

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'SMC' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD
BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No.574/Ahd/2022
Asstt.Year : 2011-12

Amev Pravinbhai Brahmbhatt C/o. Divyang J. Shah 201, 2 nd Floor, Devashish Complex Nr.Regenta Central Atarim Hotel Off CG Road Ahmedabad. PAN : AELPB 9923 J	Vs	The ITO, Ward-7(1) Ahmedabad.
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(Applicant)		(Responent)
Assessee by :		Shri Divyang Shah, AR
Revenue by :		Shri V.K. Mangla, Sr.DR

सुनवाई की तारीख/Date of Hearing : 05/12/2023
घोषणा की तारीख /Date of Pronouncement: 07/12/2023

आदेश/O R D E R

The present appeal has been filed by the assessee against order passed by the Commissioner of Income Tax(Appeals), National Faceless Appeal Centre, Delhi [in short referred to as Id.CIT(A)] under section 250(6) of the Income Tax Act, 1961 dated 30.11.2022 pertaining to Asst.Year 2011-12 confirming the levy of penalty imposed by the AO under section 271A of the Act.

2. Sole ground raised by the assessee is as under:

"1. Whether, on facts and in circumstances of the case and in law, the Id.AO has erred in levying penalty of Rs.25,000/- u/s.271F of the Act.?"

3. The impugned penalty was levied for non-maintenance of the books of accounts as prescribed under section 44AA of the Act.

4. I have gone through the assessment order passed in the case of the assessee under section 144 read with section 147 of the Act dated 14.12.2018 in which penalty under section 271A was initiated by the AO. I have also gone through the order of the AO levying penalty under section 271A of the Act amounting to Rs.25,000/- and also perused orders of the CIT(A)'s order confirming the levy of penalty. I have carefully heard contentions of both the parties and also gone through the documents referred before me during the course of hearing.

5. The issue before me is levy of penalty under section 271A of the Act. The provisions of section 271A are reproduced hereunder:

Failure to keep, maintain or retain books of account, documents, etc.

271 A. Without prejudice to the provisions of section 270A or section 271, if any person fails to keep and maintain any such books of account and other documents as required by section 44AA or the rules made thereunder, in respect of any previous year or to retain such books of account and other documents for the period specified in the said rules, the Assessing Officer or the —[Joint Commissioner (Appeals) or the] Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum of twenty-five thousand rupees.

6. As is evident, the penalty under the impugned section is levied for non-maintenance of books of accounts and other documents, as required by section 44AA of the Act. Section 44AA of the Act needs to be read therefore for adjudicating the levy of penalty before me and the said section is reproduced hereunder:

Maintenance of accounts by certain persons carrying on profession or business.

44AA. (1) Every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by

the Board in the Official Gazette shall keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act.

(2) Every person carrying on business or profession [not being a profession referred to in sub-section (1)] shall,—

- (i) if his income from business or profession exceeds one lakh twenty thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds ten lakh rupees in any one of the three years immediately preceding the previous year; or*
- (ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceed one lakh twenty thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession are or is likely to exceed ten lakh rupees, during such previous year; or*
- (iii) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AE or section 44BB or section 44BBB, as the case may be, and the assessee has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, during such previous year; or*
- (iv) where 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,*

keep and maintain such books of account and other documents as may enable the Assessing Officer to compute his total income in accordance with the provisions of this Act:

Provided that in the case of a person being an individual or a Hindu undivided family, the provisions of clause (i) and clause (ii) shall have effect, as if for the words "one lakh twenty thousand rupees", the words "two lakh fifty thousand rupees" had been substituted :

Provided further that in the case of a person being an individual or a Hindu undivided family, the provisions of clause (i) and clause (ii) shall have effect, as if for the words "ten lakh rupees", the words "twenty-five lakh rupees" had been substituted.

(3) The Board may, having regard to the nature of the business or profession carried on by any class of persons, prescribe⁷¹, by rules, the books of account and other documents (including inventories, wherever necessary) to be kept and maintained under sub-section (1) or sub-section (2), the particulars to be contained therein and the form and the manner in which and the place at which they shall be kept and maintained.

(4) Without prejudice to the provisions of sub-section (3), the Board may prescribe, by rules, the period for which the books of account and other documents to be kept and maintained under sub-section (1) or sub-section (2) shall be retained.

7. As per section 44AA of the Act, any person carrying on specified business or carrying on business as specified under the

section are required to keep and maintain books of accounts and other documents, which enable the AO to compute his total income in accordance with the Act.

8. A conjoint reading of the above two sections reveals that a person engaged in specified profession or business is required to maintain books of accounts, and non-maintenance of the same would attract levy of penalty under section 271A of the Act. Therefore, it is only in the event that an assessee is found to be carrying on business or profession as specified under section 44AA of the Act, and he does not maintain necessary books of accounts/documents, that penalty under section 271A of the Act is levied.

9. On going through the assessment orders passed in relation to the assessee under section 144 read with section 147 of the Act, wherein the penalty under section 271A was initiated by the AO, I have been unable to discern any finding on the fulfillment of basic condition of the assessee carrying out on any business requiring him to maintain books of accounts under section 44AA of the Act. In the entire assessment order passed under section 144/147, there is no finding by the AO that the assessee was carrying out any business. On going through this assessment order, I find that the case of the assessee was reopened noting that the assessee was indulging in share transaction exceeding Rs.10 lakhs, which information was obtained from the AIR information, and no income or loss relating to the share transactions were shown in the return of income. Thereafter, the assessment order reveals that the AO obtained information regarding the assessee's share transaction from the bank statements, and statement submitted by the NSE/BSE and KIFS Trade Capital Pvt. Ltd. Based on this information, he made addition of cash deposits in the bank, source of which remained

unexplained, amounting to Rs.81,000/- and of unexplained source of investment in shares amounting to Rs.6,37,000/-. In the entire order, there is no finding by the AO to the effect that share transactions entered into by the assessee, regarding which he obtained information from various sources, was by way of business transaction. The assessment order does not reveal any inquiry being conducted by the AO vis-à-vis nature of the share transaction also. The AO after making addition of cash deposits and undisclosed investment in shares, as noted by me above, at para-6 of his order, simply notes that the assessee's total transaction in securities and derivatives is Rs.2.33 crores and since he has not produced any books of accounts, therefore, there is a clear violation of provision of section 44AA of the Act. Para-6 of the assessment order reads as under:

6. As per 10DB submitted by KIFS Trade Capital Pvt.. Ltd, during the F.Y. 2010-11, the assessee has made total transactions in securities and derivatives of Rs. 2,33,72,993/- (2,02,61,041+31,11,952). On querying whether he has maintained any books of accounts in respect of such transactions, the assessee has not responded till the date. However, assessee has not produced any books of accounts and hence it is reasonably presumed that he has maintained none. Therefore, there is a violation of provision of section 44AA and hence, separate penalty proceedings u/s.271A of the Income Tax Act is initiated.

10. I hold that, without first finding out whether there was any transaction of the assessee entered into by way of business, the AO could not have found the assessee to have violated the provisions of section 44AA by not maintaining books of accounts relating to same. The AO, I find, has jumped gun on the issue. He has found the assessee to have indulged in huge volume of transaction of Rs.2.23 crores. From this information, he has jumped to the conclusion that

the assessee was required to maintain books of accounts under section 44A of the Act, and having not so maintained, penalty under section 271A of the Act is leviable, and therefore initiated by him. He has clearly missed out one step in the process of arriving at this conclusion, which I find is a very crucial step, regarding fulfillment of the condition of the assessee indulging in business transaction of share trading or whatever, which is necessary for applicability of section 44AA of the Act. Without finding the fulfillment of this condition, the AO could not have possibly concluded the assessee being required to maintain books of accounts under section 44AA of the Act, and therefore, his satisfaction recorded in the assessment for initiation of penalty proceedings under section 271A of the Act, I find, is based on an incomplete and incorrect premise.

11. Even on going through the penalty order passed by the AO under section 271A of the Act, I do not see any finding to the effect that the assessee indulged in share transactions by way of business or profession. Para-2 and 3 of the order passed under section 271A of the Act reveals the same fact, as noted by me in the order passed under section 147 of the Act that the AO has, from the information in possession that the assessee's share transactions were of huge volume jumped to the conclusion that he was required to maintain books of accounts under section 44AA of the Act, without finding whether the assessee has fulfilled other essential condition of carrying out the share trading transactions by way of business. The relevant para-2 and 3 of the order are reproduced hereunder:

2. During the assessment proceedings, it was noticed from 10DB submitted by KIFS Trade Capital Pvt. Ltd. that during the year under consideration, the assessee was made share transaction of Rs. 31,11,952/- (Code-01- Rs. 887286+Code-2- Rs. 2147916+Code-03- Rs. 76750) in National Stock Exchange on which STT paid of Rs. 3,814/- and Total Share Transactions of Rs. 2,02,61,041/-(Code-01- Rs. 9754096+Code-2- Rs. 7241069+Code-03- Rs. 3265876) in Bombay Stock Exchange

on which STT paid of Rs. 22,063/-. During the F. Y. 2010-11, total turnover for share transaction of the assessee exceeds the prescribed limit mentioned u/s 44AA of the Act i.e. **Rs. 2,33,72,993/-** (31,11,952+2,02,61,041) and accordingly the assessee have to maintain Books of accounts. In view of above facts, the assessee was directed to submit books of accounts i.e. cash book, trading A/c, Profit and loss accounts and Balance sheet for the year under reference. However, assessee has not produced any books of accounts and hence it is reasonably presumed that he has maintained none. Therefore, there is a violation of provision of section 44AA. According to section 44AA(2) of the Act, every person carrying on business or profession [not being a profession referred to sub-section(1)] shall –

(i) if his income from business or profession exceeds [one lakh twenty] thousand rupees or his total sales, turnover or gross receipts, as the case may be, in business or profession exceed or exceeds [ten lakh] rupee in any one of the three years immediately preceding the previous year or

(ii) where the business or profession is newly set up in any previous year, if his income from business or profession is likely to exceeds [one lakh twenty] thousand rupee or his total sales, turnover or gross receipts as the case may be, in business or profession are or is likely to exceed [ten lakh] rupees during such previous year, or

(iii) Where the profit and gain from the business are deemed to be the profits and gains of the assessee under [section 44AE] or section 44BB or Section 44BB], as the case may be, and the assessee has claimed his income to be lower than the profits or gain so deemed to be the profits and gains of business, as the case may be, during [previous year or]

(iv) where the profits and gains from the business are deemed to be the profits and gains of the assessee under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business, and his income exceeds the maximum amount which is not chargeable to income tax during such previous year.]

Keep and maintain such books of accounts and other documents as may be enable the [Assessing] Officer to compute his total income in accordance with the provisions of this Act.

3. In view of above, any person whose turnover exceeds minimum amount as prescribed u/s 44AA has to maintain books of accounts compulsorily as prescribed under the Act. Failure to comply with the provision of Section 44AA is liable to be penalized u/s 271A of the Act. According to Section 271A, without prejudice to the provision of section 271, if any person fails to keep and maintain any such books of account and other documents as required under section 44AA or the rules made there under, in respect of any previous year or to retain such books of account and other documents for the period specified in the said rules, the [Assessing] officer or the [commissioner (Appeals)] may direct that such person shall pay, by way of

penalty [a sum of twenty five thousand rupees].

Para 5 to 5.2 of his order reveals the same fact.

Therefore, I find that the AO has failed to make out a case for levy of penalty under section 271A of the Act, since, he has not given clear finding regarding on the fulfillment of condition of section 44AA of the Act by the assessee, violation of which resulted in levy of

penalty u/s 271A of the Act. The AO has not made out a case, while levying penalty under section 271A of the Act, that the assessee's share transactions were carried out by way of business requiring the assessee to maintain books of accounts under section 44AA of the Act.

In view of the same, levy of penalty under section 271A of the Act of Rs.25,000/-, I hold, is totally unjustified. I may conclude by adding that the Id.CIT(A) had confirmed the penalty order of the AO under section 271A of the Act in the absence of any representation by the assessee; but from the facts on record noted by me, relating to the case, it is clear that there was no case made out by the AO for the levy of penalty under section 271A of the Act.

The Id.DR, before me, was unable to point out from the records any finding of the AO regarding fulfillment of the condition of the section 44AA in the case of the assessee.

12. In view of the above, we set aside the order passed under section 271A of the Act, and the penalty levied therefore to the tune of Rs.25,000/- is directed to be deleted.

The grounds of appeal of the assessee are allowed in above terms.

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

Order pronounced in the Court on 7th December, 2023 at Ahmedabad.

**Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER**

Ahmedabad, dated 07/12/2023

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