***TAX AUDIT – PROTECTION FROM PENALTIES LEVIABLE***

***1. INTRODUCTION***

1.1 Tax audit is made compulsory u/s.44AB of the Income tax Act, 1961for those

a) carrying on business having sales, turnover or gross receipts, as the case may be, exceed or exceeds Rs.60.00 lacs in the previous year ending 31.03.2012 (Rs.1 crore for and from the previous year ending31.03.2013)

b) carrying on profession having gross receipts exceed Rs.15 lacs in the previous year ending 31.03.2012 (Rs25 lacs for and from the previous year ending 31.03.2013)

c) carrying on business the income from which needs to be computed on a presumptive basis u/s 44AE, sec 44BB and sec 44BBB and the assessee claims that the income earned is less than the prescribed minimum amount or percentage, as the case may be.

d) carrying on business the income from which needs to be computed on a presumptive basis u/s 44AD and the assessee claims that his income earned is lower than the prescribed percentage (8%) and his income does not exceed the maximum amount not chargeable to tax.

1.2 The persons covered above need to get the accounts audited before the specified date and furnish the same by that date. Specified date for this purpose is 30th September of every assessment year.

***2. PENALTIES LEVIABLE***

2.1 Sec 271B, inserted by the FA 1984, provides for levy of penalty for non-compliance of the provisions of sec. 44AB. According to that section, the assessing office may direct that the assessee shall pay penalty for

a) non getting the books of account audited or

b) not furnishing the audit report as per sec 44AB

2.2 The penalty so leviable shall be ½% of the sales, turnover, or gross receipts or Rs.1.50 lacs whichever is less.

2.3 The provisions of sec. 271B is not violative of Article 19(1)(g) and Article 14 of the Constitution1.

2.4 As per sec 44AB, audit report is to be obtained before the specified date and **NOT** “on or before” the specified date. Therefore, one can hold a view that penalty can be levied wherever audit report is dated as 30th September of the assessment year.

***3. WHERE PENALTY CANNOT BE LEVIED***

3.1 The recent amendment of sec 44AD making it separate from other provisions relating to presumptive income requires a careful study. In all other provisions relating to presumptive income, the audit under sec 44AB is mandatory in case the assessee claims the income from such business is less than the prescribed percentage or quantum, as the case may be, irrespective of the fact whether the total income of the assessee is less than basic limit or otherwise. However, under the amended sec 44AB(1)(d), there is no need to get the books audited u/s 44AB when the income from the business otherwise required to be computed u/s. 44AD is less than 8 % of the turnover but the total income itself is less than the basic limit of that year. In those cases, levy of penalty for not getting the accounts audited is not applicable at all.

3.2 Sec 44AA requires the assessee to maintain the books. As per sec 271A, penalty can be levied in case where the books are not maintained as per sec 44AA. Where the case of the assessee falls under sec 44AA and sec 44AB and the assessee claims that he did not maintain books of account, levy of penalty under both the sections namely. 271A and 271B are not possible. Where penalty is already levied u/s 271A for not maintaining books of account, another penalty u/s. 271B for not getting the accounts audited cannot be levied2.

3.3 Following are the instances in which the courts/tribunals have reversed the penalty levied u/s. 271B

a. The assessee was engaged in the business of buying and selling units and shares and no delivery was taken. The account was settled by crediting the difference and net difference so credited was reflected in the profit and loss account. It was held that no turnover was effected and therefore the levy of penalty was held to be not in accordance with law3.

b. The assessee was engaged in the advertisement business and only acted as an agent between principal and media and earned commission. Penalty was levied for non-compliance of sec. 271B considering the total transaction value. The levy of penalty was cancelled since the assessee was acting as agent and his commission was the only turnover and not the entire amount transacted4.

c. Where the approval of the joint commissioner was not obtained, levy of penalty is held to be not valid5.

d. The assessing officer did not mention about the initiation of penalty proceedings in the assessment order. Therefore, subsequent levy of penalty was held to be invalid6.

***4. PROTECTION FROM LEVY OF PENALTY***

4.1 Section 273B provides that notwithstanding anything contained in sec 271B, no penalty shall be imposable for any failure referred to in sec 271B if the assessee proves that there was reasonable cause for the said failure.

4.2 The onus is on the assessee to prove the existence of reasonable cause for failure and if he proves so, no penalty shall be levied.

4.3 The word used in sec.271B is “may” and not “shall”. Therefore, the adjudicating authority shall have to exercise the discretion after considering the non-obstante clause provided in sec 273B (i.e., reasonable cause). Existence or absence of a reasonable cause is essentially a question of fact7.

4.4 Levy of penalty under sec 271B is not mandatory but discretionary8.

4.5 Following are the instances in which the courts/tribunals have held that there was reasonable cause

a) Illness of an accountant of the assessee9.

b) Illness of the Chartered Accountant of the assessee10.

c) Illness of the partner and subsequent his undergoing surgery11.

d) Books impounded by the department12.

e) Bonafide belief that the assessee is not covered by sec 44AB13.

f) Delay in obtaining branch reports from overseas branches14.

g) Delay due to time consumed in collection of details from customers who are upcountry constituents and pressure of work of Chartered Accountant15.

h) Current year audit report is filed belatedly because of delay in completion of audit last year16.

i) Delay was due to late appointment of auditors under Co-op societies Act17.

j) Delay was due to the delay in finalizing the accounts by the Accountant General’s office18.

k) Delay is for few days19.

***5. REMEDIES***

5.1 The order levying penalty u/s. 271B is an appeal-able order. The aggrieved assessee is entitled to file an appeal u/s 246A to the Commissioner of Income tax (Appeals). Alternatively, a revision petition u/s. 264 can also be filed to the Commissioner of Income tax.

5.2 Assessee may also make a petition to Commissioner of Income tax u/s. 273A for waiver or reduction of the penalty levied after satisfying the conditions mentioned in that section.

***6. RECENT DEVELOPMENTS***

6.1 After the concept of annexure less returns introduced, the need to file the tax audit report arises only when the assessee is required file the hard copy of the enclosure to the return of income and not otherwise.

6.2 Since this provision is open for misuse, the days are not far off when the Revenue may introduce a condition that the soft copy of the audit report needs to be uploaded while filing the return of income.

*1. Abhay Kumar & Co – 164 ITR 148*

*2. Ram Prakash C Puri – 77 ITD 210*

*3. Growmore Exports Ltd – 78 ITD 95*

*4. Heros Publicity services – 248 ITR 256*

*5. Sree Malathi Chit Funds – 278 ITR 258*

*6. Indian Handloom Textiles – 68 ITD 560*

*7 Anantharam Veerasinghaiah & Co – 142 ITR 755*

*8 Haryana Agro Services – 279 ITR 113*

*9 Karthika Entrepreneurs – 45 ITD 70*

*10 Gayathri Coal Supply Co – 63 ITD 237*

*11 K Ravi Kumar – 29 ITD 537*

*12 Babulal Jain – 251 ITR 656*

*13 Wadiwala & Co – 72 TTJ Ahd Trib*

*14 Data software Research Co P Ltd – 288 ITR 289*

*15 H Ajitbhai & Co – 45 ITD 262*

*16 Kamlesh R Agarwal 282 ITR 117 (AT)*

*17 Tanjavur Silk Handloom \_ 263 ITR 334*

*18 Rajastan Rajya Vidyut Prasaran Nigam – 262 ITR 262*

*19 Ramakrishna Stores – 253 ITR 175*

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