IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH (SMC), SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 288/Srt/2023 (Assessment Year 2016-17)
(Physical hearing)

Radheyshyam Bisani, B. 1102, Shyam Sangini Apartment, GD Goenka Canal Road, Vesu, Surat. Old Address: 204, Paras Market, Ring Road, Surat. **PAN No. AASPB 9157 F**	Vs.	I.T.O., Ward-1(2)(1), Surat.
Appellant/ assessee		Respondent/ revenue

Assessee represented by	Shri Suresh K. Kabra, CA
Department represented by	Shri Vinod Kumar, Sr. DR
Date of Institution of Appeal	26/04/2023
Date of hearing	25/05/2023
Date of pronouncement	25/05/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the assessee is directed against the order of learned National Faceless Appeal Centre, Delhi (NFAC)/Commissioner of Income Tax (Appeals) (in short, the ld. CIT(A)) dated 14/03/2023 for the Assessment Year (AY) 2016-17. The assessee has raised following grounds of appeal:

"1. The ld. CIT(A) has erred and was not just and proper on the facts of the case and in law in confirming the penalty u/s 271B of the Act.

2. Prayer

2.1 The imposition of penalty may kindly be deleted.

2.2 Personal hearing may be granted.

2.3 Any other relief that your honours may deem fir may be granted.

3. The assessee craves leave to add, amend, modify alter or delete any of the grounds at the time of hearing."

4. *The appellant craves leave to add, amend, alter, vary and/or withdraw any or all the above grounds of appeal."*

2. Rival submissions have been heard and record perused. The learned Authorised Representative (ld. AR) of the assessee submits that the assessee is an individual and while return of income has income from salary, house property and capital gain. The Assessing Officer while passing the assessment order, accepted the return of income. However, the Assessing Officer initiated penalty under Section 271B of the Income Tax Act, 1961 (in short, the Act) by taking a view that the share transaction of short term capital gain cannot be treated as short term investing activities and is 'business activities'. The Assessing Officer prepared/ worked out turnover of assessee on share trading of Rs. 1.79 crore and held that the turnover of assessee liable to be audited under Section 44AB of the Act. The Assessing Officer was of the view that as the assessee has not obtained the audit report, therefore penalty under Section 271B of the Act is attracted.

3. The Assessing Officer issued show cause notice before levying of penalty. The assessee filed his reply and contended that the turnover is not a business turnover and no penalty under Section 271B of the Act is attracted. The reply of assessee was not accepted by the Assessing Officer. The Assessing Officer levied penalty of Rs. 94,362/- vide order dated 26/02/2019 being ½ % pf turnover in order dated 26.02.2019. On appeal the ld. CIT(A) confirmed the penalty vide order dated 14.03.2013 by

upholding the action of Assessing Officer that profit earned by assessee in share trading relates to business activities.

4. The ld. AR of the assessee further submits that the assessee earned salary income of Rs. 1,25,000/-, the assessee has loss in income from house property of Rs. 2.00 lacs, the assessee earned Rs. 5,87,377/- in intraday trading in the share transaction. The assessee has loss in capital gain of Rs. 2,91,325/-. However, the assessee has income from other sources of Rs. 5,87,278/-. The ld. AR of the assessee by referring the provisions of Section 44AB of the Act submits that the audit of account is attracted when there is turnover in business. The income under the head of business and profession, the assessee has profit of Rs. 5,87,377/-, the total turnover of the assessee is only Rs. 10,13,908/-. Section 271B speaks to failure to get the account audited as required under Section 44AB of the Act, meaning thereby the audit is required in connection with business or profession and no any other turnover. To support his submission, the ld. AR of the assessee relied upon the decision of Hon'ble Rajasthan High Court in the case of Bajrang Oil Mills 163 Taxman 154. The ld. AR of the assessee submits that since the books of account of assessee was not liable to be audited as the turnover of assessee is less than the threshold limit of Section 44AB of the Act.

5. On the other hand, the learned Senior Departmental Representative (ld. Sr. DR) for the revenue supported the orders of lower authorities. The ld.

Sr.DR for the revenue submits that the Assessing Officer on the basis of ledger account, worked out the turnover of assesse on delivery based shares of Rs.1.79 crores. Thus, the books of account attracts the provisions of Section 44AB of the Act. The ld. CIT(A) considered all such submissions and objection raised by assessee which has been raised before the Bench.

6. I have considered the submissions of both the parties and have perused the orders of the lower authorities carefully. There is no dispute that while passing the assessment order, the Assessing Officer accepted the return of income without variation. However, the Assessing Officer initiated the penalty proceedings under Section 271B of the Act by taking a view that the turnover of assessee on delivery bases share transaction and intra-day transaction is more than the threshold limit for attracting audit under Section 44AB of the Act. The Assessing Officer after giving show cause notice to the assessee, levied penalty @ .5% on turnover and worked out the penalty of Rs. 94,362/-. The ld. CIT(A) confirmed the penalty by holding that the profit made by assessee relates to business activities involving dealing in shares. The transaction of assessee leading to business activities. The Hon'ble Rajasthan High Court in Bajrang Oil Mills (supra) while considering the question that if for the purpose of attracting of section 44AB, the receipts of an assessee by way of sale or trading business and receipts for doing the job work can be clubbed for the purpose of finding out whether the limit prescribed for attracting the

provisions of section 44AB is made out and that if the answer to question is in affirmative, whether holding of belief contrary by an assessee can be held to be *bona fide* so as to be considered as a reasonable cause in terms of section 273B, read with section 271B, of Income-tax Act. The High Court after considering the facts and submissions of the parties passed following order;

> **"23.** Having given our careful consideration to the rival submissions and looking to the object with which the provisions have been enacted, it appears that the maximum limit of Rs. 40 lakhs has been fixed in the case of every person who is carrying on business and whose total receipts exceed (*sic*) from his business activity, which come under the head 'Income from the profit and gains from the business', has to be viewed as one integrated whole and not independently. The assessment of a person is on the total income and not on the income derived from the different sources separately. The three expressions used by the legislation, the total "sales", "turnover" or "gross receipts" though not defined under the Act, in the ordinary sense refers to the volume of the business to which it relates and which is/are carried on by the assessee and in making assessment of profits and gains from the business whether such volume is a part of the business concerns trading in commodities or otherwise the business activities where the assessee has to indulge in incurring cost before receiving the amount in relation to that business or he is carrying on other business activities in which the cost factor is excluded by the assessee and what he is receiving as charges for the work done by him, like job work, where the raw material is provided by the other manufacturer, the assessee is merely to relate his receipts to labour charges or procuring cost incurred by him along with part of his profit. It is in that sense that business which is carried on by the assessee has to be taken into totality. It may be noticed that the "sales", "turnover" or "gross receipts" are not words of art used in relation to any individual transaction independently but has been used as "sales", "turnover" or "gross receipts". The expression 'total' qualifies all the other three expressions, *viz.,* 'sales', 'turnover, and

'gross receipts'. Total sales indicate the aggregate price of the sales of commodities carried out by the assessee as a trading business. Obviously, it would not include such transfer of immovable or movable property by way of investment. Similarly, where the assessee is not merely selling the movable commodities, but relating to other trading activities, *e.g.,* where assessee is a land developer and he is engaged in business of acquiring land developing it and selling houses or purchasing or is indulged in leasing business or is indulged in stock market so on and so forth, the expression "turnover" is made out to denote receipts from such activities. There may be third or residuary category which may not be termed properly a trading activity yet it is carrying on as business activity like job works for others, without himself being the manufacturer and selling such manufactured goods, or running a motor service garage, for the receipts of such business can aptly termed as receipts of firm. However, integral relation of receipts by a person from business, does indicate that it refers to revenue receipts only and do not include capital receipts and certainly not the receipts which are not relatable to business and may fall under the expression income to be subjected to tax as income from sources other than profits or gains from business, profession or vocation.

24. Having come to the conclusion that on true interpretations of section 44AB(*a*) of the Income-tax Act, 1961, the assessee in the present case was required to get his accounts audited as his gross receipts had exceeded Rs. 40 lakhs during the previous year relevant to assessment year 1994-95, we may next consider the question No. (*iii*) that has been framed as substantial question of law before considering question No. (*ii*).

25. The question No. (*iii*) as framed relates to interplay between the obligation of the assessee to get is accounts audited before the date specified under *Explanation* (*ii*) attached with section 44AB and the provisions of section 139(9) in the light of the penalty provisions under section 271B, read with section 273B.

26. Section 44AB requires every person falling in any of the categories (*a*), (*b*) and (*c*) to get his accounts of previous year audited by accountant before the specified date and furnish the report of such audit in the prescribed form

duly signed and verified by said accountant as may be prescribed along with return. The specific date has been stated to be 31st day of October of the assessment year.

27. Sub-section (9) of section 139 operates where a return has been submitted by the assessee and the Assessing Officer considers whether the return of income furnished by the assessee is defective. It requires the Assessing Officer where he finds that the return submitted by the assessee is defective, he must give him an opportunity to rectify the defect within a period of fifteen days from the date of such intimation or within such further period which, on an application made in this behalf, the Assessing Officer may, in his discretion, allow; and if the defect is not removed within the said period of fifteen days or within the extended period as may be allowed by the Assessing Officer, the return has to be treated invalid and the assessee is considered to have failed to furnish the return.

28. The provisions of section 139(9) is of singular importance from the point of view to allow a chance to assessee to make his return complete and specify the defects which are curable and for the purpose of curing that defect an opportunity has to be offered to the assessee before the consequences of such defects follow. In other words, the consequence of non-compliance of requirement of furnishing of valid return takes effect only after the assessee fails to remove the defects within time allowed until the assessee has opportunity to remove such defects, the consequence of such failure to comply with such defects cannot follow.

29. Clause (*bb*) of the *Explanation* attached with sub-section (9) reads as under :

> "*Explanation.*—For the purposes of this sub-section, a return of income shall be regarded as defective unless all the following conditions are fulfilled namely :—
>
> (*a*) and (*b*) ** ** **
>
> (*bb*)the return is accompanied by the report of the audit referred to in section 44AB, or, where the report has been furnished prior to the furnishing of the return, by a copy of such report together with proof of furnishing the report."

30. Clause (*d*) of *Explanation 2* is relevant which also refers to a return being defective, if it is not accompanied with the copies of audited profit and loss

account and balance sheet and auditor's report where the assessee maintains regular books of account and the account of assessee has been audited.

31. In both the provisions requirement of valid return is that it should be accompanied with auditor's report. Where the accounts required to be audited under section 44AB in terms of clause (*bb*) of the *Explanation* or where the account books of the assessee are regularly maintained and have been audited then too for a valid return the copy of audit report is required to be annexed to the return. Not annexing the required audit report with the return makes the return defective. In such events, it becomes the duty of the Assessing Officer to notify the assessee about the defect in the return submitted by him and requiring to remove those defects. The defects in respect of requirement of submitting audit report concerning the defect of procedural nature in submitting the return along with the audit report but this defect does not concern literally speaking where the accounts have not been audited as required by law. However, that fact can come to notice only later. At the time when the return shows that assessee's return discloses his turnover or gross receipts to be in excess of rupees forty lakhs, and it is not accompanied with an auditor's report, the Assessing Officer is under an obligation to issue notice calling upon the assessee to furnish the report within 15 days. The next step comes when either the assessee does not submit such report within the time allowed by Assessing Officer, or finally extended or he submits such report or he may submit an explanation for not submitting such report.

32. If no such report is submitted the question may not carry further as in that event the return itself becomes invalid and it becomes a case where it is to be deemed that the assessee has failed to submit any return which may lead to consequence of default in filing return.

33. However, the second and third contingency beset further question to by probed. If the accounts have duly been audited before 31st October of the assessment year, and such report is submitted after receipt of notice under section 139(9) the return in all literal sense and substantial sense has to be considered as valid return to be dealt with in accordance with provisions of

law.

34. However, in response to notice under section 139(9) the assessee submits an auditor's report in terms of section 44AB and also the audited accounts and balance sheet, but such audit has taken place after 31st October of the assessment year, the question arises whether furnishing of such auditor's report and audited accounts results in filing of valid return or the return remains invalid as if such belated audit is of no consequence?

35. Similarly if the assessee, instead of submitting such auditor's report as notified joins an issue about requirement of getting his accounts compulsorily audited at all, whether in such case, the return has to be ignored or opportunity to remove defects of such defective return is to be afforded after such objection is decided, his objection is overruled the Assessing Officer is required to give an opportunity to comply with the provisions in terms of his decision and remove the defect in the return submitted by the assessee, before proceeding further in the matter?

36. Apparently no such consequences have been provided in the Act for failure to get accounts audited by 31st October. In that case the further contingency comes to fore where assessee submits his return along with auditor's report as required under section 44AB but audit has been conducted after 31st October of the assessment year. Whether in such case return is to be treated invalid.

37. All in all the bulls eye is whether specified date fixed for getting accounts audited as per section 44AB is absolute in terms, so that failure to comply makes it incurable default and renders it impossible for the assessee to file a valid return at any time, even if default is held to be attributed to reasonable cause with the assessee or leaves a leeway for making compliance with the provision before regular assessment in pursuance of valid return could take place?

38. In case section 44AB applies and it is considered that conduct of audit by 31st October is absolute in terms and cannot be cured by later audit, in no case such assessee can file a valid return and he will always be deemed an assessee who has failed to file a return required of him and suffer consequence of such default in filing return also and also suffer the indication

of his income escaping assessment due to non-filing of return.

39. There does not appear any moral to accept such express proposition.

40. What is the effect of getting accounts audited in terms of section 44AB belatedly does not come within the province of section 139(9). If there is delay in getting the accounts audited in time but the accounts have been audited in fact after the due date, it may in the given circumstances, which may depend on facts and circumstances of each case constitute a reasonable cause for failure of the assessee to comply with the provisions of section 44AB so as to avoid levy of penalty by invoking section 273B which in terms provide that failure to comply with section 44AB for a reasonable cause, the penalty leviable for such (default) under section 271B may not be levied. However, in the present case sub-section (9) of section 139 cannot be invoked. This takes us to consider the last question whether non-compliance with the provisions of section 44AB in the present circum-stances can be attributed to a *bona fide* belief held by the assessee about the true interpretation of clause (*a*) of section 44AB which was ultimately found to be erroneous can be considered as a reasonable cause for the assessee's failure to get his accounts audited for the assessment year 1994-95 so as to attract the provisions of section 271B for absolving himself to levy of penalty.

41. Apparently when a return is filed unaccompanied with auditor's report as required under section 44AB it by itself does not make the person liable for any consequence in the first instance. But he is required to be called upon by the Assessing Officer, if he thinks that it is a case to which section 44AB is attracted to remove the defect for which a minimum 15 days time is given to the assessee. The period may further be extended on an application being made by the assessee in that regard. In provision like the one with which we are concerned, it is primarily of the procedural nature for smooth discharge of functions of the Assessing Officer and is not meant for conferring any benefit on the assessee in respect of liability arising under the taxing statute unlike the benefits conferred under section 32AB, sections 80HHC and 80HHD. Neither it creates additional liability in the case of a company with an object to fix minimum tax liability as in the case of an assessee which is a company and is governed by section 115J of the Act. Such provision cannot

be interpreted in a manner that a person should be held to be in perpetual default which he cannot rectify and result in defeating the basic purpose of the statute and to avoid or minimise the effect of such procedural non-compliance. Moreover it has also to be seen that while consequence of non-compliance with section 44AB invites penalty to be levied on the assessee after affording an opportunity to show cause against levy of such penalty and failure to comply with the requirement of section 44AB, if attributable to reasonable cause which may have resulted in default by the assessee then the penalty is also not imposable in terms of section 273B. In light of these provisions, if the requirement of removing the defect in return itself has the meaningful purpose to bring home the due levy of tax by securing a complete and valid return from the assessee by giving him an opportunity to remove the defects, which are primarily of the procedural nature, then if during the time afforded to the assessee, he produces the auditor's report or gets his accounts audited on receipt of notice after specified date under section 44AB which are subject of return and produces the certificate of auditor about the audited account, in our opinion, validates a return and that return is required to be processed by the Assessing Officer. Taking any other view would mean that where audit of account under section 44AB is attracted but such audit has not been completed prior to 31st October of the relevant assessment years, for any reason, would become an incurable default. Consequence will be that because requirement of law is that every return must be accompanied with the auditor's report where section 44AB is applicable, and unless such report is produced there cannot be any valid return, such an assessee cannot be in a position to submit a valid return at all which could be taken into consideration by the Assessing Officer for the purpose of effecting charge of tax, as such defect cannot be cured.

A construction (*sic*) leads to such a result will lead to absurd end.

42. We are, therefore, of the opinion that clear purpose of section 139(9) in the contract (*sic*) is that whenever from the return submitted by the assessee it appears to the ITO or Assessing Officer that accounts of the assessee are required to be audited under section 44AB and, therefore, the return ought to have been accompanied with the auditor's report, before rejecting the

return as invalid return, he is required to afford an opportunity as a matter of statutory obligation under section 139(9) of the Act to the assessee to submit the auditor's report. On receiving such notice, an assessee can avail such opportunity either by submitting the auditor's report if the accounts have already been audited and if the accounts have not been audited by then and he realises that the accounts are required to be audited then he can in the given time get his accounts audited and submit the accounts along with the report of the auditor in terms of clauses (*bb*) and (*d*) of section 139(9) of the Act of 1961 and on furnishing of such report with or without audited accounts as the case may be the return become valid will be required to be processed as such.

43. There may be yet another contingency where the assessee considers that he is not under an obligation to get his accounts audited under section 44AB. In such event, he may raise this objection before the Assessing Officer in response to notice under section 139(9). Where such objection is raised it will be for the Assessing Officer to decide such objection before taking any decision about validity of return. In case the Assessing Officer accepts the objection, that will be end of matter. The Assessing Officer in that case will proceed with assessment on the basis of return already submitted before him. However, in case the objection raised by assessee is overruled, the Assessing Officer will be required to then call upon the assessee to comply with the provisions of section 44AB within reasonable time to enable a valid return to come before him which could be processed for regular assessment.

The question of considering the issue of penalty cannot arise until that stage has arisen.

44. The question of penalty for non-compliance cannot be inquired into without reading the provisions of sections 271B and 273B as both are integrally enacted. While section 271B provides for consequence of non-compliance of section 44AB, section 273B provides defence or way by which the assessee can seek absolution from liability to penalty that arises under section 271B.

45. This brings us to second question which we have noticed to above, assuming it for the sake of arguments that sub-section (9) of section 139 is

not attracted when any accounts have not been audited by 31st of October of the relevant assessment year as required under section 44AB and the accounts are audited thereafter or not audited by the assessee on its own evaluation. It becomes relevant to consider what is the effect of getting accounts audited in terms of section 44AB belatedly or of raising an issue by the assessee, when he is called upon to remove the defects in return under section 139(9) for not filing the auditor's report under section 44AB along with the return, or in consequences of proceedings under section 271B, that under the law he was not required to get his accounts audited.

46. Apparently, in terms of section 273B, the Assessing Officer will be required to consider whether not getting the accounts audited by 31st October of the relevant assessment year was due to any reasonable cause which the assessee may put forward as defence for the failure to comply with the aforesaid provisions. In either case where the assessee raises an issue that his case does not fall within the purview of section 44AB before penalty could be levied, the Assessing Officer would be under an obligation to decide such objection raised by the assessee. If the objection is sustained obviously, no occasion would arise either of filing of auditor's report along with the return so as to complete the defective return on such receipt of the notice under section 139(9) or to suffer penalty under section 271B. In case where the Assessing Officer overrules the assessee's objection and holds that the assessee is/was liable to get his accounts audited in terms of section 44AB the question is always be germane to consider whether such objection raised by assessee as to his obligation under section 44AB was frivolous or a plausible stand, before arriving at conclusion whether in such case penalty could be levied.

47. Section 273B clearly postulates where the assessee furnishes a reasonable cause for his failure to comply with the provisions which invite penalty under section 271B along with certain other provisions, with which we are not presently concerned, no penalty is leviable.

48. As a matter of law, it cannot be said that in all cases where ultimately the assessee's objection as to his liability to get his accounts audited under section 44AB or for any matter non-compliance of any provision, his

objections are overruled, his defects or reason for non-compliance cannot be considered to be not *bona fide.* The fact that ultimately on the analysis of the provisions the successive authorities or the Court may come to the conclusion that the objections raised by the assessee about the requirement to comply with the provisions of the Act are not sustainable, does not make objection raised by the assessee to be not *bona fide* or groundless. The fact that the assessee raises certain questions about interpretation of the statute which needs interpretorial (*sic*-interpretational) exercise, *prima facie* supports the assessee in that the objection raised by him is *bona fide* and he seeks the decision on its merit. The fact that ultimately the Court comes to the conclusion against the assessee is no reflection in all cases that objection raised by him were frivolous that answer to objection raised by assessee was self-evident, as appears to have been assumed by the Tribunal.

49. We are, therefore, of the opinion that the Tribunal was not justified in rejecting the assessee's contention that, even if it is ultimately held that the assessee was under an obligation to get his accounts audited under section 44AB, he was under *bona fide* belief about the true interpretation of the provisions constitutes reasonable cause for not complying with the provisions of section 44AB without considering the matter in its totality. In the manner in which the defence of the assessee has been rejected summarily by holding that since the Tribunal found no merit against the assessee, the answer is self-evident about the interpretation of section 44AB and the default cannot be said to be *bona fide*.

50. It needs to be reminded that when a matter is brought in appeal before the Court, such appeal lies only in respect of substantial question of law to be framed at the time of admission, when no substantial question of law arises for considering the appeal, it cannot be entertained. For that matter under the earlier provisions also the questions of law only could be referred to this Court for its opinion by way of reference. In this connection, the position is also clear from the decisions of the Supreme Court that any question answer to which is self-evident is not a question of law which is required to be referred to this Court or the question which is self-evident or governed cannot be said to be a substantial question of law which need

consideration in an appeal under section 260A.

51. The fact that the Tribunal has to take up the interpretorial (*sic*-interpretational) exercise by referring to the provisions and analyzing the different phraseology used in section 44AB(*a*) before reaching its conclusion at least gives a clue that the interpretorial (*sic*-interpretational) exercise in respect of objection raised by the assessee was not a self-evident exercise but needed a rational and reasoned approach keeping in view the content, context and object of provision itself, in conjunction with other provisions of the Act having a relevant bearing of concerned provision.

52. The fact that this Court while considering the admission of the appeal has found that interpretation of section 44AB is a substantial question of law requiring consideration by this Court *prima facie* suggests that the interpretation of section 44AB was not self-evident and needed an examination of provisions of section 44AB and different phraseology used with the aid of interpretorial (*sic*) tools in true scope of the provision.

53. If that be so, in our opinion, it cannot be said that the assessee was not *bona fide* in not getting his accounts audited for the assessment year 1994-95 because he has genuine doubts about his liability to do so which he raised when he was called upon to answer the non-compliance. The question about the interpretation of section 44AB was required to be considered by the revenue authorities before finding the assessee to be in breach of such provision and which has in fact been considered by the revenue authorities albeit ultimate answer is found against the assessee. Moreover, we find from the facts, and about which there is no dispute that for the subsequent years and thereafter when the assessee had his total turnover from its business of manufacture was more than the prescribed limit he had been subjecting his accounts to audit and is complying with the provisions of section 44AB regularly.

54. We are further of the opinion that failure to comply with such procedural provisions with which we are concerned, under a *bona fide* belief that the assessee is not required to act in a particular manner under the statute and which does not affect its rights and obligation otherwise arising under the statute; nor by raising of objection, he obtains any advantage to which he is

not otherwise entitled to; or where on fulfilment of such requirement, the assessee becomes entitled to certain benefits of statute which requires strict compliance with requirement of law in the manner prescribed breach remains a venial and technical breach for which the penalty is not leviable merely because if it is lawful to do so.

55. In terms of law laid down by the Supreme Court, the penalty could not be levied for every venial and technical breach of procedural laws. In this connection, it may be apposite to draw attention to decision of Supreme Court in *Hindustan Steel Ltd.* v. *State of Orissa* [1972] 83 ITR 26 where it was laid down that even if minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act or where the breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed by the statute. In our opinion, the aforesaid ratio in *Hindustan Steel Ltd.'s* case (*supra*) fully governs the facts of the present case and, therefore, the assessee was entitled to absolution from the liability to penalty under section 271B for non-compliance of section 44AB. Failure to comply with the provisions of section 44AB can be directly related to a *bona fide* belief by the assessee that he was not liable to get his accounts audited under section 44AB looking to the different nature of receipts by him from the different activities.

56. For the same reason, raising a contest by taking a plausible stand as true construction of statute which may ultimately be not found correct in the given circumstances constitutes a reasonable cause due to which the assessee can be said to have failed to comply with requirement of section 44AB by not getting his accounts audited for the relevant assessment year. If that were not so, it will be deterrent to a taxpayer even to raise any plausible defence to contest his liabilities and obligations within the framework of statute itself. It will be altruist statement, that where the assessee succeeds in stand taken by him on construction of statute, no case will survive for levy of penalty. It is only where his contention fails on merit, and he is found in breach of a given provisions ultimately, question of consequence befalling for such non-compliance arises. In that view of the matter, the opportunity could have been

given to the assessee to remove the defects in return by complying with the requirement of law so that his return became complete. On the return being complete, no penalty could otherwise have been levied, as no breach would survive. In other case where the compliance with section 44AB becomes redundant, due to completion of assessment, the question as to levy of penalty has to be considered in the light of provisions of statute, in the present case section 271B, read with section 273B.

57. It may also be noticed that for the reason that the accounts are not audited where section 44AB is attracted it does not affect the proper computation of income in terms of provisions of Act of 1961 nor does it affect any claim to any deduction by the assessee under any provisions of the Act. In such event the breach remains a technical breach of the procedural requirement. The conduct of the assessee cannot be said to be lacking in *bona fide* or of gross negligence when he raised issue about the interpretation of a provision which had used multiple expressions, construction of which cannot be said to be self-evident but needed interpretorial (*sic*-interpretational) exercise. Because ultimately on construction of statute the stand taken by the assessee is found to be wrong, it does not become a case of 'self-evident' interpretation, impinging on conduct of assessee. Even in the absence of provisions like section 273B, which aptly governs the present case, the ratio of Supreme Court decision in *Hindustan Steel Ltd.'s* case (*supra*), keeping in view the object of provisions of mischief it was intended to suppress.

58. Therefore, levy of penalty in the aforesaid circumstances under section 271B for non-compliance of section 44AB regarding assessment year 1994-95 cannot be sustained.

59. As a result, the appeal is allowed. The order of the Tribunal as well as the order of the CIT(A) and Assessing Officer levying penalty against the assessee under section 27IB are set aside. There shall be no orders as to costs and the penalty is quashed."

7. In view of the afforesaid factual and legal discussions, I find that the heard under which the income is assessed and taxed not being the head of profit

and gains of business or profession, and the turnover of the assessee for the purpose of capital gain, short term or long term shall not form part of the turnover. Therefore, the assessee was not required to get his books audited. Hence, no penalty can be levied on the assessee. Hence, the grounds of appeal raised by the assessee are allowed.

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

Order announced in open court on 25th May, 2023.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated: 25/05/2023
**Ranjan*
Copy to:
1. Assessee –
2. Revenue –
3. CIT
4. DR
5. Guard File

By order

Sr. Private Secretary, ITAT, Surat