

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI OM PRAKASH KANT, AM

आयकरअपीलसं /I.T.A. No.13/Mum/2023

(निर्धारणवर्ष / Assessment Year: 2017-18)

Saltwater Studio LLP 103, Corporate Corner, Sunder Nagar, near Dalmia College, Malad (west) Mumbai-400 064	बनाम / Vs.	NFAC, Delhi F Block, Northe Block, New Delhi-110001
स्थायीलेखासं/.जीआइआरसं/.PAN/GIR No. : ACKFS1653D		
(अपीलार्थी/ Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Dhaval Shah
Revenue by:	Shri Anil K. Das(Sr. AR)

सुनवाईकीतारीख / Date of Hearing: 09/03/2023

घोषणाकीतारीख /Date of Pronouncement: 22/05/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner Of Income Tax(Appeals)/ NFAC, Mumbai (herein after "CIT(A)", dated 23-11-2022 for AY 2017-18, wherein the Ld. CIT(A) was pleased to confirm the penalty levied by AO u/s 270A of the Income Tax Act,1961 (herein after "the Act").

2. Brief facts are that the assessee had filed its return of income for AY 2017-18 dated 31.10.2017 declaring Rs. 21,21,750/-. Later the case of the assessee was selected for scrutiny under CASS. Thereafter, the AO framed scrutiny assessment

u/s 143(3) by order dated 10-12-2019 by making the *inter-alia* quantum addition of total Rs 3,94,996/- which action was assailed by assessee before the Ld. CIT(A) who was pleased to dismiss the appeal of the assessee vide order on 23.11.2022, which action of the Ld. CIT(A) was again challenged before this Tribunal. And the Tribunal vide order dated 31.03.2023 has given part relief to the assessee and confirmed certain additions since assessee did not press the addition on following (i) Interest on income tax refund to the tune of Rs. 64,581/- (ii) to interest of late payment of TDS of Rs. 973/-, (iii) disallowance of expenses on estimate basis @ 0.6% i.e, Rs. 2,416/-. Thus addition of total Rs. 67,970/- was not pressed before Tribunal, which was confirmed. Thus, the assessee's quantum assessment was partly allowed by the Tribunal directing AO, to delete Rs. 3,27,026/- and thus assessee's appeal(quantum) was partly allowed.

3. Meanwhile, the AO levied penalty u/s 270A of the Act, wherein AO imposed 200% of tax which was held by him to be *mis-reported* at Rs. 2,44,110/- by order dated 06-08-2021 which has been challenged by the assessee before the Ld. CIT(A) who was pleased to confirm the same by passing the impugned order; and therefore the assessee being aggrieved, is before this Tribunal.

4. We have heard both the parties and perused the records. It is noted that the assessee's quantum assessment has been partly allowed by this Tribunal, and the Tribunal was pleased to delete Rs. 3,27,026/- vide order dated - 31.03.2023. Therefore the penalty issue even if leviable is only confined to the balance additions of total Rs 67,970/- and not on the Rs 3,94,996/- as done by

AO/Ld CIT(A). The quantum additions sustained by this Tribunal are (i) late payment of interest TDS of Rs 973/-; (ii) Interest on income tax refund of Rs. 64,581/- (iii) disallowance of expenses of estimate basis @ 0.6% Rs. 2,416/-. Therefore, according to the Ld AR even if penalty can be levied it can be only regarding this amount I.e, Rs 67,970/-. And the following chart would give bird's eye view about the same;

Sr No.	Particulars	Addition amount	Remark
1	Interest paid on late payment of serv8ice tax	3,27,026	Quantum addition deleted by the Tribunal
	Total	3,27,026	
2	Interest on Income Tax Refund	64,581	Not pressed before the Tribunal in quantum proceedings.
3	Interest paid on late payment on TDS	973	
4	Disallowance of expenses on estimate basis at 0.6%	2,416	
	Total..(B)	67,970	Confirmed addition
	Grand Total...(A+B)	3,94,996	

According to the Ld. AR, the penalty has been levied erroneously by the AO @ 200% on tax payable alleging misreporting of income which is erroneous and for adjudicating the same, it is gainful to refer to section 270A of the Act which reads as under: -

"Penalty for under-reporting and misreporting of income

270A. (1) The Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner, during the course of any proceedings under this Act, direct that any person who has under-reported his income shall be liable to pay a penalty in addition to tax, if any, on the under-reported income.

(2) A person shall be considered to have under-reported his income, if-

- (a) the income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of section 143;
- (b) the income assessed is greater than the maximum amount not chargeable to tax, where no return of income has been furnished /or where return has been furnished for the first time under section 148/
- (c) the income reassessed is greater than the income assessed or reassessed immediately before such reassessment;
- (d) the amount of deemed total income assessed or reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of section 143;
- (e) the amount of deemed total income assessed as per the provisions of section 115JB or section 115JC is greater than the maximum amount not chargeable to tax, where /no return of income has been furnished or where return has been furnished for the first time under section 148/

- (f) the amount of deemed total income reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income assessed or reassessed immediately before such reassessment;
- (g) the income assessed or reassessed has the effect of reducing the loss or converting such loss into income. (3) The amount of under-reported income shall be, -

3.The Amount of under-report income shall be____

(i) in a case where income has been assessed for the first time.____

(a) if return has been furnished, the difference between the amount of income assessed and the amount of income determined under clause (a) of sub-section (1) of section 143;

(b) in a case where /no return of income has been furnished or where return has been furnished for the first time under section148/-

(A) the amount of income assessed, in the case of a company, firm or local authority; and

(B) the difference between the amount of income assessed and the maximum amount not chargeable to tax, in a case not covered in item (A);

(ii) in any other case, the difference between the amount of income reassessed or recomputed and the amount of income assessed, reassessed or recomputed in a preceding order.

Provided that where under-reported income arises out of determination of deemed total income in accordance with the provisions of section 115JB or section 115JC, the amount of total

under-reported income shall be determined in accordance with the following formula -

$$(A-B)/(C-D)$$

where,

A = the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);

B = the total income that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of under-reported income;

C = the total income assessed as per the provisions contained in section 115JB or section 115JC;

D = the total income that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC been reduced by the amount of under-reported income;

Provided further that where the amount of under-reported income on any issue is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D.

Explanation. For the purposes of this section, -

- (a) "preceding order" means an order immediately preceding the order during the course of which the penalty under sub-section (1) has been initiated;
- (b) in a case where an assessment or reassessment has the effect of reducing the loss declared in the return or converting that

loss into income, the amount of under-reported income shall be the difference between the loss claimed and the income or loss, as the case may be, assessed or reassessed.

(4) Subject to the provisions of sub-section (6), where the source of any receipt, deposit or investment in any assessment year is claimed to be an amount added to income or deducted while computing loss, as the case may be, in the assessment of such person in any year prior to the assessment year in which such receipt, deposit or investment appears (hereinafter referred to as "preceding year") and no penalty was levied for such preceding year, then, the under-reported income shall include such amount as is sufficient to cover such receipt, deposit or investment.

(5) The amount referred to in sub-section (4) shall be deemed to be amount of income under-reported for the preceding year in the following order -

- (a) the preceding year immediately before the year in which the receipt, deposit or investment appears, being the first preceding year, and
- (b) where the amount added or deducted in the first preceding year is not sufficient to cover the receipt, deposit or investment, the year immediately preceding the first preceding year and so on.

(6) The under-reported income, for the purposes of this section, shall not include the following, namely:-

- (a) the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, is

satisfied that the explanation is bona fide and the assessee has disclosed all the material facts to substantiate the explanation offered;

- (b) the amount of under-reported income determined on the basis of an estimate, if the accounts are correct and complete to the satisfaction the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, but the method employed is such that the income cannot properly be deduced therefrom
- (c) the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of his income and has disclosed all the facts material to the addition or disallowance;
- (d) the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer, where the assessee had maintained information and documents as prescribed under section 92D, declared the international transaction under Chapter X, and, disclosed all the material facts relating to the transaction; and
- (e) the amount of undisclosed income referred to in section 271AAB.

(7) The penalty referred to in sub-section (1) shall be a sum equal to fifty per cent of the amount of tax payable on under-reported income.

(8) Notwithstanding anything contained in sub-section (6) or sub-section (7), where under-reported income is in consequence of any misreporting thereof by any person, the penalty referred to in sub-section (1) shall be equal to two hundred per cent of the amount of tax payable on under-reported income.

(9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:-

- (a) misrepresentation or suppression of facts;
- (b) failure to record investments in the books of account;
- (c) claim of expenditure not substantiated by any evidence;
- (d) recording of any false entry in the books of account;
- (e) failure to record any receipt in books of account having a bearing on total income; and
- (f) failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X apply.

(10) The tax payable in respect of the under-reported income shall be -

- (a) where no return of income has been furnished for where return has been furnished for the first time under section 148/ and the income has been assessed for the first time, the amount of tax calculated on the under-reported income as increased by the maximum amount not chargeable to tax as if it were the total income;
- (b) where the total income determined under clause (a) of sub-section of section 143 or assessed, reassessed or recomputed in a preceding order is a loss, the amount of

tax calculated on the under-report income as if it were the total income;

(c) in any other case, determined in accordance with the formula:-

$(X-Y)$

where,

X = the amount of tax calculated on the under-reported income a increased by the total income determined under clause (a) of sub section (1) of section 143 or total income assessed, reassessed a recomputed in a preceding order as if it were the total income, and

Y = the amount of tax calculated on the total income determined under clause (a) of sub-section (1) of section 143 or total income assessed, reassessed or recomputed in a preceding order.

(11) No addition or disallowance of an amount shall form the basis for imposition of penalty, if such addition or disallowance has formed the basis of imposition penalty in the case of the person for the same or any other assessment year.

(12) The penalty referred to in sub-section (1) shall be imposed, by an order in writing, by the Assessing Officer, the Commissioner (Appeals), the Commission or the Principal Commissioner, as the case may be./”

5. A bare reading of the section 270A reveals that the AO 'may' direct the assessee to pay penalty in addition to tax on the *under-reported* income. According to the Ld. AR therefore its gives discretion to the AO to levy penalty or not to levy the penalty in as much as the Parliament has not used 'shall'; and by using the

word 'may' in sub-section (i) of section 270A of the Act, it conveys the intention of the Parliament that levy of penalty u/s 270A of the Act is not mandatory. Having said that, the Ld. AR Shri. Dhaval Shah enlightened us about the scheme/arrangement of the provision of section 270A of the Act which is summarized as under:-

"-Subsection (1) Charging section giving discretionary powers for levy of penalty

-Subsection (2)- What items constitute 'underreported income

-Subsection (3) - Computation of underreported income

-Subsection (4) - Penalty where source of receipts added in earlier years

- Subsection (5) - Quantum of underreported income as stated in subsection 4

- Subsection (6) - Certain items not to be considered as underreported income

-Subsection (7) - Quantum of penalty at 50% of tax payable on under reported income

-Subsection (8) If underreported income as a consequent of misreporting of income then quantum of penalty to be 200% of tax payable on such underreported income.

-Subsection (9)-Certain cases of misreporting of income

-Subsection (10) - Working of tax payable on underreported income

-Subsection (11) No double penalty on same addition

-Subsection (11) - Penalty to be imposed by order in writing

6. The Ld AR pointed out that there are two (2) different type of penalty prescribed on the basis of default of the assessee. First one is that Penalty can be levied at 50% of tax payable for *under-reporting* of income as per sub section (2) r.w s. (7) of section 270A of the Act; and second penalty can be levied at a higher amount

being 200% of the tax payable, if such under-reported income is in consequence of *misreporting* of income as per subsection (8) r.w.s. (9) of section 270A of the Act.

7. According to him, as stated earlier, imposition of penalty is at the discretion of AO, since sub-section (1) of section 270A of the Act, refers to the word '*may*' and not *shall*. And further, he pointed out that there are certain *specific instances/exceptions* given in sub section (6) of section 270A of the Act, [which does not constitute under reported income for the purpose of s. 270A]. Therefore, according to him it is clear that all additions made in the quantum/assessment order cannot culminate into charging of penalty u/s 270A of the Act; and that the penal provision need to be invoked only after considering facts and circumstances of each case.

8. Coming to the penalty levied in the instant case, the Ld AR submitted that section 270A(9) refers to six (6) distinct instances which can qualify underreporting *as a consequence of misreporting*. And that the provisions of section 270A(9) applied only in case where there is *mens-rea* as can be deciphered from the instances of misreporting of income as given in sub section (9) of the Act which are as under:

- a. misrepresentation or suppression of facts;
- b. failure to record investments in the books of account;
- c. claim of expenditure not substantiated by any evidence
- d. recording of any false entry in the books of account
- e. failure to record any receipt in books of account having a bearing on total income; and

f. failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X apply.

8. According to him, the AO has nowhere stated under which of the six (6) cases, the appellant's case falls, so as to levy higher penalty at 200%. Merely mentioning that the appellant has misreported income without bringing out how the additions has lead to misreporting of income, and which specific instance specified under sub-section (8) is attracted, according to him, AO erred in levying Penalty, which action shows total non application of mind and arbitrary use of power to levy penalty. According to him, the AO has passed the penalty order with a pre-determined mind and in a whimsical manner which cannot be sustained in the eyes of law. Per-Contra, the Ld DR supporting the action of Ld CIT(A), defended the action of both authorities and does not want us to interfere in the same.

9. The assessee has challenged the penalty levied under sub-section (9) of section 270A of the Act which is against the *misreporting* of income as referred in sub-section (8) of section 270A of the Act. The AO has made the addition on account of addition made on these issues as under: -

	Particulars	Addition amount
1	Interest paid on late payment of service tax	3,27,026
2	Interest on Income Tax Refund	64,581
3	Interest paid on late payment on TDS	973
4	Disallowance of expenses on estimate basis at 0.6%	2,416
		3,94,996

10. Out of the aforesaid quantum additions made by AO, the assessee had filed an appeal which was before this Tribunal wherein the Tribunal was pleased to delete the addition of Rs.3,27,026/- (Interest paid on late payment of service tax by order dated 31.03.2023 in ITA. No.10/Mum/2023 for AY. 2017-18). Therefore, the quantum addition sustained is now only Rs.67,970/- (i.e. Rs.64,581 + Rs.973 + Rs.2,416/-).

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 270(A)(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 270(A)(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: -

"Penalty for under-reporting and misreporting of income.

270A. (1)

(8) Notwithstanding anything contained in sub-section (6) or sub-section (7), where under-reported income is in consequence of any misreporting thereof by any person, the penalty referred to in sub-section (1) shall be equal to two hundred per cent of the amount of tax payable on under-reported income.

(9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—

- (a) misrepresentation or suppression of facts;
- (b) failure to record investments in the books of account;
- (c) claim of expenditure not substantiated by any evidence;
- (d) recording of any false entry in the books of account;
- (e) failure to record any receipt in books of account having a bearing on total income; and
- (f) failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X apply."

13. The AO has levied the higher penalty of 200% of tax payable of *mis-reporting* 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.

14. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 22/05/2023.

Sd/-

Sd/-

(OM PRAKASH KANT)
ACCOUNTANT MEMBER

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 22/05/2023.
Aniket Rajput

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि ,आयकरअपीलीयअधिकरण ,मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

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**उप/सहायकपंजीकार / (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण ,मुंबई / ITAT, Mumbai**