

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI “SMC” BENCH: NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER &
Dr.B.R.R.KUMAR, ACCOUNTANT MEMBER**

ITA No.1882/Del/2023

[Assessment Year : 2017-18]

Ashok Kumar Gupta, C/o-Anil Jain DD & Co., 611, Surya Kiran Building, 19 K.G.Marg, New Delhi-110001. PAN-AAAPG2240G	vs	DCIT, Central Circle-14, New Delhi.
APPELLANT		RESPONDENT
Appellant by	Shri Shivam Garg, Adv. & Shri Rahul Aggarwal, CA	
Respondent by	Shri Om Parkash, Sr.DR	
Date of Hearing	22.04.2024	
Date of Pronouncement	26.04.2024	

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the assessee is directed against the order passed by Ld.CIT(A)-24, New Delhi dated 30.05.2023 for the assessment year 2017-18.

2. The assessee has raised following grounds of appeal:-

1. *“That on the facts and circumstances of the case and the provisions of the law, the Ld. CIT(A) has failed to appreciate that the impugned penalty order passed by the learned assessing officer u/s 270A of the Act is illegal, bad in law, time barred and without jurisdiction.*
2. *That on the facts and circumstances of the case and the provision of law the Ld. CIT(A) has erred in not appreciating the fact that the Initiation of the proceeding U/s 270A is illegal and bad in law and thus penalty order requires to be quashed.*
3. *That on the facts and circumstances of the case and the provision of Law the Ld. CIT(A) has erred in not appreciating the fact that the*

impugned penalty order passed is without considering the reply submitted by the assessee and thus, the penalty order passed is bad in the eyes of law and liable to be quashed.

4. *That on the facts and circumstances of the case and the provision of law the Ld. CIT(A) has erred in sustaining the penalty of Rs. 425614/- u/s 270A of the Act.*
5. *That without prejudice to the ground no. 4 above on the facts and circumstances of the case and the provision of Law the Ld. CIT(A) has erred in not appreciating the fact that the Ld. AO erroneously imposed the penalty for under reporting of income @200% instead of 50%.*
6. *That the appellant craves leave to reserve to itself the right to add, alter, amend, vary, modify and/or withdraw any ground(s) of appeal at or before the time of hearing.*

All of the above grounds of appeal are without prejudice and mutually exclusive to each other.”

3. Facts in brief are that in this case, the assessee e-filed his return of income, declaring total income of INR 4,93,460/- on 16.03.2018. The case was processed u/s 143(1) of the Income Tax Act, 1961 (“the Act”). The case was taken up for Compulsory Manual Scrutiny and the assessment u/s 143(3) of the Act was completed on 27.12.2019, determining the income of the assessee at INR 13,53,184/-. Thereafter, the Assessing Officer (“AO”) initiated penalty proceedings u/s 270A of the Act. The AO while initiating the penalty proceedings u/s 270A of the Act, issued a notice dated 27.12.2019, calling upon the assessee to explain about under-reporting of income as to why the penalty proceedings u/s 270A of the Act, could not be imposed for under-reporting his income. Thereafter, the AO considering the reply filed by the assessee, imposed the impugned penalty @ 200% u/s 270A of the Act.

4. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A), who after considering the submissions, sustained the penalty and dismissed the appeal of the assessee.

5. Aggrieved against the order of Ld.CIT(A), the assessee preferred appeal before this Tribunal.

6. Ld. Counsel for the assessee reiterated the submissions as made in the written synopsis. He contended that although notice for imposing the penalty was issued for under-reporting the income but the penalty levied is imposed for misreporting the income. It is the case of the assessee that the AO without referring to the clause (9) of section 270A of the Act, proceeded to impose penalty which is contrary to binding precedents. He submitted that there is substantial difference in the rate of penalty for under-reporting and misreporting of income. Hence, the impugned order is illegal and unjustified. Ld. Counsel for the assessee placed reliance on the decision of the Co-ordinate Bench of the Tribunal in the case of **Alrameez Construction (P.) Ltd. vs CIT/NFAC, Delhi [2023] 152 taxmann.com 382 (Mumbai-Trib.)**. The relevant contents of the synopsis filed by the assessee are reproduced as under:-

1. *“The present appeal of assessee is arising from the order of CIT (A) dated 30.05.2023 and relates to A.Y 2017-18.*
2. *The assessee is an individual who had filed his return declaring an income of Rs. 4,93,460/- for the impugned year. Later on an assessment u/s 143(3) was framed on 27.12.2019 determining the total income at Rs. 13,53,184/- and penalty proceeding u/s 270 A was initiated against the assessee vide penalty notice dated*

27.12.20219 for under reporting of income. Finally, a penalty @ 200% was imposed u/s 270A(8) upon the assessee vide order dated 26.03.2022.

3. Against the penalty order dated 26.03.2022, the assessee preferred, an appeal before the CIT(A), who affirmed the order of the Ld. AO. Therefore, now the assessee is before this Hon'ble ITAT. Certain dates which are crucial to issues involved in present matter are as under:

DATE	PARTICUALRS	REMARKS
16.03.2018	Assessee filed his ITR at Rs. 4,93,460/-	
27.12.2019	Assessment order u/s 143(3) was passed determining the total income at Rs. 13,53,184/-.	Assessee did not prefer appeal before CIT(A) against such order.
27.12.2019	Penalty notice u/s 270A was issued to the assessee	It was issued for " Under-reporting of income " (Penalty notice annexed with this synopsis) (Para 3 at P.NO. 2 of Penalty Order)
26.03.2022	Penalty order u/s 270A was passed imposing penalty @ 200%	Para 9 at P.NO. 4 of Penalty order
30.05.2023	CIT(A) order affirming the penalty order dated 26.03.2022	

4. During the penalty proceedings, Ld. AO imposed the penalty u/s 270A @ 200% of the amount of tax payable on under-reported income observing:

a) That assessee had under-reported his income for the year under consideration

b) As per section 270A(8), the penalty for under-reporting of income shall be a sum equal to 200% of amount of tax on under-reported income.

5. On appeal before the CIT(A), the Ld. CIT(A) affirmed the order of the AO.

Submissions before the ITAT

6. It is submitted that the action of Ld. AO as affirmed by the CIT(A), of imposing the penalty of @ 200% for under-reporting of income is ultra-vires and contrary to the law.

7. *It is submitted that under section 270A, penalty is imposed in two conditions i.e. when the income is "under-reported" or misreported". Section 270A provides different penalty rates for each heads i.e as per section 270A(7) the penalty for "under-reporting" is prescribed at 50% and it is only for "Misreporting" the penalty is prescribed at 200% u/s 270A(8).*
8. *It is further submitted that section 270(A) under its clause 9 specifically prescribes the cases of misreporting from sub-clause (a) to (f), which are exclusive in nature. It is only in these cases, a penalty @200% can be imposed.*
9. *Furthermore perusal of penalty notice u/s 270A dated 27.12.2019 would show that the penalty was initiated under the head "under-reporting of income" and not under the head "Mis-reporting". This fact is further fortified by the observation of Ld. AO in PARA 3 of Penalty Order, wherein he himself accepted that the penalty proceeding was initiated for "under-reporting of income" only and not for "under-reporting by way of misreporting".*
10. *In addition to above it is submitted that even in the penalty order, there is not a single whisper of the "Mis-Reporting" by the Ld AO but allegedly he proceeded to impose the penalty @200% prescribed for misreporting. It is submitted that this act of Ld. AO is against the law and hence liable to be declared void.*
11. *Without prejudice, it is submitted the Ld. AO has failed to state, both in the notice as well as in the penalty order, as to how the Assessee's case/addition falls within instances given in Clauses (a) to (f) of Sub-Section (9) of Section 270A of the Act and, therefore, the impugned notice, issued u/s 270A being 'vague notice' and thus illegal and consequently the penalty order is liable to be quashed.*
12. *Further, in the instant case, from perusal of the penalty notice placed on record dated 27.12.2019, 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'. Therefore, the assessee could be expected to give reply only in respect of show cause notice that is put to him and cannot be assumed to infer/assume/presume that merely because the Ld. AO recorded satisfaction in the quantum assessment order that offence of both 'under reporting' and 'mis-reporting' is committed by the assessee and therefore, accordingly the penalty would also be levied on the assessee for both in terms of section 270A(9) of the Act.

13. *It is further submitted that the various High Courts and Benches of the Tribunal repeatedly held that the defective penalty notice issued by the Department without mentioning the proper limbs and details will be fatal to the entire penalty proceedings.*

14. *It is submitted that the Hon'ble jurisdictional HC in similar circumstances had quashed the penalty proceedings u/s 270A in the case of Schneider Electric South East Asia (HQ) Pte Ltd vs. ACIT in W.P.(C) 5111/2022 (Del) dated 28.03.2022, The Hon'ble High held as under (para 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."

15. *It is further submitted that following the above-mentioned judgment of Hon'ble Delhi HC, the Division Bench of Hon'ble ITAT Delhi has, in the case of Jania Marketing v. DCIT, ITA 224, 225, 226/D/2023 order dated 20.03.2024, quashed the penalty order under similar circumstances.*

16. *Assessee further seeks to rely upon the following judgments:*

- a) *Prem Brothers Infrastructure LLP v. NFAC reported in 288 Taxman 768 (Del)*
- b) *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*
- c) *The Pune Bench of the Tribunal in ITA No. 54 & 55/Pune/2023 Kishore Digambar Patil v. ITO dated 23.6.2023*
- d) *Sahara India Life Insurance Ltd reported in 432 ITR 84 (Del)*
- e) *Mohd. Farhan A Shaikh vs DCIT reported in 434 ITR 1 (Bom) (FB)."*

7. On the other hand, Ld. Sr. DR for the Revenue opposed these submissions and supported the orders of the authorities below.

8. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. The contention of the assessee is that the AO has throughout in the notice for imposing the penalty stated about under-reporting of income and also in the impugned order. But while imposing penalty, he invoked the provision related to the misreporting of income. For the sake of clarity, section 270A of the Act is reproduced as under:-

Penalty for under-reporting and misreporting of income.

270A. (1) "The Assessing Officer or²⁸[the Joint Commissioner (Appeals) or] the Commissioner (Appeals) or the Principal Commissioner or Commissioner may, 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,—

(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 section 148,—

(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 or²⁹⁻³⁰[the Joint Commissioner (Appeals) 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 of the Assessing Officer or²⁹⁻³⁰[the Joint Commissioner (Appeals) 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 or 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 (1) of section 143 or assessed, reassessed or recomputed in a preceding order is a loss, the amount of tax calculated on the under-reported 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 as increased by 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 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 of 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,³¹[the Joint Commissioner (Appeals) or] the Commissioner (Appeals), the Commissioner or the Principal Commissioner, as the case may be.”

9. The AO issued notice dated 27.12.2019 for invoking the provision of section 270A of the Act. The relevant contents of the notice are reproduced asunder:-

“Whereas in the course of proceedings before me for the Assessment Year 2017-18, it appears to me Under-reporting of income.

You are hereby requested to appear before me either personally or through a duly authorised representative at 10:30 AM on 23/01/2020 and show cause why an order Imposing a penalty on you should not be made under section 270A of the Income Tax Act, 1961.

If you do not wish to avail yourself of this opportunity of being heard in person or through authorised representative, you may show cause in writing on or before the said date which will be considered before any such order is made under section 270A of the Income Tax Act.”

10. From the above, it is clear that the assessee was called upon to explain about under-reporting of income. But while imposing the penalty u/s 270A of the Act, the AO imposed penalty @ 200% which falls under clause (8) of section

270A of the Act. The Co-ordinate Bench of the Tribunal in the case of *Alrameez Construction (P.) Ltd. vs CIT/NFAC, Delhi* (supra) has held as under:-

7. *“In view of above discussion and case laws in favour of assessee, we are of the considered view that no penalty can be imposed in this case, as there is no misreporting is there by assessee for the purposes of section 270A. Even addition u/s. 43CA was not sustainable in view of Jai balaji Business Corporation (P.) Ltd. v. Asstt. CIT. [2023] 147 taxmann.com 333/200 ITD 58 (Pune - Trib.) But as assessee before us is for penalty issue only and matter of quantum issue is not before us that are of no use to assessee in present appeal. In the result grounds of appeal raised by assessee is allowed.”*

10. Therefore, considering the facts of the present case, the AO ought to have restricted the penalty to the extent of 50% which is leviable for under-reporting of the income. Since it is the case of the AO that the assessee had under reported his income and AO nowhere states that clause (8) of section 270A of the Act is applicable. We hold accordingly. Grounds raised by the assessee are accordingly, partly allowed.

11. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 26th April, 2024.

Sd/-

(Dr.B.R.R.KUMAR)
ACCOUNTANT MEMBER

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

** Amit Kumar **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI