IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE 'B' BENCHES :: PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER &
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA Nos.612 & 613/PUN/2023
(A.Y. 2017-18 & 2018-19)

Sanjeev Kumar Manchand Rajput, Plot No.31, S.No.126/1A, Near GYM Shivaji Nagar, Satpur, Nashik. PAN: AAWPR 2279 L	vs	ITO, Nashik.
Appellant		Respondent

Assessee by	:	Ms. Abhilasha Pawar, AR
Revenue by	:	Shri M.G. Jasnani, DR
Date of hearing	:	12/07/2023
Date of pronouncement	:	13/07/2023

O R D E R

Per Bench:

These appeals preferred by the assessee emanates from the separate orders of National Faceless Appeal Centre [NFAC], Delhi, each dated 26.04.2023 for A.Ys. 2017-18 & 2018-19 as per the grounds of appeal on record.

2. The common and solitary grievance of the assessee in both these appeals is the confirmation of levy of penalty u/sec. 270A of the Act.

3. We shall take up ITA No.612/PUN/2023 as the lead case for illustration of facts and adjudication. It has been conceded by the parties herein that the facts and circumstances and the issues involved in both the years of appeal are absolutely identical and similar, therefore, these cases were heard together and were disposed of vide

this consolidated order.

4. The relevant facts of the case are that assessee is an individual and derives income from salary, filed his return of income declaring total income of Rs.4,22,340/- after claiming deduction under chapter VI-A of Rs. 2,35,000/-. Subsequently, a survey was conducted u/sec.133A of the Act on the assessee's ITP, and on the basis of the information from Inv. Wing, the case of the assessee was reopened by issue of notice u/s.148. In response thereto, assessee filed return on 03-03-2020 declaring total income of Rs.8,27,340/- wherein he claimed deduction of Rs.1,50,000/- under chapter VI-A. In the assessment proceedings, the Assessing Officer (AO) accepted the income of Rs. 8,27,340/- filed in the return in response to notice u/sec.148. The AO noted that in the original return filed on 27-06-2017, the gross total income was declared at Rs.6,57,341/- while in the return dated 03-03-2020, the gross total income was declared at Rs.9,77,338/- and thus higher by Rs.3,20,000/-. Similarly, the deduction claimed under chapter VI-A was reduced from Rs.2,35,000/- to Rs.1,50,000. The AO accepted the income as per return filed in response to the notice u/sec.148 and initiated penalty proceedings u/sec.270A for under-reporting in consequence of misreporting of income. The assessee did not file any appeal against the quantum assessment and has accepted the assessment. The AO then took up the penalty proceedings and held that assessee had misreported his income of Rs.4,05,000/-. During the penalty

proceedings, assessee filed Form-08 requesting for grant of immunity u/sec.270AA, which was rejected by the AO and levied penalty @200% on misreporting of income.

5. Before the NFAC, detailed written submissions have been filed which is on record. That, after considering the submissions of the assessee and the assessment order, it was observed and held by the NFAC as follows:-

> *"5.2 In the AY 2017-18, the original return filed by the assessee declaring income of Rs. 4,22,340 comprising of Gross Total Income of Rs 6,57,341 and claiming deduction under Chap VI A of Rs. 2,35,000 was merely processed u/s 143(1) and refund issued to the assessee. Later it was revealed that the assessee has suppressed the gross total income itself to the extent of Rs. 3,20,000. This was in spite of the Form 16 issued by the employer showing a higher & correct salary. It is not known as to why and how the assessee could declare a salary lower than that recorded in Form 16. Similarly, the assessee has overstated the deduction under Chap VI A by Rs. 85,000, i.e to say, claimed a deduction under Chap VI A of Rs. 2,35,000 against the correctly allowable Rs. 1,50,000. The details of such inflated claims were not revealed by the assessee in the present appeal proceedings. I specifically requested the assessee to explain the mechanics of these differences between the original return and that filed in response to notice u/s 148. However, the assessee has responded on 28/03/2023 stating that he has nothing further to state in respect of the difference between the figures of Gross Total Income and Chap VI A deduction between the original return and the later return. The facts on record thus indicate that admittedly the assessee has originally returned a lower gross total income and an inflated Chap VI A deduction, and has offered no explanation regarding the same.*
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> *5.3 Similarly, in the AY 2018-19, the gross total income as per original return is Rs.7,46,015 as against Rs.9,26,047 is the return filed in response to notice u/s 148, and is under reported by Rs.1,80,000. The Chap VI A deduction is claimed at Rs.3,55,000 in the original return as against Rs.1,50,000 claimed in the later return and is inflated by Rs.1,55,000.*
>
> *5.4 Sec 270A(1) is the charging section for levy of penalty and sec 270A(2) lays down situations in which an assessee is considered to have under reported his income. The case of the assessee for both AYs would fall in sec 270A(2)(a) as the assessed income is higher than that as determined u/s 143(1)(a). The quantum of such under reported*

income is to be determined as per sec 270A(3)(i)(a) for both AYs. There are certain exclusions from the definition of under reporting of income which is provided in sec 270A(6). Clauses (b) to (e) of sec 270A(6) obviously do not apply to the assessee and one has to examine cl (a) of sec.270A(6) whether the explanation offered by the assessee is bonafide and has disclosed all material facts to satisfy such explanation. As discussed earlier, the assessee has clearly offered no explanation whatsoever in respect of why & how the gross total income was under stated in the return in spite of Form 16 issued by the employer recording the correct salary. Similarly, there is no explanation whatsoever as to why & how the Chap VI A deduction was inflated. In fact, the assessee has answered my specific query stating that he has nothing more to explain. I am therefore of the view that the assessee has firstly offered no explanation at all and has not disclosed all material facts in regard to his explanation for under reporting of income. Merely blaming his tax consultant cannot confer immunity on the assessee as ultimately the assessee has certified his original return as true and correct, when he was in the knowledge that it was not so. I am therefore of the view that sec 270A(6) cannot rescue the assessee.

5.5 This is clearly a case of mis-reporting of income as defined in sec 270A(9), which is preceded by sec.270A(8) which begins with a non obstante clause. Sections 270A(8) and (9) read as under:

> *(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:-*
>
> *1. Misrepresentation or suppression of facts;*
> *2. Failure to record investments in books of accounts'*
> *3. Claim of expenditure not substantiated by evidence;*
> *4. Recording of any false entry in the books of accounts;*
> *5. Failure to record any receipt in books of account having a bearing on total income; and*
> *6 ……*

It is evident that in cases of under reporting of income as a consequence of mis-reporting thereof, sec.270A(8) and (9) would operate and a higher penalty is prescribed. Mis-reporting is defined in sec. 270A(9) and the case of the assessee would fall under clause (a) for suppressing the gross total income and under clause (c) for claiming a higher deduction under Chap VI A not substantiated by any evidence. The assessee has evidently declared a lower salary than that reported by his employer in Form 16, and further has not disclosed the basis of such under reporting when specifically asked by me to do so.

This action of the assessee would clearly be construed as misrepresentation or suppression of facts. Similarly, in case of the inflated claim under Chap VI A, the assessee has not revealed the basis on which a higher claim was made, in spite of being specifically requested by me. Based on the facts as discussed above, I am of the view that the assessee has clearly mis-reported his income as defined in sec 270A(9) and therefore the AO has correctly levied penalty @200% as prescribed. The scheme of the section as evident from the language is that a mere under reporting attracts penalty of 50% with certain exclusions, while mis-reportinq attracts a higher penalty of 200%. The legislature has intentionally distinguished between mis-reporting and under reporting by providing specific definition of mis-reporting and exclusions to under reporting. In my view by suppressing his gross total income in spite of Form 16 recording a higher and correct quantum, the assessee has mis-reported his GTI, and by inflating his Chap VI A deduction, the assessee has mis-reported income to the extent of inflation. These actions of the assessee would fall under clauses (a) and (c) of sec 270A(9). I therefore uphold the levy of penalty u/s 270A for both the AYs and dismiss the single ground of appeal."

6. We have analyzed the facts and circumstances, heard the submissions of the parties herein and have given considerable thought to the materials/documents on record.

6.1 In A.Y. 2017-18, the original return filed by the assessee declaring income of Rs. 4,22,340/- was processed u/sec. 143(1) of the Act and refund was issued to the assessee. Later, it was revealed that assessee has suppressed the gross total income itself to the extent of Rs.3,20,000/-. This was in spite of Form 16 issued by the employer showing higher and correct salary. It is for reasons best known to the assessee why he had declared salary lower than that recorded in Form 16 and similarly had overstated the deduction under chapter VI-A by Rs. 85,000/-, meaning thereby, claimed higher deduction under chapter VI-A of Rs.2,35,000/- as against the correctly allowable maximum deduction of Rs. 1,50,000/-. These details of such inflated

claims and the justifiable reasons thereof were not revealed by the assessee, even during the appellate proceedings before the NFAC. The assessee was specifically asked to explain the reasons for these differences between the original return filed and that the return filed in response to notice u/sec. 148. But even before the NFAC, the assessee responded that he has nothing further to state in respect of difference between the figures of gross total income and chapter VI-A deduction between the original return and the later return. Similarly, in A.Y. 2018-19, the gross total income as per original return was at Rs. 7,46,015/- as against Rs.9,26,047/- in the return filed in response to notice u/sec. 148 and was thus misreported by Rs.1,80,000/-. The Chapter VI-A deduction was claimed at Rs.3,55,000/- in the original return as against Rs. 1,50,000/- claimed in the later return and was inflated by Rs. 1,55,000/-. In this case, as evident from the order of the NFAC, assessee has offered no explanation as to why the gross total income was understated causing misreporting of income in the original return in spite of Form 16 issued by the employer, and similarly there was no explanation given by the assessee as to why chapter VI-A deductions were inflated. That, as rightly observed by the NFAC for both these years, it was a clear case of misreporting of income as defined u/sec. 270A(9) of the Act, which is preceded by sec.270A(8) of the Act which begins with a non-obstante clause. Sec.270A(8) and (9) specifies that in case of under-reporting of income as a consequence of mis-reporting thereof, sec. 270A(8) and

(9) would operate and a higher penalty is prescribed. As per the provisions of clause (a) & (c) of sec. 270A(9), the assessee has mis-reported his income. The scheme of the provisions provides that if it is a case of under-reporting, it attracts penalty of 50% with certain exclusions, but if it is a case of mis-reporting, it attracts higher penalty of 200%. The assessee admittedly declared lower salary than that reported by his employer in Form 16 and further has not disclosed the basis for such misreporting. This is a clear case of mis-representation or suppression of facts. Similarly, the assessee had inflated his claim of deduction under chapter VI-A of the Act and again has not revealed the basis for which, such higher claim of deduction was made. In fact, the assessee specifically stated before the NFAC that he does not have any explanation for these discrepancies. In fact, as per records with the Department, the assessee is habitual for claiming fraudulently refund by increasing deduction and reducing his taxable income since A.Y. 2016-17 onwards. Reference may be made to the decision of the Hon'ble Supreme Court in the case of *Mc Dowell & Company Ltd. v. CTO* [1985] 154 ITR 148 (SC) wherein the Hon'ble Supreme Court has held that "*Tax planning may be legitimate provided it is within the framework of law, Colourable devices cannot be part of tax planning….".* In the case of *DCIT v. Pawan Kumar Malhotra* [2010] 2 ITR 250 (Del – Trib.), it was observed that AO had come to a conclusion after meticulous enquiry as regards the purchases found by him as sham transaction treating the difference as undisclosed income

and, therefore, the Revenue's appeal was allowed restoring the order of the AO. The Tribunal relying upon the decision of the Hon'ble Supreme Court in the case of *Mc Dowell & Company Ltd.* (supra) and the case of *Sumati Dayal v. CIT* [1995] 214 ITR 801 (SC) wherein the former case dealt with tax planning and not on sham transactions and in the later case, the inference was based upon test of human probabilities with the assessee's version on facts was unbelievable and hence, was to be discarded. In all these decisions, the judicial conclusion is clearly set out that where tax planning is permitted at the same time, the assessee is not allowed to resort to any sham transaction or colourable devices for avoiding and evading tax. One classic judicial example is the decision of the Hon'ble Supreme Court in the case of *M/s. Friends Trading Company v. Union of India* in Civil Appeal No.5608/2011 vide order dated 23/09/2022 held in the context of availment of alleged forged in capital DEPB under the Customs Act held that exemption benefit availed on such forged DEPB are *void ab initio* on the principle that fraud vitiates everything. The ratio of this decision squarely applies to the conduct of the present assessee before us as he had done fraud with the Revenue by misreporting his income in the return filed for evading tax. Further, the application of principle of fraud was considered by the Hon'ble Supreme Court in the case of *Badami (deceased) by her LRs v. Bhali* in Civil Appeal No. 1723/2008, dated 22/05/2012 wherein the Hon'ble Supreme Court has held as follows:-

> *"20. In S. P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others AIR 1994 SC 853 this court commenced the verdict with the following words:-*
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> > *"Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."*
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> *21. In the said case it was clearly stated that the courts of law are meant for imparting justice between the parties and one who comes to the court, must come with clean hands. A person whose case is based on falsehood has no right to approach the Court. A litigant who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If a vital document is withheld in order to gain advantage on the other side he would be guilty of playing fraud on court as well as on the opposite party .*
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> *22. In Smt. Shrist Dhawan v. M/s. Shaw Brothers AIR 1992 SC 1555 it has been opined that fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It has been defined as an act of trickery or deceit. The aforesaid principle has been reiterated in Roshan Deen v. Preeti Lal AIR 2002 SC 33, Ram Preeti Yadav v. U.P.Board of High School and Intermediate Education and others (2003) 8 SCC 312 and Ram Chandra Singh v. Savitri Devi and others (2003) 8 SCC 319.*

6.2 Reverting to the facts of the present case, here also, the assessee who has a history for habitually claiming fraudulent refund by increasing deductions and reducing his taxable income since A.Y. 2016-17 onwards, could not justify why he has continuously misreported his income and what was the legal basis for such an action and no plausible legal explanations were submitted why such misreporting was done by the assessee. It is obvious that this is a fraud committed against the Department in order to evade tax. That, on examination in the light of aforestated judicial pronouncements and

the facts and circumstances involved in the assessee's case, we hold that NFAC has rightly upheld the levy of penalty by the AO @200% for misreporting of income as defined u/sec. 270A(9) of the Act. In view thereof, we do not find any infirmity with the findings of the NFAC which is upheld. Grounds of appeal in ITA No.612/PUN/2023 for A.Y. 2017-18 stands dismissed.

7. In the result, appeal of the assessee in ITA No.612/PUN/2023 for A.Y. 2017-18 stands dismissed.

8. At the very outset, the parties herein had submitted that the facts and issues involved in both the years are absolutely identical and similar and, therefore, our decision in ITA No.612/PUN/2023 for A.Y. 2017-18 shall apply *mutatis mutandis* to ITA No.613/PUN/2023 for A.Y. 2018-19. The grounds of appeal in ITA No.613/PUN/2023 for A.Y. 2018-19 stands dismissed.

9. In the result, appeal of the assessee in ITA No.613/PUN/2023 for A.Y. 2018-19 stands dismissed.

10. In the combined result, both the appeals of the assessee are dismissed.

Order pronounced in open Court on 13th July, 2023.

Sd/-	Sd/-
(INTURI RAMA RAO)	(PARTHA SARATHI CHAUDHURY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated : 13th July, 2023

vr/-

Copy to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
5. The DR, ITAT, "B" Bench Pune.
6. Guard File.

By Order

// TRUE COPY //

Senior Private Secretary
ITAT, Pune.