he did not. Thus, the order of Ld. CIT(A) was vague in itself and hence prayed for being quashed.

5. On the facts and circumstances of the case, the Ld. AO has disregarded and misinterpreted the basic accounting principles for calculation of turnover. Thus, it is hereby prayed to allow the relief to the assessee by calculating turnover as per basic accounting principles.

6. The assessee hereby craves the leave to add, alter, amend or substitute one or more grounds of appeal at the time of or before the actual hearing of the case."

3. The fact as culled out from the records is that in this case, the assessee has not filed ITR declaring total income for AY 2012-13 and the filing of ITR is not found verifiable from the AST-ITBA system. As per the details/information given in ITS-CIB data, the assessee has held share & commodity transactions for Rs.1467932400/- (with Agency Code: MX001, Trading Member Code-321 through MCX. As per ITS data available on AST system, the assessee has entered into share transactions & commodity transactions through the brokers i.e. M/s Mohak Commodities Pvt Ltd which has not been found verifiable from the ITR. After obtaining necessary permission, notice u/s 133(6) has been issued on 13/3/2019 to the assessee for verification of filing of ITR and discloser of above transactions & gains/loss thereof but the assessee has not furnished any reply/details. Thus, the then Assessing Officer has reasons to believe that the income to the extent of Rs. 1467932400/- has escaped assessment within the meaning of Section 147 of the Income Tax Act 1961 and recorded reasons u/s 147 & found it a fit case for issue of notice u/s 148 of the Act. After recording satisfaction on the reasons u/s 147 and finding it a fit case for initiating proceedings u/s 148 and granting approval by the Pr. CIT-II, Jaipur on 25/03/2019, the AO has issued

and delivered notice u/s 148 of the Act on 29/03/2019 for service upon the assessee at the given address through the postal authority vide receipt dated 30/03/2019 requiring the assessee to deliver within 30 days from the service of the notice a return in the prescribed format & manner online for the said assessment year. In response to the notice u/s 148, the assessee has not filed eITR. for AY 2012-13 within the time allowed. However, he has filed eITR u/s 148 on 16/12/2019 income of Rs.1,50,000/- for AY 2012-13 and accordingly, notice u/s 143(2) & notice u/s 142(1) were issued.

3.1 During the course of assessment proceeding the ld. AO observed from the data available with him that the assessee has incurred loss of Rs. 39,03,160/- against which he has shown Rs. 39,99,567/- which is taken in multi commodity transaction and loss of Rs. 22,548/- in Future and Options (F&O) totaling to Rs. 40,22,115/- under the head income from business and profession. The report reveals total turnover of Rs. 1,59,27,862/- which is the total of Mark to Mark (MTM) value irrespective of minus or plus. Thus, ld. AO observed that the assessee is required to keep and maintain books of account u/s. 44AA and the total sales turnover is exceeding to the prescribed limit for getting the audited books of

accounts by a chartered accountant u/s. 44AB. The ld. AO further noted that the assessee has neither kept and maintained books of account and evidence of maintenance of books of account has not been furnished for verification of the claims. Thus, the assessing officer has initiated penalty proceeding u/s. 271A as the assessee has failed to keep & maintain books of account u/s. 44AA and penalty 271B were initiated to get audited the books of account u/s. 44AB.

3.2 As the penalty proceeding were initiated pursuant to the order of the assessment ultimately vide order dated 06.01.2022 penalty for an amount of Rs. 79,639/- was ordered to be levied u/s. 271B of the Act by the ld. AO. While levying the penalty the ld. AO has held as under:

> "Onus is always on the assessee to prove that there is no violation of provision of section 44AB of the Act. The assessee had to maintain books of accounts and further get them audited u/s. 44AB. However, the assessee failed to justify the violation of section 44AB of the Act. It is therefore, satisfied that the assessee has committed a default within the meaning of Explanation to section 271B of the Act and it is a fit case to levy penalty u/s. 271B of the Act which pertains to the penalty for noncompliance of section 44AB of the Act."

3.3 Aggrieved from the order of the assessing officer the assessee has preferred an appeal before the ld. CIT(A). The ld. CIT(A) confirmed the levy of the penalty holding that the assessee is not covered under the any reasonable clause and since the assessee has not complied the statutory provisions, the action of levy of penalty by the AO was confirmed.

4. Aggrieved from the order of the ld. CIT(A) the assessee has preferred this appeal before the tribunal challenging the levy of penalty on the grounds as raised in para 2 above.

5. To support the various grounds so raised the ld. AR appearing on behalf of the assessee has placed their written submission which is extracted in below;

> "The assessee is an individual and was engaged in trading of securities for the year under consideration. He also earned income in the form of salary amounting to Rs 150000.00, interest on saving bank deposits of Rs 291.00 and in addition to this he suffered short term capital loss on sale of securities of Rs 6928.00. He also suffered loss from commodity trading amounting to Rs 3999567.00 and loss from F&O trading amounting to Rs 22548.00. As the income of assessee was below the maximum amount not chargeable to tax, he did not filed any return of income. The Ld. A.O reopened the case of assessee under Section 148 and in response to notice issue under Section 148, the assesse filed his return of income on 16.12.2019 with details of income as mentioned above. The Ld. A.O concluded the assessment proceedings vide order dated 19.12.2019 (Paper Book Page No. 1-14) in which income was assessed at Rs 150291.00 and also loss was assessed at Rs 3932885.00 from commodity and F&O trading. Further, loss of Rs

7177.00 was assessed on account of short term capital loss on account of trading in securities. The Ld. A.O also allegedly issued two show cause notices for imposing penalty under Section 271B (Paper Book Page 15 & Pages 16-17). However, one of the show cause notice allegedly dated 20.12.2019 was not uploaded on portal and was also not served in hard copy. The copy of screenshot of portal is enclosed as Paper Book page no. 15. The assessee ignoring the vagueness of show cause notice (Second one) filed reply to show cause notice which is forming part of Paper Book as page No. 18. Without considering the arguments raised by the assessee in his reply, the Ld. A.O eventually imposed penalty under section 271B of Rs 79639.00 vide order dated 06.01.2022 (Paper Book Page no. 21-23) alleging that the assessee's turnover has exceeded the limit prescribed under Section 44AB. The Ld. A.O also imposed penalty under Section 271A vide order dated 06.01.2022 which is also enclosed as a part of paper book vide Page No.'s 19-20. Aggrieved by the said order, the assessee preferred an appeal before the Ld. CIT(A). The copy of Form 35 filed by the assessee is enclosed with paper book vide Page No. 24-30. The appeal was dismissed by Ld. CIT(A) vide order dated 29.06.2022 (Paper Book page no. 31-34). Aggrieved by the said order, the assessee is in appeal before the H'ble ITAT, Jaipur bench.

Now we hereby submit ground wise reply as under:

Ground No. 1

On the facts and circumstances of the case, The Ld. CIT(A) has erred in law and facts by confirming the action of Ld. A.O of imposing penalty under section 271B for not getting the books audited when it was admitted and undisputed fact that the assessee did not maintain any books of accounts. The penalty is thus against the provisions of law and hereby prayed for being deleted.

1.. As per section 271B of the act, *"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".*

2. Thus, the default mentioned in this penal provision is not getting the accounts audited by the assessee. *Once it has been established that assesse has not maintained any books of accounts, the question of invoking penal provisions under section 271B does not arise.*

We draw the attention of Ld. Appellate authority to definition of books of accounts (Section 2(12A) as per the act which clearly stipulates as follows:

"books or books of account" includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device;

In the present case, the assessee was maintaining neither of these documents. The only information which the Ld. A.O was having for assessment was the statement of share broker i.e a third party which he has obtained directly from the broker.

The fact that assessee did not maintained any books of accounts can be confirmed with Page 7 of the assessment order (Also Page 7 of paper book) where Ld. A.O in last para has admitted that assessee did not maintain any books of accounts. This fact is also confirmed by the fact that the Ld. A.O has imposed penalty under Section 271A upon the assessee for not maintaining books of accounts. A copy of said order has already been submitted by us as a part of paper book.

Thus, in absence of books of accounts, the audit of same is not possible as held in various legal precedents which are mentioned hereunder.

3. We rely upon the decision of the jurisdictional ITAT, Jaipur in the case of Shahnaz Khanam, Jhalawar vs The ITO, Jhalawar, ITA No. 38/JP/2018 where it was held by the H'ble bench that "Accordingly, in view of the binding precedent, we hold that once the assessee found to have not maintaining the regular books of account as contemplated by Section 44AA of the Act the default was completed and therefore, after the default of not maintaining the books of accounts there cannot be a further default for not getting the same audited as required U/s 44AB of the Act. Hence, the penalty of levy by the AO U/s 271B is not justified and the same is deleted".

We also rely upon the landmark judgements of H'ble Allahabad High Court in the case of CIT Vs. S.K. Gupta and Co. [2010] 322 ITR 86 (All.) where similar findings were given by the honorable court which are as follows:

"We have heard Sri A.N. Mahajan, learned standing counsel for the Revenue and Sri R.R. Kapoor, learned counsel appearing for the respondent assessee. Sri Mahajan contended that the Tribunal has erred in law while upholding order of the CIT(A) cancelling the penalty in as much as the assessee had failed to get its books of account audited. The submission of Sri Mahajan is misconceived for the reason that the requirement of getting the books of account audited could arise only where the books of accounts are maintained. If for some reason the assessee has not maintained the books of account the appropriate provision under which penalty proceedings can be initiated is under s. 271A of the Act which recourse has also been taken by the assessee as would appear from the order of the Tribunal. The Tribunal was, therefore, justified in upholding the order of the CIT(A) cancelling the penalty imposed under s. 271B of the Act".

We further place our reliance on the decision delivered in the case of CIT Bareilly v Bisauli Tractors – (2008) 299 ITR 219, the H'ble Allahabad High Court held that:

"14. Therefore, Section 27IB of the Act is not attracted in a case where no account has been maintained and instead recourse under Section 271A can be taken.
15. In view of the foregoing discussions we answer the question referred to us in the affirmative, i.e., in favour of the assessee and against the revenue. There will be no order as to costs".
We also rely upon the judgement of Hon'ble Gauhati High Court in case of Surajmal Parsuram Todi vs. CIT 222 ITR 691 where it was held by the court that "*We have gone through the provisions of sections 44AA, 44AB, 271A and 271B of the Act. Maintenance of accounts is envisaged under section 44AA and on failure to do so the assessee shall be guilty and liable to be penalised under section 271A. Even after maintenance of books of account the obligation of the assessee does not come to an end. He is required to do something more, i.e., by getting the books of account audited by an accountant. But when a person commits an offence by not maintaining the books of account as contemplated by section 44AA the offence is complete. After that there can be no possibility of any offence as contemplated by section 44AB and, therefore, in our opinion, the imposition of penalty under section 271B is erroneous. The Tribunal has overlooked this aspect of the matter. Of course, it is apparent from the records that the assessee failed to maintain the books of account as required under section 44AA and for that penalty is prescribed under section 271A. It is for the Tribunal to take action in accordance with law".*
Similar findings were given by jurisdictional H'ble ITAT, Jaipur in the case of Yogendra Singh Shekhawat vs ITO, Ward 3(1), Jaipur, ITA No. 1001/JP/2016 relying upon the decisions in the case of Hon'ble Gauhati High Court in case of Surajmal Parsuram Todi vs. CIT 222 ITR 691 & h'ble Allahabad High Court in the case of CIT Bareilly v Bisauli Tractors – (2008) 299 ITR 219.
We further place our reliance upon decision of coordinate bench in the case of Roshni Devi vs ITO, Ward 3(1), Jaipur, ITA No. 953/JP/2017 pronounced on 16.05.2018 in which it was held that:
"It is clearly a case of impossibility of performance where it is expected that the assessee should get her books of accounts audited when it is a known and admitted fact that there are no regular books of accounts which have been maintained at first place. Our view is fortified by the decision of the Hon'ble Gauhati High Court in case of Rajmal Parsuram Todi (supra) wherein it was held that when a person commits an offence by not maintaining the books of accounts as contemplated under section 44AA, the offence is complete and after that, there can be no possibility of any offence as contemplated under section 44AB and therefore, the imposition of penalty under section 271B is erroneous."
We further rely on the judgement passed by coordinate bench in Appeal No. ITA No. 262/JP/2019 in the case of Shri Sharad Kankaria vs ITO, Ward- 6(1), Jaipur wherein it was held that "*Since the issue in question is covered by the decision of the ITAT Coordinate Bench in the case of Roshni Devi vs ITO (supra), therefore,*

respectfully following the decision of this Bench on the issue of deleting the penalty u/s 271B of the Act, we direct the AO to delete the penalty of Rs. 1,50,000/- confirmed by the ld. CIT(A). Thus the solitary ground of the assessee is allowed".

We further submit that this explanation for not imposing penalty was also submitted before the Ld. A.O but he did not considered same while passing the penalty order.

We thus hereby pray the Ld. authority to allow this ground raised by the assesse.

Ground No. 2

On the facts and circumstances of the case, the Ld. A.O grossly erred in assuming jurisdiction and hence imposing penalty upon the assessee on the basis of an invalid show cause notice dated 01.04.2021 which even did not specify the actual charge upon the assessee. Similarly, there was an alleged show cause notice dated 19.12.2019 which was never served upon the assessee on portal or otherwise. Hence, it is hereby prayed that in absence of proper jurisdictional notice, proceedings in pursuance thereof may kindly be declared void.

We hereby draw the attention of the Ld. members to Page No. 15 of paper book where we have attached the screen shot of portal where it can be clearly seen that no notice was uploaded on portal. Further, no manual notice was even served upon the assessee. A show cause notice was issued on 01.04.2021 but it simply referred to notice dated 19.12.019 and did not contain any charges against the assessee as such. The copy of said notice dated 01.04.2021 is enclosed as a part of paper book vide Page No. 16-17. Thus, it can be clearly seen that no notice was served upon the assessee which required him to show cause for his alleged default. As the show cause notice was itself missing, the order passed in pursuance thereof is void ab initio and prayed for being declared so. It has been held in various judicial pronouncements that penalty cannot be levied on the basis of a vague show cause notice i.e when there is no clear charge upon the assessee so as to enable him to reply. The cases relied upon are as follows:

We rely upon the decision of the Guwahati bench of H'ble ITAT in the case of North Eastern Constructions vs The ITO, ITA 184/Gau/2019 where it was held in Para 10 and succeeding paras of the order as follows:

"We have heard both the parties and perused the records. We note that the assessee had filed return of income for the AY 2015-16 on 31-03-2016 along with TAR. Thereafter, we note the department accepted the return of income filed by the assessee by issuing intimation u/s. 143(1) of the Act on 28-05-2016. After two years on 15-05-2018, the AO had issued notice u/s. 274 read with section 271B of the Act proposing to levy of penalty u/s. 271B for the following faults:

i) failed to get accounts audited or

ii) failed to furnish a report of such audit as required u/s. 44AB of the Act

Thus, we note that the AO has given a show cause notice, which is per-se vague. Thus, we note that the AO by issuing penalty notice u/s. 271B has not spelt out what was the fault for which the assessee is being proceeded against for levy of penalty. Since the AO has not struck down the irrelevant portion/fault which is not applicable in the facts and circumstances of the case, the notice reproduced (supra) is vague and therefore, bad in law as held by the Co-ordinate Bench of the Tribunal in the case of Parkinson Electrical Corprn (supra). We are of the opinion that notice proposing penalty should clearly spell out the fault/charge for which the assessee is put on notice, so that he can defend the charge properly. The issue of bad/vague penalty notice was adjudicated by the Hon'ble Karnataka High Court [though in a different context i.e notice issued u/s.274 read with section 271(1)(c) of the Act] in the case of CIT vs. SSA's Emerald Meadows in ITA No.380 of 2015 dated 23.11.2015 wherein the Hon'ble High Court following its own decision in the case of CIT vs Manjunatha Cotton and Ginning factory (2013) 359 ITR 565 has held that if the penalty notice is vague, then the penalty
order is also bad in the eyes of law. This decision of Karnataka High Court was challenged by the Revenue before the Hon'ble Apex Court, and the Hon'ble Supreme Court has dismissed the SLP. Therefore, applying the ratio-dicedenti in SSA's Emerald Meadows & M/s. Parkinson (supra), we are of the view that the notice issued by AO before levying penalty u/s. 271B of the Act is bad in law".

We further reply upon the decision of Hon'ble Apex Court in case of CIT vs. SSA's Emerald Meadows – (2016) 73 com248 (SC) where dismissing the SLP filed by the Revenue quashing the penalty by the Tribunal as well as Hon'ble High Court on ground of unspecified notice has held as under:-

"Section 274, read with section 271(1)(c), of the Income-tax Act, 1961 – Penalty – Procedure for imposition of (Conditions precedent) – Assessment year 2009-10 – Tribunal, relying on decision of Division Bench of Karnataka High Court rendered in case of CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 1TR 565/218 Taxman 423/35 taxmann.com 250, allowed appeal of assessee holding that notice issued by Assessing Officer under section 274 read with section 271 (1)(c) was bad in law, as it did not specify under which limb of section 271 (1)(c) penalty proceedings had been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income – High Court held that matter was covered by aforesaid decision of Division Bench and, therefore, there was no substantial question of law arising for determination – Whether since

there was no merit in SLP filed by revenue, same was liable to be dismissed – Held, yes [Para 2] [In favour of assessee]"

We further rely on the decision of the coordinate bench in the case of Tejpal Singh Nunia vs DCIT, Central Circle – 2, Jaipur, ITA No. 1294 to 1296/JP/2019 where the H'ble bench observed as under:

"6. The law is well settled that penalty u/s 271(1)(c) can be imposed for concealing particulars of income or furnishing inaccurate particulars of income which are two limbs of the section 271(1) (c) but the penalty can be imposed only when the authority is satisfied that either of the two events of limbs exists in a particulars case and this perquisite should invariably be evident from the notice issued u/s 274 r.w.s 271 of the Act, which is a statutory jurisdictional notice. The intent and purpose of this notice is to inform the assessee as to for which specific charge he has been show caused.

7. In the present case, from the notice u/s 274 dated 27.12.2011, neither the assessee nor anyone else could make out as to 'for what precise charge, the assessee was asked to show cause viz. whether the charge is for furnishing inaccurate particulars of income or concealment of particulars of such income. It is further important to note that, in notice, under the point which is intended towards proposed penalty u/s 271(1)(c), the word OR has been used between the charge of concealment of income and furnishing inaccurate particulars of income. These facts and circumstances make it abundantly clear that in the case of assessee, penalty notice is completely vague and ambiguous. The AO simply issued a preprinted notice without striking off the unnecessary charge and not mentioning the precise charge. The above act of the AO clearly shows that the entire exercise of initiation of penalty proceedings has been done without application of mind which resulted into issuing a completely vague jurisdictional notice u/s 274 and the jurisdictional notice being vague, the consequent levy of penalty is illegal and deserves to be deleted in full.

8. In view of above facts and circumstances, the initiation of penalty proceeding is void ab initio. For this purpose, reliance may be placed on the decision of Jaipur Bench of ITAT in the case of Shri Subhash Sharma Vs DCIT in ITA No.205/JP/2020 vide order dated 21.07.2020, wherein it was held as under:

"5……………….the notice issued by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961 is bad in law in as much as it did not specify in which limb of section 271(1)(c) of the Income Tax Act, 1961 the penalty proceedings has been initiated, i.e. whether for concealment of income or furnishing of inaccurate particulars of income.

5.1. It is pertinent to note that in the notice, AO has not clearly mentioned the limb, on the basis of which, penalty was proposed to be imposed. The AO in assessment order or penalty notices did not specify the limb under which the penalty was initiated and simply issued a pre-printed notice without striking off the unnecessary portions of the notice. If the AC) was of the view that the assessee has concealed the income or furnishing inaccurate particulars of income then he should have

deleted or not mentioned the other limb for imposition of penalty i.e. concealing the particulars of income. The above act of the AO clearly shows that the entire exercise of initiation of penalty proceedings has been done without application of mind. "

Though few of the above the above decisions have been delivered in context of Section 271(1)(c), but the ratio behind the same is that whenever any penal proceedings are initiated against the assessee, there must be a specific charge in the notice by which jurisdiction is assumed. In absence of same, the assessee is not able to reply to same and hence it vitiates the entire proceedings.

Ground No. 3

On the facts and circumstances of the case, the ld. CIT(A) has erred in approving the action of the Ld. A.O where the Ld. A.O passed the said order against the provisions of law by making allegation that assessee has committed default within the meaning of explanation to Section 271B of the act whereas no such explanation exists in law. Thus the order passed on the basis of such false allegation is void ab initio and hence prayed for being quashed.

We reproduce Section 271B of the act which is as under:

[55]*[Failure to get accounts audited.*

271B. If any person fails [56]*[***] to get his accounts audited in respect of any previous year or years relevant to an assessment year or* [57]*[furnish a report of* [58]*such audit as required under section 44AB], the* [59]*[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* [60]*[one hundred fifty thousand rupees], whichever is less.]*

Thus, looking at the provisions of law above, it can be clearly seen that the Ld. A.O passed the said order against above provisions by making allegation that assessee has committed default within the meaning of explanation to Section 271B of the act whereas no such explanation exists in law. Thus the order passed on the basis of such vague allegation is void ab initio and hence prayed for being quashed.

Ground No. 4

On the facts and circumstances of the case, the Ld. CIT(A) has erred in passing order without considering the adjournment application of the assessee and on the basis of assumption that assessee has filed his reply whereas he did not. Thus, the order of Ld. CIT(A) was vague in itself and hence prayed for being quashed.

This ground of appeal is not pressed by the appellant.

Ground No. 5

On the facts and circumstances of the case, the LD. A.O has disregarded and misinterpreted the basic accounting principles for

calculation of turnover. Thus, it is hereby prayed to allow the relief to the assessee by calculating turnover as per basic accounting principles.

1.. As per section 44AB,

"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 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 the due date for furnishing the return of income under sub-section (1) of section 139.
The said limit during the relevant year for carrying out audit was Rs 60 Lakhs.
We would like to draw the attention of the Ld. Appellate authority that assessee was carrying on the business of trading in securities i.e F&O and commodity trading. The turnover for the same is calculated as per guidance note issued by ICAI which is a very well settled principle. In case of delivery based transactions, the sale amount is treated as turnover whereas in case of intra day transactions, the summation of positive and negative differences (absolute value) is treated as turnover. The relevant extract of the said guidance note in respect of intra day transactions is as follows:
"*A speculative transaction means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips. Thus, in a speculative transaction, the contract for sale or purchase which is entered into is not completed by giving or receiving delivery so as to result in the sale as per value of contract note. The contract is settled otherwise and squared up by paying out the difference which may be positive or negative. As such, in such transaction the difference amount is 'turnover'. In the case of an assessee undertaking speculative transactions there can be both positive and negative differences arising by settlement of various such contracts during the year. Each transaction resulting into whether a positive or negative difference is an independent transaction. Further, amount paid on account of negative difference paid is not related to the amount received on account of positive difference. In such transactions though the contract notes are issued for full value of the purchased or sold asset the entries in the books of account are made only for the differences. Accordingly, the aggregate of both positive and negative differences is to be considered as the turnover of such transactions for determining the liability to audit vide section 44AB".*
Thus, the turnover has to be taken in this mode. The Ld. A.O miscalculated the turnover to Rs 15927862.00 by some arbitrary methodology. We have enclosed the relevant statements of broker from which it can be clearly inferred that the turnover from F&O was Rs 47203.51 and that from commodity was Rs 6566786.50. The copy of statements are enclosed as a part of paper book vide Page No's 35-36.
Thus, it could be clearly observed that due to wrong interpretation of meaning of turnover or possibly wrong calculation, penalty was imposed on a higher amount. It is hereby prayed that the penalty thus imposed must be reduced. This ground is without prejudice to other grounds where we have claimed that the assesse was not liable for penalty under section 271B.

Ground No. 6

The assessee hereby craves the leave to add, alter, amend or substitute one or more grounds of appeal at the time of or before the actual hearing of the case.

This ground of appeal does not require any submission.

With the above submissions, we hereby pray the Ld. Bench to allow this ground and appeal of the assessee."

6. The ld. AR of the assessee in support of the written submission filed a paper book containing following records:

S. No.	Brief Description of document	Page No.	Filed/Available before Ld. AO/Ld. CIT(A)/Both
1	Quantum assessment order dated 19.12.2019 passed by the ld. AO	1-14	Both
2	Screenshot of portal where alleged show cause notice dated 20.12.2019 for imposing penalty under section 271B is being claimed to have been uploaded.	15	Both
3	Show cause notice dated 01.04.2021	16-17	Both
4	Reply to show cause notice filed by the assessee.	18	Both
5	Order under section 271A dated 06.01.2022	19-20	Both
6	Order under section 271B dated 06.01.2022	21-23	Both
7	Form 35 filed by the assessee	24-30	Ld. CIT(A)
8	Order dated 29.06.2022 passed by ld. CIT(A)	31-34	Ld. CIT(A)
9	Calculation of turnover and relevant documents	35-36	Ld. AO

7. The ld. AR of the assessee in addition to the written submission and paper book filed to support the contentions so raised, also filed a compilation of case law. Based on these evidence placed on record submitted that the department has already levied and confirmed the penalty u/s 271A, being the penalty for failure to keep /maintain or retain books of accounts, documents etc. if so then the levy of penalty u/s 271B is incorrect. Since, the assessee has already been held that he failed to maintain the books of accounts then again, he cannot hold to get the books of accounts audited to support the contentions raised by the ld. AR of the assessee he has relied upon the decision of the Co-ordinate Bench in the case of Shahnaz Khanam, Jhalawar vs. the ITO, Jhalawar, ITA No. 38/JP/2018.

8. Per contra, ld. DR supported the orders of the lower authority and submitted that the assessee has even though liable to get his books of account failed to do and the levy of penalty is correct and the same be upheld.

9. We have heard the rival contentions, perused the material on record and order of the lower authorities. We have also gone

through the various judicial decision cited by the ld. AR of the assessee in support his arguments before us. The bench has noted from the paper book of the assessee that in the case of the assessee there has been a levy of penalty for non-maintenance of books of accounts u/s. 271A of the Act and the ld. DR did not controvert the fact the same is not deleted. So once it has been held the assessee has not maintained the books of account and consequent there upon the penalty has also been levied the separate penalty for not getting the books of account audited cannot be fastened. The penalty u/s. 271B can be levied while the assessee maintain the books and not get them audited but once it is been not disputed that the assessee has not maintained the books how the penalty for not getting the books audited be levied. The ld. DR did not controvert the various decisions cited by the ld. AR of the assessee and thus, considering the ratio of decision so relied upon by the ld. AR of the assessee where in the decision of various Hon'ble High Courts and of this Co-ordinate Bench also. This co ordinate bench in the case of Shahnaz Khanan, Jhalawar Vs. ITO in ITA No. 38/JP/2018 held that :

> "6. Having considered the rival submissions as well as relevant material on record we note that the assessee has committed the default for not maintaining the regular books of accounts as required U/s 44AA of the Act. The Assessing Officer has already imposed the penalty U/s 271A for

violation of the provisions of Section 44AA of the Act. The AO has also imposed the penalty U/s 271B for not getting the books of accounts audited. It is pertinent to note that when the assessee did not maintain the regular books of account then the question of getting of books of accounts audited does not arise. Once, there is a violation of provisions of section 44AA of the Act the said violation cannot be extended to section 44AB of the Act. The provisions of Section 44AB of the Act can be invoked only when the assessee has complied with the provisions of Section 44AA of the Act. Therefore, the violation of Section 44AA of the Act cannot continue because once it is found that the assessee did not maintain the regular books of account the said violation cannot travel beyond the provisions of Section 44AA and hence, cannot be held as a further violation of Section 44AB of the Act. The Hon'ble Allahaband High Court in case of CIT Vs. Bisauli Tractors (supra) while dealing with this issue as held in paras 11 to 14 as under:-

"11. In the case of S. Narayanappa & Bros. v. CIT [1961] 41 ITR 125 the Mysore High Court has held as follows :

"What was urged before us was that in a case where an assessee has furnished no return at all before the Income-tax Officer, it should be presumed for the purposes of section 28(1)(b) that he has furnished a return of his income intimating the Income-tax Officer that his income is nil. It seems to me that the language of section 28(1) does not admit of any such construction since the clear requirement of the provisions of this sub-section is that an assessee on whom a penalty is proposed to be imposed under section 28(1)(b) should have in the first instance furnished his return. That, in my opinion, is the ordinary and grammatical meaning of the words occurring in the Act. To interpret the language of this provision in the manner suggested by the learned Government Pleader would, in my opinion, be too artificial and too far-fetched to commend itself for acceptance. Although it is true that the provisions of a statute like those contained in section 28(1)(b) have to receive to construction so as to promote the object of the statute, it is clear that when we interpret a penal provision like that contained in section 28(1)(b), the interpretation we should place upon it must accord with reason and justice and must be in accordance with the plain ordinary and rational meaning of the words contained in those provisions. So interpreted, I would not, in my opinion, be right in placing on section 28(1)(b) the construction for which the learned Government Pleader contends." (p. 133)

12. The Madras High Court in the case S. Santhosa Nadar v. First Addl. ITO [1962] 46 ITR 411 has gone to the extent that a voluntary return filed after the period of four years from the close of the assessment year is not a valid return and such a case should be regarded as if no return has been filed at all and it cannot be said in such a case that there has been a concealment of the particulars of income or deliberate furnishing of inaccurate particulars and section 28(1)(c) of the Income-tax Act, 1922 would not be applicable. The Madras High Court has held as follows :

"When we come to section 28(1)(c), it deals specifically with the concealment of 'particulars' of income or the deliberate furnishing of inaccurate 'particulars' of income. In the setting in which this subsection finds place it is impossible to construe section 28(1)(c) except as relating to a case where a return has been filed but from which return particulars of income have been omitted or any particulars have been deliberately inaccurately furnished. The use of the expression 'particulars of his income' and 'particulars of such income' would be wholly inapposite in a case where no return has at all been filed; such a case would clearly come within the scope of section 28(1)(a) alone."

13. This Court in CWT v. Yadu Raj Narain Singh [2006] 286 ITR 564 also taken the same view. It has held as follows :

"Thus applying the strict construction of penalty provisions contained in clause (1) of sub-section (c) of section 18 of the Act, we find that prior to the amendment in Explanation 3 by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1-4-1989 in a case where the person who has previously been assessed under the Act does not file any return in response to the notice or even where time for filing the return has expired has not filed any return there cannot be any concealment for which penalty provision can be imposed. In view of the foregoing discussions, we are of the considered opinion that in the present case the respondent assessee has not concealed the particulars of his income for which wealth no penalty under clause (1) of sub-section (c) of section 18 of the Act is exigible.

14. Therefore, section 271B of the Act is not attracted in a case where no account has been maintained and instead recourse under section 271A can be taken."

7. A similar view has been taken by the Hon'ble Gauhati High Court in case of Surajmal Parsuram Todi vs. CIT (supra) and held in para 6 as under:-

"6. We have gone through the provisions of sections 44AA, 44AB, 271A and 271B of the Act. Maintenance of accounts is envisaged under section 44AA and on failure to do so the assessee shall be guilty and liable to be penalised under section 271A. Even after maintenance of books of account the obligation of the assessee does not come to an end. He is required to do something more, i.e., by getting the books of account audited by an accountant. But when a person commits an offence by not maintaining the books of account as contemplated by section 44AA the offence is complete. After that there can be no possibility of any offence as contemplated by section 44AB and, therefore, in our opinion, the imposition of penalty under section 271B is erroneous. The Tribunal has overlooked this aspect of the matter. Of course, it is apparent from the records that the assessee failed to maintain the books of account as required under section 44AA and for that penalty is prescribed under section 271A. It is for the Tribunal to take action in accordance with law.

The Delhi Benches of the Tribunal in case of Nirmal Kumar Jain vs. ITO (supra) has held in paras 3 & 4 as under:-

"3. In so far as the penalty u/s 271B is concerned, it is noticed that the AO has recorded a categorical finding on page 2 of the assessment order that no books of account were maintained by the assessee. Under such circumstances, a question arises as to whether any pnalty can be imposed u/s 271B for not getting the books of account audited. The Hon'ble Gauhati High Court in SuraiMal Parasuram Todi vs. CIT (1996) 222 ITR 691 (Gau.), has held that where no books of account are maintained, penalty should be imposed for non- maintenance of books of account u/s 271A and no penalty can be imposed u/s 271B for violation of section 44AB requiring ITA Nos.6696 & 6645/Del/2014 audit of accounts. Similar view has been taken by the Hon'ble Allahabad High Court in CIT vs. Bisauli Tractors (2008) 299 ITR 219 (All). The Hon'ble Aliahabad High Court reiterated the similar view in CIT and Anr. Vs. S.K. Gupta and Co. (2010) 322 ITR 86 (All) by holding that requirement of getting the books of account audited can arise only where the books of account are maintained. In the absence of the maintenance of books of account, there Can be no penalty u/s 271B of the Act. In view of the foregoing legal position emanating from the judgment of the two Hon'ble High Courts, we are convinced that penalty u/s 271B ought not to have been levied because the assessee admittedly did not maintain any books of account as has been recorded in the assessment order itself. We, therefore, order for the deletion of penalty.

1. As regards the imposition of penalty u/s 271(1)(c) of the Act on the addition of Rs.7.5o lac, we find that this addition has resulted on estimation of income at 5% on estimated sales ITA Nos.6696 & 6645/De1/2014 of Rs.1.50 crore. Except that there is no other basis for imposition of penalty. The Hon'ble Delhi High Court in CIT vs. Aero Traders P. Ltd. (2010) 322 ITR 316 (Del) has upheld the view taken by the Tribunal in deleting penalty u/s 271(1)(c) which was imposed on the basis of addition made by the AO on estimated profit. Similar view has been taken in a series of judgments including the Hon'ble Punjab & Haryana High Court in CIT vs. Dhillon Rice Mills (2002) 256 ITR 447 (P&H). In this case also, the Hon'ble Punjab & Haryana High Court approved the view taken by the Tribunal in deleting the penalty u/s 271(1)(c) which was based on an estimate of income made by the AO. In view of the foregoing decisions, it is clear that the penalty so confirmed in the instant case cannot be sustained because it was imposed by the AO on the estimate of income made by him. We, therefore, order for the deletion of penalty."

Accordingly, in view of the binding precedent, we hold that once the assessee found to have not maintaining the regular books of account as contemplated by Section 44AA of the Act the default was completed and therefore, after the default of not maintaining the books of accounts there cannot be a further default for not getting the same audited as required U/s 44AB of the Act. Hence, the penalty of levy by the AO U/s 271B is

not justified and the same is deleted. In the result, the appeal filed by the assessee is allowed."

10. On being consistent of the view already taken by the Co-ordinate Bench, we are of the view that once the penalty is levied for non-maintenance of book of accounts, there cannot be further default for not getting the same audited as required u/s 44AB of the Act and therefore, the penalty levied u/s 271B is not justified and thus vacated.

In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 06/03/2023

Sd/-	Sd/-
(डा॰ एस. सीतालक्ष्मी)	(राठोड कमलेश जयन्तभाई)
(Dr. S. Seethalakshmi)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य / Judcial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 06/03/2023
*Ganesh Kr.
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Sh. Rakesh Kumar Agarwal, Jaipur
2. प्रत्यर्थी / The Respondent- Income Tax Officer, Ward 4(4), Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 330/JP/2022}

आदेशानुसार / By order

सहायक पंजीकार / Asst. Registrar