**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
MANISH AGARWAL, ACCOUNTANT MEMBER**

ITA No.359/CTK/2023
Assessment Year : 2020-2021

DCIT, Aayakar Bhavan, Main Building, Rajaswas Vihar, Vani Vihar, Bhubaneswar.	Vs.	Odisha State Beverages Corporation Limited., 2nd floor, Fortune Towers, S.E.Rly Proj. complex, Bhubaneswar.
PAN/GIR No.		
(Appellant)	..	(**Respondent**)

Assessee by : Shri Satyajit Mishra, CA
Revenue by : Shri Sanjay Kumar, CIT DR

Date of Hearing : 11/06/2024
Date of Pronouncement : 11/06/2024

O R D E R

Per Bench

This is an appeal filed by the revenue against the order of the ld CIT(A), NFAC, Delhi dated 21.9.2023 deleting the penalty levied u/s.270A of the Act for the assessment year 2020-2021.

2. Brief facts of the case are that the assessment in this case was passed u/s.143(3) of the Act on 23.9.2022 by disallowing a sum of Rs.3,00,00,000/- out of expenses claimed by the assessee on account of license fees u/s.40(a)(iib) of the Act. Simultaneously, penalty proceedings

u/s.270A of the Act were initiated for under reporting of income, which is in consequence of misreporting thereof. Thereafter, the Assessing Officer vide penalty order dated 17.3.2023 levied penalty u/s.270A of the Act of Rs.2,09,66,400/- being 200% of the tax sought to be evaded as per the provisions of section 270A(1) r.w.s 270A(9)(a) of the Act. Against this penalty order, the assessee preferred appeal before the ld CIT(A), who vide order dated 21.9.2023 allowed the appeal of the assessee by deleting the penalty levied by the AO. Therefore, the present appeal is filed by the revenue before us.

3. During the course of hearing, ld CIT DR submitted that it is a clear case of mis-representation of facts as the assessee had claimed expenses on account of license fees, which is not allowable in view of the provisions of section 40(a)(iib) of the Act. Ld CIT DR submitted that although it is in the knowledge of the assessee that this amount is not allowable but the assessee has made wrong claim in the profit and loss account, which is clearly mis-interpretation of the provisions of the Act and cannot be accepted as a bonafide explanation. He further submits that the Assessing Officer while levying penalty has correctly invoked clause (a) to sub-section (9) of Section 270A of the Act, which prescribed the case of misreporting of income on account of mis-representation or suppression of facts as is evident from perusal of facts. Therefore, he prayed for reversal of the order of the ld CIT(A) deleting the penalty levied by the AO.

4. Per contra, ld AR supported the order of the ld CIT(A) and submitted that the penalty proceedings were initiated in the assessment by observing as under:

> "In view of the above, the AO is satisfied that the case of assessee is fit to levy penalty u/s.270A of the Income tax Act on the issue. Penalty proceedings u/s.270A of the Act is initiated separately for under reporting of income which is in consequence of misreporting thereof."

5. He further stated that in the notice for initiating penalty proceedings, the Assessing Officer has not referred as to which limb of section 270A(9) is invoked for initiating penalty proceedings. For this, he placed reliance on the notice issued by the Assessing Officer dated 23.9.2022, which is available at page 46 of paper book and subsequent notice dated 1.11.2022 available at pages 47 & 48 of paper book. In support of this arguments, ld AR placed reliance on the judgment of Hon'ble Delhi High Court in the case of Schneider Electric South East Asia (HQ) Pte Ltd, 443 ITR 186 (Del). He further submitted that the assessee company has paid license fees to the Government, which is in terms of Odisha Excise Act, according to which, license fee is received from liquor business in the state of Odisha. Since the assessee company is engaged in buying and selling liquor in the State of Odisha, it has to pay license fees to obtain trading right and to carry on the liquor trading in the State in retail basis. He submitted that in preceding years, the claim of the assessee was disallowed from 2014-15 and the

appeals against the said orders were pending before the Hon'ble Orissa High Court. Likewise, the appeals for other assessment years were pending before the various appellate forums. In the meanwhile, the Hon'ble Supreme Court in the case of Kerala State Beverages Manufacturing and Marketing Corporation Ltd. v. ACIT (2022) 440 ITR 492 ha**s s**ettled the issue and accordingly, the assessee has not challenge the disallowance made in the year under appeal and also withdrawn the appeals for the earlier assessment years also. Besides this, the assessee company for the impugned assessment year has paid the tax within a period of 30 days from the creation of demand against the said disallowance in order to buy peace of mind. It is submitted that the issue of allowance of license fees is highly debatable and the matter has since now settled by the Hon'ble Supreme Court in the case of Kerala State Beverages Manufacturing and Marketing Corporation Ltd(supra), it cannot be said that the claim of the assessee was malafide and any fact was concealed or misrepresentation before the Assessing Officer. He, therefore, prayed confirmation of the order of the ld CIT(A) in deleting the penalty.

6. We have considered the rival submissions and perused the material on record. In this case, the proceedings for levy of penalty u/s.270A were initiated by issue of notice by the AO dated 23.9.2022. From perusal of the said notice, we find that the Assessing Officer has not referred under which

clause of section 270A(a0, he is asking the assessee to explain the case for levy of penalty. Said notice is reproduced herein below:

> "Notice for penalty under section 274 read with section 270A of the Income tax Act, 1961.
>
> Whereas in the course of proceedings for the assessment year 2020-21, it appears that you have under reported income which is in consequence of misreporting thereof as per details given in the assessment order.
>
> You are required to show cause why an order imposing penalty u/s.270A of the income tax Act, 1961 should not be passed.
>
> You are required to submit your reply electronically in 'e-proceeding' facility through your account in e-filing website (www.incometax.gov.in) by the 0.00 AM of 22.10.2022.
>
> In case reply is not submitted, the order shall be passed without the benefit of your explanation."

7. While levying penalty, the Assessing Officer has invoked the provisions of section 270A(9)(a) and alleged that the assessee has mis-represented the fact and therefore, is liable for levy of penalty. Ld CIT(A) while deleting the penalty in para 4.3 to4.3.4 has observed as under:

> "I have considered the facts of the case, grounds of appeal, penalty order and submission of the appellant. The appellant had not filed any quantum appeal against the assessment order passed by the AO. As per the provisions of section 37(1) of the I.T.Act, "any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assese) laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "profits and gains of business of profession". It is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to

have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure. In order to claim a deduction, it is enough to show that the money is expended not of necessity and with a view to direct and immediate benefit, but voluntarily and on grounds of commercial expediency and in order to indirectly facilitate the carrying on of the business. Therefore, the expenditure incurred for necessity or not with a view to have direct and immediate benefit but such observations apply to the expenses incurred voluntarily and on the ground of commercial expediency or in order to indirectly facilitate the carrying on the business."

4.3.1 Apart from the above, if one is to trace the expenditure incurred for necessity, it would certainly include the statutory liability for running of the business. On the contrary, if the statute is not obeyed and resultantly the person is unable to do business, such expenditure incurred for compliance of the statute would in any case fall under the expenditure for necessity.

4.3.2 If any businessman or a professional has incurred expenses by way of discharge of statutory obligation to get a license to do business or to get a license to undertake profession such expenditure in any case can be termed as an expenditure on account of necessity of the business or profession. The AO being a statutory authority under the Act is bound to respect all the laws may be made by the Parliament or may be made by the State Legislature.

4.3.3 As per the provisions of section 270A(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 the books of account

3. Claim of expenditure not substantiated by any evidence.

4. Recording of any false entry in the books of account.

5. Failure to record any receipt in books of account having a bearing on total income; and

6. 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.

> 4.3.4 There is also no dispute that these facts were in the knowledge of the revenue and the aforementioned expenses which were sought to be claimed are incurred in fact. Therefore, this was not a case where the assessee had either concealed particulars of its income and/or furnished inaccurate particulars of its income. Therefore, the action of the AO can be justified at the assessment stage. But penalty proceedings the principle of law is on a different footing. Accordingly, the appeal of the appellant is allowed and the penalty imposed is cancelled."

8. From the facts, it is seen that in this case, the issue of claim of deduction for license fees is not challenged before the appellate authority as the assessee since insertion of section 40(a)(iib) has challenged the operation of the same , which finally settled by the Hon'ble Supreme Court in the case of Kerala State Beverages Manufacturing and Marketing Corporation Ltd (supra). Therefore, it is not a case where the claim made by the assessee was not bonafide at all. Further, the AO has not mentioned as to under which limb, the case of the assessee is attracted while initiating the penalty u/s.270A of the Act. The ld CIT(A) while deleting the penalty has clearly observed that it is not a case of mis-reported or under-reported which observations were not controverted by the department by bringing on record any material to show that the assessee has mis-represented the fact while making the claim of deduction on account of license fees. The Pune Bench of ITAT vide its order dated 30.3.2023 in ITA No.54 & 55/Pun/2023 in the case of Kishore Digamber Patil vs ITO, Ward 2(1), Nasik has discussed the validity of notice issued initiating proceedings u/s.270A and held as under:

"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 underreported 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 broughtout 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 out stepping 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 denovo 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. "

9. Further, Hon'ble Delhi High Court in the case of Schneider Electric South East Asia (HQ) Pte Ltd(supra) has dealt the issue of satisfaction recorded at the time of levying the penalty u/s.270A of the Act, wherein, the Hon'ble Court has held as follows:

> "6. Having perused the impugned order dated 09 March, 2022 to contend that the Petitioner is not entitled to the benefit of immunity under Section 270A of the Act for misreporting of income is not only erroneous but also arbitrary and bereft of any reason as in the penalty notice the Respondents have failed to specify the limb - "underreporting" or "misreporting" of income, under which the penalty proceedings had been initiated.
>
> 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.
>
> 8. This Court is of the opinion that the entire edifice of the assessment order framed by Respondent No.1 was actually voluntary computation of income filed by the Petitioner to buy peace and avoid litigation, which fact has been duly noted and accepted in the

> assessment order as well and consequently, there is no question of any misreporting xxxxxxx."

10. In view of the above facts of the case and also respectfully following the Hon'ble Delhi High Court in the case of Schneider Electric South East Asia (HQ) Pte Ltd (supra) and Pune Bench of ITAT in the case of Kishore Digambar (supra), we are of the view that the failure on the part of the AO to show cause as to which clause of section 270A(9) was invoked before imposing the penalty, the consequent levy of penalty u/s.270A is bad in law. In the instant case also, as observed above, the AO has issued show clause notice to the assessee wherein, it was not specified as to under which clause of sub-section (9) to Section 270A, he is going to hold the assessee as under reporting of income. Therefore, the consequent order imposing penalty u/s.270A is bad in law and ld CIT(A) has rightly quashed the same. Further, we have already hold that the claim of license fee is a bonafide claim and there is no mis-representation of facts nor any suppression of facts as enumerated in clause (a) to sub-section (9) of Section 270 A of the Act. Also in the instant case, the assessee has already paid the taxes within 30 days and there was no misrepresentation of facts, assessee is also entitled for immunity granted under the Act for imposition of penalty u/s.270A of the Act. Therefore, we decline to interfere with the order of the ld CIT(A), which is hereby confirmed.

11. In the result, appeal of the revenue stands dismissed.

Order dictated and pronounced in the open court on 11/06/2024.

Sd/-	sd/-
(George Mathan)	**(Manish Agarwal)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Cuttack; Dated 11/06/2024
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : DCIT, Aayakar Bhavan, Main Building, Rajaswas Vihar, Vani Vihar, Bhubaneswar

2. The Respondent: Odisha State Beverages Corporation Limited., 2nd floor, Fortune Towers, S.E.Rly Proj. complex, Bhubaneswar
3. The CIT(A)- NFAC, Delhi
4. Pr.CIT, Bhubaneswar
5. DR, ITAT,
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack