

IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH 'D', MUMBAI

**BEFORE SHRI SAKTIJIT DEY, HON'BLE VICE PRESIDENT
AND SHRI AMARJIT SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA No.2795/Mum/2024
Assessment Year: 2018-19**

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| Mr. Rakesh Fatechand Jain Shop No. 140, Kherwadi Market, Bandra (E), Mumbai – 400051. PAN: AFJPJ 0418 D (Appellant) | vs | Assessing Officer, Assessment Unit, National E-Assessment Centre, Delhi (Respondent) |
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Present for:

Assessee by : Shri Kunal D. Lunawat
Revenue by : Shri R.R. Makwana, Sr. DR

Date of Hearing : 19.11.2024
Date of Pronouncement : 04.12.2024

ORDER

PER AMARJIT SINGH, AM:

This appeal of the assessee for the assessment year 2018-19 is directed against the order dated 18.04.2024 passed by the Id. Commissioner of Income-tax (Appeal), NFAC Delhi. The assessee has raised the following grounds of appeal:

“1. That the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [Ld. CIT(A)] has erred on facts and in law in confirming the imposing 50% penalty i.e. Rs. 3,38,179/- under section 270A of the Act as levied by Ld. Assessing Officer [Ld. AO] for alleged under-reporting.

2.1 The CIT(A) has erred in law and on facts in upholding the levy of penalty u/s 270A in respect of addition made under section 50C without appreciating specific discrepancies in the report of the DVO which were pointed out by the appellant during the course of assessment as well as appellant proceedings.

2.2 The CIT(A) has erred in upholding the levy of penalty u/s 270A rejecting the contention of the appellant that the sale price is the actual price of property and no penalty u/s 270A can be levied on artificial income not earned by the appellant.

2.3 That the penalty as levied is without specific show cause notice and without proper specific lawful opportunity or compliance with Principle of Natural Justice. As such too the penalty deserves to be struck and deleted.

2.4 That the penalty as levied and confirmed is based on erroneous views and / or non-appreciation of the facts or law involved and without properly considering and rebutting the material, submissions and binding case laws in favour of appellant relied upon. Moreover, the penalty is based on suspicion, conjectures and surmises without any substantive basis or cogent material. As such too the penalty deserves to be deleted in toto.

2.5 The CIT (A) failed to appreciate that addition is made by invoking diming fiction provided under the Act, then no separate penalty can be levied. Since addition of notional income itself is a in the form of penalty.

3.1 On the above grounds are mutually exclusive and without prejudice to each other

3.2 The Appellant craves leave to alter, amend or withdraw all or any of the Grounds of Appeal herein or add any further grounds as may be considered necessary and to submit such statements, documents and papers as may be considered necessary either before or during the appeal hearing.

9. The Assessee craves leave to add, amend, alter, amend or drop any or all Grounds of appeal at the time of the appeal proceedings. ”

2. Fact in brief is that case of the assessee was subject to scrutiny assessment u/s 143(3) r.w.s. 144B of the Act. During the course of assessment, the assessing officer noticed that assessee had sold two properties for consideration of Rs. 24,00,000/- whereas the stamp value of the property sold determined by the stamp value authority

was Rs. 82,98,500/-. On query, the assessee explained that stamp value determined by the stamp value authority was much higher than the market value of the immovable property, therefore, requested that the matter may be referred to the Departmental Valuation Officer for determining the fair market value of the property. The assessing officer has referred the matter to the DVO u/s 50C(2) of the Act to determine the fair market value of the property sold. Till the date of passing the assessment order, the assessing officer has not received the valuation report from DVO and the long term capital gain on the sale of the property was computed as per the fair market value of the property determined by the stamp value authority. Accordingly, the long term capital gain was determined at Rs. 58,98,500/- after reducing the long term capital gain of Rs. 53,413/- already shown by the assessee in the return of income filed. Subsequently, the assessing officer initiated proceedings u/s 270A of the Act for under reporting of income and levied a penalty of Rs. 3,38,179/- equal to 50% of tax under reported income vide order u/s 270A of the Act passed on 20.03.2023.

3. The assessee filed appeal before the ld. CIT(A) against the levying of penalty u/s 270A of the Act. The ld. CIT(A) has dismissed the appeal filed by the assessee.

4. During the course of appellate proceedings before us, the ld. Counsel submitted that while levying penalty, assessing officer has not specified the limbs of section 270A(2) of the Act. The ld. Counsel further submitted that addition was merely made under the deeming provision of section 50C of the Act and there was mis-reporting or under reporting of income. The ld. Counsel has also referred the

various pronouncements of the ITAT, Mumbai placed in the paper book filed.

5. On the other hand, ld. DR supported the order of lower authorities.

6. Heard both the sides and perused the material on record. Without reiterating the fact as discussed above during the year under consideration, the assessee had sold immovable property for consideration of Rs. 24,00,000/- as against the fair market value of Rs. 82,98,500/- determined by the stamp value authority. The AO has referred the case of the DVO u/s 50C(2) of the Act to determine the fair market value of the property. However, till the date of passing the assessment order, the valuation report has not been received from the DVO. The assessing officer computed the long term capital gain after taking into consideration, the fair market value determined by the stamp value authority to the amount of Rs. 58,98,500/- as discussed. The assessing officer has levied penalty to the amount of Rs. 3,38,180/- u/s 270A of the Act for under reporting of the income after considering the fair market value of the sold properties as determined by Stamp Value Authority. On perusal of the copies of notices for penalty under section 274 read with section 270A of the Act placed in the paper book, it is noticed that the AO has not specified any of the circumstances of mis-reporting of income mentioned in section 270A(2) of the Act as under:

- a. Misrepresentation or suppression of facts;*
- b. Failure to record investments in the books of account;*
- c. Claim of expenditure nor 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.”

It is also prescribed under the provision of section 270A(6) of the Act that under reporting income shall not include the amount of under reported income determined on the basis of an estimate. The Id. Counsel has also referred the decision of ITAT, Mumbai in the case of Satyam Print House vs ACIT vide ITA No. 2898/M/2023 dated 08.03.2024 wherein it is held that as per section 270A(6)(C) of the Act under reported income does not include the amount of income determined on the basis of estimation. Looking to the above facts and circumstances, it is evident that assessing officer has merely levying penalty u/s 270A of the Act on the fair market value determined the DVO on estimation basis under the deeming provision without specifically pointing out any circumstances as specified under sub-section 9 of section 270A of the Act. Therefore, the action of the Id. CIT(A) in sustaining the impugned penalty levied u/s 270A is not justified. Accordingly, the ground of appeal filed by the assessee are allowed.

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

Order pronounced in the open court on 04.12.2024

Sd/-

Sd/-

**(SAKTIJIT DEY)
VICE PRESIDENT**

**(AMARJIT SINGH)
ACCOUNTANT MEMBER**

Mumbai: 04.12.2024
Biswajit, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:
3. The CIT,
4. The DR .

//True Copy//

By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai