

आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ  
**IN THE INCOME TAX APPELLATE TRIBUNAL,  
RAJKOT BENCH, RAJKOT**  
**(Conducted through Virtual Court)**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER**  
**And**  
**SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

आयकर अपीलसं./ITA Nos. 57 & 58 /RJT/2023  
निर्धारणवर्ष/Asstt. Years:(2011-2012 & 2012-2013)

Shri Pradipbhai Dayabhai Aghara, Timbadi, Dist. Morbi, Gujarat.  <b>PAN: ALBPA9409P</b>	Vs.	I.T.O, Ward-4, Morbi.
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(Applicant)		(Respondent)
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Assessee by	:	Shri Mehul Ranpura, A.R
Revenue by	:	Shri Ashish Kumar Pandey, Sr.D.R

सुनवाई की तारीख/**Date of Hearing** : **04/01/2024**

घोषणा की तारीख /**Date of Pronouncement:** **17/01/2024**

**आदेश/ORDER**

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

The captioned two appeals have been filed at the instance of the Assessee against the separate orders of Learned Commissioner of Income Tax (Appeals), Rajkot, 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 Years 2011-2012 & 2012-13.

2. First, we up take up **ITA No. 57/RJT/2023**, an appeal by the assessee for AY 2009-10. The only grievance raised by the assessee is that Ld. CIT(A), erred in confirming the penalty levied by the AO for Rs. 1,50,000/- u/s 271B of the Act.

3. In the present case, the AO has levied penalty u/s 271B of the Act, on account of not getting books of accounts audited as per the provisions of section 44AB of the Act. The order passed by the AO was subsequently upheld by the Ld. CIT(A).

4. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

5. The Ld. AR before us, among other contentions, submitted that the assessee has not written up the books of accounts till the date of finalization of audit within the due date specified u/s 44AB of the Act. Accordingly, there was no possibility of getting accounted u/s 44AB of the Act. This offence was committed by the assessee is on account of non-maintenance of books of accounts u/s 44AA of the Act, which is complete in itself and therefore there cannot be any penalty under the provisions of section 44AB of the Act.

6. On the other hand, the Ld. DR made written submissions dated 04/01/2024, which are reproduced as under:

*2. Both the above referred matters were listed for hearing before the Hon DB Bench on 04.01.2024. During the course of hearing on the above referred matters it was mentioned by the Hon'ble Accountant Member as to what would be the position of Revenue with respect to the orders of Hon'ble Gauhati and Allahabad High Courts in the cases of Surajmal Parsuram Todi Vs. CIT [1996] 222 ITR 691 (Gauhati) and CIT Vs. Bisauli Tractors [2007] 165 Taxman 1 (Allahabad) wherein it has been held that where the books of*

*account itself have not been maintained by the assessee there is no question of getting them audited u/s 44AB and therefore penalty u/s 271B could not be imposed.*

*3. With respect to the above it is humbly submitted that the above cited judgements are applicable in a case where no books of account have been maintained by the assessee. In the present case in the instant appeals the assessee has clearly submitted books of accounts and other documents including copy of bank account statement, Form 26AS, copy of P&L and balance sheet, proprietors capital account etc. in response to the notices to the assessee. In view of the above, the case of the assessee is factually different from the case laws cited above wherein no books of accounts were found to be maintained. The assessee has himself submitted the book of accounts during the assessment proceedings. Hence, in view of the discussion above, the facts of the case of the assessee are distinguishable from the case laws cited and therefore the ratio of those cases may not be applicable in the present set of facts.*

*4. Moreover, the assessee in the instant appeals have not shown as to how it was under any bona fide belief that tax audit u / s 44AB was not required or was to be done only on net receipts and not gross receipts. The submission of the appellant that after declaring income under presumptive scheme of taxation U / s 44AE he was exempt from preparing and getting his books audited is also not proven in the penalty proceedings since no records regarding ownership of vehicles on which income has been claimed has been filed before any adjudicating authority till date. Therefore, penalty is leviable in spite of provision of section 44AE(5) which otherwise exempts assessee from the provisions of section 44AB. Further, section 44AE(7) does provide for assessee to maintain his books of account even under presumptive taxation and therefore the submission of the assessee that he is not liable to maintain books of accounts u / s 44AE is also not entirely correct.*

*5. Further, Revenue would like to rely upon the following case laws in support of the levy of penalty u / s 271B :*

*(i) S. Ramakumar Reddy [2023] 147 taxmann.com 401 (Telangana High Court) wherein it has been held that since assessee had not complied with the provisions of section 44AB i.e. by submitting audited accounts despite having turnover exceeding the prescribed limit, penalty was rightly levied.*

*(ii) Shish Ram Raja Ram and Party [2017] 81 taxmann.com 91 (Rajasthan High Court upheld penalty u/s.271B for belated filing of audit report.*

*6. The assessee has not been able to provide a reasonable cause so as not to levy the penalty u/s.273B of the Act. In view of the above, it is requested that the order of Ld.CIT(A) may be confirmed and the appeal of the assessee be dismissed.*

7. We have heard the rival contentions of both the parties and perused the materials available on record. The undisputed fact is this that the assessee did not file any return of income under the provisions of section 139(1) of the Act. The return was filed in response to the notice issued under section 148 of the Act on account of income escaping assessment. Thus, there remains no ambiguity that the books of accounts of the assessee were not written up before the due date of

filing the return of income as specified u/s 139(1) of the Act. This fact can be verified from the penalty order framed by the AO under section 271B of the Act. Once it is established that the books of accounts were not written up within the due date of filing the return of income, the question of getting them audited to comply the provision of section 44AB of the Act, does not arise. As such the first default of the assessee on stand-alone basis is non-maintenance of books of account u/s 44AA of the Act which is complete offence. Therefore, such default i.e. non-maintenance of the books of accounts is subject to the penalty under the provisions of section 271A of the Act. In such facts and circumstances the Hon'ble Guwahati High Court in the case of Shri Surajmal Pursuman reported in 222 ITR 691 has held as under:

2. *We have gone through the provisions of sections 44AA, 44AB, 271A and 271B of the Act. Maintenance of accounts is envisaged under section 44AA and on failure to do so the assessee shall be guilty and liable to be penalised under section 271A. Even after maintenance of books of account the obligation of the assessee does not come to an end. He is required to do something more, i.e., by getting the books of account audited by an accountant. But when a person commits an offence by not maintaining the books of account as contemplated by section 44AA the offence is complete. After that there can be no possibility of any offence as contemplated by section 44AB and, therefore, in our opinion, the imposition of penalty under section 271B is erroneous. The Tribunal has overlooked this aspect of the matter. Of course, it is apparent from the records that the assessee failed to maintain the books of account as required under section 44AA and for that penalty is prescribed under section 271A. It is for the Tribunal to take action in accordance with law.*
3. *In view of the above observations, we answer the question in the negative and in favour of the assessee.*

7.1 Likewise, the Hon'ble High Court of Allahabad in the case of CIT vs. Bisauli Tractors reported in 165 taxman 1 has held as under:

*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.*

7.2 The Principles laid down by Hon'ble High Court are squarely applicable in the instant set of facts. Therefore, the assessee can get the immunity from the penalty specified u/s 271B of the Act.

7.3 Regarding the contention of the Ld. DR that the assessee has written up the books of accounts is misplaced. Indeed, the assessee has written up books of account but on a later date. As such, the Ld. DR has not brought any concrete evidence justifying that the books of accounts of the assessee were written up before the due date of filing return of income as specified under section 139 of the Act and therefore the assessee has contravened the provisions of section 44AB of the Act. In view of the above, and after considering the facts in entirety, we hold that the assessee did not maintain the books of accounts within the due date specified u/s 139(1) of the Act, so as to comply the provisions of section 44AB of the Act. Accordingly, the assessee cannot be visited to the penalty for the offence committed by the assessee for not getting accounts audited. Hence, we set aside the findings of Ld. CIT(A) and direct the AO to delete the penalty levied by him. Thus, the ground of appeal of the assessee is hereby allowed.

8. In the result, the appeal filed by the assessee is hereby allowed.

**Coming to ITA No. 58/RJT/2023, an appeal by the assessee for the Assessment Year 2012-13.**

9. At the outset, we note that the issue raised by the assessee in the captioned appeal for the AY 2012-13 is identical to the issue raised by the assessee in ITA No. 57/Rjt/2023 for the assessment year 2011-12. Therefore, the findings given in ITA No. 57/Rjt/2023 shall also be applicable for the year under

consideration i.e. AY 2012-13. The appeal of the assessee for the assessment 2011-12 has been decided by us vide paragraph No. 7 of this order in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2011-12 shall also be applied for the year under consideration i.e. A.Y 2012-13. Hence, the ground of appeal filed by the assessee is hereby allowed.

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

11. In the combined result, both the appeals of the assessee are hereby allowed.

**Order pronounced in the Court on 17/01/2024 at Ahmedabad.**

**Sd/-  
(SIDDHARTHA NAUTIYAL)  
JUDICIAL MEMBER**

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

Ahmedabad; Dated  
*Manish*

**(True Copy)**  
17/01/2024