

**IN THE INCOME TAX APPELLATE TRIBUNAL,
" A " BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms. MADHUMITA ROY, JUDICIAL MEMBER
ITA No. 41/AHD/2019
Asstt. Year: 2012-2013**

M/s Gurukrupa Developers, Mahavir Complex, Opp. FCI Godown, Sapana Road, Godhra-389001. PAN: AAIFG8293P	Vs.	D.C.I.T., Central Circle-1, Vadodara.
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(Applicant)		(Respondent)
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Assessee by :	Shri Ketan H. Shah, with Shri Aman K. Shah, A.R
Revenue by :	Shri Deelip Kumar, Sr. DR

Date of Hearing : 15/06/2022
Date of Pronouncement: 22/06/2022

ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals)-12, Ahmedabad, dated 15/11/2018 arising in the matter of penalty order passed under s. 271B of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2012-2013.

2. The only effective issue raised by the assessee is that the learned CIT (A) erred in confirming the penalty levied by the AO under section 271B of the Act for not getting the accounts audited under section 44AB of the Act.

3. The facts in brief are that the assessee in the present case is a partnership firm and engaged in the business of construction of residential as well as commercial complex. There was the search under section 132 of the Act dated 02-07-2012 carried out at the "Dhanjimama group" and the assessee was also part of the search. During search at the premises of Dhanjimama Group documents belonging to the assessee were found. Accordingly, a notice under section 153C of the Act was issued upon the assessee. The assessee in response to such shown cause notice furnished the return of income declaring an additional income of ₹ 40,18,357/- which was accepted by the AO in the order framed under section 143(3) read with section 153C read with section 153A of the Act. However, the AO found that the assessee in the year under consideration has achieved a turnover of ₹ 1,03,11,896/- and therefore it was liable for getting the accounts audited under section 44 AB of the Act. But the assessee failed to do so. Accordingly, the AO initiated the penalty proceedings under section 271B of the Act, proposing to levy the penalty by issuing show cause notice to the assessee.

4. The assessee in response to such show cause notice vide letter dated 05-08-2015 submitted that its books of account and other supporting materials were impounded by the search team. Therefore, it was practically impossible to prepare the books of accounts and get them audited. As such, the return of income was filed on provisional basis. However, during the assessment proceeding all the material facts were available before the AO and no defect was pointed out in such details. The assessee also submitted if the assessing authority felt the necessity to get books audited then he has the option to refer the case for the special audit under section 142(2A) of the Act, but he accepted the books/ necessary details without pointing out any defect therein. Therefore, the procedural laps committed

for the reason beyond the control, the assessee cannot be penalized. The assessee in its support also relied upon the various case laws.

4.1 However the AO disregarded the submission made by the assessee and levied the penalty under section 271B of Act for ₹ 51,559/- being ½% of the turnover by holding that it was the duty of the assessee to get its books of account audited under section 44AB which has not been complied with.

5. Aggrieved assessee preferred an appeal to the learned CIT (A) who has confirmed the order of the AO by observing as under:

5.2 There is no dispute that by virtue of gross receipt during the F.Y. 2011-12 (relevant to A.Y. 2012-13) the appellant was required to maintain the books of accounts and also required to get the accounts audited u/s 44AB before the specified date and furnish by that day the report of such audit in the prescribed form duly signed and verified by such accountant. The appellant is therefore prima facie liable for penalty u/s 271B for failure to comply to section 44AB. But the search having been conducted on 03/07/2012, the Department may have seized the books of accounts and the documents for the small period from 01/04/2011 to 31/03/2012 of the financial year 2011-12 but as the books of accounts are maintained in the computers also and the Department allows the searched party to obtain the photocopies of the seized materials, I do not find that the search by itself could prevent the appellant from maintaining the books of accounts for FY 2011-12 and completing them and thus getting the books of accounts audited impossible by the specified date. To me the "conduct of search" in the appellant's case does not appear to be a "reasonable cause" as a defence provided u/s 273B for the failure of section 44AB. In Kalakrithi Vs ITO (2002) 253 ITR 754 (Mad) the High Court has held that the words "reasonable cause" in section 273B must necessarily have a relation to the failure on the part of the assessee to comply with the requirement of the law which he failed to comply with and that the cause shown must be for the whole of the period of the delay and not merely for a part thereof and that in case where the cause shown is such as to explain a part of the delay, or the cause shown is only to mitigate the gravity of the non compliance, such a cause cannot be extrapolated and treated as being a good cause for the whole of the period of delay in its entirety. The assessee fails to meet the test laid down in the cited case law. I also find that the appellant has not produced any judgment where the conduct of search and/or seizure of books of accounts or document have been held as "reasonable cause" for failure of section 44AB for the purpose of not imposing penalty u/s 271B.

5.3 I also note that the various case laws relied upon by the appellant basically lay down that when a person commits an offence of not maintaining the books of accounts as per section 44AA, there is no possibility of any offence of violating section 44AB. In this context it is noted that the appellant himself has admitted that the return of income was filed based on a provisional annual accounts and I see no reason if the provisional books of accounts can be prepared and return of income can be prepared and filed, how the accounts cannot be got audited u/s 44AB. Though the returned income has been accepted by the AO, it only means that the AO did not have material/information with him to reject the returned income and it cannot be argued that the AO should have invoked section 142(2A). Accepting the returned income by the AO cannot reduce the provisions of section 44AB to a nullity and a formality in futile. As the search was early in the financial year, I hold that the appellant has

failed to comply to the provisions of section 44AB without there being reasonable cause and is therefore liable for penalty u/s 271B. I find no reason to interfere with the penalty order for the AY 2012-13.

6. Being aggrieved by the order of the learned CIT-A, the assessee is in appeal before us.

7. The learned AR before us inter-alia submitted that the books and other supporting documents of the assessee were impounded by the search team. Therefore, the assessee could not maintain proper books of accounts due to the reason beyond its control. When proper books of account were not available, the question of getting the same audited in prescribed time limit does not arise. Therefore, there cannot be any penalty under section 271B of the Act for not maintaining the books of accounts.

8. On the other hand, the learned DR vehemently supported the order of the authorities below.

9. We have heard both the parties and perused the materials available on record. Admittedly the books and other material were not available with the assessee due to seizure made by the search team in the search proceeding dated 2nd July 2012. Therefore, the assessee in our considered view at the most can be held as defaulter for not maintaining the books of accounts which attracts the penalty under the provisions of section 271A of the Act. But the authorities below have not initiated any penalty under section 271A of the Act for not maintaining the books of accounts.

9.1 The question of the audit arises when the assessee maintains the books of accounts. Thus, in the absence of books of accounts, the question of getting them audited under the provisions of section 44 AB of the Act does not arise. The right course of action available to the Revenue was to initiate the penalty under section 271A of the Act but the same has not been done so. In holding so, we find support

and guidance from the judgment of Hon'ble Allahabad High Court in the case of CIT versus Bisauli Tractors reported in 299 ITR 219 wherein it was held as under:

"7. It may be mentioned here that separate penalty has been provided for non-maintenance of accounts, i.e., under section 271A of the Act and for not getting the accounts audited and not furnishing the audit report i.e., under section 271B of the Act. In the present case, the Assessing Officer did not impose penalty under section 271A of the Act and instead proceeded to impose penalty under section 271B of the Act. If a person has not maintained the accounts book or any accounts the question of its audit does not arise. In such an event the imposition of penalty under the provision contained in section 271A of the Act for the alleged non-compliance of section 44AA of the Act may arise but the provisions of section 44AB of the Act does not get violated in case where the accounts have not been maintained at all and, therefore, penal provisions of section 271B of the Act would not apply."

9.2 In view of the above, we are of the opinion that the assessee cannot be penalized for not getting the accounts audited as the assessee did not maintain any books of accounts and there was no penalty initiated by the AO against the assessee on account of non-maintenance of the books of accounts under section 271A of the Act.

9.3 Without prejudice to the above we also note the assessee was prevented by the sufficient cause which was beyond the control of the assessee. Therefore, the provision of section 273B also comes into play which reads as under:

Penalty not to be imposed in certain cases.

273B. *Notwithstanding anything contained in the provisions of clause (b) of sub-section (1) of section 271, section 271A, section 271AA, section 271B, section 271BA, section 271BB, section 271C, section 271CA, section 271D, section 271E, section 271F, section 271FA, ⁸⁶⁻⁸⁷[section 271FAB,] section 271FB, section 271G, ⁸⁶⁻⁸⁷[section 271GA, ⁸⁸[section 271GB,] section 271H, ⁸⁹[section 271-I,] clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA or section 272B or sub-section (1) or sub-section (1A) of section 272BB or sub-section (1) of section 272BBB or clause (b) of sub-section (1) or clause (b) or clause (c) of sub-section (2) of section 273, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure.*

9.4 In the case on hand, there was the search carried out and the relevant books/ materials were impounded by the search team which prevented the assessee to get them audited within the time. However all the materials were available before the AO in the course of assessment proceeding and the AO based such material accepted the rerun income of the assessee. Therefore, in our considered view the assessee in the given fact and circumstances cannot be held guilty for the procedural

laps as there was sufficient cause for non-compliance as provided under the provisions of section 273B of the Act. Accordingly we set aside the order of the learned CIT (A) and direct the AO to delete the penalty levied by him under section 271B of the Act. Hence the ground of appeal of the assessee is allowed.

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

Order pronounced in the Court on 22/06/2022 at Ahmedabad.

**Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated **(True Copy)**
22/06/2022
Manish