

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH: KOLKATA
[Before Shri A. T. Varkey, JM and Dr. Arjun Lal Saini, AM]

I.T.A No. 113/Kol/2019 A.Y 2010-11

Smt. Mukti Roy (PAN: AJDPR5772L)	Vs.	I.T.O. Ward- 2(4), Kolkata
Appellant		Respondent

Date of Hearing	04.12.2019
Date of Pronouncement	01.01.2020

For the Appellant	Shri Subho Chakravorty, Advocate
For the Respondent	Smt. Ranu Biswas, Addl. CIT

ORDER

PER SHRI A.T. VARKEY, JM

This appeal preferred by the assessee against the order of Ld. CIT(A)-Burdwan dated 20-12-2018 for the assessment year 2010-11.

2. At the outset, it has been brought to our notice that the appeal of the assessee is against the action of the Ld. CIT(A) in confirming the penalty u/s. 271A/271B of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) of an amount of Rs.1,50,000/-.

3. Briefly stated the facts are that the AO noted in the assessment proceedings that the assessee had made transaction of shares and securities through M/s. ICICI Securities Ltd. So the AO issued notice u/s. 133(6) of the Act to NSE calling for details of transactions in the name of the assessee. According to AO, from the reply of NSE it was found that the total sale was to tune of Rs.23,08,90,576.50 and the assessee had paid STT of Rs.59,332.99/- and thereby incurred total loss of Rs.1,96,168.49. The AO observed that the assessee had not filed return of income in response to notice u/s. 148 of the Act. Therefore, while completing the assessment on 25.03.2015, the AO considered the loss as speculation loss and initiated penalty proceedings u/s. 271B of

the Act for failing to get the accounts audited as required u/s. 44AB of the Act. Thereafter by penalty order u/s 271B of the Act dated 29.01.2018, the AO levied penalty of Rs. 1,50,000/- of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who confirmed penalty also under section 271A as well as u/s 271B of the Act. Aggrieved, the assessee is before us.

4. We have heard rival submissions and gone through the facts and circumstances of the case. At the outset itself, we note that the AO in the assessment order dated 25.03.2015 at para 6 has found that assessee is not maintaining any books of account. In such a scenario penalty u/s. 271A of the Act in contravention of sec. 44AA can be only levied and not u/s 271B of the Act. We note that the Delhi Tribunal in Nirmal Kumar Jain Vs. ITO in ITA Nos. 6696 & 6645/Del/2014 for AY 2010-11 dated 02.03.2016 has held that when the AO has found during assessment that assessee is not maintaining books of account, then penalty u/s 271B for not getting the books audited should not be levied as under:

“3. In so far as the penalty u/s. 271B is concerned, it is noticed that the Ao has recorded a categorical finding on page 2 of the assessment order that no books of account were maintained by the assessee. Under such circumstances, a question arises as to whether any penalty can be imposed u/s. 271B for not getting the books of account audited. The Hon’ble Gauhati High Court in Suraj Mal Parasuram Todi vs. CIT (1996) 222 ITR 691 (Gau) has held that where no books of account are maintained, penalty should be imposed for non-maintenance of books of account u/s. 271A and no penalty can be imposed u/s. 271B for violation of section 44AB requiring ITA Nos. 6696 & 6645/Del/2014 audit of accounts. Similar view has been taken by the Hon’ble Allahabad High Court in CIT vs. Bisauli tractors (2008) 299 ITR 219 (All). The Hon’ble Allahabad High Court reiterated the similar view in CIT and Anr. Vs. S. K. Gupta and Co. (2010) 322 ITR 86 (All) by holding that requirement of getting the books of account audited can arise only where the books of account are maintained. In the absence of the maintenance of books of account, there can be no penalty u/s. 271B of the Act. In view of the foregoing legal position emanating from the judgments of the two Hon’ble High courts, we are convinced that penalty u/s. 271B ought not to have been levied because the assessee admittedly did not maintain any books of account as has been recorded in the assessment order itself. We, therefore”, order for the deletion of penalty.”

5. Respectfully following the ratio in Nirmal Kumar Jain (supra), of the Tribunal & taking note of the ratio laid by the Hon’ble High Courts mentioned in that order, we are of the opinion that penalty u/s 271B ought not to have been levied

against the assessee and since the Id. CIT(A) has exercised his co-terminus power to levy penalty u/s 271A of the Act for not maintaining books of account, therefore, we restrict the penalty to the tune of Rs. 25,000/- in place of R.1,50,000/- as imposed by AO and confirmed by Ld. CIT(A). So, the assessee gets relief of Rs.1,25,000/-.

6. In the result, the appeal of assessee is partly allowed.

Order Pronounced in the Open Court on 1st January, 2020

Sd/-
Arjun Lal Saini
Accountant Member

Sd/-
A.T. Varkey
Judicial Member

Dated 1st January, 2020

Jd. (Sr.P.S.)

Copy of the order forwarded to:

1. Appellant - Smt. Mukti Roy, C/o Shri K. S. Roy, Rabindrapally, Burdwan-713101
2. Respondent: ITO, Ward-2(4), Kolkata.
3. CIT,
4. CIT(A)-Burdwan,
5. DR, Kolkata Benches, Kolkata

True Copy

By Order

Assistant Registrar
ITAT Kolkata