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TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "SMC" JAIPUR

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BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

vk;dj viyh l-a@ITA. No. 230/JP/2023
fu/kZkj.k o"kZ@Assessment Years : 2017-18

Subhash Chand Saini Village-Maid, Tehsil-Virat Nagar Jaipur	cuke Vs.	ITO, Ward, Behror
LFkk;h y[s kk l-a@thvkbvZ kj l-a@PAN/GIR No.: CEFPS 7350 G		
vihykFkhZ@Appellant		izR;FkhZ@Respondent

fu/kZkfjrh dh vkjs l@s Assessee by : Shri P. K. Garg (C.A.)
jktLo dh vkjs ls@ Revenue by : Smt Monisha Choudhary (Addl. CIT)

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lquokbZ dh rkjh[k@ Date of Hearing : 17/08/2023
mn?kk"sk.kk dh rkjh[k@Date of Pronouncement :
12/09/2023 vkn's k@ ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by the assessee aggrieved from the order of the National Faceless Appeal Centre (NFAC), Delhi [Here in after referred as (NFAC)] for the assessment year 2017-18 dated 13.02.2023, which in turn arises from the order passed by the Assessing Officer passed under Section 271B of the Income tax Act, 1961 (in short 'the Act') dated 22.12.2021.

2. The assessee has marched this appeal on the following

grounds:-

- “1. That Ld. AO had erred in levying penalty for failure to get the books of accounts audited as no books of accounts were maintained by the assessee.*
 - 2. That Ld. AO had erred in levying penalty u/s 271B when the assessment order has been passed on presumptive basis.*
 - 3. That the appellant craves the right to add, amend or alter any grounds of appeal either before or at the time of hearing of appeal.”*
3. The fact as culled out from the records is that in this case return of income for A. Y. 2017-18 declaring income of Rs. 5,89,190/- filed on 28.03.2018. The assessee has declared income from business or profession for the year under consideration. The case was selected through CASS under scrutiny with remarks “ (i) cash deposit during the year”. Notice u/s 143(2) of the I.T. Act, 1961 was issued on 14.08.2018 fixing the case for hearing on 29.08.2018. Further notice u/s 142(1) was issued on 22.04.2019 along with query letter fixing the case for hearing on 07.05.2019. No compliance made by the assessee. Further notice u/s 142(1) was issued on 30.05.2019 fixing the case for hearing on 07.06.2019. Online written reply received on 07.05.2019 along with copy of ITR and computation of income and copy of bank statements. Thereafter notice u/s 142(1) was issued on 25.09.2019 along with query letter fixing the case for hearing on 10.10.2019. In compliance to this notice the assessee has furnished documents, details and produced

relevant documents which were examined on test check basis and replies filed were placed on record. Assessee is engaged in the business of wholesale trading of vegetables during the year under consideration.

4. The Id. AO on completion of assessment proceedings-initiated issued notice for penalty proceedings u/s 271B for failure to file audit report as per provision of section 44AB of the Income Tax Act, as the turn over as declared in the return of income is exceeding to Rs. 1 cr. Based on these the Id. AO passed an order u/s 271B of the Act levying penalty of Rs. 90,874/- being 0.5% of turnover Rs. 1,81,74,825/- is levied on the assessee company u/s 271B of the Income Tax Act, 1961 holding that the assessee has committed default and has not shown reasonable cause for such default and therefore, the penalty u/s 271B of the Act levied from the assessee.

5. Aggrieved from the order of the Assessing Officer levying penalty of Rs. 90,874/-, assessee preferred an appeal before the Id. CIT(A)/NFAC. A propose to the grounds so raised the relevant finding of the Id. CIT(A)/NFAC is reiterated here in below:

“The grounds of appeal are decided as under:-

3.1 Ground No. 1 : That the Id. AO had erred in levying penalty u/s 271B during pendency of appeal against quantum assessment order.

In this case the assessee has himself declared the turnover to be Rs. 1,10,47,462/- in his return of income which was above Rs. 1 crore and therefore, there was no role of the appellate proceedings on the penalty proceedings u/s 271B of the Act. Further, there are certain limitations provided in section 275 of the Act, beyond which penalty cannot be imposed but there is no bar in completing the penalty proceedings u/s 271B of the Act during pendency of first appeal. However, it has been found that on request of the appellant that the penalty proceedings should be kept in abeyance till the decision of quantum appeal. The assessee was given an opportunity to file his submission vide notice dated 27.12.2022 which was after the decision in the quantum appeal dated 22.11.2022 passed by the CIT(Appeal), NFAC. The appellant did not file any reply in this case. I find that the turnover which was worked out as Rs. 1,81,74,825/- by the Assessing Officer during the assessment proceedings has been reduced to Rs. 1,74,59,825/- after decision in the quantum appeal. However, the turnover remains above Rs. 1 crore and the appellant was therefore required to get his account audited as per provisions of section 44AB of the Act. As the appellant neither got the account audited before the due date nor furnished any reasonable cause for failure to do so, the provisions of section 271B of the Act are clearly attracted. Therefore the penalty of Rs. 90,874/- imposed by the Assessing Officer u/s 271B has rightly been imposed. However, as the turnover has been reduced to Rs. 1,74,59,825/- by the CIT(Appeal), the penalty is reduced to Rs. 87,299/- (being 0.5% of Rs. 1,74,59,825/-). Therefore, the ground of appeal is partly allowed as discussed above.”

6. As the assessee did not receive any favor from the levy of penalty and was slightly reduced to Rs. 87,299/- against levy at Rs. 90,874/- . The assessee has challenged the balance levy of penalty of Rs. 87,299/- confirmed by Id. CIT(A) before this tribunal on the grounds as raised hereinabove. Apropos to the grounds so raised the Id. AR appearing on behalf of the assessee has placed their written submission which is extracted in below;

"As per Sec 44AD of Income Tax Act, 1961,

(1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an eligible assessee engaged in an eligible business, a sum equal to eight per cent of the total turnover or gross receipts of the assessee in the previous year on account of such business or, as the case may be, a sum higher than the aforesaid sum claimed to have been earned by the eligible assessee, shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession":

[Provided that this sub-section shall have effect as if for the words "eight per cent", the words "six per cent had been substituted, in respect of the amount of total turnover or gross receipts which is received by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account during the previous year or before the due date specified in sub-section (1) of section 139 in respect of that previous year.]

(2) Any deduction allowable under the provisions of sections 30 to 38 shall, for the purposes of sub-section (1), be deemed to have been already given full effect to and no further deduction under those sections shall be allowed.

(3) The written down value of any asset of an eligible business shall be deemed to have been calculated as if the eligible assessee had claimed and had been actually allowed the deduction in respect of the depreciation for each of the relevant assessment years.

(4) Where an eligible assessee declares profit for any previous year in accordance with the provisions of this section and he declares profit for any of the five assessment years relevant to the previous year succeeding such previous year not in accordance with the provisions of sub-section (1), he shall not be eligible to claim the benefit of the provisions of this section for five assessment years subsequent to the assessment year relevant to the previous year in which the profit has not been declared in accordance with the provisions of sub-section (1)

(5) Notwithstanding anything contained in the foregoing provisions of this section, an eligible assessee to whom the provisions of sub-section (4) are applicable and whose total income exceeds the maximum amount which is not chargeable to income tax, shall be required to keep and maintain such books of account and other documents as required under sub- section (2) of section 44AA and get them audited and furnish a report of such audit as required under section 44AB.]

(6) The provisions of this section, notwithstanding anything contained in the foregoing provisions, shall not apply to-

- (i) a person carrying on profession as referred to in sub-section (1) of section 44AA;
- (ii) a person earning income in the nature of commission or brokerage; or
- (iii) a person carrying on any agency business.

Explanation. For the purposes of this section,-

(a) "eligible assessee" means,-

- (i) an individual, Hindu undivided family or a partnership firm, who is a resident, but not a limited liability partnership firm as defined under clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009); and
- (ii) who has not claimed deduction under any of the sections 10A, 10AA, 108, 108A or deduction under any provisions of Chapter VIA under the heading "C. Deductions in respect of certain incomes" in the relevant assessment year;

(b) "eligible business" means, -

- (i) any business except the business of plying, hiring or leasing goods carriages referred to in section 44AE; and
- (ii) whose total turnover or gross receipts in the previous year does not exceed an amount of [two crore rupees]

In view of above, penalty of Rs. 87299/- levied u/s 2718 deserves to be quashed."

6.1 In this appeal the Id. AR of the assessee submitted a detailed paper and the index of the paper book index is extracted here in below :

S. No.	Particulars	Page No.	Authority before whom presented
1	Affidavit	1-2	NA
2	Copy of return filed for AY 17-18	3-9	NA
3	Lokesh Kumar Sharma vs. ITO [ITA No. 278/JP/2022]	10-22	Case Law

7. Per contra, the Id. DR sought time to check whether the assessee filing of the return u/s 44AD even if the turnover exceeding at Rs. 1,10,47,462/- is permitted or not and thereby the penalty u/s 271B of the Act is leviable or not. Therefore, on

08.08.2023, the matter was adjourned to 17.08.2023 and on that date of hearing, Id. DR did not bring anything contrary to the provision of section 44AD so as to debar of the assessee even though the turnover exceeding Rs. 1 cr to file the return of income or any decision to support the view for levy of penalty. Thus Id. DR heavily relied upon the finding of Id. AO and thereby Id. CIT(A) while levying the penalty u/s 271B of the Act and thereby prayed to sustain the penalty.

8. We have heard the rival contentions and perused the material placed on record. The bench noted that the return of income filed by the assessee is under the provisions of section 44AD of the Act and even in the assessment proceeding the income based on the estimate as per provision of section 44AD of the Act was accepted. The return of income filed by the assessee u/s. 44AD in the assessment was disputed for computing the turnover based on the bank statement and thus the estimated income was again increased based on the presumptive taxation. The Id. AO based on this fact also noted that the assessee is liable to get his books of accounts audited and therefore, he failed to comply with the provisions of section 44AB of the Act to and get the books of account audited. On

careful perusal of the provision of section 44AD and 44AB of the Act, the bench noted that section 44AB lays down that

(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:

Whereas the section 44AD also effected a change with effect from 01.04.2017 wherein the words “eight per cent”, substitute to six per cent”, in respect of the amount of total turnover or gross receipts which is received by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed] during the previous year or before the due date specified in sub-section (1) of section 139 in respect of that previous year.

Thus, on conjoint reading of the section the assessee is eligible to avail the benefit of presumptive taxation up to Rs. 2 crores turnover.

Thus, based on these set of facts and on perusal of the record, turnover of the assessee has determined finally by the Id. CIT(A) at Rs. 1,74,59,825/- which is below at Rs. 2 crores and the assessee has already filed his return of income under the provisions of section 44AD of the Act at it is evident from the paper book page No. 5

wherein the assessee has disclosed turnover as well as opted that the provisions of section 44AD by offering 6 % of estimated income on that turnover in the return of income, the relevant extract from the paper book is extracted herein below:

SCHEDULE BP - DETAILS OF INCOME FROM BUSINESS OR PROFESSION		
COMPUTATION OF PRESUMPTIVE INCOME UNDER 44AD		
E1.	Gross Turnover or Gross Receipts	
E1a.	Through a/c payee cheque or a/c payee bank draft or bank electronic clearing system	11047482
E1b.	Any other mode	0
E2.	Presumptive income under section 44AD	
a.	6% of E1a	662848
b.	8% of E1b	0
c.	Total (a + b)	662848

9. Considering over all the fact and provisions of law has discussed herein below. We are of the considered view that the assessee has not controverted the provisions of section 44AB of the Act and since turnover is not exceeding the revised limit of Rs. 2 crores. The levy of penalty by the lower authority is against the provisions of law and therefore, the same is deleted based on these observations. Thus, the grounds of appeal raised by the assessee are allowed.

In the result the appeal of the assessee is allowed.

Order pronounced in the open Court on 12/09/2023

Sd/-

¼ Mko ,I- Ihrky{eh ½
(Dr. S. Seetalakshmi)
U;kf;d lnL;@Judcial Member
Tk;iqj@Jaipur

Sd/-

¼ jkBkMs dey's k t;UrHkkbZ ½
(Rathod Kamlesh Jayantbhai)
ys[kk lnL;@Accountant Member

fnukda @Dated:- 12/09/2023 *Ganesh Kumar, PS vkn's k dh
izfrfyfi vxfzs'kr@Copy of the order forwarded to: 1.
vihykFkhZ@The Appellant- Subhash Chand Saini, Jaipur
2. izR;FkhZ@ The Respondent- ITO, Ward, Behror
3. vk;dj vk;qDr@ CIT
4. vk;dj vk;qDr@ CIT(A)
5. foHkkxh; ifzrfuf/k] vk;dj vihyh; vf/kdj.k] t;iqj@DR, ITAT, Jaipur.
6. xkMZ QkbyZ @ Guard File { ITA No. 230/JP/2023}

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lgk;d ita hdkj@Asst. Registrar