

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM AND SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 73/JP/2018
निर्धारण वर्ष/Assessment Year: 2011-12

Nirmal Kumar Joshi C/o Rajasthan Marble, Makran Road, Madanganj, Kishangarh,	बनाम Vs.	ITO, Ward-1, Kishangarh
स्थायी लेखा सं./जीआईआर सं./PAN No. AGCPJ 8574 C		
अपीलार्थी/Assessee		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 74/JP/2018
निर्धारण वर्ष/Assessment Year: 2011-12

Shri Krishan Murari Agarwal Prop. M/s Shree Sunder Marbles Chandra Colony, Madanganj, Kishangarh	बनाम Vs.	ITO, Ward-1, Kishangarh
स्थायी लेखा सं./जीआईआर सं./PAN No. AAPPA1482R		
अपीलार्थी/Assessee		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Nikhilesh Kataria (CA)
राजस्व की ओर से/ Revenue by : Smt. Poonam Ray (JCIT)

सुनवाई की तारीख/ Date of Hearing : 21/03/2018
घोषणा की तारीख/ Date of Pronouncement : 27/03/2018

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are two appeals filed by the respective assesseees against the order of the Id CIT(A) in confirming the levy of penalty under section 271B of the Act. Since common issues are involved, both these appeals were heard together and disposed off by this consolidated order.

2. For sake of discussions, with the consent of both the parties, appeal in ITA No. 74/JP/2018 was taken up wherein the assessee has challenged the order of Id. CIT (A) - Ajmer dated 13.12.2017 confirming the levy of penalty u/s 271B amounting to Rs. 46,162/- for not getting the accounts audited u/s 44 AD of the Act.

3. Briefly stated, the facts of the case are that the assessee is engaged in the business of trading in marble through his proprietorship concern M/s Shree Sundar Marbles. In the original return of income, the assessee has disclosed a turnover of Rs. 48,98,269/- and has reported a net profit of Rs. 3,96,243/- in terms of section 44AD of the Act. A survey u/s 133A was conducted by the Investigation wing, Jaipur at the business premises of Shri Abhishek Kumawat on 18.01.2011. During the course of survey, it was noticed that Shri Abhishek Kumawat was maintaining bank accounts with PNB, Kishangarh where huge deposits have been found deposited. In the statement recorded during the survey operation, Shri Abhishek Kumawat stated that the amount credited in these bank accounts does not belong to him. He stated that many marble traders at Kishangarh are affecting sales of marble without recording the same in their books of accounts. This is being done either by selling the marbles totally without bills or by under invoicing. The sales consideration for such sales is received in cash which is not being recorded in their books of accounts. These traders have devised method of collecting cash through bank accounts of Shri Abhishek Kumawat. The cash used to be deposited at different stations of India in the bank account of Shri Abhishek Kumawat and the said cash was subsequently withdrawn at Kishangarh and returned to beneficiary marble traders. Some diaries/incriminating documents were also impounded from the business premises of Shri Abhishek Kumawat and from these documents, a list was

prepared and as per the said list, the assessee, Shri Kishan Murari Agarwal the proprietor of Shree Sundar Marbles has received cash of Rs. 50,90,474/- in different years through bank account of Shri Abhishek Kumawat. During the course of assessment proceedings, the assessee offered an amount of Rs. 6,58,344/- on such undeclared business receipts of Rs. 43,34,064/- for the year under consideration by way of revised return of income filed on 14.09.2013. Similarly, an amount of Rs. 94,323/- on the balance business receipts of Rs. 7,56,410/- was offered to tax by way of revised return for AY 2009-10.

4. As per the Assessing Officer, the business transactions routed through the bank accounts of Shri Abhishek Kumawat are not entered in the regular books of accounts of the assessee and thus it could not be said that the true profits can be deduced from the books of accounts which were thereafter rejected by the AO invoking the provisions of section 145(3) of the Act. The AO thereafter brought to tax Rs. 3,86,510/- as per income declared in the original return filed u/s 44AD of the Act. Further, the income amounting to Rs. 6,58,344 by applying GP @ 15.19% on undisclosed business receipts of Rs. 43,34,064/- offered for taxation in the revised return of income and confirmed by the assessee during the course of assessment proceedings was brought to tax. Simultaneously, the AO initiated the penalty proceedings u/s 271B of the Act stating that during year under consideration, total business turnover of the assessee comes to Rs. 92,32,333/- (48,98,269 + 43,34,064) which exceeds Rs. 60 lacs as specified in section 44AB of the Act and the assessee has not got his accounts audited as required. Apparently, the assessment proceedings have attained finality as nothing further has been brought to our notice disputing the findings and the additions made by the AO in the order passed u/s 147 read with 143(3) of the Act.

5. During the course of penalty proceedings, in response to the show cause notice, the assessee submitted that the assessment was completed on the basis of an estimate and books of accounts were also rejected. It was submitted that during this period the monitory limit was Rs 60 lacs and receipts were less than this amount. It was further submitted that the income was estimated on the basis of third party statement and records and the same cannot be basis for levy of penalty. Further, reliance was placed on the decision in case of Ram Prakash C. Puri vs. CIT (2001) 117 Taxman 154 (Pune) and CIT vs. Bisauli Tractors (2007) 165 Taxman 1 (All) for the proposition that no penalty u/s 271B can be levied where no books of accounts are maintained. The submissions so filed by the assessee were not found acceptable by the Assessing Officer. As per the Assessing Officer, on the basis of investigations carried out by the department and confronted to the assessee, it was noticed and accepted by the assessee that he was involved in the business of unaccounted sales through Shri Abhishek Kumawat the quantum of which works out to Rs. 4334064/- for the year under consideration apart from sales of Rs. 48,98,269/- declared in the return of income. It was held that the total receipts were more than Rs. 60 lacs and as per the provisions of section 44AB, the assessee has to get his accounts audited by Chartered Accountant and in this case, no such audit was done in the assessee's case. It was further held by the AO that although the assessee has claimed is that no books of accounts were maintained and thus audit cannot be conducted, it is clear from the proceedings that the books were produced which were rejected. It was held by the AO that the books of accounts were maintained but unaccounted turnover not included therein. It was further held by the AO that the explanation offered by the assessee is not found acceptable as the fact that the transactions in the bank account of Shri

Abhishek Kumawat were related to the assessee has been accepted by the assessee by disclosing further income of Rs. 658,344/- in the revised return during the course of assessment proceedings. Regarding the other plea of the assessee that no books of accounts were maintained by assessee, the same was also not found acceptable as provisions of Income Tax Act makes it mandatory for the assessee to maintain his books of accounts and get them audited. In light of the same, the AO held that the assessee clearly violated provisions of section 44AB of the Act and is liable to be penalized u/s 271B for not getting his accounts audited as required u/s 44AB and penalty of Rs. 46,162/- was levied on the assessee.

6. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who has confirmed the levy of penalty and his relevant finding are contained at para 4.3 which is reproduced as under:-

"4.3 I have gone through the penalty order, statement of facts, grounds of appeal and written submission carefully. It is seen that in the profit & loss account, the assessee had shown total sales of Rs. 48,98,269/- and the assessee admittedly had also effected undisclosed sale of Rs. 43,34,064/- through the bank account maintained by Shri Abhishek Kumawat. The profit @ 15.19% on the undisclosed turnover of Rs. 5,13,900/- was offered for taxation by assessee himself during the course of assessment proceedings itself when the fact of undisclosed turnover was brought to the notice of the assessee. In view of these facts, I am of the considered view that the assessee had turnover of Rs. 92,32,333/- and he was required to get his accounts audited u/s 44AB and submit the audit report in the prescribed form. The assessee has failed to obtain the audit report and furnish the same before the specified date. In the written submission filed by the appellant, the assessee could not furnish any reasonable cause for not getting his accounts

audited u/s 44AB. Hence, I am of the considered view that the AO was fully justified in levying penalty of Rs. 46,162/- u/s 271B of the I.T. Act. Accordingly, the penalty levied by the AO is hereby confirmed."

7. During the course of hearing, the Id. AR submitted that conditions precedent for invoking of Penalty is not met in the instant case. It is submitted that for levying of penalty u/s 271B for not getting the accounts audited, as per settled judicial pronouncement as has been discussed later on, the following two basic conditions which must be met:

- a. The assessee must have maintained the books of accounts as per section 44AA of the Act and
- b. The assessee must be required to get such accounts audited u/s 44AB of the Act

If any one of such conditions is not met, then penalty u/s 271B of the Act cannot be levied. However, in the present case, both these conditions are not met as has been discussed below.

7.1 Assessee Declared Income u/s 44AD of the Act – Books of Accounts Not Required to be Maintained – Not Required to be Audited: We may submit that the assessee has declared its turnover in section 44AD of the Act and this section specifically exempts the assessee not only from getting its accounts audited u/s 44AB of the Act but also exempts the assessee from maintaining of books of accounts u/s 44AA of the Act. Though the reading of the relevant sections makes it clear but still it would be useful to peruse the relevant extracts of Circular No.5 of 2010 dt.3-6-2010 to make things clear as is reproduced herein below:

Explanatory Notes to the Provisions of Finance (No. 2) Act, 2009

"21. Special provision for computing profits and gains of business on presumptive basis

21.1 The existing provisions of the Income-tax Act provide for taxation of income on presumptive basis in the case of construction business, income from goods carriages and business of retail trade. Section 44AD prescribes a method of presumptive taxation for assessee engaged in the business of civil construction or supply of labour for civil construction in which a sum equal to eight percent of the gross receipts is deemed to be the profits and gains from business. Section 44AE provides presumptive provisions for the assessee engaged in the business of plying, hiring or leasing up to ten goods carriages in which a prescribed sum per vehicle is deemed to be the presumptive income of the assessee. Section 44AF prescribes a method of presumptive taxation for retail trade, under which the presumptive income is computed at the rate of a sum equal to five per cent of the total turnover. There has been a substantial increase in small businesses with the growth of transport and communication and general growth of the economy. A large number of businesses and service providers in rural and urban areas who earn substantial income are outside the tax-net. Introduction of presumptive tax provisions in respect of small businesses would help a number of small businesses to comply with the taxation provisions without consuming their time and resources. A presumptive income scheme for small taxpayers lowers the compliance cost for such taxpayers and also reduces the administrative burden on the tax machinery. In view of the above, to expand the scope of

presumptive taxation to all businesses, the existing section 44AD has been substituted by a new section 44AD.

21.2 The salient features of the new presumptive taxation scheme are as under:

(a) The scheme is applicable to individuals, HUFs and partnership firms excluding Limited liability partnership firms. It is also not be applicable to an assessee who is availing deductions under sections 10A, 10AA, 10B, 10BA or deduction under any provisions of Chapter VIA under the heading "C.—Deductions in respect of certain incomes" in the relevant assessment year.

(b) The scheme is applicable for any business (excluding a business already covered under section 44AE) which has a maximum gross turnover/gross receipts of 40 lakhs.

(c) The presumptive rate of income is prescribed at 8% of gross turnover/gross receipts.

(d) An assessee opting for the above scheme is exempted from payment of advance tax related to such business under the current provisions of the Income-tax Act.

(e) An assessee opting for the above scheme is exempted from maintenance of books of accounts related to such business as required under section 44AA of the Income-tax Act.

(f) An assessee with turnover below Rs. 40 lakhs, who shows an income below the presumptive rate prescribed under these provisions, in case his total income exceeds the taxable limit, required to maintain books of accounts and also get them audited.

(g) The existing section 44AF is to be made inoperative for the assessment year beginning on or after 1st April, 2011.

21.3 Applicability—These amendments have been made applicable with effect from 1st April, 2011 and will accordingly apply in relation to assessment year 2011-12 and subsequent assessment years”

In the instant case, the assessee has declared n.p. rate of 9.39% which was in excess of minimum 8% required for qualifying exemption u/s 44AD of the Act. Thus neither the assessee was required to maintain any books of accounts u/s 44AA of the Act nor the same were required to be audited u/s 44AB of the Act. Therefore no penalty u/s 271B of the Act could be levied on the assessee.

7.2 No Details or Evidence of Additional Sale Declared by the Assessee – No Possibility to Treat Same Books of Accounts and Further Getting Same Audited: It is also submitted that the assessee has declared additional sales only on the basis of cash deposit made in some other person's bank account and the same cannot be treated as books of accounts of the assessee. The additional sales have been declared simply on the basis of statement given by the other person. There are absolutely no other details available with regard to such additional sales like details of parties, details of relevant purchases, details of expenses, actual margins in trading and so on. Even there is no evidence or details with the department and the estimated additional income declared by the assessee has been accepted without making any variation in the same. In support, reliance was placed on the decision of Hon'ble Delhi ITAT in the case of Brij Lal Goyal vs. ACIT 88 ITD 413 (Del)(Tri).

Thus for the purposes of section 44AA the books of accounts must be maintained in the regular course of business and merely some entries in

seized documents would not constitute books of accounts as referred to in section 44AA of the Act.

7.3 Books of Accounts Must Enable the Assessing Officer to Compute Total Income: We may submit that under the provisions of law it is not any books of accounts which may be treated as books of accounts as referred to in section 44AA and rather such books of accounts must enable the assessing officer to compute total income of the assessee.

Section 44AA: Maintenance of accounts by certain persons carrying on profession or business

“(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 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 account and other documents as may enable the [Assessing Officer] to compute his total income in accordance with the provisions of this Act.”

Thus the above provision makes it clear that the books of accounts should be kept and maintain by the assessee in such a manner so that the total income could be deduced there from. However, in the present case, the income itself has been declared on estimated basis and even further there are no documents related to the additional turnover declared and there also net profit is declared on estimated basis. Hence the records and books maintained by the assessee were not as required u/s 44AA of the Act and rather there were no books of accounts in relation to the additional turnover.

7.4 Some Records Kept by Assessee Cannot be Treated as Books of Accounts – Finding of AO Not Relevant: The Id. AO pointed out that the assessee has maintained books of accounts but not included the entire turnover. In this regard, we may submit that as already submitted that the assessee was not required to keep any books of accounts but still some records or books are kept by the assessee to support figure of its turnover, details of debtors and creditors, advances taken or paid etc. Such books or records cannot be treated as such books of accounts as has been stated u/s

44AA of the Act as these are not adequate to get them audited u/s 44AB of the Act. The income has been declared by the assessee on estimated basis u/s 44AD of the Act and as such the finding of Id. AO is not relevant for determining the issue in hand.

7.5 Ld. AO Himself Rejected Books of Accounts: We may also submit that the Id. AO himself has rejected the books of accounts by invoking section 145 of the Act as would appear on page 3 of the assessment order. As such where the Id. AO was not able to deduce proper income out of books maintained by the assessee, the same cannot be treated as books of accounts maintained for the purposes of section 44AA of the Act. Hence, there is no possibility of getting the same audited u/s 44AB of the Act and therefore, penalty u/s 271B could not be invoked.

In such circumstances, there is impossibility to treat the same as books of accounts and even further get them audited as per provisions of section 44AB of the Act.

7.6 Independent Penalty Prescribed for Violation of Section 44AA & Section 44AB of the Act: We may submit that for violation of provisions of section 44AA of the Act, penalty is prescribed u/s 271A of the Act whereas for violation of section 44AB of the Act, penalty can be levied u/s 271B of the Act. But it is to be seen that section 44AB is dependent on section 44AA of the Act in so far as unless books of accounts are maintained as per provisions of section 44AA, question of audit of the same u/s 44AB would not arise.

7.7 Books of Accounts Not Maintained – Penalty Could be Levied u/s 271A of the Act – Section 271B Cannot Be Invoked: in view of the foregoing submission, we may submit that even if the assessee did not maintain any books of accounts with regard to its turnover then still a maximum penalty

could be levied u/s 271A of the Act and there was no occasion to levy penalty u/s 271B of the Act and obvious reason for the same is that where there are no books of accounts maintained by the assessee there is impossibility to get the same audited and as such no occasion arises for levy of penalty u/s 271B.

7.8 Case Laws: There are various decisions wherein it has been held that where no books of accounts were maintained u/s 44AA of the Act, then penalty u/s 271B will not be a proper recourse and rather at best penalty could be levied u/s 271A of the Act.

- COMMISSIONER OF INCOME TAX vs. BISAULI TRACTORS (2008) 217 CTR 0558 : (2008) 8 DTR 0273 : (2008) 299 ITR 0219 :
- SURAJMAL PARSURAM TODI vs. COMMISSIONER OF INCOME TAX (1997) 142 CTR 0209 : (1996) 222 ITR 0691 (Gau HC)
- COMMISSIONER OF INCOME TAX & ANR. vs. S.K. GUPTA & CO. (2010) 322 ITR 0086 (All HC)

7.9 Decision of Hon'ble Jaipur ITAT: The Hon'ble Jaipur ITAT in the matter of Yogendra Singh Shekhawat vs. ITO ITA No. 1001/JP/2016 dt.24-4-2017 has given a similar finding that separate penalty has been provided for violation of section 44AA and section 44AB of the Act and in case of violation of section 44AA of the Act, penalty u/s 271B cannot be fastened.

7.10 Therefore, considering the above facts and circumstances of the case, where no books of accounts were maintained by the assessee u/s 44AA of the Act, penalty u/s 271B cannot be fastened on the assessee and accordingly, the appeal of the assessee may please be allowed.

8. The Id DR is heard who has vehemently argued the matter and took us through the order and the findings of the lower authorities. She submitted that the assessee has maintained the books of accounts however there were

unaccounted sales which were later on admitted by the assessee by way of revised return of income and taking the declared and undeclared turnover, it exceed the threshold of Rs 60 lacs which is prescribed for getting the books of accounts audited which the assessee has failed in the instant case and therefore, the AO was right in levying penalty under section 271B of the Act and which has rightly been confirmed by the Id CIT(A).

9. We have heard the rival contentions and perused the material available on record. We find that the AO has accepted the income offered in the return of income filed under section 44AD of the Act and at the same time, has brought to tax the undisclosed business receipts of Rs. 43,34,064/- offered for taxation during the course of assessment proceedings. The AO has thus come to a conclusion that since the combined receipts exceed the prescribed threshold of Rs 60 lacs, the assessee has failed to get his books of accounts audited. We find that by accepting the income offered under section 44AD(1), the AO has thus accepted the assessee's eligibility for presumptive basis of taxation under section 44AD. Once the said eligibility is accepted, if we read the provisions of section 44AD and in particular sub-section (5), it clearly provides that an eligible assessee who claims his income from the eligible business is below the presumptive rate of 8% of total turnover or gross receipts, he shall be required to maintain books of accounts and also get them audited and furnish a report as required under section 44AB of the Act. Therefore, only in a scenario, where such a claim is made by the assessee whereby he claims that his income to be lower than 8% of total turnover or gross receipts, he will be required to maintain books of accounts and get them audited. Corresponding provisions are provided in section 44AA(2)(iv) of the Act as well. In the instant case, the assessee has not made any such claim in his return of income. Further, the Revenue has

accepted the claim of the assessee as being eligible for such presumptive taxation where the assessee has reported a net profit of 8.09% on total reported turnover of Rs 48,98,269. In such a situation, having not disturbed the said position under section 44AD, it cannot be said that the assessee has failed to get his books of accounted where undisclosed business receipts of Rs. 43,34,064/- are brought to tax during the course of assessment proceedings and whereby the prescribed turnover threshold has been breached. Had the Revenue rejected the assessee's claim under section 44AD of the Act and thereafter, taking into consideration the declared turnover of Rs 48,98,269 and undisclosed business receipts of Rs 43,34,064, had come to a position that the assessee has failed to get offered his books of accounted, that in a such a scenario, the contention of the Revenue could have been accepted. Further, what has been referred in section 44AB is the books of accounts maintained in the regular course of business and where an admission is made by the assessee based on third party statement during the course of survey that the amount found deposited in the bank account belongs to the assessee, it cannot be said that regular books of accounts are maintained even in respect of unaccounted sales or business receipts and the penalty can be levied under section 271B of the Act. In this regard, we refer to the decision of the Coordinate Bench in case of **Brij Lal Goyal vs. ACIT (supra)** wherein it has been held as under:

*"---11. It is evident from the aforesaid observation that books of account maintained in regular course only make the assessee eligible for grant of immunity from penalty and not with reference to any of such books, which have not been maintained in the regular course of business. **Admittedly, the additional sales found as a result of search, was not recorded in the books of account regularly kept in the course of business by the appellant. Merely because the appellant accepted the***

additional sales for the purpose of assessment of the relevant year on the basis of entries in the seized documents, the same would not constitute accounts of the appellant maintained in the regular course of business and on that basis alone liability cannot be fastened on the assessee by holding him to have committed the default. Furthermore, the word "accounts" has not been defined under the IT Act. However, under s. 34 of the Indian Evidence Act, 1872, sanctity is attached to the books of accounts, if the books are indeed "account books", i.e., in original if they show on their face, that they are kept in the 'regular course of business'. So, the accounts under s. 34 of Indian Evidence Act means accounts which are maintained in the regular course of business. Accordingly we are satisfied that the record carrying entries from which the appellant admits of additional sales are not the accounts as referred to under s. 44AB of the Act. On that basis it was not open to the AO to hold that the sales of the assessee as referred in s. 44AB of the Act have exceeded to Rs. 40 lakhs and by not getting such accounts audited from an accountant, the appellant has committed a default. Such a finding arrived at by the AO is reversed."

10. In light of above discussions and in the entirety of facts and circumstances of the case, the penalty levied under section 271B is hereby deleted. In the result, the appeal of the assessee is allowed.

11. In ITA No. 73/JP/18, Admittedly, the facts and circumstances in this case are similar. Our findings and directions contained in ITA No. 74/JP/18 shall apply *mutatis mutandis* to this matter as well. The appeal of the assessee is thus allowed.

In the results, both of the appeals of respective assessee are allowed.

Order pronounced in the open Court on 27/03/2018.

Sd/-
(विजय पॉल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Jaipur

Dated:- 27/03/2018.

Ganesh Kumar/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Assessee- Shri Krishan Murari Agarwal, Kishangarh & Shri Nirmal Kumar Joshi, Kishangarh
2. The Respondent – ITO, Kishangarh
3. The CIT.
4. The CIT (4),
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 73 & 74/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar