



Tax alert: Penalty for failure to audit books not leviable if penalty is levied for its non-maintenance

20 February 2024

The Raipur Bench of the Income-tax Appellate Tribunal has rendered its decision that the penalty, under section 271B of the Income-tax Act, 1961 (ITA), for failure to audit books of accounts, could not be levied where such books of accounts are not maintained by the taxpayer and penalty under section 271A for failure to maintain accounts has already been levied.

Background:

- The taxpayer¹, an individual, is engaged in the business of manufacturing and trading of iron and steel items.
- During the course of audit proceedings, the Assessing Officer (AO), amongst others, had initiated penalty proceedings for the following:
 - Penalty under section 271A of the Income-tax Act, 1961 (ITA) for failure to maintain books of account and other documents as required under section 44AA of the ITA; and
 - Penalty under section 271B of the ITA for failure to get books of accounts audited as per the provisions of section 44AB of the ITA.
- Aggrieved by the imposition of penalty under section 271B of the ITA, amongst others, the taxpayer filed an appeal and in the course of appellate proceedings, the matter reached before the Raipur Bench of the Income-tax Appellate Tribunal (ITAT).

The key contention of the taxpayer was that:

- When the taxpayer had been subjected to rigors of penalty (under section 271A of the ITA) for failure to maintain books of accounts, the AO could not have imposed on the taxpayer the penalty (under section 271B of the ITA) for failure to get books of accounts audited. Reliance in this regard was placed on earlier cases² of the Allahabad High Court as well as Pune and Delhi Bench of the ITAT.

Relevant provisions in brief:

Relevant extract of section 271A of the ITA

“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,

¹ Santosh Jain vs. Income-tax Officer [2023] 155 taxmann.com 58 (Raipur ITAT)

² CIT v. S.K. Gupta & Co. [2010] 322 ITR 86 (Allahabad HC), Ram Prakash C Puri v. Asst. CIT [2001] 77 ITD 210 (Pune ITAT) and Mohit Garg v. ITO [IT Appeal No. 3355 (Delhi) of 2017, dated 23-6-2020] (Delhi ITAT)

the Assessing Officer or the [Joint Commissioner (Appeals) or the]³ Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum of twenty-five thousand rupees.”

Relevant extract of section 271B of the ITA

“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.”

Decision of the ITAT:

The ITAT noted that the issue in the case under consideration was with respect to sustainability of penalty imposed by the AO under section 271B of the ITA for his failure to get his books of accounts audited as per the mandate of section 44AB the ITAT. In this regard, the ITAT noted /observed the following:

- When the taxpayer had been penalised under section 271A of the ITA for not maintaining books of accounts and other documents as required under section 44AA of the ITA, then, he could not have further been saddled with failure of getting such books of account which were admittedly not maintained, audited.
- The requirement of getting the books of account audited could arise only where the books of account are maintained. If for some reason the taxpayer had not maintained books of account, then the appropriate provision under which penalty proceedings could be initiated was section 271A of the ITA. Reliance was placed on earlier rulings⁴ in this regard.

Thus, considering the fact that the issue involved in the case under consideration was same, penalty for failure to get books of account audited could not have been levied.

In view of the above, the ITAT quashed the penalty imposed by the AO under section 271B of the ITA.

Comments:

This ruling has held that the penalty under section 271B of the ITA for failure to get books of accounts audited could not be levied where such books of accounts are not maintained by the taxpayer and penalty under section 271A for failure to maintain accounts has already been levied.

Similar view was taken by the Jaipur Bench of ITAT in case of *Lokesh Kumar Sharma vs ITO [2023] 152 taxmann.com 130 (Jaipur - Trib.)*.

However, it may be pertinent to note that the Ranchi Bench of ITAT in case of *Rakesh Kumar Jha vs. ITO [2023] 150 taxmann.com 298 (Ranchi-Trib.)* had observed that neither section 44AA and section 44AB are in substitution of each other nor the penalty levied under section 271A and 271B are in alternate or in substitution to each other. The persons who have been given double responsibility of maintaining books of account and audit of the accounts are liable to be subjected to penalty on both counts and they cannot be equated with the persons given single/lesser responsibility for their own wrongful act or omission.

Separately, it may be noted that in respect of the transfer pricing provisions of the ITA:

- Penalty under section 271AA can be levied:
 - Where the taxpayer fails to maintain information and document in respect of certain transactions as required under section 92D of the ITA.

³ Inserted by the Finance Act, 2023 w.e.f. 1 April 2023

⁴ CIT v. S.K. Gupta & Co. [2010] 322 ITR 86 (Allahabad HC), Ram Prakash C Puri v. Asst. CIT [2001] 77 ITD 210 (Pune ITAT) and Mohit Garg v. ITO [IT Appeal No. 3355 (Delhi) of 2017, dated 23-6-2020] (Delhi ITAT)

— Where any person fails to furnish the information and the document as required under section 92D(4) of the ITA.

As per section 92D(1) of the ITA every person,—

- i. who has entered into an international transaction or specified domestic transaction shall keep and maintain such information and document in respect thereof as may be prescribed;*
 - ii. being a constituent entity of an international group, shall keep and maintain such information and document in respect of an international group as may be prescribed.*
- Further, penalty under section under section 271G of the ITA can be levied where the taxpayer fails to furnish the information or document as required under section 92D(3) of the ITA.

As per section 92D(3) of the ITA, the AO or the Commissioner (Appeals) may, in the course of any proceeding under the ITA, require any person referred to in section 92D(1)(i) of the ITA to furnish any information or document referred therein, within a period of 10 days from the date of receipt of a notice issued in this regard:

Provided that the AO or the Commissioner (Appeals) may, on an application made by such person, extend the period of 10 days by a further period not exceeding 30 days.

Taxpayers may want to evaluate the impact of this ruling to the specific facts of their cases.

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