

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.4134/M/2023
Assessment Year: 2019-2000**

Shri Manish Manohardas Asrani, 801, 8 th Floor, Triberca, 29 th Road, Bandra, West, Mumbai-400 050 PAN: AJXPA1100D	Vs.	INT TAX WARD 1(1)(1), Room No.1817A, 18 th Floor, Air India Building, Nariman Point, Mumbai – 400 021
(Appellant)		(Respondent)

Present for:

Assessee by : Dr. K. Shivaram a/w Mr. Shashi Behkal, A.R.
Revenue by : Shri R.R. Makwana, Sr. DR.

Date of Hearing : 30 . 09 .2024
Date of Pronouncement : 15 . 10 .2024

O R D E R

Per : Narender Kumar Choudhry, Judicial Member:

This appeal has been preferred by the Assessee against the order dated 27.09.2023, impugned herein, passed by the Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) under section 250 of the Income Tax Act, 1961 (in short 'the Act') for the A.Y. 2019-2000.

2. In the instant case, the Assessee by filing his return of income on dated 07.08.2019 had declared total income at Rs.26,35,970/-. Thereafter, in response to the notice u/s 139(9) of the Act, the Assessee declared the same income of Rs.26,35,970/- by filing his return of income on 29.11.2011. Thereafter, the case of the Assessee was selected for scrutiny assessment and consequently notice u/s 143(2) of the Act was issued to the Assessee, in response to which the Assessee furnished the

relevant details as called for by the Assessing Officer (AO). Thereafter a draft assessment order dated 22.09.2021 u/s 143(C)(1) of the Act was passed. Though the Assessee was supposed to file his objection before the Dispute Resolution Panel (Ld. DRP) within 30 days from the receipt of the draft order, however, the Assessee by filing his submission on 12.10.2021 disputed the addition by the AO but did not attach any objection filed before the Ld. DRP. Therefore the AO by considering the fact that 30 days time has already been passed from the service of the draft order, therefore the submission made by the Assessee after passing the draft order cannot be considered and thus the draft order is finalized under the provisions of section 143(C)(3) of the Act.

2.1 On perusing the ITR filed by the Assessee, it was seen by the AO that a sum of Rs.27,79,510/- has been offered by the Assessee to tax under the head "salaries" whereas as per ITR schedule TDS-details of the tax deducted at source from salary as per Form-16 issued by the Employer, the TDS of Rs.28,19,510/- was deduced from the total salary paid to the tune of Rs.91,13,252/- by the Employer namely WM Global Sourcing India Pvt. Ltd. as a result thereof the Assessee has claimed refund of Rs.21,92,090/-. Therefore the AO by considering the difference between the amounts of salary received and as per the Form 26AS vis-à-vis salary offered in the ITR, vide notice dated 13.09.2021 u/s 142(1) of the Act, asked the Assessee to furnish the copy of Form No.16 issued by the Employer to ascertain total salary received during the Financial Year 2018-19. Secondly the copy of bank statement duly reflecting receipt of salary during Financial Year 2018-19.

2.2 The Assessee by filling its reply before the AO mainly claimed as under:

"That while filing ITR for the A.Y. 2019-2020, his status was "non-resident" as he was deriving income from Bangladesh for the part of said year, as his job required into work for a company in India but his employer deposited salary in his Dubai account, whereas his Indian employer deducted tax at source on salary and credited to his

Dubai account. So he at the time of filing of the return for the A.Y. 2019-2020 inadvertently took salary income to the extent of Rs.28,19,510/- instead of gross salary of Rs.91,13,252/-. He has inadvertently took the same amount of salary as taken in the original ITR i.e. Rs.28,19,510/- while filing ITR in response to notice u/s 139(9) of the Act. However, subsequently, he rectified the said inconsistency and paid taxes on his total income (which included the salary of Rs.91,13,252/-) at the time of filing of response to the notice dated 31.03.2021 u/s 143(2) of the Act”.

2.3 The aforesaid submissions/claim of the Assessee was though considered by the AO, however, not found acceptable mainly on the following reasons:

“That the Assessee while filing his return of income in response to the notice u/s 139(9) of the Act declared the same income as declared while filing original return of income and has not made any change in respect to the salary income. Now during the course of scrutiny proceedings, the Assessee has admitted his mistake that though he received sum of Rs.91,13,252/- as salary (gross salary) in India from his employer for the period from 30.08.2018 to 20.01.2019 (as reflected in form 26AS and form No.16), however he has shown the amount of Rs.28,19,510/- as gross salary only. Thus it is crystal clear that the amount of Rs.91,13,252/- is actual “salary accrued” or arisen to the Assessee in India during the year and should have been offered to tax”.

2.4 The AO therefore on the aforesaid reason ultimately made the addition of Rs.62,93,742/- and added the same to the total income of the Assessee under the head “salaries”.

2.5 Simultaneously the AO also initiated the penalty proceedings u/s 270A of the Act qua the addition made and consequently issued the notice dated 11.11.2021 u/s 274 r.w.s. 270A of the Act for under reporting of income due to misreporting. Thereafter reminder dated 20.12.2021 was also issued to the Assessee.

2.6 In response to the notice 20.12.2021 u/s 274 r.w.s. 270A of the Act, the Assessee vide letter dated 23.12.2021 mainly claimed that he has not received any show cause notice dated 11.11.2021 and therefore the compliance could not be done for the same. The Assessee further claimed that undisputedly no addition ultimately has been made to his

total income; therefore he has not filed any appeal against the assessment order. The Assessee in the later part of the reply further claimed that he inadvertently took the salary income to the extent of tax withheld i.e. Rs.28,19,510/- instead of gross salary of Rs.91,13,252/-, however, subsequently he rectified his mistake and offered the correct taxable income.

2.7 The AO, not being impressed with the claim of the Assessee, ultimately levied the penalty of Rs.4490048/- being 200% of the amount of tax payable or amount of Rs.22,45,024/- tax payable on under reported of income of Rs.62,93,742/- u/s 270A(8) with the aid of clause (e) of sub section (9) of section 270A of the Act, mainly by holding as under:

“It is clear that had the case not been selected for scrutiny, the Assessee would not have filed the said subsequent return and the income to the extent of Rs.62,93,742/- must have escaped the assessment leading to tax evasion for which the Assessee is entirely responsible. The Assessee in response to the defect notice u/s 139(9) of the Act dated 15.11.2019 issued by Central Processing Centre (CPC), again declared the same income as declared in the original return of income, instead of disclosing the actual amount of income received and therefore the contention/claim of the Assessee is not acceptable.

3. The Assessee, being aggrieved, challenged the levy of penalty before the Ld. Commissioner, who on the same footing as adopted by the AO for imposing the penalty, vide impugned order affirmed the penalty.

4. The Assessee, being aggrieved, challenged the affirmation of the penalty by raising various original grounds of appeal. Subsequently during the appellate proceedings, the Assessee raised following additional grounds of appeal .

“3. On the facts and circumstances of the case and in law the Ld. Commissioner of Income-tax (Appeals) (CIT(A)) has erred in confirming a penalty of Rs. 44,90,048/- under section 270A(8) of the Act levied by Income- tax Officer Ward 1(1)(1), when the jurisdiction of the Assessee

lies with Assistant Commissioner or Deputy Commissioner as per CBDT instructions 1 of 2011 dated January 31, 2011.

4. On the facts and circumstances of the case and in law the Ld. CIT(A) has erred in confirming a penalty of Rs. 44,90,048/- under section 270A(8) of the Act when the assessment proceedings and penalty proceedings are bad in law as there is no valid Notice issued under section 143(2) of the Act.

The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal.”

5. The additional grounds raised by the Assessee apparently are legal in nature and therefore we are inclined to adjudicate the same before going into the merits of the case. The Assessee by way of additional grounds of appeal has raised two issues, **first** pertains to the jurisdiction of the AO, **second** pertains to the notice issued u/s 143(2) of the Act. The Ld. Sr. Advocate Dr. K. Shivaram at the outset claimed that in the instant case a notice dated 11.11.2021 u/s 274 r.w.s. 270A of the Act was issued for under reporting of income u/s 270A(a) with the aid of section 270(A)(e) of the Act, whereas penalty has been levied for misreporting of the income for which admittedly no notice was issued by the AO. The AO in the show cause notice, has also not specified any particular limb/charge and therefore in view of the decision in the case of Jaina Marketing & Associates vs. DCIT (2024) 162 taxmann.com 439 (Delhi-Trib.) passed by the Tribunal, the penalty is not sustainable. The Ld. Senior Counsel also argued on other aspects of the case.

6. On the contrary the Ld. D.R. refuted the contentions raised by the Ld. Counsel by submitting that the defective notice, cannot entail passing of penalty order invalid and/or deletion of the penalty.

7. We have heard the parties and perused the material available on record. Admittedly, in the notices dated 11.11.2021 and 20.12.2021 issued u/s 274 r.w.s. 270A of the Act, no specific charge/limb is specified. Misreporting of income and under reporting of income, are having two different connotations and having its own different consequences. We

observe that the identical issue was dealt with by the co-ordinate Bench of the Tribunal in Jaina Marketing & Associates (supra), wherein the Hon'ble Tribunal analyzed the provisions of law as well as various judgments including in the case of Schneider Electric South East Asia (HQ) Pte Ltd. vs. ACIT [W.P.(C)] 5111/2022 (Delhi) dated 28.03.2022, wherein the Hon'ble Delhi High Court dealt with a cases wherein the ingredients of sub section 9 of section 270A of the Act, were not specified while imposing the penalty. The Hon'ble High Court ultimately affirmed the deletion of the penalty imposed u/s 270A(9) of the Act, by holding as under:

"6. Having perused the impugned order dated 09th March, 2022, this Court is of the view that the Respondents' action of denying the benefit of immunity on the ground that the penalty was initiated under [Section 270A](#) of the Act for misreporting of income is not only erroneous but also arbitrary and bereft of any reason as in the penalty notice the Respondents have failed to specify the limb "underreporting" or "misreporting" of income, under which the penalty proceedings had been initiated.

7. This Court also finds that there is not even a whisper as to which limb of [Section 270A](#) of the Act is attracted and how the ingredient of sub- section (9) of [Section 270A](#) is satisfied. In the absence of such particulars, the mere reference to the word "misreporting" by the Respondents in the assessment order to deny immunity from imposition of penalty and prosecution makes the impugned order manifestly arbitrary.

8. This Court is of the opinion that the entire edifice of the assessment order framed by Respondent No. 1 was actually voluntary computation of income filed by the Petitioner to buy peace and avoid litigation, which fact has been duly noted and accepted in assessment order as well and consequently, there is no question of any misreporting."

7.1 The Hon'ble Tribunal also taken into account the judgment of the co-ordinate Bench of the Tribunal at Mumbai in the case of Saltwater Studio LLP v. NFAC, Delhi (ITA No.13/Mum/2023) dated 22.5.2023, wherein the identical issue as involved in the instant case was also dealt with and ultimately the penalty levied u/s 270A of the Act was deleted by holding as under:

"10. The Mumbai Bench of the Tribunal in ITA No. 13/Mum/2023 in the case of Saltwater Studio LLP v. NFAC, Delhi vide order dated 22.5.2023 held as under:-

11. It has to be examined as to whether the action of the AO to have levied penalty under sub-section (9) of [section 270A](#) of the Act is legally valid or not. The AO in order to levy the penalty has given the reason for doing so as under:-

"The contention of the assessee to drop the penalty proceedings is rejected because the assessee has clearly misreported its income by an amount of Rs.3,94,996/- as per the provisions of the [Section 270A\(9\)](#) of the Act. And a misreported income leads to evasion of Tax. Hence, it is clearly established that the assessee has committed an intentionally fault under the provisions of the [Section 270A\(9\)](#) of the Act by under reporting its income in consequence of misreporting its income, to the tune of Rs.3,94,996/-. Therefore, I am satisfied that it is a fit case for levy of penalty [u/s 270A](#) of the Income Tax Act, 1961. The amount of penalty that is to be levied for the fault of under reporting income in consequence of misreporting income is determined under [section 270A\(8\)](#) of the Act, which is two hundred percent of the tax payable on under reported income in consequence of misreported income."

12. And the above action of AO has been confirmed by the Ld. CIT(A) on the same reasoning. The question is whether the AO's action to levy penalty [u/s 270A\(9\)](#) of the Act is sustainable in the given facts of the case. In order to examine that let us have a look at relevant provisions of [Section 270\(8\)](#) & (9) of the Act which reads as under: -

13. The AO has levied the higher penalty of 200% of tax payable of misreporting income. Then in such a scenario, the AO has to bring the action/omission on the part of the assessee in the ken of sub-section (9) of [section 270A](#) of the Act which are given (supra), viz (a) to (f) of [section 270A\(9\)](#) of the Act. However, a reading of the reasons given by the AO to levy penalty for misreporting (supra) it is discerned that he has failed to spell out as to how the assessee's case/additions falls within the ken of instances given in clause (a) to (f) of sub-section (9) of [section 270A](#) of the Act. Since AO failed to bring the addition/disallowance he made in quantum assessment, under the ken of (a) to (f) of the sub-section(9) of [section 270A](#) of the Act, the penalty levied for misreporting @ 200% cannot be sustained because it is trite law that penalty provisions have to be strictly interpreted. And therefore, taking into consideration, the facts and circumstances of the case, we find that the levy of penalty by

the AO u/s 270A of the Act suffers from the vice of non-application of mind as well as violates principles of natural justice. And therefore, the penalty levied on addition of sustained quantum addition of Rs.67,970/- cannot survive. And therefore, it is directed to be deleted.”

7.2 The Hon'ble co-ordinate Bench of the Tribunal in Jaina Marketing & Associates case (supra) ultimately deleted the identical penalty as imposed u/s 270A(9) of the Act, by holding as under:

“15. In the instant case, on perusal of the penalty notice placed on record dated 02/06/2021, it is evident that the Ld. AO had show caused the assessee as to why the assessee should not be imposed with penalty for 'under reporting of income'. The assessee had filed its submissions stating that he had not 'under reported its income' We are unable to comprehend ourselves to accept to the argument of the Ld. DR that assessee did not make any submissions with regard to 'mis reporting of income'. The assessee could be expected to give reply only in respect of show cause notice that is put to him. Why at all the assessee should infer/ assume/presume that the Ld. AO having recorded satisfaction in the quantum assessment order that offence of both 'under reporting' and 'mis reporting' is committed by the assessee and accordingly the penalty would be levied on the assessee for both in terms of section 270A(9) of the Act?

16. It is well settled that penalty proceedings and assessment proceedings are separate and distinct. Reliance in this regard is placed on the decision of Hon'ble Supreme Court in the case of Anantharam Veera Singhaiah & Co. Vs. CIT (1980) 123 ITR 457 (SC) wherein it was held that findings recorded in assessment proceedings cannot be taken as conclusive for penalty proceedings. Even the provisions of section 270A(6) of the Act provides for granting immunity from penalty if the case falls in "under reporting of income". Moreover different rates of penalty are prescribed for 'under reporting of income' alone and for 'under reporting' in consequence of 'misreporting of income'. Hence it is all the more essential to mention in the show cause notice itself as to which of the offence is committed by the assessee for which explanations are being sought for by the Id. AO. There is no whisper at all in the notice issued u/s 270A read with section 274 of the Act about "misreporting of income". In-fact two notices were issued by the Id. AO and in both the notices, the A.O. had only directed the assessee to reply with regard to 'under reporting of income'. But we find that the penalty had been levied ultimately for both 'under reporting' and 'misreporting of income' @ 200% in terms of section 270A(9) of the Act for which show cause notice was never issued to the assessee. The ratio laid down in the aforesaid Full Bench decision of Hon'ble Bombay High Court, the decision of Hon'ble Jurisdictional High Court in the case of Sahara India

Life Insurance reported in 432 ITR 84 (Del) and other decision reffered supra squarely applies to the facts of the instant case before us. Hence we direct the Ld. AO to delete the penalty levied u/s 270A of the Act for the Assessment Year 2017-18. Accordingly, we allow the Appeal of the Assessee on this technical ground and leave the grounds raised on levy of penalty on merits left open as adjudication of the same becomes academic in nature.”

8. Coming to the instant case, admittedly in the assessment order, the AO initiated the penalty proceedings u/s 270A of the Act without mentioning any sub clause of the section 270A of the Act or not specifying any limb of the penalty proposed to be levied. Further, in the penalty notice issued u/s 274 r.w.s 270A of the Act dated 11.11.2021 mentioned **under reporting of the income**. Subsequently during the penalty proceedings again issued the notice dated 20.12.2021 u/s 274 r.w.s 270A of the Act, without specifying any limb or sub clause of section 270A of the Act and ultimately vide order dated 22.02.2022 u/s 270A of the Act levied the penalty for **misreporting of the income as well as underreporting of the income**, as per provisions of section 270A(8) of the Act with the aid of section 270A(9)(e) of the Act. As the AO issued the vague notice without specifying any particular limb or sub clause for levying the proposed penalty. There is no whisper at all in the notice issued u/s 270A read with section 274 of the Act about “misreporting of income” whereas the penalty has been levied ultimately for both 'under reporting' and 'misreporting of income' @ 200% in terms of section 270A(9) of the Act, for which show cause notice was never issued to the Assessee. And therefore in view of the judgment passed by the co-ordinate Bench of the Tribunal in the case of Jaina Marketing & Associates (supra), wherein the Co-ordinate Bench of the Tribunal not only analyzed the provisions of law but also considered the judgments of the Higher Courts and the Tribunal and deleted the identical penalty as involved in this case, hence respectfully following the decision of the Tribunal, we are inclined to delete the penalty under consideration. Thus, the penalty is deleted and appeal filed by the Assessee is allowed.

9. As we have deleted the penalty, hence not dwelling into other aspects of the case, as extensively argued by the parties, as adjudication of the same would be futile exercise.

10. In the result, the appeal filed by the Assessee is allowed.

Order pronounced in the open court on 15.10.2024.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER**

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.