

**IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'A' AT KOLKATA
[BEFORE SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER &
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER]**

I.T.A. No. 484/Kol/2020

Assessment Year: 2015-16

Anju Chamaria.....**Appellant**

*C/o. S.N. Ghosh & Associates, Advocates,
"SEBEN BROTHERS LODGE" P.O. Buroshibatala,
P.S. Chinsurah, Dist. Hooghly-712105
[PAN: AEEPC6262Q]*

Vs

ITO, Ward-43(1), Kolkata..... **Respondent**

Appearances by:

Shri Somnath Ghosh, Advocate appearing on behalf of the Assessee

Smt. Ranu Biswas, ACIT, appearing on behalf of the Revenue:

Date of concluding the hearing : March 15, 2022

Date of pronouncing the order : April 22, 2022

ORDER

PER SONIOY SARMA, JM

This appeal filed by the assessee for A.Y. 2015-16 against the order dated 28.07.2020 passed by the Ld. CIT(A) – 13, Kolkata. The assessee in this appeal has taken the following grounds:

1. FOR THAT the Ld. Commissioner of Income Tax (Appeals)-13, Kolkata failed to appreciate that none of the conditions precedent required to be satisfied for the assumption of jurisdiction u/s. 27 IB of the Income Tax Act, 1961 existed and/or have been complied with and/or fulfilled in the instant case by the Ld. Income Tax Officer, Ward 43(1), Kolkata and his specious action in upholding the impugned order imposing penalty in the sum of Rs. 1,50,000/- alleging purported infringement to the provisions of s. 44AB of the Income Tax Act, 1961 is therefore *ab initio void, ultra vires and ex-facie null in law.*

2. FOR THAT on a true and proper interpretation of the scope of the provisions of s. 27IB of the Income Tax Act, 1961, the Ld. Commissioner of Income Tax (Appeals)-13, Kolkata was absolutely in error in upholding the impugned order imposing penalty in the sum of Rs. 1,50,000/- passed by the Ld. Income Tax Officer, Ward 43(1), Kolkata and his purported finding *de hors* any violation thereof is wholly arbitrary, unreasonable and perverse.

3. FOR THAT the Ld. Commissioner of Income Tax (Appeals)-13, Kolkata erred in sustaining the impugned order imposing penalty u/s. 27 IB of the Act passed without considering explanation tendered by the appellant in light of the provision of s. 273B of the Income Tax Act, 1961 by the Ld. Income Tax Officer, Ward 43(1), Kolkata and failing to controvert her bonafides in the facts of the instant case and the impugned findings considering extraneous parameters not germane to the issue is therefore, unfounded, unjustified and untenable hi law.

4. For THAT the specious approach of the Ld. Commissioner of Income Tax (Appeals)-13, Kolkata of considering improper facts, failing to consider proper position in law and thus coming to an erroneous finding in confirming the impugned order imposing penalty u/s 271B of the Income Tax Act, 1961 in the sum of Rs. 1,50,000/- passed by the Ld. Income Tax Officer, ward-43(1), Kolkata is wholly illegal, illegitimate and infirm in law.”

2. The brief facts of the case are that the assessee filed its return of income at Rs. 6,64,660/- and it was selected for compulsory limited scrutiny assessment (CASS) and notice u/s 143(2) of the Act was issued to the assessee. Subsequently notice u/s 142(1) of Income Tax was also issued on the assessee, calling various details/documents in support of the accounts furnished along with the return. In response to the same, AR of the assessee appeared on different dates and filed various details and, documents in support of the return. Further the AR submitted the hard copy of return, balance sheet, income statement, profits & loss A/c, loan confirmation, bank statements, ledger of Angel Broking Pvt. Ltd., the broker of the assessee and derivative trading script wise details which were perused and kept on record. The transactions of shares were cross verified on test check basis with the transaction records furnished by the broker of the assessee in response to notice sent u/s 133(6) of the Income Tax Act. However, the AO found during the assessment proceeding that the assessee failed to comply with

provisions as laid down in section 44AB of the Act as the assessee was involved in delivery based as well as non-delivery based trading of shares and securities and thus had speculative income/loss non-speculative business income/loss as per the provisions laid down in section 43(5) of the I.T. Act and therefore, provisions of section 44AB are applicable to the assessee. Accordingly a show cause notice dated 27.09.2017 was issued upon the assessee stating that as to why penal provisions of section 271B should not be involved in her case, but AO was not getting any response from the assessee. Accordingly penalty proceedings u/s 271B of the Income Tax Act, 1961 was initiated upon the assessee separately.

3. That during the penalty proceeding the assessee filed written submissions, submitting therein that he was ignorant of the law about applicability of section 44AB of the I.T. Act. The AO after considering and rejecting the contentions of the assessee imposed a penalty amounting to Rs. 1,50,000/- upon the assessee on 08.06.2018.

4. Being aggrieved by the order dated 08.06.2018, the assessee preferred an appeal before the CIT(A) -3, Kolkata which was by the Ld. CIT(A) observing as under:

5.2 I have carefully perused the penalty order, the observations of the Assessing Officer and the contentions and arguments of the appellant.

Reasonable cause, as applied to human action is that which would constrain a person of average intelligence and ordinary prudence. The word "reasonable" can be described as rational according to the dictates of the reason and is not excessive or immoderate.

5.3 It is observed that the appellant has been engaged in the trading in derivative contracts in large volumes. The appellant has transacted in derivatives amounting to Rs. 965.35 crores. Thus, the appellant cannot be

by any stretch of imagination be termed as an ordinary layperson which was ignorant of law. It has to be appreciated that dealing in derivatives is a specialized professional activity and thus, the appellant cannot be termed as an ordinary person who is ignorant of law.

Thus, the plea of the appellant of being ignorant of law is bereft of merit and is not covered under section 273B of the Income Tax Act which provides that no penalty shall be imposed if there was reasonable cause for the failure to get the accounts audited.

5.4 Keeping in view the above mentioned factual matrix, the appellant has not been able to prove that there was a reasonable cause in her case.

Therefore, the penalty of Rs. 1,50,000/- imposed u/s 271B of the Income Tax Act, 1961 by the Assessing Officer is confirmed and the ground of the appeal of the appellant is dismissed.”

5. At the time of hearing the Ld. AR placed before us in Paper Book containing the copy of following documents:

“Description of Documents	Page Nos
1. Facts of the Case	1
2. Copy of written submissions filed by the appellant before Ld. C.I.T.(A)	8
3. Copy of rejoinder to notice u/s. 271B of the Act filed before A.O.	12
4. Copy of notice dated 07-12-2017 issued u/s. 271B of the Act by A.O.	14
5. Copy of assessment order u/s. 143(3) of the Act framed by A.O.	15
6. Copy of rejoinder to notice dated 27-09-2017 filed before A.O.	20
7. Copy of notice dated 27-09-2017 issued by A.O.	21
8. Copy of rejoinder to notice filed before A.O.	22
9. Copy of computation of loss of Future & Options filed before A.O.	23
10. Copy of D-mat statement of the appellant filed before A.O.	25
11. Copy of rejoinder to notice u/s. 143(2) of the Act filed before A.O.	40
12. Copy of Ledger account of Angel Broking Pvt. Ltd filed before A.O.	41
13. Copy of details of receipt & payment made by the appellant filed before A.O.	45
14. Copy of statement of Bank account of the appellant filed before A.O.	46
15. Copy of notice dated 01-08-2016 issued u/s. 143(2) of the Act by A.O.	50
16. Copy of return u/s. 139(4) of the Act filed by the appellant before A.O.	51
17. Copy of computation of total income of the appellant filed before A.O.	67
18. Copy of financial statement of the appellant filed before A.O.	71”

6. He submits that the assessee has disclosed loss against the future and options as a speculative loss, however it may not be taken as business transactions. Since no physical delivery is taken or given, the transactions of buying and selling of commodities is to be considered as

speculative transaction and the said buying and selling of shares/commodities does not constitute turnover for the purpose of getting the account audited by the assessee and, therefore, failure on the part of assessee to get the account audited would not lead to levy of penalty u/s 271B of the Act. Moreover, the assessee was under bonafide impression that trading in commodities being speculative activity would not constitute turnover for the purpose of section 44AB of the Income Tax Act. Besides that department could not bring on record any evidence to point out that the income returned by the assessee was not accepted in the assessment nor any suggestion that the books of account maintained by the assessee were in any way fabricated or deficient and the default committed by the assessee is of a technical nature. Further, the AO was not handicapped for want of tax audit report while making the assessment for the assessment year under appeal. Hence the penalty proceeding u/s 271B could not be levied. The Ld. AR relied upon the following decisions in defence of these arguments:

- i. ITA 1594 to 1598/Kol/2004, The Kalna Town Credit Co-operative Bank Ltd.*
- ii. ITA 3215/Chny/2019, Shri Dwaraknath Krishnaram*
- iii. ITA 441/Mum/2011*
- iv. Banwari Sitaram Pasari HUF vs ACIT (2013) 140 ITD 320 (PN)"*

7. On the other hand, Ld. DR appearing on behalf of the revenue relied on the orders of the Ld. CIT(A).

8. After hearing the rival submission and on careful perusal of material available on record, we find that the AO imposed penalty for not getting the accounts audited as according to the AO turnover exceeds the threshold limit as prescribed u/s 44AB of the Act. We note that the assessee is doing non-delivery based transactions and in such

case the turnover has to be determined on the basis of the net of sales and purchase of shares. Further the default committed by the assessee is of technical nature and the AO was not handicapped for want of tax audit report while making assessment under appeal.

9. The case of the assessee is squarely covered by the decision of coordinate bench of the Tribunal in the case of The Kalna Town Credit Co-operative Bank Ltd. vs ITO operative part is reproduced as under:

“5. We have heard the rival submissions and perused the orders of the authorities below.

We find that the explanation of the assessee for not filing the Tax Audit Report within the prescribed due date was that the Manager who is generally responsible for looking after the income-tax matters of the bank was under suspension since 5.5.1997 and there was no alternative arrangement in his place till June, 2000. From the order of the Ld. C.I.T.(A) we also find that the assessee-bank was approaching for appointment of Manager, but the Cooperative Service Commission, through whom only the appointment can be made, could appoint the Manager on 30.6.2000 only. We, therefore, find force in the contention of the learned counsel for the assessee that due to absence of the concerned and responsible official of the bank, i.e. Manager, the other subordinate staff could not be expected to be so conversant about the complicity and other matters in regard to preparing and filing the return of income. Basically the assessee is a co-operative society running its banking business in the village and dealing with the public money. The status of the assessee is not that of an individual. Auditor is appointed by the Government on whom the assessee has no control. It is not disputed that the final audit has been completed in time. It is also not the case of the department that there was manipulation. The entire income of the assessee-bank is non-taxable and the department could not bring on record any evidence to point out that the incomes returned by the assessee were not accepted in the assessments. In this connection, we may refer to the order of the Kolkata Bench “B” of the Tribunal in I.T.O., Ward-37(3), Kolkata vs. M/s. Star Hide Co. [I.T.A.No. 1626 (Kol)/2002, dated 11.2.2004] to hold that where the income returned by the assessee has been accepted by the department and there is no suggestion that the books of account maintained by the assessee were in any way fabricated or suffered from certain defects or deficiency and taking into consideration the fact that the entire income of the assessee-bank is non-taxable meaning thereby that the assessee had no intention to defraud the revenue, the default committed by the assessee is of

a technical or venial nature. Further, the A.O. was not handicapped for want of the Tax Audit Report while making the assessments for each of the assessment years under appeal. He was not prevented from verifying or making enquiries into the accounts of the assessee as the basis of the Tax Audit Report. Thus the ratio of the decision of the Tribunal in M/s. Star Hide Co. (supra) is very much applicable in the case of the present assessee and we are of the considered view that the default committed by the assessee is of a technical or venial nature and the penalty imposed is liable to be deleted.”

10. Keeping in view all the facts and circumstances of the case and relying on the decision of the coordinate bench of the Tribunal in the case of The Kalna Town Credit Cooperative Bank Ltd. (supra), we are of the view that the default committed by the assessee is a technical or venial nature. Beside that the assessment was selected for limited scrutiny to verify the derivative (future) transaction and securities transactions. The case of the assessee is squarely covered by the decision of coordinate bench of the Tribunal in the case of Shri Dwaraknath Krishnaram vs ITO, the operative part whereof is as under:

“6. In the present case, it is clear from the assessment order which shows that the assessment was selected for limited scrutiny to verify the derivatives, (Futures Transactions and Securities Transactions). The assessee has disclosed the loss against the Futures and Options as a speculative loss. However, the Assessing Officer treated the same as a business transaction. A perusal of the decision of the Co-ordinate Bench of this Tribunal, Pune Benches in the case of Banwari Sitaram Pasari [HUF] vs. Assistant Commission of Income Tax shows that the Co-ordinate Bench has held that when no physical delivery is taken or given, the transaction of buying and selling of commodities is to be considered as speculative transaction and consequently there is no turnover constituted for the purpose of the assessee to get his accounts audited u/s.44AB. As the facts in this assessee's case are identical, applying the principles laid down by the Co-ordinate Bench of this Tribunal in the case of Banwari Sitaram Pasari [HUF] vs Assistant Commission of Income Tax, it is held that the assessee's accounts is not liable for audit u/s 44AB. Consequently, the penalty levied u/s.271B of the Income

Tax Act, 1961 as levied by the Assessing Officer and as confirmed by the learned Commissioner of Income Tax (Appeals) stands deleted”

11. Considering the aforesaid facts and the judicial decisions, we are of the view that there is no requirement for getting the accounts audited u/s 44AB of the Act as the turnover is less than the prescribed limit. Accordingly, we set aside the order of Ld. CIT(A) and direct the AO to delete the penalty.

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

Order Pronounced in the Open Court on 22nd April, 2022.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(SONJOY SARMA)
JUDICIAL MEMBER

Dated: 22/04/2022

By order,

Assistant Registrar
ITAT Kolkata Benches, Kolkata