

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI**

**BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER
AND
SHRI A.T. VARKEY, JUDICIAL MEMBER**

**ITA No. 6777/Del/2013
Assessment Year: 2009-10**

SPA Lifestyle (P) Ltd., 3 rd Floor, Annexe Block, MGF Metropolitan Mall, M.G. Road, Gurgaon. PAN NO. AAJCS8974K (Appellant)	Vs.	ACIT, Circle 9(1), New Delhi. (Respondent)
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**Stay Appl. No. 124/Del/2014
(In ITA No. 6777/D/2014)
Assessment Year: 2009-10**

SPA Lifestyle (P) Ltd., 3 rd Floor, Annexe Block, MGF Metropolitan Mall, M.G. Road, Gurgaon. PAN NO. AAJCS8974K (Appellant)	Vs.	ACIT, Circle 9(1), New Delhi. (Respondent)
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Appellant by: Smt. Renuka Jain Gupta, CIT(DR)
Respondent by: Sh. Sharad Mohan, FCA

ORDER

PER S.V. MEHROTRA, A.M.

This appeal filed by the assessee is directed against the order of Id. CIT(A)-XII, New Delhi, dated 18/09/2013 for A.Y. 2009-10. The assessee has also filed a petition for stay of demand.

2. The effective ground of appeal is that the Id. CIT(A) erred in sustaining penalty levied u/s 271B of Income Tax Act for the A.Y. 2009-10.

3. Brief facts of the case are that assessee had filed its return of income declaring a loss of Rs. 4,30,01,359/- on 30th September, 2009. Subsequently, a revised return was filed by the assessee at a loss of Rs. 3,39,83,024/- on 31st March, 2011. The assessment was completed at a total loss of Rs. 3,09,54,039/-.

4. The AO noticed that the statutory auditors M/s BSR & Associates, Gurgaon, signed the accounts only on 17th November, 2011 (correct date as per assessee's counsel is 27th November, 2011) while the revised return was filed on 31st March, 2011. The AO further observed that assessee explained that due to certain differences among the stakeholder and the Auditors, the signing of the account was delayed. He did not accept the assessee's contention and initiated penalty proceedings u/s 271B. Before AO the assessee had filed its reply dated 20th January, 2012 which is reproduced hereunder:

“The assessee vide its letter dated 20/01/2012 contended that:

“The Company as the per franchise conditions of the Franchisor closed its accounts on 31/12/2008.

To comply with the I.T. Act provisions the company prepared its accounts for the remaining period of three months i.e. upto 31/03/2009, on provisional basis.

Further, the audited accounts upto 31/12/08 were not available for certain unavoidable reasons until the tax

audit was taken up and hence it was conducted as if the complete accounts were unaudited.

The Audited Accounts were submitted during the proceedings and it was noticed that the Statutory Auditors M/s BSR & Associates, Gurgaon, signed the accounts on 17/11/2011. This delay was beyond the control of the management.

The signing of the accounts was delayed due to certain differences among the stakeholders and the Auditors. However, the accounts were ready and, therefore, the tax audit could not be done in time.

It may kindly be noted that from reporting point of view the difference is only technical as annexure to the report in form 3CD, which has detailed comments on the various reporting paras remains same in both the cases. Only the text part of the Audit Report has minor difference and has no financial implication.”

4.1 The AO after considering the assessee's reply levied a penalty of Rs. 1,50,000/-.

5. Before Id. CIT(A) the assessee had advanced two fold contentions:

- a. Since the statutory audit of the company got completed on 27th November, 2011 (wrongly mentioned as 17th November, 2011), therefore, there was reasonable cause for not furnishing the tax audit report in the prescribed form.
- b. In the alternative it was submitted that assessee had obtained Tax Audit Report on 30th September, 2009 for the accounts of the previous year ended 31st March, 2009. This tax audit report in Form 3CB with Annexure in a prescribed Form 3CD was duly

submitted to the AO during the proceedings and was not rejected by her.

5.1 Ld. CIT(A), however, held that there was no reasonable cause for failure of comply with the provisions of section 44AB. He restricted the penalty to Rs. 1 lakh as was applicable for the relevant assessment year.

6. Being aggrieved with the order of Id. CIT(A), the assessee is in appeal before us.

7. Ld. Counsel for the assessee submitted that assessee had filed return of income on 30th September, 2009 and in the return furnished all the details in regard to tax audit report which was also obtained on 30th September, 2009 in Form 3CB along with Annexure in Form 3CD had been furnished. Ld. Counsel submitted that since the statutory audit got completed on 27th November, 2011, therefore, it was not possible to furnish the report in Form 3CA along with annexure in Form 3CD and, therefore, assessee had furnished the report in form 3CB. Thus, assessee had made substantial compliance of the provisions contained u/s 44AB of the I.T. Act.

7.1 Ld. Counsel submitted that second proviso to section 44AB only gives the assessee an option to furnish report in form 3CA if the accounts have been audited under any other provision of the Act. Ld. Counsel further referred to circular no. 561 dated 22nd May, 1990 which specifically mentioned that where companies accounting period is different from the financial year then the tax audit report will be in form 3CB instead of 3CA. Ld. Counsel pointed out that assessee's accounts closed on 31/12/2008,

therefore, as per circular assessee was to file report in Form 3CB for the period ended on 31/03/2009.

8. Ld. CIT(DR) referred to second proviso to section 44AB and submitted that in view of the said proviso, the assessee was required to furnish the report in form 3CA and could not submit the report in form 3CB. She further referred to Rule 6G of the Income Tax Rules which deals with the report of audit of accounts to be furnished u/s 44AB and submitted that since the assessee was required to get its account audited under the Companies Act, therefore, audit report had to be furnished form 3CA.

8.1 Ld. CIT(DR) submitted that by furnishing report in form no. 3CB the assessee cannot escape the penalty for not furnishing the report in form 3CA.

8.2 We have considered the rival submission and have perused the record of the case.

9. The short controversy in the present appeal is that if an assessee is required to get its account audited under any other law but the said audit has not been completed by the specified date for furnishing the return of income then could he furnish tax audit report in form 3CB or not and if assessee has furnished the report in form 3CB whether any default can be imputed to assessee or not. In order to properly appreciate the controversy, we reproduce section 44AB along with Rule 6G and relevant reports in form 3CA and 3CB:

Sec. 44AB Every person, -

- (a) *carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds [one crore rupees] in any previous year or*
- (b) *carrying on profession shall, if his gross receipts in profession exceed [twenty-five lakh rupees] in any previous year; or*
- (c) *carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AE or sec. 44BB or sec. 44BBB, as the case may be, and he 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, in any previous year; or*
- (d) *carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person u/s 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 in any previous year, get his accounts of such previous year audited by an accountant before the specified date and furnish by that date the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed:*

Provided that this section shall not apply to the person, who derives income of the nature referred

to in sec. 44B or sec. 44BBA, on and from the 1st day of April, 1985 or, as the case may be, the date on which the relevant section came into force, whichever is later:

Provided further *that in a case 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 if such person gets the accounts of such business or profession audited under such law before the specified date and furnishes by that date the report of the audit as required under such other law and a further report by an accountant in the form prescribed under this section.”*

Rule 6G (1) *The report of audit of the accounts of a person required to be furnished u/s 44AB shall, -*

(a) in the case of a person who carries on business or profession and who is required by or under any other law to get his accounts audited, be in Form No. 3CA;

(b) in the case of a person who carries on business or profession, but not being a person referred to in clause (a), be in Form No. 3CB.

(2) The particulars which are required to be furnished u/s 44AB shall be in Form No. 3CD.

FORM NO. 3CA – *“Audit report u/s 44AB of the Income Tax Act, 1961, in a case where the accounts of the business or profession of a person have been where the audited under any other law.”*

10. A bare reading of second proviso to sec. 44AB makes it clear that the said proviso will come into operation provided following conditions are fulfilled:

- a) Assessee is required by or under any law to get his accounts audited;
- b) Such person gets the accounts of such business or profession audited under such law before the specified date;
- c) Such person furnishes by the specified date the report of the audit as required under such other law.

Unless the aforementioned three ingredients are fulfilled, the assessee cannot be accepted to furnish a further report in form prescribed under this proviso (Form 3CA).

11. Admittedly, in the present case, these ingredients are not fulfilled and, therefore, operation of second proviso is ruled out. Now the second question arises as to whether in such a situation assessee is required to wait till completion of statutory audit under the relevant provision of the Act or it has to furnish the tax audit report as contemplated u/s 44AB. The answer to this is obvious and assessee cannot take the plea of not getting its account audited beyond the specified date and, therefore, is required to furnish the tax audit report as per the provisions of sec. 44AB. In such a situation the assessee is left with no other alternative but to furnish the report in form 3CB along with form 3CD to make substantial compliance with the provisions of section 44AB. If we accept the interpretation placed on 2nd proviso to section 44AB by Id. CIT(DR) then it would result in furnishing the TAR only after the statutory audit is completed under other provision of the relevant Act. In our

humble opinion, this is not the object of incorporation of 2nd provision to section 44AB. It is well settled law that proviso cannot expand or limit the construction of principle provision. It is cardinal principle of interpretation that the language of a proviso is to be construed in relation to the subject matter covered by the section to which the proviso is appended. The proviso uses the phrase '....it shall be sufficient compliance..'. These are enabling words and they only imply a discretion. All the conditions for exercise of discretion should have been fulfilled before 2nd proviso could be invoked. The object of legislature is to avoid duplicacy of audit – first under other law and then under Income Tax Act. There is no dispute that assessee had obtained report in form 3CB along with form 3CD on 30th September, 2009 and the relevant details were furnished in the return of income filed on line. Therefore, the assessee had made substantial compliance with the provisions of section 44AB. It is further noticeable that report in form 3CB requires the auditor to examine the balance sheet and profit and loss account and certify that the same are in agreement with the books of account maintained by the assessee, whereas form 3CA only requires the audit report along with audited financial statement to be annexed with the report. Thus, primarily the only difference in form 3CA and form 3CB is that in form 3CA the Auditors are not required to give separate audit report. But in form 3CB, since that deals with the case of an assessee whose accounts have not been audited, mandates a comprehensive audit report. Thus, when an assessee had furnished the tax audit report in form 3CB then it

cannot be said that it has not complied with the provisions of sec. 44AB merely because the report is not in form 3CA which was not possible for assessee to furnish. It is well settled law that law does not require an assessee to do impossible. It is further noticeable that form 3CB, form 3CA are not mutually exclusive but form 3CA is only supplemental to form 3CB.

12. In view of above discussion, we set aside the order of Id. CIT(A) and cancel the penalty levied u/s 271(1)(c).

13. In the result, the assessee's appeal is allowed. As we have decided the assessee's appeal, the stay petition filed by the assessee has become infructuous.

Order pronounced in the open court on 28.03.2014

Sd/-
(A.T. VARKEY)
JUDICIAL MEMBER

Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER

Dated: 28.03.2014
*Kavita

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.

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By Order

ASSISTANT REGISTRAR