

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI

**BEFORE SHRIAMARJIT SINGH, ACCOUNTANT MEMBER AND
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER
I.T.A No.166/Mum/2024
(Assessment Year: 2020-21)**

DCIT, Circle-14(1)(1), Mumbai Aayakar Bhavan, M.K. Road, Mumbai-20	vs	Hindustan Diamond Company Pvt Ltd, Office No.12, 14th Floor, Lamington Road, Building No.3, Navjivan Commercial Premises Co-op Society, Mumbai-400051 PAN : AAACH0400Q
APPELLANT		RESPONDENT

Assessee by : Shri Nitesh Joshi
Respondent by : Shri P.D. Choughule (All.CIT) SR DR

Date of hearing : 25/07/2024
Date of pronouncement : 29/07/2024

ORDER

PER ANIKESH BANERJEE, J.M:

Instant appeal of the revenue was filed against the order of the Learned National Faceless Appeal Centre (NFAC), Delhi [for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), for Assessment Year 2020-21, date of order 17.11.2023. The impugned order was emanated from the order of the Learned Assessment Unit, Income-tax Department (in short, 'the A.O.')

passed U/s 270A of the Act.

1. The Revenue has taken the following grounds of appeal: -

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting penalty levied u/s. 270A of the Act by stating that it is not a case of under reporting as per section 270A(2) of Act, ignoring the fact that it is a case of under reporting in consequence of misreporting u/s.270A(B) and 270A(9)(a) of the Act,

2. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

3. The appellant craves leave to amend, or alter any grounds or add a new ground, which may be necessary."

2. The brief fact of the case is that the assessee has filed the return of income declaring the sale of depreciated asset as long-term capital gain (in short LTCG) instead of Short-Term Capital Gain (in short STCG) and offered tax @22.88%. During the assessment U/s 143(3), the Ld.AO treated this gain as a STCG and levied the tax under normal rate @31.20%. So the difference of tax was 10.40% related to tax declared by the assessee and assessed tax. Finally, the AO levied the penalty @200% on difference of tax amount by invoking Section 270A(8) & 270A(9) of the Act which is amount to Rs.8,32,77,864/-. The aggrieved assessee filed an appeal before the Id.CIT(A). the Id.CIT(A) quashed the penalty order by finding the lacunae in imposition of penalty under section 270A. Being aggrieved, the revenue is in appeal before us.

3. Both the parties have argued together, and matter heard.

4. We heard the rival submissions and considered the documents available in the record. During the hearing before the bench, Id.DR vehemently argued and fully relied on the order of the Ld.AO. The Ld.AR for assessee argued both the legal and factual aspect and first invited our attention in the appeal order. The relevant part of the appeal order is reproduced as below: -

"5.4. On a combined reading of section 270A(8) and 270A(9), it is clear that at the very instance to come under the purview of misreporting, it must be under-reporting of income as defined u/s 270A(2) of the Act, in the first place."if there's no under-reporting of income at all, then neither the penalty can be levied for under-reporting of income nor for misreporting of income. Further, if the case falls under "under-reporting of income" as defined in section 270A(2), then such under-reporting must fall under the list given in section 270A(9) of the Act in order to treat the same as under-reporting as a consequence of mis-reporting.

5.5. Hence, it is pertinent to refer to sub section (2) of section 270A of the Act which mentions the scenarios under which a person shall be considered to have under-reporting of income; the relevant extract of the same and whether the present case fits into such scenarios is detailed is as under:-

<i>(2) A person shall be considered to have under-reported his income, if -</i>	
Provisions of the Act	Fact in case of the Appellant / Appellant's response
<i>(a) the income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of <u>section 143</u>;</i>	<i>The income assessed as per order u/s 143(3) and income determined u/s 143(1) is same; hence this clause is not applicable to the Appellant. The only dispute in this assessment was what rate capital gain is chargeable to tax whether as short term or at rate applicable to long term.</i>
<i>(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 <u>section 148</u>;</i>	<i>The appellant has furnished the return on 09/11/2020 which is well within the time limit as prescribed u/s 139(1) of the Income Tax Act, 1961; hence this clause is not applicable to the Appellant.</i>
<i>(c) the income reassessed is greater than the income assessed or reassessed immediately before such reassessment.</i>	<i>This is the original assessment u/s 143(3), hence this clause is not applicable to the Appellant.</i>

<p>(d) the amount of deemed total income assessed or reassessed as per the provisions of <u>section 115JB or section 115JC as the case may be</u>, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of <u>section 143</u>;</p> <p>(e) the amount of deemed total income assessed as per the provisions of <u>section 115JB or section 115JC</u> 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;</p> <p>(f) the amount of deemed total income reassessed as per the provisions of section 115JB or <u>section 115JC as the case may be</u>, is greater than the deemed total income assessed or reassessed immediately before such reassessment.</p>	<p>The provision of section 115JB is not applicable as the appellant has opted for taxation under new regime of section 115BAA; hence clause (d), © and (f) are not applicable to the captioned appellant.</p>
<p>(g) the income assessed or reassessed has the effect of reducing the loss or converting such loss into income.</p>	<p>The returned income and the assessed income, both are positive; hence, this clause is not applicable to the Appellant.</p>

5.6. From the above, it is clear that the case of appellant does not fit into any of the above clauses of section 270A(2) and thus it cannot be called that the appellant had under-reported its income. Since, there is no under-reporting of income as per section

270A(2); the question that the appellant has under-reported income in consequence of misreporting of income does not arise. Thus, the AO has erred in levying the penalty u/s 270A of the Act treating that the appellant has under-reported income in consequence of misreporting of income. **Hence, the AO is directed to cancel the penalty levied u/s 270A of the Act.**

5.7. In result, the appeal of the appellant is **ALLOWED.**”

5. During the argument, the Id.AR mentioned that the assessee sold the depreciable block of assets and treated it as a long-term capital asset and computed tax @22.88% u/s 112 of the Act as LTCG. The fact is that the tax will be levied @25.168% by treating this transfer as a STCG. The Ld.AR in argument relied on the order of Hon'ble Supreme Court in the case of **CIT, Panaji vs V.S. Dempo Company Ltd (2016) 74 taxmann.com 15 (SC)**. The depreciable assets, if it's holding more than 3 years, the nature of the asset will be treated as long term capital asset and cannot be treated as short term capital asset and cannot be excluded from the exemption u/s 54E of the Act. The same issue is duly relied on by the order of the co-ordinate bench of **ITAT, Mumbai Bench "E"** in the case of **M/s. Smita Conductors Ltd vs DCIT Range 3(3), Mumbai ITA No.4004/Mum/2011 date of pronouncement 17/09/2013**. Respectfully following this order, the Co-ordinate bench followed the order of the Hon'ble Apex Court and explained that section 50 is related to the capital gain in respect of depreciable assets is a deeming provision and tax is calculated as short term capital gain. For the purpose of sections 48 & 49 of the Act, which are related to computation of capital gain. Therefore, the deeming provision was only limited to provision of computation of capital gain. The Id.AR also relied on the order of Hon'ble **High**

Court at Calcutta in the case of **PCIT, Kolkata vs Eveready Industries Ltd ITAT/233/2018 IA no.GA/2/2018 (Old No.GA/2095/2018)**, date of order **30/11/2021** held that the application of section 270A(9) is not fit for the assessee. The Id. AR argued that the assessee is in liquidation and has not challenged the merit of the case before any of the authority and paid the tax. So, the calculation of penalty @200% on difference of tax amount Rs.8,32,77,864/- is fully erroneous. The correct figure will be Rs.,1,83,21,130/- which is duly considered by the Id.CIT(A) in impugned appeal order. But the first argument of the Id.AR was fully related to the legal issue for application of section 270A for the assessee. The observation of the Hon'ble Apex Court in the case of **V.S. Dempo Company Ltd**(supra) is respectfully followed by the bench. We respectfully relied on the order of **Eveready Industries Ltd**(supra) and find that the order of the Id.CIT(A) is fully justified. We find no reason to interfere in the impugned appeal order related to deletion of penalty u/s 270A. Accordingly, the ground of the revenue is rejected.

8. In the result, appeal of the revenue bearing **ITA 166/Mum/2024** is dismissed.

Order pronounced in the open court on 29th day of July, 2024.

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated:

Pavanan

sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

29/07/2024

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
5. गार्डफाइल/Guard file.

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BY ORDER,
(Asstt. Registrar), **ITAT, Mumbai**