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

IN THE INCOME TAX APPELLATE TRIBUNAL, PUNE "A" BENCH, PUNE

BEFORE HON'BLE SHRI S. S. GODARA, JUDICIAL MEMBER

AND

SHRI G. D. PADMAHSHALI, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 54 & 55/PUN/2023

निर्धारण वर्ष / Assessment Year : 2017-18 & 2018-19

Kishor Digambar Patil,
03, Saras Apartment, Patil Lane 04,
College Rd., Nashik – 422005
PAN: AARPP2052J ..... **अपीलार्थी / Appellant**

बनाम / V/s

Income Tax Officer,
Ward 2(1), Nashik ..... **प्रत्यर्थी / Respondent**

द्वारा / Appearances

Assessee by : Shri Shardul Sonawane & Ms Abhilasha Pawar

Revenue by : Shri Ramnath Murkunde

सुनवाई की तारीख / Date of conclusive Hearing : 30/03/2023
घोषणा की तारीख / Date of Pronouncement : 30/03/2023

आदेश / ORDER

PER G. D. PADMAHSHALI, AM;

These twin appeals for assessment years [in short **'AY'**] 2017-18 & 2018-19 are assailed against respective orders of National Faceless Appeal Centre, Delhi [in short **'NFAC'**] dt. 06 & 07/12/2022 passed u/s 250 of the Income-tax Act, 1961 [in short **'the Act'**],

2. Since the issue involved in both these appeals is identical, with the agreement of parties hereto, the matter is heard together for a consolidated order; resultantly the adjudication laid ITA No. 54/PUN/2023 shall ***mutatis-mutandis*** apply to ITA No. 55/PUN/2023.

3. At the outset we note that the grounds raised in the present appeal are inconsonance with rule 8 of the Income Tax Appellate Tribunal Rules, 1963 [in short **'ITAT-Rules'**], hence without reproducing them it shall suffice to articulate that the substantive legal ground orbits alleging violation of principle of natural justice and non-application of mind on the part of Ld. AO while dealing with imposition of penalty u/s 270A of the Act.

4. Both the parties laid their rival contentions and after hearing them at a length, we have perused the case records in the light of rule 18 of ITAT, Rules 1963 and freezed the following undisputed facts for adjudication;

4.1 The appellant assessee is a salaried employee had filed his original return of income [in short **'ITR'**] u/s 139(1) of the

Act on 19/07/2017 declaring income of ₹8,82,790/- after claiming deduction u/c VI-A for sum of ₹1,65,284/-.

4.2 Subsequently the assessee revised his ITR u/s 139(5) of the Act thereby slicing down the total income to ₹4,90,810/- consequent to higher claim of deduction u/c VI-A of ₹3,59,844/- as against original claim of deductions made in original return filed u/s 139(1) of the Act.

4.3 A survey action u/s 133A of the Act was carried out on a third party wherein certain information about the appellant was gathered which was shared by the Investigation wing to the jurisdiction AO of the assessee. Pursuant to such information, the case of the appellant was subjected for re-assessment u/s 147 of the Act following the due procedure laid therefore.

4.4 In response to notice u/s 148 of the Act, the appellant filed his ITR correcting spurious claim of deductions and thus restored original state as was then returned in the ITR filed u/s

139(1) of the Act i.e. withdrawn additional claim of deductions made in ITR filed u/s 139(5) of the Act. The said re-assessment proceedings culminated accepting income retuned pursuant to notice u/s 148 of the Act. Thus the department recovered the refund of tax earlier paid on revision of return.

4.5 The Ld. AO underlining the variation between income returned pursuant to notice u/s 148 with that of revised ITR filed u/s 139(5) of the Act, has invoked the penal provision and after considering the submission of the appellant has finally by an order dt. 14/01/2022 u/s 270A of the Act imposed a penalty of ₹1,64,392/- i.e. @200% of tax sought to be evaded for **under-reporting** of income holding it is **in the nature of mis-reporting** .

5. On an unsuccessful attempt before the first appellate authority, the appellant has set-up a present case for reversal of aforestated penalty on a solitary legal ground as intoned at para 3 herein before.

6. In this admitted factual matrix, our indulgence is called to adjudicate the legal ground and in doing so, without reproducing provision of section 270A of the Act in verbatim, it shall be purposive to state that, from AY 2017-18 Ld. 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. Here it is apt to note that, unlike section 271(1)(c) the present penalty provision of section 270A of the Act clearly enumerates seven exclusive **circumstances** or **incidences** in clause (a) to clause (g) of s/s (2) which gives rise to under-reported income of a person. And once the incidence of under-reported income is identified or determined, the sub-section (9) of section 270A lineally list outs six **actions** to tests whether such under-reported income is in consequence of mis-reporting or not for the purpose of imposition of accelerated rate of penalty @200% of tax sought to be evaded under s/s (8) in place of empathetic rate of penalty @50% for sheer under-reporting us/s (7) of section 270A of the Act.

7. We are mindful to the evolution of present penalty law, whereby the legislature in his highest wisdom has brought-in this new simplified penalty scheme through insertion of section 270A with a pre-dominant intent to end highly debated and litigated provision of section 271(1)(c) of the Act. And in this context it shall be apt to note the 'Explanatory Memorandum' to the provisions of Finance Bill, 2016 which explains the objective behind inserting this section 270A vide para 62.1 CBDT Circular 3/2017 (F. No. 370142/20/2016-TPL) as;

> *"Under the existing provisions, penalty on account of concealment of particulars of income or furnishing inaccurate particulars of income is leviable under section 271(1)(c) of the Income-tax Act. In order* ***to rationalise and bring objectivity, certainty and clarity in the penalty provisions,*** *it is proposed that section 271 shall not apply to and in relation to any assessment for the assessment year commencing on or after the 1st day of April, 2017 and subsequent assessment years and penalty be levied under the newly inserted section 270A with effect from 1st April, 2017. The new section 270A provides for levy of penalty in cases of under-reporting and misreporting of income."* *(Emphasis supplied)*

8. Coming back to present appeal we observed that, the Ld. AO after having clearly analysed facts and circumstances of the case has dejectedly failed to identify or determined **and** then communicate either through reassessment order or through notice the **specific circumstance** or **incidence** i.e. specific clause (a) to clause (g) of s/s (2) of section 270 within which the case of the appellant falls so has to hold income as under-reported to trigger said penal provision. The failure continued further in identifying or determining **and** showcasing the **specific action** of the appellant in terms of clause (a) to clause (f) to s/s (9) of section 270 within which such action of the assessee falls so has to jacket or categorise such under-reported income is in consequence of mis-reporting. We note that without adhering to aforestated exercise, the Ld. AO precipitately culminated penal proceedings imposing a penalty @200% of the tax sought to be evaded. We further note wistfully that, in an appeal the Ld. NFAC exercising plenary, coterminous and coextensive jurisdiction could have rightly dealt with this provision; however it too perfunctory ceased the proceedings echoing in line with the Ld. AO.

9. Albeit it is true that present section 270A unlike section 271 does not require the Ld. AO to record satisfaction for invocation of penal provision, but unless the person has been communicated the specific **incidence** *vis-à-vis* **action** triggering the imposition of penalty in his case, he could never be able to refute the charge brought out against him.

10. Thus non **identification or determination** *vis-à-vis* **communication** of specific clause lineally from sub-section (2) and sub-section (9) would drastically obstruct an assessee from enforcing his right to dismantle the charge alleged against him, thus resulting into violation of principle of natural justice.

11. We understand a traffic constable when catch holds of a rider entering into '*no-entry or one-way*', before he draws a challan on him, he first shows a traffic signboard indicating '*no entry*' and then demonstrates how that rider has entered into '*no entry or one-way'* path violating traffic rules and only after hearing him decides to make a penalty challan. So if a traffic constable scrupulously follows a principle of natural justice even before

imposing a petty penalty, then we are unable to comprehend as to what stopped the lower tax authorities in outstepping from principle of natural justice while dealing with impugned penalty proceedings.

12. In adjudicating the issue under consideration we are heedful to state that, the penalty provisions of section 270A like provision of section 271(1)(c) are detrimental, albeit commercial consequences and being mandatory brooks no trifling or dilution therewith. Thus a contravention of a mandatory condition or requirement is fatal with no further proof and as a result in our considered view the ***ratio decidendi*** laid in context of section 271(1)(c) of the Act by the Hon'ble Supreme Court in "Dilip N Shroff Vs JCIT" reported in 291 ITR 519 (SC) and "Ashok Pai Vs CIT" reported at 292 ITR 11(SC), further by Jurisdictional Bombay High Court in plethora judgements including "CIT Vs Samson Pericherry", "PCIT Vs Goa Dorado" and "PCIT Vs New Era Sova Mine" shall still hold good even in impugned penal proceedings of section 270A of the Act.

13. Having aforesaid, in our opinion, the non-application of mind by tax authorities while dealing with the penal provisions cannot at this stage be improved by remanding the matter back for *de-nova* consideration, hence prayer of the Ld. DR stands meritless.

14. In the light of aforestated reasoning and discussion, we observed that, the notice initiating the penal proceedings is silent on the **circumstance** or **incidence** triggering the very initiation in this case. Further the order of penalty did neither mention the circumstance or incidence nor make a mention of alleged action in reaching the final imposition. In the event respectfully applying similar analogy as laid in aforestated judicial precedents to the case in hand, we find force in the argument of the appellant that, the failure on the part of lower tax authorities to **identify and communicate** the specific **circumstance** or **incidence** from clause (a) to (g) of s/s (2) of section 270A by virtue of which the income of the appellant held as under-reported and further failure on the part of lower tax authorities to showcase which of the specific **action** of the appellant from clause (a) to (f) of s/s (9)

was determinant before imposing the impugned penalty u/s 270A of the Act has rendered the entire proceedings invalid and thus untenable in the eyes of law. Consequently the penalty imposed u/s 270A of the Act being bad in law deserves to be quashed, ergo we order accordingly.

15. **In result, both these appeals stands ALLOWED.**

In terms of rule 34 of ITAT Rules, the order pronounced in the open court on this Thursday 30th day of March, 2023.

-S/d-
G. D. PADMAHSHALI
ACCOUNTANT MEMBER

पुणे / PUNE ; दिनांक / Dated : 09th day of June, 2023.
आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1.अपीलार्थी / The Appellant. 2. प्रत्यर्थी / The Respondent. 3. The Pr. CIT -1, Nashik
4. The CIT(A)-NFAC, Delhi (India) 5. DR, ITAT, Bench 'A', Pune 6. गार्डफ़ाइल / Guard File.
Ashwini

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

CONCURRENT ORDER

PER SATBEER SINGH GODARA, J.M. :

I have gone through hon'ble brother Accountant Member's order quashing both these penalties. I express my full agreement with the same. However, keeping in mind the crucial fact that we are dealing with a newly introduced penalty provision issue i.e., sec.270A of the Income Tax Act, 1961 (in short "the

Act") applicable from assessment year 2017-2018 onwards, I deem it appropriate to pass my concurrent order supplementing the hon'ble Accountant Member's detailed discussion.

2. There would be hardly any dispute that the Assessing Officer had framed his assessments, both dated 22.08.2021, for the impugned assessment years 2017-2018 and 2018-2019. And that he had also initiated these identical sec.270A penalty proceedings against the assessee alleging "under reporting of income in consequence of misreporting" thereof. The same admittedly pertained to the assessee's chapter-VIA deduction claims raised to the tune of Rs.3,59,844/- in his revised return as against that of Rs.1,65,284/- in the original one which was reduced to Rs.1,70,727/- in the former assessment year 2017-2018. The corresponding figures in the latter assessment year 2018-2019 read Rs.3,71,686/- and Rs.1,77,924/- respectively.

3. I now advert to the section 270A proceedings in issue. The Assessing Officer's twin penalty orders, both dated 14.01.2022, rejected the assessee's stand to impose these penalties of Rs.1,64,392/- i.e., @ 200% of the tax sought to be evaded of Rs.82,196/- holding "under reporting of income which is in consequence of misreporting of income" amounting to

Rs.3,99,010/- in the former assessment year 2017-2018 and Rs.1,51,866/- in assessment year 2018-2019, for taxes sought to be evaded of Rs.75,933/- regarding the income in issue of Rs.3,68,610/- respectively.

3.1. The learned NFAC's identical detailed discussion has affirmed the impugned penalties as under :

> *"5. It's an admitted fact that the appellant filed revised return claiming false deduction under chapter Vl-A, which had resulted in the refund. The act of filing original return of income and subsequently revising the same with reduced returned income on account of claiming false deduction cannot be executed without the active knowledge of the appellant and active collusion with the tax practitioner. The appellant, but for the action of assessing officer, which was based on information gathered from the survey proceeding, would not have come forward to voluntarily file return of income excluding false deduction claimed earlier through the revised return. It is to be noted that the appellant is an educated taxpayer working in with a reputed Multi National Company and cannot claim being ignorant about the law. Also, it is to be noted that a false claim of deduction made*

had resulted in refund, despite the fact that there was no such deduction claimed before/reported by the employer through Form 16. Therefore, on the facts and circumstances, there is an element of mens rea and actus reus on the part of the appellant to make fraudulent claim of refund and to defraud the public exchequer. Therefore, the action of the Assessing Officer to levy penalty u/s. 270A of the Act is in order and requires no interference."

This leaves the assessee aggrieved.

4. Both the learned representatives vehemently reiterated their respective stands against and in support of the impugned penalties. The assessee more particularly argued that both the learned lower authorities have erred in law and on facts in imposing sec.270A penalties in issue without even specifying the relevant limb under sub-section (9) thereof pertaining to "misreporting of income". Learned counsel quoted the erstwhile earlier penalty mechanism provided u/sec.271(1)(c) of the Act wherein the law stood duly settled in light of Mohd. Farhan A Shaikh vs. ACIT [2021] 434 ITR 1 (Bom.) (FB); CIT vs. M/s. SSA's Emerald Meadows [2016] 386 ITR (St.) 13 (SC) and CIT vs. Manjunatha Cotton Ginning Factory (2013) 359 ITR 565 (Kar)

(HC) that an assessing authority has to specify the corresponding limb in the show cause notice to be issued u/sec.274 of the Act. Learned counsel's case is that the legal position would hardly be any different wherein the legislature has now prescribed clauses (a) to (f) in sec.270A (9) of the Act only to "rationalise and bring objectivity, certainty and clarity in the penalty provisions" as per the CBDT's circular no.3/2017 [F.No.370142/20/2016-TPL]. Mr. Sonawane strongly argued in tune thereof that the very line of reasoning is required to be adopted herein as well whilst dealing with penalty proceedings under this new scheme of u/s.270A introduced by the legislature by the Finance Act, 2016 w.e.f. 01.04.2017.

5. Mr. Murkunde on the other hand strongly supported the learned lower authorities action imposing the impugned penalties. He took us to the Assessing Officer's corresponding assessments, penalty orders as well as the lower appellate discussion extracted in the preceding paragraphs that the rigor of sub-section (9) stands duly complied with once it has been categorically concluded that this is a fit case to impose penalty u/sec.270A of the Act for "under reporting which is in consequence of misreporting of income". His further contention is

that such a penalty @ 200% is levied u/sec.270A(8) of the Act reading as under :

> *"Sec.270A(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."*

5.1. Mr. Murkunde lastly sought to buttress the point that section 270A(8) nowhere makes it mandatory to include any of the clause "(a) to (f)" provided in sub-section (9) thereof. He further submitted that various judicial precedents quoted at the assessee's behest in the preceding paragraphs are no more applicable once the legislature has amended the penalty provision i.e., sec.271 itself.

6. I have given my thoughtful consideration to the vehement rival stands and find no merit in the Revenue's arguments. It is made clear that the assessee's case law indeed relates to the earlier penalty provision i.e., sec.271(1)(c) of the Act only wherein various hon'ble higher judicial forums had settled

the law that the Assessing Officer ought to specify as to whether the concerned taxpayer had concealed or furnished inaccurate particulars of his taxable income during the course of assessment. I am of the view that the very line of judicial precedents would squarely apply even for the amended penalty provision i.e., sec.270A of the Act as well wherein the legislature has not only prescribed twin limbs of "under reporting of income as well as misreporting of income", but also, unlike the earlier provision u/sec.271, this time it has stipulated specific deeming illustrations under both the twin foregoing heads of the "under reported income" and "misreporting of income" in sub-sections (2) and (9) (a to f) respectively. In my considered opinion, once the instant twin appeals involve levy of penalty @ 200% of the taxes sought to be evaded and the learned lower authorities have held the assessee to have "under-reported his taxable income in consequence to misreporting", the latter limb of misreporting containing six "sub-limbs" in clauses (a to f) under sub-section-(9) deserve to be read as an extension of sub-section (8) to section 270A only. This indeed seems to be the only possible view as the legislature has incorporated the non-obstante clause "Notwithstanding anything contained in sub-sec.(6) or sub-

sec.(7)" thereby not including the sub-section (9) envisaging the six instances defining "misreporting of income" in section 270A of the Act.

6.1. Mr. Murkunde could further not dispute the fact that right from the Assessing Officer's twin assessments to his impugned penalty orders as well the NFAC's detailed discussion, the learned lower authorities have nowhere specified the corresponding "sub-limbs" (a to f) in sub-sec.(9) of sec.270A of the Act. That being the case, I wish to quote para 62.10 in the CBDT's circular no.3/2017 (supra) making it explicitly clear that these six clauses (a to f) would indeed form part of sub-section (8) to sec.270A as under :

> *"62.10 The rate of penalty shall be fifty per cent of the tax payable on under-reported income. However in a case where under reporting of income results from misreporting of income by the assessee, the person shall be liable for penalty at the rate of two hundred per cent of the tax payable on such misreported income. The cases of misreporting of income have been specified as under :*
>
> *(i) misrepresentation or suppression of facts;*

(ii) non-recording of investments in books of account;

(iii) claiming of expenditure not substantiated by evidence;

(iv) recording of false entry in books of account;

(v) failure to record any receipt in books of account having a bearing on total income;

(vi) failure to report any international transaction or deemed international transaction under Chapter X of the Income-tax Act."

6.2. Faced with the situation and in light of overwhelming material strongly supporting the assessee's case and going by stricter interpretation as per Commissioner of Customs (Imports), Mumbai vs. Dilipkumar And Co. & Ors. 2018 (9) SCC 1 (SC) (FB), I am of the view that the above stated judicial precedents regarding the "limb theory" would squarely apply even in case of failure of the Assessing Officer to quote any of the six sub-limbs as well prescribed in sec.270A(9) (a) to (f) of the Act introduced by the legislature in order "to rationalize and bring objectivity, certainty and clarity in the penalty provisions". And that his non-compliance to this clinching effect would not only defeat the legislative mandate but also it renders the amending provisions an otiose. I accordingly hold in these peculiar facts and

circumstances that both the impugned penalties deserve to be quashed as not sustainable in the eye of law. Ordered accordingly.

7. These assessee's twin appeals are allowed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 23.06.2023.

Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

Pune, Dated 23rd June, 2023

VBP/-
Copy to

1.	The appellant
2.	The respondent
3.	The CIT(A), NFAC,Delhi
4.	Pr. CIT-1, Nashik
5.	The DR, ITAT "A" Bench, Pune
6.	Guard File.

//By Order//

Assistant Registrar, ITAT, Pune Benches,
Pune.