

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक
IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND**

SHRI MANISH AGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं/ITA No.449/CTK/2024

(निर्धारण वर्ष / Assessment Year : 2017-2018)

Santosh Kumar Khandelwal, Ward No.8, HUDCO Colony, Madhuban, Baripada, Mayurbhanj-757001	Vs	ACIT, Balasore
PAN No. : AAOFS 0967 J		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से / Assessee by	:	Shri Mohit Sheth, Advocate
राजस्व की ओर से / Revenue by	:	Shri S.C.Mohanty, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	25/11/2024
घोषणा की तारीख / Date of Pronouncement	:	25/11/2024

आदेश / ORDER

Per Bench :

This is an appeal filed by the assessee against the order of Id. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, dated 23.10.2024, passed in appeal No.NFAC/2016-17/10162601 vide DIN & Order No.ITBA/NFAC/S/250/2024-25/1069892278(1) for the assessment year 2017-2018, on the following grounds of appeal :-

- 1. For that the penalty so initiated by the AO is arbitrary and unjustified and does not have any stand and should be deleted in the interest of justice.*
- 2. For that the learned CIT(A) after going through the fact and accepting the facts of the assessee in its order was not justified in rejecting the contention of the appellant and confirming the action of the learned AO levying penalty under Section 270A.*
- 3. For that the penalty assessment as made under Section 270A is arbitrary, unjustified and is itself bad in law.*
- 4. For that the penalty assessment U/s.270A is made on the assessment made by estimation of income by the Assessing Officer is unlawful and unjustified. As per AO in his order the assessee furnished all ledger copies as asked during the*

course of assessment proceedings. The AO without looking into the books had just rejected the books of accounts and estimated the income.

5. *For that the explanation given by the assessee should have been accepted as there is no under reporting or misreporting of any income as such section 270A is not attracted.*

2. Brief facts of the case are that the assessee is a firm and derives income from civil contract work. The return of income was filed on 1.10.2017 declaring total income of Rs. 38,96,284/-. The assessment order completed u/s. 144 vide order dated 6.12.2019 at a total income of Rs. 37,32,140/-. As the assessee has not filed the relevant details, the Assessing Officer has estimated the income of the assessee from contract activity by applying the net profit rate at 6% before interest and remuneration of the partners.

3 The Assessing Officer initiated the penalty proceedings u/s. 270A of the Act and thereafter had levied the penalty u/s. 270A of the Act vide impugned order dated 1.12.2021 by holding that the assessee has under reported its income as a consequence of misreporting by invoking provision of Section 270(9)(c) of the Act and had levied penalty of Rs.17,52,558/- being 200% of the tax sought to be evaded. In the first appeal the Id.CIT(A) has confirm the said penalty, therefore, the present appeal is filed before us.

4. During the course of hearing, the Id. AR submit that while initiating the penalty proceeding u/s. 270A of the Act, the AO has not recorded any satisfaction in the Assessment order as nowhere in the assessment order it was stated as to for which limb the penalty proceedings u/s. 270A of the Act he found the assessee guilty for initiation of penalty proceedings

u/s.270A of the Act. He further submit that the notice issued u/s. 274 read with section 270A of the Act dated 6.12.2019 also does not specify whether the assessee has underreported the income or misreported the income and in the notice it is stated that the assessee has “underreporting and misreporting of the income” but which clause of sub section 270A (9) is invoked is not mentioned. The Id. AR further submit that before levy of penalty also, the Assessing Officer has not show caused the assessee as to which clause of sub section 9 of Section 270A of the Act he is invoking for levy of penalty for misreporting of income in the case of assessee. He, thus, submitted that the notice issued for initiation of penalty proceedings is ambiguous and defective and does not spell out the limb for which the penalty proceedings are initiated, therefore, consequent levy of penalty u/s.270A of the Act based on such defective notice deserves to be deleted. The Id. AR further submitted that the income of the assessee was estimated by the Assessing Officer by applying a profit rate and the matter is subjudice before the first appellate authority and therefore, it is yet to be decided whether any income over and above, the return of income could be held as final income in the hands of the assessee and therefore, the action of the Assessing Officer in levying the penalty u/s. 270A on the income which is subject matter of appeal before the Id.CIT(A) as on date is bad in law and therefore, the same deserves to be deleted.

5. *Per Contra*, Id. Sr DR vehemently supported the order of lower authorities and submit that the Assessing Officer while levying the penalty

u/s. 270A has clearly invoked the provision of clause (c) of sub section 9 of Section 270A of Act, as the assessee has failed to substantiate the expenditure claimed by it in its Profit and Loss account with the necessary supporting evidences to the satisfaction of the Assessing officer. The Id. Assessing Officer has estimated the income of the assessee only after the failure on the part of the assessee to file the necessary evidences with regard to the expenses claimed. Therefore, the penalty levied u/s. 270A deserves to be upheld.

6. We have heard the rival submissions and perused the material available on record. At the outset from the perusal of the assessment order, it appears that no satisfaction was recorded by the Assessing Officer before initiating the penalty proceedings u/s. 270A of the Act. At Pg. 3 of the assessment order, after computation of income the Assessing Officer has observed as under:

“Initiated penalty proceeding u/s. 270A of the I.T. Act, separately.”

7. From the perusal of the above observation of the Assessing Officer, it clearly appears that Assessing Officer has failed to record any satisfaction whether proceedings u/s. 270A of the Act are initiated for levy of penalty for misreporting of income or underreporting of income as a consequence of misreporting of income and further which clause of sub-section 9 of Section 270A of the Act is applicable in the present case if the case is for misreporting of income. Moreover, from the perusal of the notice issued u/s. 274 r.w.s 270A of the Act dated 6.12.2019, it appears

that in the said notice also the Assessing Officer as failed to state the proper satisfaction the notice as issued is reproduced as under:



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE ASSISTANT COMMISSIONER OF INCOME TAX
ACIT, CIRCLE BALASORE

To, SANTOSH KUMAR KHANDELWAL WARD NO-8 HUDCO COLONY , MADHUBAN, BARIPADA BARIPADA MAYURBHANJ 757001, Orissa India	
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PAN: AAOFS0967J	Assessment Year: 2017-18	Notice No.: ITBA/PNL/S/270A/2019- 20/1021773439(1)	Date : 06/12/2019
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Notice under section 274 read with section 270A of the Income Tax Act, 1961

Sir/ Madam,

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

You are hereby requested to appear before me either personally or through a duly authorised representative at **02:30 PM on 03/02/2020** 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, 1961.

CHANDAN KUMAR PANDIT
ACIT, CIRCLE BALASORE

(In case the document is digitally signed please refer Digital Signature at the bottom of the page)

Note: If digitally signed, the date of digital signature may be taken as date of document.
BALASORE,ORISSA, INCOME TAX OFFICE, STATION SQUARE, I.B. ROAD, BALASORE, BHUBANESWAR, Orissa,
756001
Email: BALASORE.DCIT@INCOMETAX.GOV.IN,
* The Notice/Letter/Order No. mentioned above may be treated as DIN for the purpose of procedure for issuance of Income Tax Notice prescribed by Circular No.19/2019 dt. 14 August 2019.

8. From the perusal of the above notice also it is seen that the AO has simply mentioned that "whereas in the course of proceedings before us

for the assessment year 2017-2018, it appears to me underreporting and misreporting of income". However, the assessee was never informed under which clause its case is fallen for misreporting of income. Further, the penalty is leviable @50% of tax sought to be evaded in case of underreporting of income and 200% where the assessee found guilty of under-reporting of income as a consequence of misreporting of income. Therefore, the AO is duty bound to clearly specify about the limb on which he wants to initiate the penalty proceedings u/s.270A of the Act.

9. ITAT Pune Bench of the Tribunal in the case of Kishor Digambar Patil Vs. ITO, Ward-2(1), Nasik, passed in ITA No.54&55/PUN/2023, order dated 30.03.2023 had an occasion to decide the issue of validity of notice for initiation of proceedings u/s.270A of the Act, wherein the coordinate bench has 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 aforesaid 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 brought out 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 outstepping 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 denova consideration, hence prayer of the Ld. DR stands meritless.

14. In the light of aforesaid 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 aforesaid 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.

10. The Hon'ble Delhi High Court in the case of Schneider Electric South Asia (HQ) Pte. Ltd. Vs. ACIT(IT), (2022) 443 ITR 186 (Delhi-HC) has also dealt with the issue of satisfaction before issue of notice u/s. 270A wherein the Hon'ble Court has held as under:

6. Having perused the impugned order dated 09 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 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.

11. In the instant case as observed above, the Id. Assessing Officer has not recorded any satisfaction at the time of initiation of penalty proceedings u/s. 270A which must be recorded in the assessment order itself. However, neither such satisfaction was recorded in the assessment order nor is clearly spelt out in the notice issued for initiation for penalty proceedings u/s. 270A of the Act. It is settled proposition of law that before initiation of penalty proceedings or levying of the penalty, the assessee should be show caused about the fault committed by the assessee for which the Assessing Officer proposed to levy the penalty u/s. 270A of the Act. In absence of such communication it is not possible

for the assessee to make proper reply as without knowing the charge going to be levied how the assessee would be able to defend himself. It is also relevant to state that section 270AA of the Act provides immunity to assessee from imposition of penalty u/s.270A of the Act where the penalty proceedings has not been initiated under the circumstances referred in Section 270A(9) of the Act. As in the instant case, the Assessing Officer has failed to state whether it is for “under reporting” or “misreporting”, thus, as held by the Hon’ble Delhi High Court in the case of Schneider Electric South Asia (HQ) Pte. Ltd. (supra) such act of the Assessing Officer leads to deny the assessee from immunity from imposition of penalty and prosecution and makes the impugned order manifestly arbitrary. In view of these facts and by following the judgment of Hon’ble Delhi High Court in the case of Schneider Electric South Asia (HQ) Pte. Ltd. (supra) and Pune Bench of ITAT in the case of Kishor Digambar Patil (supra), we find that penalty proceedings initiated u/s. 270A by the Assessing Officer without specifying whether the assessee has misreported the income or underreported the income is bad in law. Therefore, the said notice is bad in law and consequent order levying penalty u/s.270A of the Act is hereby quashed.

12. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 25/11/2024.

Sd/-

(GEORGE MATHAN)

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 25/11/2024

Prakash Kumar Mishra, Sr.P.S.

Sd/-

(MANISH AGARWAL)

लेखा सदस्य / ACCOUNTANT MEMBER

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

1. अपीलार्थी / The Appellant-
Santosh Kumar Khandelwal,
Ward No.8, HUDCO Colony,
Madhuban, Baripada,
Mayurbhanj-757001
2. प्रत्यर्थी / The Respondent-
ACIT, Balasore
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT,
Cuttack
6. गार्ड फाईल / Guard file.
सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack