

**IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI**

**SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 3615/MUM/2023
(Assessment Year: 2020-2021)**

**Lords Inn Hotels and Developers
Private Limited,**

Unit No. 202, Morya Blue Moon,
Off New Link Road,
Andheri (West) - 400053
[PAN: AABCL2657G]

..... **Appellant**

**Deputy Commissioner of Income Tax,
Central Circle-3(1), Mumbai,**

Room No. 1924, 19th Floor,
Air India Building, Nariman Point,
Mumbai - 400021

Vs

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Gaurav Bansal
For the Respondent/Department : Shri Manoj Kumar Sinha

Date

Conclusion of hearing : 13.02.2024
Pronouncement of order : 30.04.2024

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Assessee has challenged the order, dated 10/08/2023, passed by the Ld. Commissioner of Income Tax (Appeals) 51, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2020-21, whereby the Ld. CIT(A) had dismissed the appeal of the Assessee against the Order, dated 23/09/2022, levying penalty of INR 1,75,640/- under Section 270A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The Assessee has raised the following grounds/additional grounds of appeal:

"1. That the Ld. CIT(A) erred in law and on facts in confirming the penalty levied u/s 270A of the Income Tax Act by the Assessing Officer of Rs. 1,75,640/- without appreciating that the travelling expenses disallowed were claimed as expenditure due to an inadvertent mistake and there is no mis-reporting of income. Thus, the penalty must be deleted."

Additional Grounds

"The Ld. AO erred in law in imposing the penalty u/s 270A of the Income tax Act, 1961 without specifying the specific clause of section 270A(9) of the IT Act for initiating the penalty proceedings. Thus, the penalty notice is invalid and must be quashed."

3. The relevant facts in brief are that the Appellant-Company engaged in the business of franchise business model i.e. giving brand name and managing the hotel properties (hybrid of franchise and management). The Appellant has filed return of income for the Assessment Year 2020-2021 on 09/11/2020 declaring total income of INR 59,16,000/-. The case of the Appellant was selected for compulsory scrutiny. A survey under Section 133A of the Act was carried out in the case of Mr. Pushpendra Bansal on 05/09/2019. Subsequently, notice under Section 143(2) of the Act was issued to the Appellant on 28/06/2021. During the assessment proceedings, the Assessing Officer noted that the travel expenses at INR 3,01,601/- were debited in the books of account of the Appellant. During the survey proceedings, it was found that the abovesaid expenses was made in personal nature. The Appellant vide show cause notice dated 07/02/2022 was asked to submit the explanation. In the response, the Appellant submitted reply through ITBA on 16/02/2022, the extracts of

which reads as under:

"2. As regards the balance amount of Rs. 2,81,482/- it is submitted that the said expenses incurred by the director of the company Mr. Pushpendra Bansal towards visit to Dubai for marriage of his daughter. It is an admitted fact and since, the payment was made from the bank account of the company to the travel agent, mistakenly the expense was considered by the accountant travelling expenses of the company. The books of account of the assessee company are audited under the Companies Act as well as Income tax Act u/s 44AB of the Income tax Act. Even the auditor of the company did not point out the said mistake in the audit report. Hence, claiming the travelling expenses of Rs. 2,81,482/- as business expenditure is a mistake inadvertent and the assessee offers to pay the tax on the said amount.

3 During the year under consideration, the total income offered by the assessee company is Rs. 59,16,003/- on which the assessee paid tax of Rs. 14,88,939/- Due to an inadvertent mistake the travelling expenses personal in nature were claimed as business expenses. There was no intention of the assessee company to evade tax on the said amount. The Company Auditor as well as Tax Auditor also not pointed out in their report the expenses due to which while preparing the computation of income, the amount of Rs. 2,81,482/- claimed as business expenditure though personal in nature skipped the attention of the assessee company.

4 Mr. Pushpendra Bansal, the director of the company also suffered from COVID -19 and therefore due to his ill health could not pay attention on the details furnished in the income tax return. The return of income was filed by

the company in November, 2020. There was no intention at all to evade any tax on the said amount which comes to about Rs. 64,403/- particularly when the assessee company paid a tax of about Rs. 14.88,939/- being a company running hotels which was the most affected sector in COVID." (Emphasis Supplied)

- 3.1. The Assessing Officer, after taking into consideration the explanation provided of the Appellant, disallowed INR 2,81,482/- out of INR 3,01,601/- under Section 37(1) of the Act holding that the said amount was not used wholly and exclusively for the purpose of business purpose. The Assessing Officer also directed initiation of penalty proceedings under Section 270A of the Act for mis-reporting of income. Thereafter, notice under Section 274 read with Section 270A of the Act was issued to the Appellant asking the Appellant to show cause why penalty under Section 270A of the Act should not be levied since the Appellant has under-reported income which is in consequence of misreporting. In response, the Appellant filed submissions on ITBA system on 18/05/2022 and 25/07/2022. The Assessing Officer was not convinced with the aforesaid submissions and therefore, vide penalty order, dated 23/09/2022, passed under Section 270A of the Act levied penalty of INR 1,75,640/- computed at the rate of 200% of tax on under-reported income holding that the under-reporting was on account of misreporting by the Appellant.
- 3.2. The appeal preferred against the penalty order, dated 23/09/2022 was dismissed by the CIT(A) vide order, dated 10/08/2023.
- 3.3. Therefore, the Appellant is now in appeal before us on the grounds reproduced in paragraph 2 above.

4. We have heard the rival submissions and perused the material on record. The contention of the Appellant is that there was no misreporting by the Appellant. Further, the notice issued under Section 274 of the Act as well as the penalty order, dated 23/09/2022, passed under Section 270A of the Act were bad in law since the same did not specify the specific limb of Section 270A(9) of the Act under which misreporting can be said to have been done by the Appellant. Per contra, the Ld. Departmental Representative relied upon the order passed by the authorities below and submitted that there was no infirmity in the order passed by the Assessing Officer/CIT(A) as the Appellant had misreported the personal expenditure incurred during the relevant previous year on travel of director for attending family function as business expenditure and had claimed deduction for the same.
5. During the course of hearing reliance was placed on behalf of the Appellant on judicial precedents dealing with levy of penalty under Section 271(1)(c) of the Act. Issue that arises for consideration is whether the said judicial precedents can be applied while interpreting the provisions contained in Section 270A of the Act. On examining the provisions of Section 271(1) and 270A of the Act, we find that the language of Section 271(1) of the Act differs from Section 270A of the Act, the relevant extract of which reads as under:

*"270A. (1) The Assessing Officer or [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.

xx xx

(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.”*
(Emphasis Supplied)

5.1. Section 271(1) of the Act specifically provides that the

Assessing Officer 'may' direct the levy of penalty if the Assessing Officer 'is satisfied' that an assessee has concealed particulars or furnished inaccurate particulars of income, whereas Section 270A of the Act does not mandate drawing of such satisfaction by the Assessing Officer. Section 270A(1) of the Act provides that Assessing Officer 'may' direct that a person under-reporting his income shall be liable to pay penalty. Thus, giving discretion to the Assessing Officer to issue directions for initiating penalty proceedings. Further, under Section 271(1)(c) of the Act penalty could be levied (a) for the charge of concealment of particulars of income; or (b) for the charge of furnishing inaccurate particulars of income. Whereas, in terms of Section 270A of the Act penalty can be levied only for the charge of under-reporting. The quantum of penalty to be levied depends upon whether there is under-reporting or under-reporting in consequence of misreporting. Where such charge of under-reporting made out for the reason of misreporting, higher penalty @ 200% of the tax on under-reported income is leviable. Therefore, unlike Section 271(1)(c) of the Act where penalty could be levied for two different charges (*being charge of concealment of particulars of income or the charge of furnishing inaccurate particulars of income*), under Section 270A of the Act penalty can be levied only for the charge of under-reporting of income. Therefore, while issuing the direction for initiation of penalty proceedings under Section 270A of the Act at the time of passing of assessment/reassessment order the Assessing Officer need not specify that the direction is for levy of penalty for under-reporting or under-reporting in consequence of misreporting. In case of under-reporting of income as well as in the case of under-reporting of income in consequence of misreporting, it would suffice in case the Assessing Officer directs initiation of

penalty proceedings for the charge of under-reporting of income under Section 270A(1) of the Act without specifying anything further.

- 5.2. In view of paragraph 5.1. above, the reliance placed by the Learned Authorised Representative for Appellant in this regard on the provisions of Section 271(1)(c) of the Act and the judgment pertaining thereto [*including the judgment of the Full Bench of the Hon'ble Bombay High Court in the case of Mohd. Farhan A Shaikh Vs. DCIT, Central Circle-1, Belgaum: 434 ITR 1 (Bombay)*] is clearly misplaced.
6. The next issue that arises for consideration is whether or not the Assessee should be informed that the Assessing Officer is proposing to levy penalty for under-reporting of income or penalty for under-reporting of income in consequence of misreporting.
 - 6.1. It is settled legal position penalty levied under the provisions of the Act are generally in the nature of a civil liability; albeit a strict liability. [*Commissioner of Income-tax, Delhi Vs Atul Mohan Bindal : [2009] 317 ITR 1 (SC)*]. Therefore, the penalty proceedings under the Act cannot be treated at par with criminal nor quasi-criminal proceedings to contend that even at the stage of issuing notice under Section 274 of the Act the assessee should be confronted with the exact charge giving details of section, sub-section and clause/limb thereof. At the same time, it cannot be disputed that assessee ought to be granted an effective opportunity to defend the allegations against him. In this regard, it would be pertinent to consider the provisions contained in Section 270A of the Act in totality. Section 270A(1) of the Act empowers the Assessing Officer to levy penalty for under-reporting of income. Section 270A(2) of

the Act provides that a person shall be considered to have under-reported income in case of instances specified in sub-clause (a) to (g) of Section 270A(2) of the Act. Section 270A(3) to 270A(6) of the Act deal with the computation of amount of under-reported income. Section 270A(6)(a) of the Act, specifically excludes from the ambit of amount of under-reported income the amount of income in respect of which the assessee offers explanation provided the concerned income tax authority is satisfied that the explanation so offered is bona fide and that the assessee has disclosed all the material facts to substantiate the explanation so offered. Section 270A(7) of the Act provides that penalty equal to 50% of amount tax on under-reported income shall be levied on under-reported income. However, Section 270A(8) of the Act provides that notwithstanding the provisions contained in Section 270A(6) and 270A(7) of the Act, where under-reporting of income is in consequence of any misreporting specified in Section 270A(9) of the Act, the penalty to be levied shall be 200% of the amount of tax on under-reported income. Thus, the scheme of Section 270A of the Act provides for two separate quantum of penalties for the single charge of under-reporting of income on the basis of the reason for such under-reporting. Section 274 of the Act provides that no penalty under Chapter XXI of the Act (which includes Section 270A) can be levied unless the assessee is heard or has been given a reasonable opportunity of being heard. There can be no dispute that the opportunity of being heard granted to the assessee must be effective and not merely empty formality. Therefore, the Appellant must be given effective opportunity to defend the charge of under-reporting as well as the quantum of penalty proposed to be levied for such charge. Therefore, the Appellant should be communicated the charge

of under-reporting as well as the reason or quantum of levying penalty. It would be pertinent to note that the Section 274 does not confer jurisdiction upon the Assessing Officer to levy penalty. It merely provides an opportunity to the Assessee to set up a case for non-levy of penalty. We have concluded hereinabove, that the assessing officer must direct initiation of penalty under Section 270A of the Act while passing the assessment/reassessment order and thereby, assume jurisdiction. Therefore, if the charge along with the proposed quantum is communicated to the assessee anytime before the passing of the penalty order giving opportunity of being heard to the Appellant, the requirements of Section 274 of the Act shall stand satisfied irrespective of the fact that the initial/first notice issued under Section 274 of the Act did not meet the aforesaid requirements.

- 6.2. By way of Additional Ground raised by the Appellant it has been contended that the notice issued under Section 274 of the Act was bad in law as it did not specify the specific limb of Section 270A(9) of the Act which was being invoked by the Assessing Officer. In view of paragraph 6 to 6.1 above, there is no statutory requirement to this effect and therefore, we do not find any merit in the aforesaid submission advanced on behalf of the Appellant. Once the broader charge of under-reporting in consequence of misreporting is communicated to the Assessee, the requirements of Section 274 of the Act stand fulfilled. Accordingly, Additional Ground raised by the Appellant is rejected.
7. The next issue that arises for consideration is whether the Assessing Officer is required to specify in the order levying penalty for under-reporting in consequence of misreporting

under Section 270A(1) read with Section 270A(8) of the Act the specific limb of Section 270A(9) of the Act invoked by the Assessing Officer while levying such penalty.

- 7.1. In our view, having been confronted with the charge of under-reporting in consequence of misreporting, it is for the assessee to take a defense that there is no misreporting as none of the provisions contained in Section 270A(9)(a) to Section 270A(9)(g) of the Act get triggered. On co-joint reading of various provisions contained in Section 270A of the Act it becomes clear that on occurrence of the instance of under-reporting of income specified in Section 270A(2)(a) to 270A(2)(g) of the Act, the assessee is required to provide explanation, inter alia, in terms of Section 270A(6)(a) of the Act and make out a case for non-levy of penalty. In case the explanation does not meet the requirements of Section 270A(6)(a) of the Act, the Assessing Officer can levy penalty under Section 270A(7) of the Act at a rate of 50% of the amount of tax on under-reported income. However, in case the Assessing Officer arrives at a conclusion that the under-reporting of income is in consequence of misreporting, Assessing Officer is required to exhibit that the aforesaid misreporting falls within the ambit of the cases of misreporting specified in Section 270A(9)(a) to 270A(9)(g) of the Act before the Assessing Officer can levy penalty at a higher rate of 200% of the amount of tax on under-reported income by invoking provisions of Section 270A(8) of the Act. Therefore, while levying penalty under Section 270A of the Act for under-reporting income in consequence of misreporting, the Assessing Officer is required to establish that there is misreporting and that such misreporting falls within the cases of misreporting specified in Section 270A(9)(a) to 270A(9)(g)

of the Act. Therefore, we hold that while passing the penalty order under Section 270A(1) read with Section 270A(8) of the Act the Assessing Officer is required to specify the specific limb of Section 270A(9) of the Act under which the Appellant was held to have misreported its income leading to under-reporting of income. The invocation of specific limb of Section 270A(9)(a) to 270A(9)(g) of the Act should either be apparent from the express provisions stated in the penalty order or should be unambiguously discernable from the reading of the penalty order as a whole.

8. On perusal of penalty order dated 23/09/2022, we find that after quoting the provisions contained in Section 270A(2) and 270A(9) of the Act the Assessing Officer has concluded as under:

"8. Further, as per section 270A(7) of the Act, 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 and as per section 270A(8) of the Act, it is stated that 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 percent of the amount of tax payable on under-reported income.

9. Penalty u/s 270A of the I.T Act is very much leviable upon assessee in view of the judgment of the Supreme Court in UOI vs. Dharmendra Textile Processors 212 CTR 432 which fortifies the interpretation that where the assessee offers an explanation, the onus is on the assessee to substantiate the explanation or prove the bona fides and show that there is full disclosure of all the facts relating to the explanation. The Assessing Officer is not obliged to prove that there was a willful attempt by the assessee or that the explanation of the assessee is not bona fide. The object behind enactment of sec. 271 (1) (c) read with Explanations indicate that the said section has been enacted to provide for a remedy for loss of

revenue and they create the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The penalty under that provision is a civil liability. Willful concealment is not an essential ingredient for attracting civil liability unlike the matter of prosecution under Section 276C.

10. In view of the above, assessee has misreported its income as discussed above. Therefore, assessee's case squarely falls within the ambit of section 270A of the Act which is on the same footing as erstwhile sec. 271(1)(c) of the Act therefore I am satisfied that the assessee's case is a fit case, where the assessee has misreported its income.

11. In view of the above mentioned facts and circumstances of the case and relying upon the above mentioned Hon'ble Supreme Court and Hon'ble High Court judgments, I am satisfied that this is a fit case for levy of penalty u/s. 270A of the Income Tax Act, 1961."

- 8.1. On perusal of above, we find that the Assessing Officer has not specified the specific limb of Section 270A(9) of the Act which has been invoked. Further, even on perusal of the penalty order as a whole it is not clearly discernible whether the Assessing Officer has invoked provisions contained in Section 270A(a)/(c)/(d) of the Act. Accordingly, in the facts of the present case, the order dated 23/09/2022 levying penalty under Section 270A of the Act cannot be sustained. Accordingly, the order passed by the CIT(A) is set aside and the penalty of INR 1,75,640/- levied under Section 270A(1) read with Section 270A(8) and 270A(9) of the Act is deleted. Thus, in terms of aforesaid, Ground No. 1 raised by the Appellant is allowed.

9. In result, the present appeal preferred by the Assessee is allowed for statistical purposes.

Order pronounced on 30.04.2024.

Sd/-
(B.R. Baskaran)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई *Mumbai*; दिनांक *Dated* : 30.04.2024
Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai