

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI**

श्री एबी टी. वर्की, न्यायिक सदस्य एवं
श्री अमिताभ शुक्ला, लेखा सदस्य के समक्ष

**BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND
SHRI AMITABH SHUKLA, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.1758/Chny/2024
निर्धारण वर्ष/Assessment Year: 2017-18

Jayasakthi Knit Wear, 3/95, Thanneerpandal Colony, Cheyur Road, Karukkampalayam B.O. Avinashi, Tirupur-641 654.	v.	The ITO, Ward-1(4), Tirupur.
[PAN: AAFFJ 4343 J]		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)
अपीलार्थी की ओर से/ Appellant by	:	Mr.S. Sridhar, Advocate (Erode)
प्रत्यर्थी की ओर से /Respondent by	:	Ms. Gouthami Manivasagam, JCIT
सुनवाईकीतारीख/Date of Hearing	:	26.09.2024
घोषणाकीतारीख /Date of Pronouncement	:	13.11.2024

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Learned Commissioner of Income Tax (Appeals), (hereinafter in short 'the Ld.CIT(A)'), NFAC, Delhi, dated 19.04.2024 for the Assessment Year (hereinafter in short 'AY') 2017-18 confirming the penalty levied u/s.270A(9) of the Income Tax Act, 1961 (hereinafter in short "the Act").



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2. The first and foremost argument of Ld. AR is that no specific charge has been framed against the assessee in first show-cause notice dated 17.03.2022 and therefore, in such an event, the consequent penalty imposed is bad-in-law. In support of this ground, the Ld AR, assailing the action of the Ld.CIT(A) confirming the penalty levied by the AO u/s.270A of the Act for underreporting its income in consequence of misreporting of income and levying 200% of total tax, he submitted that the AO erred in levying penalty without specifying in the notice the specific clause under sub-section (9) of sec.270A of the Act and drew our attention to the penalty notice dated 17.03.2022 issued by the NFAC, which notice reads as under:

1. Whereas in the course of proceedings before me for the Assessment Year 2017-18, it appears to me that you have under-reported income which is in consequence of misreporting thereof.
2. You are required to show cause as to why an order imposing penalty u/s 270A of the Income-tax Act 1961 should not be passed.
3. You are required to submit your reply online electronically in 'e-Proceeding' facility through your account in e-filing website (www.incometax.gov.in) by the midnight (23:59 hours) of 20/04/2022.
4. In case reply is not submitted, the order shall be passed without the benefit of your explanation.

3. And drawing out attention to the sub-section (9) of section 270A of the Act, he submitted that there are six (6) different clauses/limbs which would qualify to attract the penalty of misreporting, which reads as under:

(9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—



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- (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.

4. The Ld.AR submitted that the AO was bound by law to specify in the notice, which clause of sub-section (9) of section 270A has been attracted for levying of the penalty under misreporting of income. According to the Ld.AR, in the present case it can be seen that the notice issued (supra) before levying penalty u/s.270A is vague, because of which the assessee was confused and couldn't comprehend as to what fault assessee committed to attract such a penalty. In other words, the assessee was in the dark and wondered as to what kind of violation/fault, assessee has committed which assessee needs to defend while answering the show-cause notice issued by the AO.

5. We find force in the submissions of the assessee and note that the notice of penalty issued by the AO is vague and doesn't spell out the specific fault for which assessee has been called upon to defend the proposed penalty viz *underreporting its income in consequence of misreporting of income* which falls under sub-section (9) of section 270A of the Act. According to us, the assessee should be informed in the show-



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cause notice with certainty and accuracy of the exact nature of the fault alleged against him. In this case, it has been noted that the impugned notice issued by the AO is silent about which limb/clause of sub-section (9) of section 270A of the Act has been attracted in the facts of the case, to deserve levy of penalty and how the ingredient of sub-section (9) of Section 270A is satisfied. Therefore, show-cause notice proposing penalty is found to be vague and doesn't muster the requirement of law to legally impose penalty and therefore consequent levy of penalty is fragile in eyes of law and is held to be ab-initio bad in law.

6. We find that similar issue had come up for consideration before the co-ordinate bench of this Tribunal in the case of Enrica Enterprises Pvt. Ltd. in ITA Nos.1166 & 1167/Chny/2023 dated 06.06.2024, and it was held, as under: -

12. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The AO levied penalty u/s.270A of the Act, for both the assessment years on the ground that the assessee has 'under reporting of income and under reporting as a consequence of misreporting of income'. The AO invoked provisions of clauses (c) & (d) of Sec. 270A(9) of the Act, which deals with claim of expenditure not substantiated by any evidence and recording of any false entry in the books of accounts. The AO has arrived at the above conclusion on the basis of findings in the assessment order, where income admitted by the assessee in the return of income filed in response to notice u/s.153A of the Act, has been accepted. In the revised return filed u/s.153A of the Act, the assessee has admitted taxable income of Rs.2,55,35,485/- which is higher than the last return filed u/s.139(1) of the Act. According to the AO, the assessee has 'under reporting of income and under reporting as a consequence of misreporting of income' in respect of marketing expenses, which is clearly evident from information gathered during the course of search coupled with statement recorded from the Director of the assessee company and also enquiries conducted with suppliers of 'gift articles' during the course of assessment proceedings. The AO further observed that had search was not taken place u/s.132 of the Act, 'under reporting of income and under reporting as a consequence of misreporting of income' would not have come to light. Therefore, the AO opined that it is a clear case of 'under reporting of income and under reporting as a consequence of misreporting of income' which attracts provisions of Sec.270A(9) of the Act, and



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thus, levied penalty for both the assessment years for 'under reporting of income and under reporting as a consequence of misreporting of income'.

13. The fact with regard to seizure of huge unaccounted cash during the course of search on 6-12-1018 was not disputed. It is also an admitted fact that the assessee company has offered additional income of Rs.16.39 Crs. & Rs.23.62 Crs. towards disallowance of estimated marketing expenses @ 1/3rd of total expenses incurred under the head 'marketing expenses' for both the assessment years. The cash seized during the course of search was telescoped against additional income offered by the assessee towards estimated disallowance of marketing expenses. The assessee has filed return of income in response to notice u/s.153A of the Act, for both the assessment years and offered additional income admitted during the course of search in respect of disallowance of marketing expenses and paid taxes. The AO has also accepted return of income filed by the assessee in response to notice u/s.153A of the Act, without any further addition and also recorded a clear finding in the assessment order that after going through the circumstances in its entirety, the income offered by the assessee, including estimated disallowance of portion of marketing expenses, is found to be in order and accepted. In other words, there is no separate addition towards marketing expenses, but the assessment has been completed by accepting additional income offered by the assessee towards estimated disallowance of marketing expenses for both the assessment years.

14. In light of above factual back ground, if we examine the order passed by the AO imposing penalty u/s.270A(9) of the Act, it is necessary to refer to provisions of Sec.270A of the Act, and the reasons given by the AO to impose penalty u/s.270A(9) of the Act. The provisions of Sec.270A of the Act, deals with penalty for 'under reporting of income and under reporting as a consequence of misreporting of income'. Sub-section 1 to 6 of Sec.270A of the Act, deals with 'under reporting of income and under reporting as a consequence of misreporting of income', has been specified in sub-section 7 of Sec.270A of the Act. Sub-section 8 & 9 deals with 'under reporting of income and under reporting as a consequence of misreporting of income' thereof by any person and such cases of 'misreporting of income' referred to in sub-sec.8 has been specified in sub sec.9 of Sec.270A of the Act. From the above, it is manifestly clear that provisions of Sec.270A of the Act, has two limbs or two charges for which penalty can be levied. The first limb or first charge is 'under reporting of income and such under reporting of income' has been specifically referred to in sub-section 2 to 6 of Sec.270A of the Act. In the present case, these provisions are not relevant, because, the AO has not invoked under reporting of income. The second limb or charge is 'under reporting of income as consequence of misreporting of income' thereof and in the present case, the AO invoked second limb of provisions of Sec.270A of the Act. Admittedly, these provisions have been substituted by the Finance Act, 2016 w.e.f.01.04.2017 and applicable for AY 2017-18 onwards. Prior to insertion of Sec.270A of the Act, a similar provision was existed in the statute by way of sec.271(1)(c) of the Act, for concealment of particulars of income or furnishing of inaccurate particulars of income. Provisions of Sec.271(1)(c) of the Act, was also having two limbs or two charges i.e. i) for concealment of particular of income and ii) furnishing of inaccurate particulars of income. If you go by provisions of Sec. 271(1)(c) of the Act & Sec.270A of the Act, and wordings therein both provisions are similar and para materia to each other. Although, the term 'tax evasion' has been redefined by way of 'under reporting of income and under reporting as a consequence of misreporting of income' but it is synonymous to concealment of particular of income or furnishing of inaccurate particulars of income. Therefore, it is necessary to examine whether penalty proceedings u/s.270A of the Act, is mandatory in nature and further, such penalty can be invoked without providing an opportunity to the assessee as required u/s.274 of the Act.



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15. The order imposing penalty u/s.270A of the Act, is an appealable order u/s.246A of the Act before the First Appellate Authority. If penalty u/s.270A of the Act, has been mandatory, there have not been any provision of appeal u/s.246A of the Act. Since, the order imposing penalty Sec.270A of the Act, is an appealable order, then, it cannot be said that penalty u/s.270A of the Act, is not mandatory in nature. Since, penalty u/s.270A of the Act, is not mandatory in nature, the AO is required to give an opportunity to the assessee to show cause 'as to why' penalty should not be levied in terms of sec.274 of the Act. Admittedly, the AO issued notice u/s.274 r.w.s.270A of the Act. Sec.274 of the Act deals with the procedure for levy of penalty, wherein, it directs that no order imposing penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of hearing. Thus, it is evident that the penalty u/s.270A of the Act, cannot be imposed unless the assessee has given a reasonable opportunity and the assessee is being heard. Once, the AO is bound to act to hear the assessee and give reasonable opportunity to explain its case, then, there is no mandatory requirement of imposing penalty, because the opportunity of hearing is not a mere formality, but it is to adhere to the principle of natural justice. Therefore, in our considered view, the penalty u/s.270A of the Act, is not mandatory and it is based on the facts and merits placed before the AO.

16. Having said so, let us come back to notice issued u/s.274 r.w.s.270A of the Act. We have gone through notice u/s 274 r.w.s. 270A of the Act dated 26.07.2021, wherein, the AO has stated that 'under reporting of income and under reporting as a consequence of misreporting of income'. From the notice, it is not discernable whether penalty has been initiated for 'under reporting of income' as per section 270A (1) to (6) or 'misreporting of income' as per section 8 & 9 of Sec.270A of the Act. The AO issued a notice in a routine manner without specifying under which clause of Sec.270A of the Act, the assessee is liable for penalty. Though, the AO while passing the impugned order has imposed penalty u/s.270A(9) of the Act, but no such ground was specified in the show cause notice dated 26.07.2021. In our considered view, notice u/s.274 r.w.s.270A of the Act, is not a valid notice for the reason that the AO did not specify the satisfaction as to whether assessee had either 'under reporting of income' or 'misreporting of income'. In absence of proper notice, which is mandatory, the AO cannot impose penalty, because, it is a clear violation of principles of natural justice, because, issuing a vague notice without specifying the charge under which limb the proposed penalty proceedings is initiated, would vitiate the entire proceedings, because, the assessee was not given an opportunity to explain its case on specific charge. Therefore, in our considered view, penalty levied on the basis of invalid or vague notice is invalid and void **ab initio**.

17. The concepts of 'under reporting of income' and 'misreporting of income' are two different charges with very clear boundaries. As we have already discussed in earlier part of this order, sub-section 2 to 6 of sec Sec.270A of the Act, deals with concept of 'under reporting of income' and for this, separate rate of penalty is provided. Sub-sec.9 deals with concept of 'misreporting of income' and for this, separate rate of penalty is provided. Therefore, 'under reporting of income' and 'misreporting of income' shall not be used interchangeably nor are they synonymous, but each operates under strict definition and do not overlap each other. Since, 'under reporting of income' and 'misreporting of income' are two concepts and separate charges, the AO before initiating penalty proceedings should specifically arrive at a satisfaction to the effect that, for which charge, he has initiated penalty Sec.270A of the Act. In the present case, if you go by the assessment order passed by the AO, there is no satisfaction in respect of initiation of penalty proceedings u/s.270A of the Act, whether it is for 'under reporting of income and under reporting as a consequence of misreporting of income' thereof which is clearly evident from the assessment order passed by the AO, where, the AO simply referred to initiation of penalty proceedings u/s.270A of the Act. Further, said lapse is even continued while issuing show cause notice u/s.274



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r.w.s.270A of the Act, where, the AO simply specified 'under reporting of income and under reporting as a consequence of misreporting of income', without specifying for which charge the assessee is directed to pay penalty u/s.270A of the Act. There is no whisper as to which limb of Sec.270A of the Act, is attracted and how the ingredients of sub-sec.9 of Sec.270A of the Act are specified. In absence of such particulars, the mere reference to the word 'misreporting of income' in the assessment order or in the show cause notice makes the impugned order manifestly arbitrarily. Therefore, we are of the considered view that show cause notice issued by the AO u/s.274 r.w.s.270A of the Act, without specifying the charge under which penalty is proposed u/s.270A of the Act, is a clear case of non-application of mind at the time of issuing show cause notice and thus, in absence of specific charge against the assessee, the assessee is not in a position to counter the show cause notice issued by the AO as well as cogent reply to the show cause notice. In view of vague notice without any whisper as to which limb of section 270A of the Act is attracted and how ingredients of sub-section 9 is specified, initiation of penalty u/s.270A of the Act for 'misreporting of income' is not only erroneous, but also arbitrary and thus, penalty proceedings cannot be sustained. This legal position is strengthened by the decision of the Hon'ble Delhi High Court in the case of Prem Brothers Infrastructure LLP (supra), where the Hon'ble Delhi High Court by following the earlier decision in the case of Schneider Electric South East Asia (HQ) Pte Ltd. v. ACIT, International Taxation in WP (C) No.5111 of 2022 dated 28.03.2022, held that in view of vague notice without any whisper as to which limb of section 270A of the Act is attracted and how ingredients of sub-section 9 is specified, initiation of penalty u/s.270A of the Act for 'misreporting of income' is not only erroneous, but also arbitrary and bereft of any reason and consequently, penalty order passed by the AO, cannot be sustained. The relevant findings of the Hon'ble Delhi High Court are as under:

6. This court in the case of Schneider Electric South East Asia (HQ) PTE Ltd. Vs. ACIT, International Taxation Circle 3(1)(2), New Delhi and Ors. W.P.(C) No. 5111/2022 vide judgment dated 28.03.2022 observed as under:-

"6. Having perused the impugned order dated 9th March, 2022, this Court is of the view that the Respondents' action of denying the benefit of immunity on the ground that the penalty was initiated under Section 270A of the Act for misreporting of income is not only erroneous but also arbitrary and bereft of any W.P.(C) 7092/2022 Page 4 of 6 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.

9. This Court is further of the view that the impugned action of Respondent No.1 is contrary to the avowed Legislative intent of Section 270AA of the Act to encourage/incentivize a taxpayer to (i) fast-track settlement of issue, (ii) recover tax demand; and (iii) reduce protracted litigation.

10. Consequently, the impugned order dated 09th March, 2022 passed by Respondent No.1 under Section 270AA (4) of the Act is set aside and Respondent No.1 is directed to grant immunity under Section 270AA of the Act to the Petitioner."

7. This Court is of the opinion that the only addition in the assessment order framed by Respondent No.1 is in respect of disallowance under section 14A of the Act. The Petitioner has made a disallowance of Rs.3,20,14,010/- which was recomputed by the Assessing Officer at Rs.6,82,45,759/-. Thus, this is a case where the amount of underreporting of income is consequent to increase in the disallowance voluntarily estimated by the assessee. This court is conscious of the



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fact that there can be cases where underreporting of income may result in misreporting of income, however, in peculiar facts of the present case, the underreporting allegedly done by the assessee cannot amount to misreporting as the assessee had furnished all the details of the transactions relating to disallowance made under Section 14A of the Act and the AO as well as assessee has used the same details to arrive at different conclusions i.e. differing quantum of disallowances under Section 14A of the Act. This by no stretch of imagination can be held to be 'misreporting'.

8. 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 penalty order to deny immunity from imposition of penalty and prosecution makes the impugned order manifestly arbitrary. W.P.(C)

9. Consequently, the impugned penalty order dated 28th March, 2022 passed by Respondent No.1 under Section 270A of the Act is quashed and Respondent No.1 is directed to grant immunity under Section 270AA of the Act to the Petitioner.

18. At this stage, it is relevant to consider the decision of Hon'ble Madras High Court in the case of Babuji Jacob v. ITO reported in [2021] 430 ITR 259 (Madras), where the Hon'ble High Court has dealt with the issue of show cause notice u/s.274 r.w.s.271(1)(c) of the Act, and after considering its earlier decision in the case of Sudaram Finance Ltd. v. ACIT reported in [2018] 93 taxmann.com 250, held that issuing a printed form of notice without striking inapplicable portion in the notice and not charging the assessee for particular evasion vitiates the entire penalty proceedings, including the order passed by the AO imposing penalty u/s.271(1)(c) of the Act. A similar view has been taken by the Hon'ble Karnataka High Court in the case of CIT v. Manjunatha Cotton & Ginning Factory reported in [2013] 359 ITR 565, where the issue of show cause notice and consequent penalty proceedings has been dealt in detail and held that penalty proceedings consequent to vague and invalid notice becomes invalid and liable to be quashed. The Hon'ble Supreme Court has upheld the decision of the Hon'ble Karnataka High Court in the case of CIT v. SSA's Emerald Meadows reported in [2016] 73 taxmann.com 241. From the ratio of above case laws, it is undisputedly clear that satisfaction of the AO should be discernable from the show cause notice issued by the AO u/s.274 r.w.s.270A of the Act. In absence of any particular charge for which, the assessee is directed to pay penalty u/s 270A of the Act, entire penalty proceedings becomes invalid and liable to be quashed.

19. In this view of the matter and by following the ratio laid down by the Hon'ble Supreme Court and various High Courts referred to hereinabove, we are of the considered view that show cause notice issued by the AO u/s.274 r.w.s.270A of the Act, is vague, non specific to charge and thus, is illegal and liable to be quashed. Thus, we quash the order passed by the AO imposing penalty u/s.270A(9) of the Act.

7. Respectfully following the decision of the co-ordinate bench in the case of Enrica Enterprises Pvt. Ltd.(supra), we hold that show cause notice issued by the AO u/s.274 r.w.s.270A of the Act dated 17.03.2022 is vague, doesn't spell out the specific charge and thus, is illegal and



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liable to be quashed. Thus, we quash the penalty order passed by the AO u/s.270A(9) of the Act.

8. In the result, appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on the 13th day of November, 2024, in Chennai.

Sd/-
(अमिताभ शुक्ला)
(AMITABH SHUKLA)
लेखा सदस्य/**ACCOUNTANT MEMBER**

Sd/-
(एबी टी. वर्की)
(ABY T. VARKEY)
न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 13th November, 2024.
TLN, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai / Madurai / Salem / Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF