

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI

**BEFORE SHRI S RIFAUH RAHMAN, AM AND
MS. KAVITHA RAJAGOPAL, JM**

ITA Nos. 2904 & 2906/Mum/2023
(Assessment Year: 2016-17)

Hareesh Ghanshyamdas Makhija 601, Gaurav Luxury, Opp. Lal Pathaogy, Near Balaji Medical Store, Ulhasnagar – 421 001	Vs.	ITO, Ward 2(2) Kalyan, Maharashtra – 421 301
PAN/GIR No. BBFPM 1623 L		
(Assessee)	:	(Respondent)
Assessee by	:	Ms. Manisha Ghind
Respondent by	:	Shri P D Chougule
Date of Hearing	:	12.12.2023
Date of Pronouncement	:	23.02.2024

ORDER

Per Bench :

The captioned appeals have been filed by the assessee, challenging the *ex parte* order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2016-17.

2. As the facts are identical, we hereby pass a consolidated order in both the appeals by taking ITA No. 2906/Mum/2023 as the lead case for the sake of convenience.

ITA No. 2906/Mum/2023

3. The assessee has in this appeal challenged the penalty levied u/s. 271B of the Act by the Id. Assessing Officer ('A.O.' for short) and upheld by the Id. CIT(A) vide an *ex parte* order.

4. The brief facts are that the assessee is an individual engaged in the business of trading in plastic bags and also into the business of cheque discounting where the assessee received commission @ 1.5% to 2%. The assessee's case was reopened u/s. 147 of the Act vide notice dated 29.03.2019 u/s. 148 of the Act for the reason that the assessee has deposited cash in his bank accounts and the total turnover of the assessee was less in comparison to the total credit made in the bank account of the assessee during the year under consideration and that the sources of the difference in the amount credited in the bank account of the assessee remains unexplained.

5. The assessee had filed the return of income in response to the said notice declaring total income at Rs.2,96,750/- on gross receipts of Rs.15,44,870/- and commission income of Rs.3,60,865/- and after claiming deduction in Chapter VIA, the total income is declared at Rs.6,41,650/-. The assessment order dated 16.12.2019 was passed u/s. 143(3) r.w.s. 147 of the Act where the total income was determined at Rs.6,41,650/- without any variation with the returned income. The ld. A.O. vide order dated 19.01.2022 passed u/s. 271B of the Act levied a penalty of Rs.80,566/- @ 271B of the Act being 0.5% of the turnover of Rs.1,61,13,210/-.

6. Aggrieved the assessee was in appeal before the ld. CIT(A) who vide an *ex parte* order dated 22.06.2023 upheld the penalty levied by the ld. A.O. on the ground that the assessee has failed to furnish any documentary evidences or written submission substantiating his claim.

7. Further aggrieved the assessee is in appeal before us.

8. The learned Authorised Representative ('ld. AR' for short) for the assessee contended that the ld. A.O. in the assessment proceeding had accepted the returned income filed by the assessee but had levied penalty for the reason that the assessee has not audited his book of accounts as per the provisions of section 44AB of the Act. Without considering the fact that the assessee's total business turnover was only Rs.19,05,735/- the ld. A.O. has taken Rs.1,45,68,340/- as the gross amount of commission received by the assessee. The ld. AR further stated that the ld. CIT(A) had disposed of the appeal without getting into the merits of the case. The ld. AR contended that the ld. A.O. had initiated the penalty proceedings u/s. 271A and 271B of the Act for failure to maintain the books of accounts and for not getting the same audited. The ld. AR contended that the penalty u/s. 271B cannot be levied when the assessee has not maintained his books of accounts and relied on the decision of the co-ordinate bench in the case of *Varadagovind Parthasarthy Iyer (through the legal heir Arvind Iyer) vs. ITO* (in ITA No. 1716/Mum/2023) in support of the assessee's contention.

9. The learned Departmental Representative ('ld.DR' for short), on the other hand, controverted the said facts and stated that the assessee has been non compliant before the first appellate authority and has failed to substantiate his claim before both the lower authorities. The ld. DR relied on the order of the lower authorities.

10. We have heard the rival submissions and perused the materials available on record. Ground no. 1 of the assessee's appeal challenged the penalty levied u/s. 271B of the Act on the ground that once the penalty u/s. 271A has been levied, there is no *locus*

standi by the Id. A.O. to levy penalty u/s. 271B of the Act. The assessee has relied on a catena of the decisions in support of his claim, which are mentioned here under:

1. *CIT vs. S K Gupta and Co.* [2010] 322 ITR 86 (Allahabad)
2. *CIT, Bareilly vs. Bisauli Tractors* [2007] 165 Taxman (All)
3. *CIT vs. Surajmal Parsuram Todi* [1996] 222 ITR 691 (Gauhati)
4. *Nirmal Kumar Jain vs. ITO* (in ITA No. 6696 & 6645/Del/2014)

11. It is a settled proposition of law that once the penalty has been levied u/s. 271A of the Act for non maintenance of books of accounts, then penalty u/s. 271B of the Act cannot be levied. The co-ordinate bench in the case of *Varadagovind Parthasarthy Iyer (through the legal heir Arvind Iyer)* (supra) has held the same and the relevant extract of the said decision is cited hereunder for ease of reference:

6. *After considering the relevant facts placed on record and also the orders passed by the authorities below, we find that the penalty has been levied u/s. 271B for violation of Section 44AB, ie., failure to get the accounts audited. It is not in dispute that assessee has not maintained any books of accounts as required ws.44AA. For violation of non maintenance of books of account u/s. 44AA, there is a separate penal provision for levying penalty for not maintaining of books of accounts prescribed u/s. 271A and therefore if at all penalty should have been levied under this section. The Hon'ble Allahabad High Court in the case of CIT vs. Bisauli Tractors reported in 299 ITR 219 had held that Section 271B of the Act is not attracted in the case where no account has been maintained and instead recourse u/s.271A can be taken. This principle has again been reiterated by the Hon'ble Allahabad High Court in the case of CIT vs. S.K Gupta reported in 322 ITR 86. Similar view has been taken by the Hon 'ble Guahati High Court in the case of CIT vs. Surajmal Parsuram Todi supra. Accordingly, we hold that no penalty u/s.271B is leviable when assessee has not maintained the books of acco unts. Accordingly, penalty is deleted.*

12. From the above observation, we are of the considered opinion that once the penalty u/s. 271A has been levied for non maintenance of books of accounts, no penalty u/s. 271B of the Act can be levied. This view has been supported by the decisions of various high courts. It is observed that in the present case in hand the Id. A.O. had levied a penalty of Rs.25,000/- u/s. 271A of the Act which according to the Id. AR has been accepted and paid by the assessee. As per the decisions cited herein above, we deem it fit

to hold that penalty u/s. 271B of the Act cannot be levied in the present facts of the case for non auditing of the books of accounts where the assessee has failed to maintain the same. We hereby direct the Id. A.O. to delete the impugned penalty. Ground no. 1 raised by the assessee is hereby allowed.

13. As we have deleted the impugned penalty, the other grounds of appeal raised by the assessee requires no further adjudication.

14. In the result, the appeal filed by the assessee is allowed.

ITA No. 2904/Mum/2023

15. The assessee in this appeal has challenged the penalty levied u/s. 271(1)(c) of the Act amounting to Rs.53,820/-. As the facts have already been elaborated in ITA no. 2906/Mum/2023, we deem it fit to decide the issue without reproducing the facts. The Id. A.O. in the present case has levied the impugned penalty for the reason that the assessee has concealed the particulars of income during the year under consideration.

16. The Id. CIT(A) upheld the penalty vide an *ex parte* order dated 22.06.2023 holding that the assessee has failed to substantiate his claim neither by documentary evidence nor by the submission of the assessee.

17. The assessee is in appeal before us, challenging the impugned order passed by the Id. CIT(A).

18. The learned Authorised Representative ('Id. AR' for short) for the assessee contended that there has been no variation in the returned and assessed income in which

case there is no concealment of particulars of income by the assessee. The Id. AR relied on the decision of the co-ordinate bench in the case of *Armoury International vs. ACIT* (in ITA No. 3299 to 3301/Mum/2017 vide order dated 01.01.2019).

19. The learned Departmental Representative ('Id.DR' for short), on the other hand, controverted the said fact and relied on the orders of the lower authorities.

20. We have heard the rival submissions and perused the materials available on record. It is observed that the assessee had filed his return of income in response to notice u/s. 148 of the Act, declaring total income at Rs.6,41,650/- which amounts to business income of Rs.2,96,750/- on the total turnover of Rs.15,44,870/- and commission income of Rs.3,60,865/- which aggregates to Rs.6,57,615/- out of which the assessee had claimed deduction of Rs.15,970/- under Chapter VIA of the Act. The Id. A.O. in the assessment proceeding had accepted the return of income filed by the assessee and determined the total income at Rs.6,41,650/- without any variation between the returned and the assessed income. The Id. AR has placed reliance on the decision of the Tribunal in the case of *Armoury International* (supra) which has held that when the returned income and the assessed income are the same, penalty u/s. 271(1)(c) of the Act cannot be levied. The relevant extract of the said decision is cited hereunder for ease of reference:

6. *We have heard both the counsel and perused the records. We find that the assessment in this case has been completed on the returned income. Hence, when the return of income and the assessed income are same, the machinery provision for levy of penalty u/s. 271(1)(c) fails, as the penalty u/s. 271(1)(c) is levied with reference to the tax sought to be evaded, which is the difference between the income returned and that assessed by the A.O.*

7. *In this case, since the assessed income and the returned income are the same, the machinery provision of penalty u/s. 271(1)(c) fails. In this regard, we draw support from the of Hon'ble Delhi High Court decision in the case of CIT vs. SAS Pharmaceuticals [2011] 335 ITR 259 (Del). The Hon'ble High Court has expounded that penalty u/s. 271(1)(c) can only be levied if in the course of proceedings, the A.O. is satisfied that there is an concealment or furnishing of*

inaccurate particulars. The words "in the course of any proceedings under this Act mean the assessment proceedings". However, the question 'whether there is concealment or inaccurate particulars' has to be determined with reference to the returned income. Accordingly, in the background of the aforesaid discussion and precedent, we set aside the order of the ld. CIT(A) and delete the levy of penalty.

21. From the above observation, we deem it fit to hold that as there has been no variation in returned and the assessed income, there could not be any possibilities of the assessee concealing the particulars of income which could attract the provision of section 271(1)(c) of the Act. We hereby deem it fit to direct the ld. A.O. to delete the impugned penalty levied u/s. 271(1)(c) of the Act. Hence, the grounds raised by the assessee are hereby allowed.

22. In the result, the appeal filed by the assessee in ITA No. 2904/Mum/2023 is allowed.

Order pronounced in the open court on 23.02.2024

Sd/-

Sd/-

(S Rifaur Rahman)
Accountant Member

(Kavitha Rajagopal)
Judicial Member

Mumbai; Dated : 23.02.2024

Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai