IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH : COCHIN

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
AND
SHRI SOUNDARARAJAN K., JUDICIAL MEMBER

ITA No. 171/Coch/2024
Assessment Year : 2018-19

M/s. Kerala State Co-operative Bank Ltd., CO Bank Towers, Palayam, Thiruvananthapuram – 695 033. **PAN: AAAAK4255G**	**Vs.**	The Deputy Commissioner of Income Tax, Circle -1(1), Thiruvananthapuram.
APPELLANT		**RESPONDENT**

Assessee by	:	Shri Dijo Mathew, Advocate
Revenue by	:	Shri Sanjit Kumar Das, CIT-DR

Date of Hearing	:	11-09-2024
Date of Pronouncement	:	11-12-2024

ORDER

PER SOUNDARARAJAN K., JUDICIAL MEMBER

This is an appeal filed by the assessee challenging the order of the NFAC, Delhi dated 08/01/2024 in respect of the penalty imposed u/s. 270A of the Act for the A.Y. 2018-19.

2. The brief facts of the case are that the assessee is an Apex co-operative bank and they filed their return of income on 30/10/2018. Subsequently, the case was selected for scrutiny and the AO issued notices u/s. 143(2) and 142(1) for which the assessee filed their response. In the said notices, the AO had pointed out that the assessee had not deducted

TDS on interest payments made from 20 branches and therefore sought for the details along with the TDS amount deducted thereon. The assessee submitted that during the year they paid interest to co-operative banks, scheduled banks, reserve fund from co-operative banks, savings bank and ACS fund (to other co-operative societies) and therefore they need not deduct TDS and in respect of the balance payment of Rs. 39,40,47,888/- the assessee submitted because of the merger and the technical error in the system they are not able to get the details. The AO proposed to disallow 30% of the interest payments u/s. 40(a)(ia) of the Act. Similarly, the AO had proposed to disallow the claim made u/s. 36(1)(viia) of the Act on the provision made for bad and doubtful debts. The assessee explained that due to merger of 13 district co-operative banks with the assessee from 29/11/2019, there is a change in the software and therefore the complete datas could not be retrieved for the financial year 2017-18. The assessee further filed the details of the interest on the fixed deposits maintained by the individuals, PF trust and other co-operative societies. The assessee further submitted that after deducting the above said amounts, the balance interest payment comes about Rs. 1,30,37,207/-. The assessee further submitted that further details of declaration filed in form 15G/15H and the name of the depositors and the full details could not be collected in order to give explanations to the proposal because of the technical error in the system.

3. In respect of the deduction claimed for the provision made for the bad and doubtful debts, the assessee explained that the auditor in their audit report for the year ended 31/03/2018 had observed that the assessee is having a qualification for the deduction to be claimed u/s. 36(1)(viia) and 36(1)(viii) of the Act so that the tax liability could be reduced. Thereafter only, the assessee decided to claim the deduction for which they are entitled, and initiated process for complying with the condition to claim the said deduction. But unfortunately, the assessee was not able to reopen the audited accounts and create the necessary provision in the accounts for claiming the deduction. The assessee further submitted that the reason for

disallowing the above said claim by the AO that the assessee is not having any rural branches is also not correct. The assessee also relied on the amendment made in the year 1986, to claim the deduction u/s. 36(1)(viia) of the Act, it is not mandatory to have rural branches but only the deduction rate would vary i.e. 10% advances made by rural branches and 8.5% for other branches.

The assessing officer without considering the submissions had mechanically disallowed the 30% of the interest payments for not deducting the TDS u/s. 40(a)(ia) of the Act. In the said order, the AO had also stated that penalty proceedings u/s. 270A(1) of the Act would be initiated separately. The AO had not specifically mentioned under which limb underreporting was done by the assessee in view of the above said facts and circumstances of the case. The AO further disallowed the deduction claimed u/s. 36(1)(viia) of the Act for the reason that the assessee has no rural branches. The AO finally came to the conclusion that the assessee has not furnished the details of the rural branches and therefore the assessee is not qualified for deduction u/s. 36(1)(viia) of the Act and also for the reason that the assessee had not created the provisions. The AO also observed that penalty proceedings u/s. 270A(1) r.w.s. 270A(9)(a) of the Act will be initiated for misreporting / underreporting of income. While making the above said observation, the AO had not specifically stated under which limb of section 270A(2), the underreporting would come in order to treat the same as misreporting u/s. 270A(9) of the Act.

4. Thereafter, the AO initiated proceedings to levy penalty u/s. 270A(1) and 270A(9) of the Act vide notice dated 24/02/2021 which is reproduced hereunder for easy reference.

5. In the above said notice, the AO had not specifically mentioned under which limb of the section 270A(2) and 270A(9) of the Act the penalties are proposed. In the said notice, the AO had made a general observation that the assessee has underreported as a consequence of misreporting the income but not specifically pointed out under which limb there was an underreporting and underreporting as a consequence of misreporting the income. Thereafter, a reminder show cause notice was issued on 13/06/2021 and in the reminder also, the AO had not specified under which limb of the provision, the penalty has been imposed.

6. The assessee explained the reasons for not deducing the tax at source and also submitted that reasons for not having a provision in the accounts for claiming the deduction u/s. 36(1)(viia) of the Act. The assessee also relied on some judgments and orders in support of their case and prayed to drop the penalty proceedings initiated. The AO in the proceedings dated 23/03/2022 had confirmed the penalties u/s. 270A(2) of the Act and 270A(9) of the Act. In the proceedings, the AO had not mentioned under which limb of 270A(2), underreporting has been done by the assessee and also under which limb of 270A(9) of the Act the underreporting of income was made which is in consequence of misreporting.

7. Before proceeding further, we will first go through the provisions which deals with the two occasions in which the respective penalties can be imposed.

> ***"Penalty for under-reporting and misreporting of income.***
>
> ***270A.*** *(1) The Assessing Officer or [95][the Joint Commissioner (Appeals) or] the Commissioner (Appeals) or the Principal Commissioner or Commissioner may, during the course of any proceedings under this Act, direct that any person who has under-reported his income shall be liable to pay a penalty in addition to tax, if any, on the under-reported income.*
> *(2) A person shall be considered to have under-reported his income, if—*

(a) the income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of section 143;

(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 section 148;

(c) the income reassessed is greater than the income assessed or reassessed immediately before such reassessment;

(d) the amount of deemed total income assessed or reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of section 143;

(e) the amount of deemed total income assessed as per the provisions of section 115JB or section 115JC 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;

(f) the amount of deemed total income reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income assessed or reassessed immediately before such reassessment;

(g) the income assessed or reassessed has the effect of reducing the loss or converting such loss into income.

(3) The amount of under-reported income shall be,—

(i) in a case where income has been assessed for the first time,—

(a) if return has been furnished, the difference between the amount of income assessed and the amount of income determined under clause (a) of sub-section (1) of section 143;

(b) in a case where no return of income has been furnished or where return has been furnished for the first time under section 148,—

(A) the amount of income assessed, in the case of a company, firm or local authority; and

(B) the difference between the amount of income assessed and the maximum amount not chargeable to tax, in a case not covered in item (A);

(ii) in any other case, the difference between the amount of income reassessed or recomputed and the amount of income assessed, reassessed or recomputed in a preceding order:

Provided that where under-reported income arises out of determination of deemed total income in accordance with the provisions of section 115JB or section 115JC, the amount of total under-reported income shall be determined in accordance with the following formula—
(A — B) + (C — D)
where,
A = the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);
B = the total income that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of under-reported income;
C = the total income assessed as per the provisions contained in section 115JB or section 115JC;
D = the total income that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC been reduced by the amount of under-reported income:
Provided further that where the amount of under-reported income on any issue is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D.
Explanation.—For the purposes of this section,—
(a) "preceding order" means an order immediately preceding the order during the course of which the penalty under sub-section (1) has been initiated;
(b) in a case where an assessment or reassessment has the effect of reducing the loss declared in the return or converting that loss into income, the amount of under-reported income shall be the difference between the loss claimed and the income or loss, as the case may be, assessed or reassessed.

(4) Subject to the provisions of sub-section (6), where the source of any receipt, deposit or investment in any assessment year is claimed to be an amount added to income or deducted while computing loss, as the case may be, in the assessment of such person in any year prior to the assessment year in which such receipt, deposit or investment appears (hereinafter referred to as "preceding year") and no penalty was levied for such preceding year, then, the under-reported income shall include such amount as is sufficient to cover such receipt, deposit or investment.
(5) The amount referred to in sub-section (4) shall be deemed to be amount of income under-reported for the preceding year in the following order—

(a) the preceding year immediately before the year in which the receipt, deposit or investment appears, being the first preceding year; and

(b) where the amount added or deducted in the first preceding year is not sufficient to cover the receipt, deposit or investment, the year immediately preceding the first preceding year and so on.

(6) The under-reported income, for the purposes of this section, shall not include the following, namely:—

(a) the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or [96][the Joint Commissioner (Appeals) or] the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, is satisfied that the explanation is bona fide and the assessee has disclosed all the material facts to substantiate the explanation offered;

(b) the amount of under-reported income determined on the basis of an estimate, if the accounts are correct and complete to the satisfaction of the Assessing Officer or [96][the Joint Commissioner (Appeals) or] the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, but the method employed is such that the income cannot properly be deduced therefrom;

(c) the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of his income and has disclosed all the facts material to the addition or disallowance;

(d) the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer, where the assessee had maintained information and documents as prescribed under section 92D, declared the international transaction under Chapter X, and, disclosed all the material facts relating to the transaction; and

(e) the amount of undisclosed income referred to in section 271AAB.

(7) The penalty referred to in sub-section (1) shall be a sum equal to fifty per cent of the amount of tax payable on under-reported income.

(8) Notwithstanding anything contained in sub-section (6) or sub-section (7), where under-reported income is in consequence of any misreporting thereof by any person, the penalty referred to in sub-section (1) shall be equal to

two hundred per cent of the amount of tax payable on under-reported income.

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

(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.

(10) The tax payable in respect of the under-reported income shall be—

(a) where no return of income has been furnished or where return has been furnished for the first time under section 148 and the income has been assessed for the first time, the amount of tax calculated on the under-reported income as increased by the maximum amount not chargeable to tax as if it were the total income;

(b) where the total income determined under clause (a) of sub-section (1) of section 143 or assessed, reassessed or recomputed in a preceding order is a loss, the amount of tax calculated on the under-reported income as if it were the total income;

(c) in any other case, determined in accordance with the formula—

(X-Y)

where,

X = the amount of tax calculated on the under-reported income as increased by the total income determined under clause (a) of sub-section (1) of section 143 or total income assessed, reassessed or recomputed in a preceding order as if it were the total income; and

Y = the amount of tax calculated on the total income determined under clause (a) of sub-section (1) of section 143 or total income assessed, reassessed or recomputed in a preceding order.

(11) No addition or disallowance of an amount shall form the basis for imposition of penalty, if such addition or disallowance has formed the basis of imposition of penalty in the case of the person for the same or any other assessment year.

(12) The penalty referred to in sub-section (1) shall be imposed, by an order in writing, by the Assessing Officer, [97][the Joint Commissioner (Appeals) or] the Commissioner (Appeals), the Commissioner or the Principal Commissioner, as the case may be."

8. From the reading of the above provision, the penalty u/s. 270A(1) could be imposed if any person has underreported his income. The sub-section (2) of section 270A explains the circumstances which are all classified as underreported. There are 7 occasions available under sub-clause (2) to attract the underreporting of income. Similarly, in order to attract the penalty under sub-clause (8) of 270A of the Act, the provision mandates that there should be an underreported income in consequence of any misreporting thereof. Therefore because of the misreporting of any income there should be an underreported income, to attract the penalty u/s. 270A(8) of the Act. The sub-clause (9) of 270A also deals about the six occasions of misreporting of income and because of that the underreporting of income was made. Therefore both the provisions of sub-section (2) as well as sub-section (9) of section 270A gave different types of underreporting as well as misreporting of income. Inspite of this, the AO had not specifically stated under which limb of the above said sub-sections, the underreporting as well as the underreporting in consequence of misreporting were made. As against the said proceedings, the assessee filed an appeal before the Ld.CIT(A) but the Ld.CIT(A) had dismissed the appeal without considering the provisions properly. Therefore the assessee had approached this Tribunal with the following grounds:

"1. The Commissioner of Income Tax (Appeals) erred in concluding that disallowance of Rs. 39,11,162/- under section 40(a)(ia) amounted to underreporting of income overlooking the fact that the appellant had deducted tax at source in all eligible cases and could not provide complete data due to technical issues faced by them on account of merger of 13 District Co-operative banks and short of time.

2. The learned CIT(A) failed to note that as held in various judicial decisions, non-deduction of TDS is only a technical violation u/s 40(a) (ia) of the Act and nothing to indicate

that there is concealment of income resulting in underreporting of income and the legal fiction created u/s 40(a)(ia) cannot be extended to the levy of penalty.

c. The statutory auditor in their audit report dated 19.09.2018 on the accounts for the year ended 31.03.2018 had given a qualification that the bank is not claiming Income Tax deductions under section 36(1)(viia) and 36(1)(viii) in its tax computations, which if claimed, can reduce the tax outgo of the Bank significantly. To overcome this qualification and to avail the tax benefit, the appellant decided to claim the deduction u/s 36(1)(viia) and initiated the process for complying with the conditions to claim the deduction. Since the appellant could not complete the required formalities before the due date for filing the return of income, the appellant filed the return of income claiming the deduction, pending completion of the required formalities. However, the CIT(A) failed to note that there is no deliberate misreporting of income as the appellant was eligible to claim the deduction and due to some procedural difficulties, the appellant could not reopen the audited accounts and create the necessary provision in the accounts for claiming the deduction. Further the appellant on recognising the fact of not to claim the allowance under section 36(1)(viia) unless the provision for the bad and doubtful assets are provided in the books of accounts, the appellant paid the full demand of Rs.4,71,32,211/- raised by the assessing officer in good faith. As per the above facts we bring to your kind perusal that, there is no misreporting or under reporting of income and kindly request to drop the penalty proceedings u/s 270A, initiated against the Appellant."

9. At the time of arguments, the Ld.AR submitted that the penalty proceedings initiated u/s. 270A(1) and 270A(8) is not correct since the Act had used the word "may" in sub-section (1) of section 270A which means that the AO has the discretion to impose or not to impose penalty based on the facts and circumstances of the case. The Ld.AR also submitted that the word "may" has been interpreted by the various High Courts as well as by the Hon'ble Supreme Court and explained the circumstances under which the TDS could not be deducted and also explained that the provision in the accounts could not be made for provision for bad and doubtful debts. The Ld.AR further submitted that the AO had failed to mention in both the

penalties under which limb the underreporting as well as underreporting as a consequence of misreporting were made and therefore the penalty being a quasi criminal proceedings, the assessee should be informed under which provision the penalties were imposed before passing the penalty order. The Ld.AR also further submitted that the penalties imposed u/s. 270A(1) and 270A(8) of the Act were set aside by the Coordinate Bench for the reason that the the AO had not mentioned under which limb the underreporting and underreporting as a consequence of misreporting were made. The Ld.AR prayed that, in any event, the proceedings under challenge is penalty proceedings and prayed to delete the said penalties in view of the peculiar facts and circumstances of the case.

The Ld.DR relied on the orders of the lower authorities and prayed to dismiss the appeal.

10. We have heard the arguments of both sides and perused the materials available on record.

11. It is an admitted fact that the assessee had explained that in view of the merger of the 13 District Coop Banks into the assessee bank and also in view of the non-recovery of datas from the system, the proper details could not be furnished before the AO. The said explanation given by the assessee was not controverted by the AO but simply the AO extracted the provision and confirmed the disallowance and consequently the AO had disallowed the 30% of the interest payments and consequently levied the penalty u/s. 270A(1) of the Act as underreporting. As already stated, the word used in section 270A(1) is, the assessing officer “may” impose penalty which means that there is no mandatory direction given by the statute to impose penalty under the provision. Further, sub-section (2) gave the details of the underreporting and therefore in order to attract the penalty u/s. 270A(1) of the Act, the assessing officer should point out under which limb of the section 270A(2), the underreporting occurs in order to impose the penalty. But in this case, the assessing officer had not mentioned anything about under which category or limb, the underreporting was done by the assessee

while levying the penalty. It is a settled position of law that the levy of penalty is a quasi criminal proceedings and it cannot be levied simply for the reason that there is a provision for imposing. The AO may desist from imposing penalty when there is a technical breach. In this case, we find that the AO had not given any reasons including the circumstances under which this penalty has been imposed. We find from the show cause notice extracted above, the AO had not stated about the limb under which the penalty u/s. 270A(1) was imposed. In such circumstances, the Ld.CIT(A) ought to have set aside the penalty imposed u/s. 270A(1) of the Act but unfortunately had confirmed the penalty and gave his own findings in its order which in our opinion is not correct.

12. Similarly, in respect of the penalty levied u/s. 270A(8) of the Act, which speaks about the underreporting of income as a consequence of misreporting, the AO had not stated under which category / limb the underreporting as a consequence of misreporting was done by the assessee. As we discussed the issue of penalty levied u/s. 270A(1) of the Act, we have stated that the show cause notice issued by the AO dated 24/02/2021 does not contain any details about the underreporting of income as a consequence of misreporting of income. The conditions to impose the penalty u/s. 270A(8) of the Act is not as easy as penalty levied u/s. 270A(1) of the Act since the sub-clause (8) of the section says that there should be an underreporting of income as a consequence of misreporting of income. Therefore in order to attract the said provision, the AO should first make out a case that there was a misreporting of income by the assessee and consequently, there is an underreporting of income. First thing is that the AO should give a clear finding about the misreporting of income and the circumstances / limbs enumerated u/s. 270A(9) should be specifically averred in the show cause notice. Thereafter, after satisfying himself that there is a misreporting of income then the AO should find out under what category / limb of section 270A(2), the underreporting has been made by the assessee, in order to attract the penalty u/s. 270A(8) of the Act. Even though, the provision is very clear, the AO had not strictly followed the

procedures contemplated under the said section but levied the penalty by saying that underreporting of income as a consequence of misreporting. This is not enough to impose penalty u/s. 270A(8) of the Act but something more is required to invoke the said provision. The AO had not adhered to the procedures provided in the Act before imposing the penalty u/s. 270A(8) of the Act. Unless and until, the AO had established that the underreporting was made as a consequence of misreporting of income by the assessee, the penalty imposed could not be sustained.

13. The assessee being a co-operative organisation is audited by the statutory auditors appointed by the Registrar of Co-operative Societies and in such circumstances, no motive can be attributed, to impose penalty, which being a quasi criminal proceedings. In similar circumstances, the Hon'ble Bangalore Bench of the Tribunal in the order dated 27/09/2024 in ITA No. 1054/Bang/2024 in the case of IIFL Samasta Finance Ltd. vs. DCIT in which the penalty levied u/s. 270A of the Act was deleted by following the judgement of Hon'ble Delhi High Court reported in 443 ITR 186 with the following findings:

> *"5.12 We are of the opinion that the penalty by hereditary nature is always discretionary. The legislature has used the word "may" in section 270A(1) of the Act which clearly says that it is discretionary on the part of the AO to levy penalty or not. We are also of the opinion that penalty is not at par with the tax and interest and therefore, penalty should not be levied in a light hearted manner or in routine manner and not every additions/disallowances are liable for penalty. The primary onus is on the revenue to prove that assessee falls under particular limb of default. The AO have to bring the case in the four corners of the sections in order to levy penalty which in our opinion, the authorities below failed to do so. The authority below misdirected themself by citing various irrelevant decisions of Hon'ble Supreme Court without understanding the real issues involved in the case of assessee company. Therefore, we are of the opinion that the explanation offered by the assessee is bonafide and the assessee has disclosed all material facts to substantiate the explanation. With the above observations, we delete the penalty levied u/s 270A of the Act and allow the appeal of the assessee."*

14. In view of the above said facts and circumstances and also by following the order of the Hon'ble Bangalore Bench of this Tribunal, we are of the view that the penalties levied u/s. 270A(1) and 270A(8) could not be sustained.

15. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 11th December, 2024.

Sd/-	Sd/-
(WASEEM AHMED)	(SOUNDARARAJAN K.)
Accountant Member	Judicial Member

Bangalore,
Dated, the 11th December, 2024.
/MS /

Copy to:

1. Appellant	2. Respondent
3. CIT	4. DR, ITAT, Cochin
5. Guard file	6. CIT(A)

By order

Assistant Registrar,
ITAT, Cochin