

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA No.927/Mum/2024 (Assessment Year: 2017-18)

ITA No.929/Mum/2024 (Assessment Year: 2018-19)

ITA No.928/Mum/2024 (Assessment Year: 2020-21)

MSC Agency (India) Private Limited MSC House, Andheri Kurla Road, Andheri (E), Mumbai-400 059	Vs.	ACIT, Circle-2(2)(2) 545, 5 th Floor, Aayakar Bhavan, Maharishi Karve Road, Mumbai-400 020
PAN/GIR No. AACCM 7663 A		
(Assessee)	:	(Respondent)
Assessee by	:	Shri Dhanesh Bafna Shri Hardik Nirmal Ms. Tejal Saraf
Respondent by	:	Shri R. R. Makwana
Date of Hearing	:	14.10.2024
Date of Pronouncement	:	31.12.2024

ORDER

Per Kavitha Rajagopal, J M:

These appeals have been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s. 250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Years ('A.Y.' for short) 2017-18, 2018-19 and 2020-21.

2. As the facts are common in all the appeals, we hereby take ITA No. 927/Mum/2024 (A.Y. 2017-18) as a lead case.

ITA No. 927/Mum/2024 (A.Y. 2017-18)

3. The assessee has raised the following grounds of appeal:

1. *Ground no.1*

1.1 *On the facts and in the circumstances of the case and in law, the order passed by the National Faceless Appeal Centre ('NFAC') under section 250 of the Income tax Act, 1961 ('IT Act) is erroneous, devoid of facts and contrary to the provisions of the law and accordingly, liable to be quashed.*

1.2 *The NFAC failed to appreciate that the Appellant had requested for a video conference hearing during the proceedings before NFAC which was not granted to the Appellant.*

2. *Ground no. 2*

1.1 *On the facts and in the circumstances of the case and in law, the NFAC erred in upholding the action of the Assessing Officer in initiating the penalty proceedings under section 270A of the I. T. Act.*

1.2 *The Appellant prays that the learned Assessing Officer be directed to drop the penalty proceedings initiated under section 270A of the I. T. Act.*

4. Brief facts of the case are that the assessee is Private Company and had filed its return of income on 29.03.2019, declaring total income at Rs.3,30,07,37,660/-. The return of income was processed u/s. 143(1) of the Act and the assessee's case was selected for scrutiny under CASS and notices u/s. 143(2) and 142(1) of the Act were duly issued and served upon the assessee. The learned Assessing Officer ('ld. A.O.' for short) had passed the assessment order u/s. 143(3) of the Act on 10.12.2019 determining total income at Rs.3,33,40,09,098/- after making an addition/disallowance on account of Education cess amounting to Rs. 3,32,71,436/- claimed by the assessee in its revised return dated 29.03.2019. The ld. AO also initiated the penalty proceeding u/s. 270A of the Act for under reporting of income.
5. Aggrieved the assessee was in appeal before the first appellate authority challenging the assessment order on various grounds and subsequently the assessee withdrew the grounds pertaining to Education cess. The only ground that was adjudicated by the ld. CIT(A) was the initiation of penalty proceeding u/s. 270A of the Act for under reporting of income. The ld. CIT(A) upheld the initiation of penalty proceeding u/s. 270A of the Act.

6. The assessee is in appeal before us, challenging the impugned order of the Id. CIT(A).
7. The only ground that requires adjudication is ground no. 2 which is on initiation of penalty proceedings u/s. 270A of the Act.
8. The learned Authorised Representative ('Id. AR' for short) for the assessee contended that it was not a case of 'under reporting of income' or 'misreporting of income', for the reason that the claim of deduction for Educational cess u/s. 37(1) of the Act was covered by the decision of the Hon'ble High Court of Rajasthan in the case of *Chambal Fertilizers and Chemicals Ltd. vs. JCIT (2018) [TS-489-HC-2018(Raj.)]* and the decision of coordinate bench in the case of *DCIT Circle-1(1), Pune vs. M/s. Bajaj Allianz General Insurance Company Ltd. (ITA Nos. 1111 & 1112/Pune/2017)* which were in favour of the assessee. The Id. AR further stated that the assessee's claim of deduction for Education cess was on a bonafide belief that it was allowable expenditure u/s. 37(1) of the Act and hence, the same was not a case for initiation of penalty proceedings u/s. 270A of the Act. The Id. AR further stated that the Id. AO has not levied penalty but the Id. CIT(A) has upheld the initiation of penalty. The Id. AR contended that the Id. CIT(A) has gone beyond his jurisdiction by giving a finding for initiation of penalty and stated that the same cannot be sustained.
9. The Id. DR on the other hand controverted the said fact and stated that the Id. CIT(A) has rightly upheld the initiation of penalty proceedings u/s. 270A of the Act. The Id. DR relied on the order of the Id. CIT(A).
10. We have heard the rival submissions and perused the materials available on record. It is observed that the Id. AO has initiated the penalty proceedings u/s. 270A of the Act but has not levied penalty in the assessee's case even after the lapse of the time after

the completion of the assessment proceedings. It is observed that Section 270A was not mandatory in nature and the ld. AO before levying of penalty is required to issue show cause notice and the assessee is to be given a reasonable opportunity of hearing for its defense. It is also the requirement that the ld. AO has to specify that as to under which clause of 270A of the Act, the assessee was liable for penalty. The ld. AO in the present case has specified that Section 270A of the Act will be initiated separately for under reporting of income. The assessment order was passed on 10.12.2019 and it is to be noted that no show cause notice was issued subsequent to the passing of the assessment order.

11. The ld. CIT(A) has upheld the initiation of penalty for under reporting of income by the assessee u/s. 270A of the Act, where the ld. AO has failed to issue show cause notice to the assessee.
12. In the present case in hand, we are of the considered view that the ld. CIT(A)'s order upholding the initiation of penalty proceeding is premature at this stage, for it is the discretion of the ld. AO as to whether to levy penalty or not. In the absence of a statutory notice, the ld. CIT(A) has no *locus standi* to adjudicate upon this issue. We therefore deem it fit to allow ground no. 2 raised by the assessee holding that the order of the ld. CIT(A) for initiation of penalty in the assessee's case is premature and is therefore held to be infructuous.
13. In the result, this appeal filed by the assessee is partly allowed.

ITA No.929/Mum/2024 (Assessment Year: 2018-19)

14. The assessee has raised the following grounds of appeal:

“Ground no.1

1.1 On the facts and in the circumstances of the case and in law, the order passed by the National Faceless Appeal Centre (NFAC) under section 250 of the Income-tax Act, 1961 (IT Act') is erroneous, devoid of facts and contrary to the provisions of the law and accordingly, liable to be quashed.

1.2 The NFAC failed to appreciate that:

a) The Appellant had requested for a video conference hearing during the proceedings before NFAC which was not granted to the appellant

b) the learned Assessing Officer (AO) erred in making the disallowances/additions in the assessment order without issuing a draft order as required under the Faceless Assessment Scheme, 2019,

2. Ground no. 2:

2.1 On the facts and in the circumstances of the case and in law, the NFAC erred in remanding the matter back to the learned AO to verify the claim of reduction of profit on sale of fixed assets amounting to Rs.10,85,026 which is credited to the profit and loss account while arriving at taxable income under the head Profit and Gains from Business and Profession.

2.2 Without prejudice to the above, the Appellant submits that the NFAC failed to appreciate the fact that the said profit on sale of fixed assets is already adjusted/netted off in the block of assets and thus, the addition / adjustment of Rs.10,85,026 ought to be deleted.

2.3 The Appellant prays that the action of the NFAC be set-aside and the claim of the Appellant be allowed on merits.

3- Ground no. 3

4.1 On the facts and in the circumstances of the case and in law, the NFAC erred in remanding the matter back to the learned AO to verify the claim of short-grant of credit of tax deducted at source amounting to Rs. 24,067.

4.9 The Appellant prays that the learned AO be directed to allow claim as per law.

4 Ground no. 4

4.1 On the facts and in the circumstances of the case and in law, the NFAC erred in upholding the action of the learned AO for levy of interest under section 234A of the IT Act amounting to Rs. 20,23,482 without appreciating the fact that the return of income for the impugned AY was filed within the due date prescribed under section 139(1) of the IT Act.

4.2 The Appellant prays that the learned AO be directed to delete the interest under section 234A of IT Act.

5- Ground no. 5

5.1 On the facts and in the circumstances of the case and in law, the NFAC erred in upholding the action of the learned AO in initiating the penalty proceedings under section 270A of the IT Act.

5.2 The Appellant prays that the learned Assessing Officer be directed to drop the penalty proceedings initiated under section 270A of the IT Act.”

15. The ground no. 1 of this appeal is general in nature and requires no adjudication.
16. The assessee has raised this ground challenging the order of the ld. CIT(A) in remanding the issue back to the ld. AO to verify the claim of reduction of profit on sale of fixed assets amounting to Rs. 10,85,026/- which was credited to the profit and loss account while computing the taxable income under the head Profit and Gains from Business and Profession. The assessee without prejudice submits that the profit on sale of fixed assets is already adjusted/netted off in the block of assets.
17. The assessee company had filed its return of income dated 30.11.2018, declaring total income at Rs. 405,76,11,380/- and had filed revised return on 29.03.2019, declaring total income at Rs. 401,71,18,820/-. The assessee's case was selected for scrutiny and assessment order dated 04.03.2021 was passed u/s. 143(3) r.w. 143(3A) and 143(3B) of the Act, where the ld. AO determined the total income at Rs. 405,86,96,408/- after making additions/disallowances.
18. Aggrieved the assessee was in appeal before the first appellate authority, challenging the order of the ld. AO.
19. The assessee has challenged the ground on non-reducing the profit on sale of fixed assets amounting to Rs. 10,85,026/- credited to the profit and loss account before the ld. CIT(A) who had remanded this issue back to the ld. AO for verification on the ground that the said issue does not arise out of the assessment order.

20. The Id. AR before us contended that addition on profit on sale of fixed assets was made in Section 143(1) intimation which according to the Id. AR has already been reduced by the assessee in the fixed assets. The Id. AR contended that the said addition is double addition made by the Id. AO and stated that though the assessee was not in appeal against Section 143(1) order, Section 143(3) order commences with Section 143(1) order and therefore the doctrine of merger would be applicable in this case and hence, the same is a valid ground for adjudication.
21. The Id. DR on the other hand controverted the said fact and stated that the assessee ought to have filed an appeal against Section 143(1) intimation and cannot challenged the same in an appeal against the Section 143(3) order.
22. On perusal of the rival contentions, it is observed that the Id. AO has nowhere in the assessment order passed u/s. 143(3) of the Act has discussed the issue of the non-reduction of profit on sale of fixed assets amounting to Rs. 10,85,026/- which was credited to the profit and loss account while determining the taxable income. The Id. CIT(A) has also not adjudicated these grounds of appeal for the reason that it does not form part of the assessment order. This fact has not been controverted by both sides. It is a settled proposition of law that the intimation u/s. 143(1) and the subsequent assessment order passed u/s. 143(3) would not merge with each other automatically, where the Id. AO has not adjudicated the issue on the merits which emanates from the intimation u/s. 143(1) and during the scrutiny assessment u/s. 143(3) of the Act. It is also evident that the assessee cannot challenge the addition made u/s. 143(1) in an appeal preferred against the order u/s. 143(3) of the Act merely for the reason that the Id. AO has concluded the assessment by incorporating the adjustments made vide

intimation u/s. 143(1) of the Act. The doctrine of merger would not be applicable unless the assessment order is passed with the discussions on the issues pertaining to the intimation u/s. 143(1) of the Act and the same has been adjudicated during the scrutiny assessment. When the issues are completely different in both the proceedings which are *per se* independent to each other, the doctrine of merger cannot be applied in such cases. We draw support from the coordinate bench decision in the case of *Areca Trust vs. CIT(Appeals)*, [2024] 117 ITR (Trib.) 264 (ITAT Bang.) and *Orient Craft Ltd. vs. DCIT* [2024] 158 taxmann.com 1124 (Del. Trib.). The decisions relied upon by the Id. AR in the cases of *Akbar Mohammad vs. ACIT in ITA Nos. 108 & 109/Jodh/2021*, order dated 31.01.2022, *National Stock Exchange of India Limited vs. DCIT*, ITA No. 732/Mum/2023, order dated 22.09.2023 and *M/s. Beyond Key Systems Pvt. Ltd. vs. DCIT*, ITA No. 184/Ind/2022, order dated 19.01.2023 are distinguishable on facts and are not applicable to the present case in hand.

23. We therefore deem it fit to dismiss this ground of appeal raised by the assessee with the liberty granted to the assessee to file an appeal before the Id. CIT(A) against the intimation passed u/s. 143(1) of the Act and direct the Id. CIT(A) to decide the issue on the merits of the case.
24. The ground no. 2 raised by the assessee is dismissed.
25. The ground no. 3 has not been pressed by the assessee and therefore does not require separate adjudication.
26. Ground no. 4 pertains to the levy of interest u/s. 234A of the Act amounting to Rs. 20,23,482/-. The Id. AR for the assessee contended that the assessee has filed its original return of income on time but the Id. AO has merely considered the revised return of

income filed by the assessee and has levied interest u/s. 234A of the Act. The ld. AR relied on the decision of the Hon'ble Apex Court in the case of *CIT vs. Anjum M. H. Ghaswala [2001] 252 ITR1*. The ld. DR relied on the order of the ld. CIT(A).

27. On perusal of the rival contentions, we deem it fit to remand this issue back to the file of the ld. AO to verify whether the original return of income was filed on time and to decide this issue in accordance with the decision of Hon'ble Apex Court in the case of *Anjum M. H. Ghaswala (supra)* relied upon by the ld. AR.

28. Ground no. 4 raised by the assessee is hereby allowed for statistical purpose.

29. Ground no. 5 pertains to the initiation of penalty proceeding u/s. 270A of the Act. The finding of ground no. 2 given in ITA No. 927/Mum/2024 shall apply mutatis mutandis to this ground also.

30. In the result, the appeal filed by the assessee is partly allowed for statistical purpose.

ITA No.928/Mum/2024 (Assessment Year: 2020-21)

31. The assessee has raised the following grounds of appeal:

1. Ground no. 1

1.1 On the facts and in the circumstances of the case and in law, the order passed by the National Faceless Appeal Centre (NFAC) under section 250 of the Income-tax Act, 1961 (IT Act) is erroneous, devoid of facts and contrary to the provisions of the law and accordingly, liable to be quashed.

1.2 The NFAC failed to appreciate that the Appellant had requested for a video conference hearing during the proceedings before NFAC which was not granted to the Appellant.

2. Ground no. 2

1.1 On the facts and in the circumstances of the case and in law, the NFAC erred in dismissing/ rejecting the ground of the Appellant related to double disallowance of Rs. 57.55.676 as infructuous and hence, is liable to be dismissed.

1.2 The NFAC failed to appreciate the fact:

- *that the starting point of the assessment order passed under section 143(3) of the IT Act by the learned Assessing Officer is income as per intimation under section 143(1) of the IT Act;*
- *that there was no specific show-cause notice issued during assessment proceedings in connection with the proposed disallowance of Rs. 57.55.676 made under section 40(a)(i) of the IT Act;*
- *that the same has been suo-motu disallowed by the Appellant under section 37(1) of the IT Act while computing its Total Taxable Income;*
- *That upholding the action of the learned AO, in sustaining the disallowance has resulted in double disallowance*

1.3 The Appellant prays that the action of the NFAC be set-aside and the claim of the Appellant be allowed.

3- Ground no. 3

3.1 On the facts and in the circumstances of the case and in law, the NFAC erred in upholding the action of the learned AO in initiating of penalty proceedings under section 270A of the IT Act.

3.2 The Appellant prays that the learned AO be directed to drop the penalty proceedings initiated under section 270A of IT Act.”

32. Ground no. 1 raised by the assessee is general in nature and requires no adjudication.

33. Ground no. 2 pertains to the double disallowance of Rs. 57,55,676/-. The assessee contends that the assessment order passed u/s. 143(3) of the Act is income as per the intimation determined u/s. 143(1) of the Act and further the assessee contends that the disallowance made u/s. 40(a)(i) of the Act was without issuance of show cause notice, where the assessee submits that the assessee has already made *suo moto* disallowance u/s. 37(1) of the Act, thereby resulting in double disallowance.

34. The facts of this ground are that the assessee company had filed its return of income on 14.02.2021, declaring total income at Rs. 127,69,23,690/-. The assessee's case was selected for scrutiny and notice u/s. 143(2) and 142(1) of the Act were duly issued and served upon the assessee. The ld. AO then passed the assessment order u/s. 143(3) of the Act dated 22.09.2022, determining total income at Rs. 130,93,41,327/- after making

addition/disallowance towards Education cess and wrong claim of deduction under Chapter VIA of the Act. The ld. AO also initiated penalty proceeding u/s. 270A for under reporting of income. The assessee contends that the disallowance of Rs. 57,55,676/- was already made u/s. 40(a)(ia) of the Act in the intimation u/s. 143(1) of the Act dated 24.12.2021.

35. The assessee has challenged the said disallowance before the ld. CIT(A) who had given the finding stating that the disallowance specified by the assessee does not arise from the assessment order passed u/s. 143(3) r.w.144B of the Act against which the assessee was not in appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the grounds raised by the assessee stating that the separate appeal against the intimation u/s. 143(1) of the Act should have been filed by the assessee.

36. Aggrieved the assessee is in appeal before us, challenging the order of the ld. CIT(A).

37. We have heard the rival submission and perused the materials available on record. The only issue in this ground is whether there has been a double disallowance made by the ld. AO/CPC u/s. 40(a)(ia) of the Act, as the assessee has not preferred an appeal against Section 143(1) intimation dated 24.12.2021, the ld. CIT(A) has failed to adjudicate upon this ground. The ld. AR's contention was that Section 143(3) order commences with Section 143(1) order and hence this issue could be adjudicated even in an appeal against Section 143(3) order.

38. The finding given in para no. 22 and 23 of ITA No. 929/Mum/2024 will apply mutatis mutandis to this ground also.

39. Hence, ground no. 2 raised by the assessee is dismissed.

40. Ground no. 3 pertains to the initiation of penalty proceedings u/s. 270A of the Act. The finding given by us in ground no. 2 of ITA No. 927/Mum/2024 would apply mutatis mutandis to this ground also.

41. In the result, this appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 31.12.2024

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai; Dated: 31.12.2024

Karishma J. Pawar (Stenographer)

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT- concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai