

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH VC 'DB', JAIPUR

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

आयकर अपील सं./ITA No. 1115/JP/2018  
निर्धारण वर्ष/Assessment Year : 2015-16.

Shri Vijay Kumar Jain, 24/131, Sand Building, Babu Mohalla, Kaiser Ganj, Ajmer.	बनाम Vs.	The Income Tax Officer, Ward 1(2), Ajmer.
स्थायी लेखा सं./जीआईआर सं./PAN No. AARPJ 5018 Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : None  
राजस्व की ओर से / Revenue by: Ms Chanchal Meena (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 26.08.2020.  
घोषणा की तारीख / Date of Pronouncement : 07/09/2020.

आदेश / ORDER

PER VIJAY PAL RAO, JM :

This appeal by the assessee is directed against the order dated 30<sup>th</sup> July, 2018 of Id. CIT (A), Ajmer arising from the penalty order passed under section 271A of the IT Act for the assessment year 2015-16. None has appeared on behalf of the assessee when this appeal was called for hearing. Since the assessee has already filed the written submissions and paper book in this case, therefore, we proposed to decide this appeal on the basis of written submissions filed by the assessee as well as the arguments of the Id. D/R. The assessee has raised the following grounds :-

1. That penalty under section 271A confirmed by Id. CIT (A) is bad in law and facts of the case as –

- Appellant derived income only from SHARES DERIVATIVE TRANSACTIONS. Income of Rs. 2,30,036/- was returned by Appellant (in accordance with details of transactions, ledger accounts, bank statements, gain loss statements and contract notes, etc. provided by Broker – M/s. KOTAK SECURITIES). Id. A.O. assessed income at Returned Figures vide Order under Section 143(3) dated 19.09.2017.
  - Section 44AA(2) only mandates that every person shall 'keep and maintain such books of accounts and other documents as may enable the A.O. to compute his total income in accordance with the provisions of law.' The Id. AO's apparent act of computing income at Returned Income figures is evidence of the approval and other documents by Id. A.O.
  - As there was no failure of the nature described in Section 271A (read with Section 44AA) penalty under section 271A needs to be quashed.
2. That the appellant carves to add, amend and alter the ground of appeal before or at the time of appellate hearing."

The hearing of the appeal is concluded through Video Conference due to prevailing condition of COVID 19 pandemic.

2. During the course of assessment proceedings, the AO noted that the assessee was having the turnover from the transactions of purchase and sale of shares of Rs. 47.86 crores but the assessee is not maintaining proper books of account. Accordingly the AO initiated the proceedings under section 271A and 271B of the IT Act for non maintenance of books of account and not auditing of the same. The AO also levied penalty under section 271A as well as under section 271B of the IT Act. The assessee challenged the levy of penalty under section 271A and 271B before the Id. CIT (A). The Id. CIT (A) deleted the penalty made under section 271B but

confirmed the penalty levied under section 271A of the Act. In the written submissions, the assessee has submitted that the AO has taken the turnover in respect of derivative transaction in shares and securities by considering the total amount instead of considering the positive and negative outcome of the derivative transactions. The assessee has further pointed out that even the Id. CIT (A) while deleting the penalty levied under section 271B has accepted the fact that the assessee has entered into derivative/F & O transactions and the turnover of F & O transactions was only Rs. 53,54,967/- and, therefore, the assessee was not required to get his accounts audited under section 44AB of the Act.

3. On the other hand, the Id. D/R has relied upon the orders of the authorities below and submitted that there are no specific details given by the assessee during the assessment proceedings as well as penalty proceedings to show that the turnover of the assessee is only Rs. 28,20,974/- which was claimed by the assessee. Whereas the AO has noted that the turnover of the assessee is Rs. 47.86 crores. The Id. D/R has submitted that the evidence brought on record by the AO cannot be ignored. He has also relied upon a decision of Hon'ble Delhi High Court in case of Suman Poddar vs. ITO, 112 taxman.com 329 (Del.) and SLP filed by the assessee has been dismissed by the Hon'ble Supreme Court reported in 112 taxmann.com 330 (SC).

4. At the outset, we note that this Tribunal has taken a consistent view that the turnover in respect of derivative transactions has to be computed by taking the total sum of positive and negative outcome of the transactions instead of the total amount of transaction. In case of Santosh Kumar vs. ITO in ITA No. 1093/JP/2019 vide order dated 03.07.2020 this Tribunal has held as under :-

" 2. We have heard the Id. AR as well as Id. DR and considered the relevant material on record. The Assessing Officer while passing the scrutiny assessment U/s 143(3) r.w.s. 147 of the Act has given the finding that the assessee is not maintaining the books of account and the turnover of the assessee in respect of derivative transactions on MCX is more than Rs. 127 Cr. Thus, the AO after framing the assessment initiated proceeding for levy of penalty U/s 271A as well as 271B of the Act. The assessee challenged the action of the AO before the Id. CIT(A) against the levy of penalty U/s 271A as well as 271B of the Act. The Id. CIT(A) deleted the penalty levied U/s 271A of the Act while passing even dated order but confirmed the penalty levied U/s 271B of the Act. We note that the Assessing Officer has proceeded on basis that the turnover of derivative more than Rs. 127 Cr. whereas total difference of positive and negative outcome of speculative transactions is only Rs. 22,55,040/-. The details of the speculative transactions carried out by the assessee during the year under consideration have been reproduced by the AO at page 3 as under:-

Symbols	Sale		Purchase		Diff in Qty	Profit/Loss
	Qty	Amount	Qty	Amount		
Copper	410	126596650	410	126510850	0	85800
Crudeoil	80	27252700	80	27214100	0	38600
Gold	31	51116300	31	51421400	0	-305100
Goldm	65	10826480	65	10989610	0	-163130
Lead	111	57909750	111	57706500	0	203250
Natural Gas	1168	336758750	1168	336731375	0	27375
Nickel	535	116574650	535	117306600	0	-731950
Solver	496	392820660	496	393569940	0	-749280
Silverm	1110	147462115	1110	147567695	0	-105580
Zinc	5	2727250	5	2714750	0	12500
	4011	1270045305	4011	1271732820	0	-1687515

From the above table it is clear that if the total some of the negative and positive outcome of the speculative transactions is taking into consideration the it would be Rs. 20,55,040/-. Though the turnover in case of speculative transactions is not defined in the income tax Act for the purpose of Section 44AA and 44AB of the Act and however, the guidance note on tax audit U/s 44AB of the IT Act issued by the Institute of chartered Accountant of India (ICAI) would be relevant on this point. We find that this Tribunal in case of Shri Rajjak Ahmed Khan vs. ITO in ITA No. 1181/JP/2019 vide order dated 13.01.2020 has considered an identical issue in para 5 as under:-

*"We have considered the rival submissions as well as the relevant material on record. The limited dispute in the case in hand is whether the provisions of section 44AB are applicable in the case of the assessee when the assessee has done the share trading in intraday segment and some of the transactions are delivery based transactions to the extent of Rs. 53,498/-. There is no dispute regarding the turnover in respect of the transactions of the shares which are delivery based. However, the dispute is regarding the turnover in respect of the intraday transactions carried out by the assessee. The AO has taken the total value of the transactions at Rs. 2,43,62,720/- in the intraday non-delivery based trading segment. There is no quarrel that the transactions carried out by the assessee in intraday non-delivery based segment are speculative transactions as per section 43(5) of the Act. This fact is also accepted by the Id. CIT (A) in his finding in para 2.3 as under :-*

*" Ground No. 01 and 02 are being taken up together which are interrelated. I have perused the facts of the case, the penalty order and the submissions of the appellant. It is seen that the*

*Assessing Officer imposed penalty under section 271B for not getting the accounts audited. There is no dispute as to the fact that the turnover of the assessee is more than the limit prescribed under section 44AB and the assessee has not got his accounts audited. Assessee has taken plea that these transactions of stock related to intraday activities/non-delivery based transactions. Therefore, the same did not require audit under section 44AB.*

*Assessee claimed that the transactions are non delivery based and daily difference (by ignoring the signs) be taken as turnover. This plea cannot be accepted as it is applicable for transaction of derivatives whereas assessee transacted in cash securities where non delivery based transactions are classified as speculative transactions as per section 43(5) of the I.T. Act, 1961. Accordingly assessee is liable to get his accounts audited. Looking to these facts, penalty under section 271B imposed by the Assessing Officer is confirmed. These grounds of appeal are dismissed."*

*Once these transactions are non-delivery based intraday transactions and classified as speculative transaction as per the provisions of section 43(5) of the IT Act, then the turnover in respect of these transactions has to be determined as per the Guidance Note issued by the Institute of Chartered Accounts of India. For ready reference, we reproduce the relevant part of the Guidance Note in para 5.14 as under :-*

*" Guidance Note on Tax Audit under Section 44AB  
of the Income-tax Act, 1961.*

*5.14. The turnover or gross receipts in respect of transactions in shares, securities and derivatives may be determined in the following manner :-*

*(a) Speculative transaction : A speculative transaction means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips. Thus, in a speculative transaction, the contract for sale or purchase which is entered into is not completed by giving or receiving delivery so as to result in the sale as per value of contract note. The contract is settled otherwise and squared up by paying out the difference which may be positive or negative. As such, in such transaction the difference amount is 'turnover'. In the case of an assessee undertaking speculative transactions there can be both positive and negative differences arising by settlement of various such contracts during the year. Each transaction resulting into whether a positive or negative difference is an independent transaction. Further, amount paid on account of negative difference paid is not related to the amount received on account of positive difference. In such transactions though the contract notes are issued for full value of the purchased or sold asset the entries in the books of account are made only for the differences. Accordingly, the aggregate of both positive and negative differences is to be considered as the turnover of such transactions for determining the liability to audit vide section 44AB."*

*The turnover has not been defined in the IT Act and particularly in respect of the speculative transactions in shares and securities. Therefore, the Guidance Note of ICAI is a relevant and proper guidance for determining the turnover in respect of such speculative*

*transactions. As it is clear from the Guidance Note issued by the ICAI that the turnover in respect of non-delivery based speculative transactions including stock and shares has to be determined by taking the aggregate of both positive and negative differences arising from such transactions and as an out-come of settlement of such contracts during the year. We find that the assessee has produced the details of the speculative transactions as well as delivery based transactions and also given the computation of the turnover as under :-*

<i>Intraday Positive or favorable differences (sheet enclosed for this)</i>	<i>109092.10</i>
<i>Intraday Negative or unfavorable differences (sheet enclosed for this)</i>	<i>152689.69</i>
<i>Sale of delivery based transactions</i>	<i>53498.9</i>
	<i>315280.69</i>

*There is no dispute regarding the delivery based transactions of shares to the tune of Rs. 53,498.90. We have verified the computation of the turnover in respect of intraday non-delivery based transactions and the positive and negative differences of these speculative transactions given in the above table. Therefore, by taking the aggregate of the positive and negative differences as well as the turnover of the delivery based transactions, the total turnover of the assessee comes to Rs. 3,15,280.69. Hence, when the turnover of the assessee is less than the threshold limit provided under section 44AB, then the assessee is not required to get its books of account audited in terms of section 44AB of the IT Act and consequently the penalty provision of section 271B of the IT Act is not attracted. Even otherwise, when this issue of 'turnover' is a debatable issue and the assessee has claimed this turnover as Rs. 3,15,280.69 if computed in terms of the Guidance*

*Note of ICAI, then the said explanation of the assessee would be regarded as reasonable and bonafide as per the provisions of section 273B of the IT Act and consequently no penalty under section 271B is leviable. Accordingly, the penalty levied under section 271B is deleted.”*

Thus, in the above case on identical issue the Tribunal has considered the guidance note of ICAI in respect of the tax audit U/s 44AB of the Act wherein the turnover or gross receipt in respect of speculative transactions has been considered as some total of positive and negative outcome of the speculative transactions. This Tribunal in a subsequent decision dated 17.02.2020 in case of Shri Sanjay Prakash vs. ITO in ITA No. 1052 to 1054/JP/2019 has again considered the said this issue and by following the earlier decision accepted the contention of the assessee that turnover in respect of the speculative transactions shall be positive and negative differences of the transactions and not volume of the speculative transactions. Accordingly in view of the consist view taken by this Tribunal the turnover of the assessee would not exceed the limit as provided U/s 44AB, the penalty levied U/s 271B is deleted.”

Accordingly, when the turnover has to be computed only by taking the positive and negative outcome of the transactions and not the entire volume of the transactions, the turnover of the assessee is wrongly considered by the AO while levying the penalty under section 271A of the Act. Even otherwise, when the issue of turnover in case of derivative transactions is a debatable issue, then the assessee cannot be penalized for not maintaining the books of account as the case would definitely fall under the provisions of section 273B of the IT Act which contemplates that no

penalty shall be imposable on a person or the assessee for any failure inter alia attracting the provisions of section 271A if he proves that there was a reasonable cause for the said failure. The showing of the turnover by the assessee from a derivative transaction is a bonafide explanation. Accordingly, the penalty levied under section 271A of Rs. 25,000/- is deleted.

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

Order is pronounced in the open court on 07/09/2020.

Sd/-  
(विक्रम सिंह यादव)  
(VIKRAM SINGH YADAV )  
लेखा सदस्य / Accountant Member

Sd/-  
(विजय पाल राँव )  
(VIJAY PAL RAO)  
न्यायिक सदस्य / Judicial Member

Jaipur

Dated:- 07/09/2020.

Das/

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

1. The Appellant- Shri Vijay Kumar Jain, Ajmer.
2. The Respondent – The ITO Ward 1(2), Ajmer.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 1115/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar