



॥ आयकर अपीलीय न्यायाधिकरण, पुणे "ए" न्यायपीठ, पुणे में ॥



IN THE INCOME TAX APPELLATE TRIBUNAL, PUNE "A" BENCH, PUNE
BEFORE HON'BLE SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER
AND

SHRI G. D. PADMAHSHALI, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 0532/PUN/2023

निर्धारण वर्ष / Assessment Year : 2017-18

Dilip Bhagwat Pimple
544, Keshav Nagar,
Mundhwa, Pune-411036
PAN:AIFPP6866J

..... अपीलार्थी / Appellant

बनाम / V/s.

Income Tax Officer,
Ward-14(1), Pune.

.....प्रत्यर्थी / Respondent

द्वारा / Appearances

Assessee by : Shri Saurabh Patil

Revenue by : Shri Ramnath Murkunde

सुनवाई की तारीख / Date of conclusive Hearing : 26/05/2023

घोषणा की तारीख / Date of Pronouncement : 14/06/2023

आदेश / ORDER

PER G. D. PADMAHSHALI, AM;

By the present appeal the assessee challenges the order of National Faceless Appeal Centre [for short 'NFAC'] dt. 29/03/2023 passed u/s 250 of the Income-tax Act, 1961 [for short 'the Act'] for the assessment year 2017-18 [for short 'AY']



2. This appeal deals with the legitimacy of action of first appellate authority in confirming levy of penalty u/s 270A of the Act when appeal against quantum is dismissed otherwise than on merits on even date.

3. We have heard the learned counsel for the assessee Mr Saurabh Patil and Ld. Ramnath Murkunde representing respondent Revenue at length and subject to the provisions of rule 18 of Income Tax Appellate Tribunal Rules, 1963 [for short 'ITAT- Rules'] perused the material placed on records and duly considered the facts in the light of settled legal position which are forewarned to parties present and ceased following facts from the case records;

3.1 During the previous year relevant to AY under consideration the assessee found to have sold an immovable property for sum of ₹35.74Lakhs, in event of assessee's failure to substantiate the cost of acquisition and indexed



cost of property sold, the Ld. National Faceless Assessment Centre [for short '**AO**'] disallowed the same and assessed the total income of the assessee at ₹44,54,040/- u/s 144 of the Act as against the returned income of ₹8,80,040/-.

3.2 Consequent to aforesaid assessment, the Ld. AO initiated penal proceedings u/s 270A by service of notice dt. 11/12/2019 & 22/05/2021 and called upon the assessee to show case as to why a penalty in his case should not be levied for *mis-reporting of income*. When notices remained unresponded, the Ld. AO culminated the proceedings by imposing a penalty @200% of tax sought to be evaded i.e. ₹2,14,440/- holding it as mis-reporting of income straightway.

3.3 In so far as the quantum addition is concerned, the assessee agitated the denial of credit for cost/indexed cost of acquisition of property before the first appellate authority.



However the Ld. NFAC vide its order dt. **29/03/2023** dismissed the appeal in *limine* for non-condonation of delay. When the matter travelled to this Tribunal in ITA No. 533/PUN/2023, the Co-ordinate bench considering the fact that the utmost part of delay in instituting appeal was attributable to COVID-19 pandemic and as such is saved by the provisions of TOLA, 2020 has remanded the matter back to the file of Ld. NFAC for *de-nova* adjudication on merits.

3.4 The levy of penalty u/s 270A of the Act was also assailed by the assessee by filing an appeal before first appellate authority. The Ld. NFAC by an impugned order of even date i.e. **29/03/2023** upheld the action of Ld. AO in imposing the penalty u/s 270A of the Act.

3.5 The assessee in this appeal alleged the action of Ld. NFAC for confirming levy of penalty prematurely without first dealing with the quantum appeal on merits as violative of natural justice.



4. In adjudicating the issue under consideration, without reproducing the provisions of section 270A of the Act, it shall be purposive to state that, from AY 2017-18 the AO, CIT, CIT(A) and PCIT are severally empowered at a discretion to initiate and levy a penalty @50% and @200% of tax sought to be evaded respectively on under-reported income and when such *under-reported* income is in consequence of *mis-reporting*. The bare reading of this provision intractably demands for determination of under-reporting and mis-reporting of income prior to levy of any penalty u/s 270A of the Act. That is to say, the determination of under-reporting and misreporting of income must precede the levy of penalty and in the absence of any such determination of under-reporting or/and mis-reporting of income the jurisdiction to initiate penal proceedings u/s 270A of the Act fails. Thus the determination of default trigger the imposition of penal action cannot succeed over levy of penalty.



5. In the extant case, we note that, the appellant assessee preferred two appeals before Ld. NFAC i.e. one against quantum addition and second appeal against levy of penalty arisen out of such quantum addition. The Ld. NFAC exercising the co-terminus power over the subject matter of quantum addition and levy of penalty has dismissed the quantum appeal of the appellant in *limine* for non-condonation of delay by an order dt. 29/03/2023 and whereas confirmed the penalty levied by the Ld. AO by the impugned order of even date. This leaves us with the question '*as to whether the action of the Ld. FAA confirming the penalty prematurely without first dealing the quantum appeal is bad in law and violative of principle of natural justice?*'

6. In first place, it shall be purposive to quote that, '**a penalty is levy of additional tax**' as held by the Hon'ble Supreme Court in '*CIT Vs Bikaji Dadabhai & Co.*' reported 42 ITR 123 which Hon'ble Lordships



subsequently reiterated in '*Jain Brothers Vs Union of India*' reported in 77 ITR 107. Thus in the light of aforesaid ratio, we are heedful to state that, the Ld. FAA without first adjudicating the quantum appeal that is to say without first determining the basic tax has proceeded to determine the additional tax in the form of penalty u/s 270A. That is to say the Ld. FAA tried to build floors in the air without first laying down the foundation on the earth.

7. The sound general rule that, no penalty can be levied on any doctrine of '*the substance of the matter*' as distinguished from its legal signification, as a subject is not liable to penalty on '*supposed spirit of law or by inference or by analogy*'. In this context it is worthy to quote from the observation of Hon'ble Guwahati High Court made at para 7 in '*CIT v. Maskara Tea Estate*' reported 130 ITR 955 that;

Lord Sumner observed in Ormand Investment Co. v. Betts [(1928) AC 143] "the Crown does not tax by analogy but by statute."



8. The penalty proceedings are penal in nature and character hence attracted only when contravention of statutory obligations as contemplated by the Act is established beyond an iota of doubt. However in the present case, the adjudication confirming the levy of penalty preceded over pending adjudication of quantum appeal which in our considered opinion amounted to levy of penalty on '*supposed spirit of law or by inference or by analogy*' which is bad in law and violating of natural justice, for the reasons, we have no hesitation in setting-aside the impugned premature penalty adjudication.

9. Resultantly, the appeal stands **ALLOWED**.

In terms of rule 34 of ITAT Rules, the order pronounced in the open court on this Wednesday 14th day of June, 2023.

-S/d-

S. S. VISWANETHRA RAVI
JUDICIAL MEMBER

पुणे / PUNE; दिनांक / Dated : 14th day of June, 2023.

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to:

1. The Appellant.

2. The Respondent.

3. The Pr. CIT Circle-6,

4. The NFAC, New Delhi.

5. The DR, ITAT, "A" Bench, Pune

6. गार्डफ़ाइल / Guard File.

-S/d-

G. D. PADMAHALI
ACCOUNTANT MEMBER

आदेशानुसार / By Order,
वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय न्यायाधिकरण, पुणे / ITAT, Pune.