

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

TUESDAY, THE 07TH DAY OF JANUARY 2020 / 17TH POUSHA, 1941

ITA.No.320 OF 2019

AGAINST THE ORDER DATED 26-06-2019 IN ITA NO.400/2018 OF
I.T.A.TRIBUNAL, COCHIN BENCH

APPELLANT/ASSESSEE:

PEROORKKADA SERVICE CO-OPERATIVE BANK LIMITED,
NO.T 1412, REPRESENTED BY ITS SECRETARY
SHRI.VISWAKUMAR V., S/O.K.VASUDEVAN PILLAI,
AGED 54 YEARS, PEROORKADA P.O.,
THIRUVANANTHAPURAM DISTRICT,
KERALA, PIN - 695 005.

BY ADVS.SRI.C.A.JOJO
SMT.SWATHY S.

RESPONDENTS/RESPONDENTS:

- 1 THE INCOME TAX OFFICER,
WARD-2(1), KOWDIAR, TRIVANDRUM - 695 003.
- 2 COMMISSIONER OF INCOME TAX (APPEALS)-I,
OFFICE OF THE COMMISSIONER OF INCOME TAX
(APPEALS), TRIVANDRUM - 695 003.
- 3 THE PRINCIPAL COMMISSIONER,
OFFICE OF THE COMMISSIONER OF INCOME TAX,
TRIVANDRUM - 695 003.

I.T.APPEAL No.320 of 2019

: -2- :

- 4 THE JOINT COMMISSIONER,
OFFICE OF THE COMMISSIONER OF INCOME TAX,
TRIVANDRUM - 695 003.
- 5 THE ASST. REGISTRAR,
INCOME TAX APPELLATE TRIBUNAL,
COCHIN BENCH, KAKKANAD, COCHIN - 682 030.

OTHER PRESENT:

SRI.CHRISTOPHER ABRAHAM, SC FOR RESPONDENTS.

THIS INCOME TAX APPEAL HAVING COME UP FOR ADMISSION ON
07.01.2020, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

C.K.ABDUL REHIM & T.V.ANILKUMAR, JJ.

I.T.Appeal No.320 of 2019

Dated this the 7th day of January, 2020

J U D G M E N T

C.K.ABDUL REHIM, J.

The above Income Tax Appeal was filed challenging an order passed by the Income Tax Appellate Tribunal, Cochin Bench in I.T.A.No.400/COCH/2018, dated 26.06.2019. The assessee is the appellant and the revenue is the respondent.

2. Issue pertains to sustainability of the penalty imposed against the appellant under Section 271B of the Income Tax Act, 1961 (*'the Act', for short*). The proceedings was initiated based on an allegation that the appellant had failed to furnish report of audited accounts as required under Section 44AB with respect to the assessment year 2014-15. A show cause notice was issued preceding imposition of the penalty, requiring the assessee to show

cause as to why penalty under Section 271B should not be imposed. In the reply the appellant said that, as per the second proviso to Section 44AB, if a person is required by or under any other law to get his accounts audited, getting the accounts audited under that law before the specified date and furnishing of a report of such audit, would be sufficient compliance of the requirement under that Section and that no penalty can be imposed. But the Assessing Authority found that, the appellant had failed to furnish the report of audit in the prescribed Form, duly signed and verified by an Accountant as required under Section 44AB or to furnish the report of audit conducted under any other law along with the further report by an Accountant in the Form prescribed, as required under the second proviso to Section 44AB. Therefore it is held that the appellant is liable to be imposed with penalty under Section 271 B and ordered to pay penalty of Rs.1,50,000/- as provided under the said Section.

3. The order imposing penalty was taken up in appeal

before the Commissioner of Income Tax (Appeals). The first Appellate Authority had found that the appellant had failed in complying with the statutory requirement of furnishing the audited report in Form No.3CA as required under Section 44AB, along with the further report of the Accountant as mandated. It was found that, what was filed by the appellant is only a 'Certificate' issued by the Joint Director (Audit), Thiruvananthapuram, Co-operative Department, dated 03.07.2018, accompanied by the 'Audit Note' of the assessee Society. It was found that, filing of Form No.3CA along with a further report by an Accountant is the mandatory requirement and the mere getting of the accounts audited under any other law will not suffice compliance of the said requirement. In the absence of compliance of the provisions contained in the second proviso to Section 44AB read with Rule 6G(1) of the Income Tax Rules,1962, it cannot be said that there is proper compliance of the provision, is the findings . It was also found that the

appellant had failed to prove that there existed no 'sufficient cause' for the failure or that there existed any 'reasonable cause' for such failure. Therefore the order of penalty was confirmed.

4. In the second appeal filed before the Tribunal, the appellant/assessee contended that the audit was completed under provisions of the Co-operative Societies Act, 1969. But the audit was completed at a later stage. The Society does not have any power to appoint an Auditor and to get its account audited within the time stipulated under the Income Tax Act. Therefore, the delay occurred in submitting the audited account was reasonable. It was pointed out that there was proper compliance of the first limb of the second proviso to Section 44AB. According to the appellant, the failure was only with respect to furnishing of the further report by an Accountant, as required under the second limb of the second proviso. It was argued that the penalty under Section 271B could be imposed only if there is a failure to

get the accounts audited or if there is a failure to furnish the report of such audit. It was contended that the scope of Section 271B cannot be extended, alleging non-compliance to furnish the further report by an Accountant.

5. The Tribunal found that that the assessee had furnished documents such as Annual report of the financial year 2013-14 depicting the audited financial statements. But the Audit Report in the prescribed Form was not produced before the Assessing Officer. It was held that, the non-production of the Audit Report in the prescribed format can be a reason for imposing penalty under Section 271B. Therefore the contentions were discarded and the orders of the authorities below were confirmed. It is aggrieved by the said order, the above appeal is filed by raising the following questions of law.

- 1 *Whether the Assessing Officer is right in imposing penalty when audit report is filed as per the 2nd proviso to S.44AB of the Income Tax Act, 1961?*

2 *Whether the Assessing Officer is right in insisting for a 'Further Report in Form No.3CA when the proviso very clearly speaks that 'where such person is required by or under any other law to get his accounts audited it shall be sufficient compliance with the provisions of this section?*

3 *Whether the Appellate Authorities are justified in confirming the penalty imposed by the assessing officer without applying mind while an Audit Report has been submitted as per the proviso to S.44AB?*

6. We heard learned counsel for the appellant Adv.

Sri.C.A.Jojo, as well as learned standing counsel appearing for the respondents.

Section 271B of the Act reads as follows ;

“271B. Failure to get accounts audited

If any person fails to get his accounts audited in respect of any previous year or years relevant to an assessment year or [furnish a report of such audit as required under section 44AB], the [Assessing] Officer may direct that such person shall pay, by way of penalty, a sum equal to one-half per cent of the total sales, turnover or gross receipts, as the case may be, in business, or of the gross receipts in profession, in such previous year or years or a sum of [one hundred fifty thousand rupees], whichever is less.”

It is evident that, if there is any failure on the part of the assessee to get his accounts audited in respect of any

previous year relevant to the assessment year or if the assessee fails to furnish a report of such audit as required under Section 44AB, it is liable to be imposed with penalty under that Section. Section 273B provides that, no penalty shall be imposed for any failure referred to in Section 271B, if the assessee proves that there was 'reasonable cause' for the said failure.

7. From the provisions enumerated as above, it is clear and evident that if an assessee is liable to furnish the audited report of his accounts, audited under any other law applicable to him, along with a further report by an Accountant in the prescribed form, within the date stipulated for the said purpose, it will attract penalty under Section 271B, subject to provisions contained in Section 273B, which is of showing sufficient reasons (reasonable cause). In the case at hand, the appellant had furnished audited financial statement with respect to the year concerned along with a Certificate issued by the Joint

Director (Audit) of the Co-operative Department dated 3.7.2018. He has not furnished the report of audit in the prescribed form, Form 3CA, as required under the second proviso (as it stood then) to Section 44AB read with the requirements under Rule 6G(1) of the Income Tax Rules.

8. Contention of the appellant herein is that the submission of audited accounts and statement along with the Certificate of the Auditor appointed under the Co-operative Societies Act, as mandated under Section 63 of the Co-operative Societies Act, would amount to sufficient compliance of the requirements under the second proviso to Section 44AB. His further contention is that the further report by an Accountant, insisted upon in the second proviso, is not a mandatory requirement, because the provision in the Constitution of India itself insists upon for a mandatory audit of the accounts of a Co-operative Society under the Department of the Government concerned. We take note of the fact that, it is a mandatory requirement

under Section 44AB that the appellant should get its account audited by an Accountant and to furnish before the specified date, the report of such audit in the prescribed form duly signed and verified by such Accountant and by setting forth such particulars as may be prescribed. Form CA is the particular form prescribed for the said purpose.

9. Since the appellant is a person required under the Co-operative Societies Act to get its account audited under that Act, it would be sufficient compliance under the second proviso to Section 44AB, if the appellant gets the account of its business audited under the Co-operative Societies Act before the specified date and furnishes that report of audit, along with further report by an Accountant in the form prescribed, before the Assessing Authority under the Income Tax Act, before the date stipulated for the said purpose. It is to be noted that, the further report required by an Accountant need to be furnished in Form 3CD. Evidently the appellant had not furnished the report of the audit under Co-

operative Societies Act in the form prescribed, which is Form 3CA. On the other hand, his contention is that the accounts were audited by the Co-operative Department and the Joint Director had issued a Certificate to that effect. Probable contention raised by the appellant is that since the appellant is a person required by the Co-operative Societies Act to get its accounts audited under that Act, the audit report need not be filed in Form 3CA. Even assuming (without admitting) that the furnishing of a report of the audit conducted by the competent Auditor stipulated under the Co-operative Societies Act would suffice compliance of the first limb of the second proviso, it is evident that the further report by an Accountant, as mandated to be furnished in Form 3CD, was not furnished by the appellant. Moreover, the factual finding arrived by the Tribunal is to the effect that the appellant had furnished only the Annual Report depicting the audited financial statement along with copy of the receipts and distribution statements. It is also

evident that the appellant had furnished a Certificate issued by the Joint Director (Audit) of the Co-operative Department. When the second proviso carves out an exemption from the general provisions of Section 44AB, the stipulations therein need to be strictly adhered and the mere fact that the audit of the assessee was conducted under the provisions of the Co-operative Societies Act, would not be sufficient for such compliance. Furnishing of the report of audit in the prescribed form accompanied with a further report by an Accountant in the prescribed form, is a mandatory requirement for proper compliance. Since the appellant had failed to show any 'reasonable cause', coming within the purview of Section 273B, the imposition of penalty under Section 271B cannot be interfered with.

10. Lastly, learned counsel for the appellant had drawn our attention to a Circular issued by the Central Board of Direct Taxes, Circular No.03/2009, dated 21.5.2009. Based on which it is contended that, the audited

: -14- :

report need not be attached along with the returns or furnished separately at any time before or after the due date; but it need only to be retained by the assessee and produced if it is called for by the Income Tax Authority during any proceedings under the Act. The Circular says that no penalty under Section 271B shall be initiated or levied for not furnishing the tax audit report before the due date. Therefore the imposition of penalty under Section 271B cannot be sustained, is the contention. We are not persuaded to accept the above contention in view of the mandatory provisions contained in Section 44AB, which insists on furnishing of the audit report in the prescribed form before the due date stipulated, along with a further report of an Accountant. When the specific provision contained in the statute is unambiguous in this respect, we cannot hold otherwise based on any circular of the Department. Hence the above contention cannot be accepted. Further, learned Standing Counsel appearing for

: -15- :

the respondents contended that, the penalty proceedings in this case was initiated on the allegation that the appellant had failed to obtain a proper audit report within the date stipulated in the relevant provision.

For the reasons mentioned as above, we are of the opinion that, no substantial question of law arises for consideration in challenge against the impugned order of the Tribunal. Accordingly, the above appeal fails and the same is hereby dismissed.

All pending interlocutory applications are closed.

Sd/-

**C.K.ABDUL REHIM
JUDGE**

Sd/-

**T.V.ANILKUMAR
JUDGE**

ami/DST

APPENDIX

PETITIONER'S EXHIBITS:

- ANNEXURE A A TRUE COPY OF THE REPLY DATED 17/01/2017
SUBMITTED TO THE 1ST RESPONDENT.
- ANNEXURE B A TRUE COPY OF THE PENALTY ORDER DATED
19/06/2017 ISSUED BY THE 1ST RESPONDENT.
- ANNEXURE C A TRUE COPY OF THE DEMAND NOTICE U/S. 156
DATED 19/06/2017.
- ANNEXURE D A TRUE COPY OF THE 1ST APPELLATE ORDER
DATED 19/07/2018.
- ANNEXURE E A TRUE COPY OF THE APPEAL DATED 21/08/2018
BEFORE THE 5TH RESPONDENT.
- ANNEXURE F THE ORIGINAL COPY OF THE APPELLATE ORDER BY
THE 5TH RESPONDENT DATED 26/06/2019.
- ANNEXURE G A TRUE COPY OF THE LETTER OF DEMAND DATED
08/11/2019 ISSUED BY THE 1ST RESPONDENT.
- ANNEXURE H A TRUE COPY OF THE STAY ORDER IN WP (C)
NO.1828/2018 DATED 18/01/2018.