

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH (SMC), SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 247/Srt/2023 (Assessment Year 2018-19)

(Physical hearing)

Dhansukhlal Maganlal Dhangar, Shantinagar Society, Ranifaliya, Vansda, Navsari-396580 (Gujarat) PAN No. ACYPD 0673 N	Vs.	I.T.O., Ward-2, Navsari.
Appellant/ assessee		Respondent/ revenue

Assessee represented by	Ms. Chaitali Shah, CA
Department represented by	Shri Vinod Kumar, Sr. DR
Date of Institution of Appeal	13/04/2023
Date of hearing	24/05/2023
Date of pronouncement	06/07/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the assessee is directed against the order of National Faceless Appeal Centre, Delhi (NFAC)/Commissioner of Income Tax (Appeals) (in short, the Id. CIT(A)) dated 23/03/2023 for the Assessment Year (AY) 2018-19. Though the assessee has raised multiple grounds of appeal, however, in my considered view the sole and effective ground of appeal relates to confirming the action of Assessing Officer in levying penalty of Rs. 1,04,600/- under Section 270A of the Income Tax Act, 1961 (in short, the Act).
2. Brief facts of the case are that the assessee is an individual, retired from Dakshin Gujarat Vij Company Limited. The assessee filed his return of income for A.Y. 2018-19 on 16/07/2018 declaring income of

Rs. 5,30,025/-. The case of assessee was selected for scrutiny. Assessment was completed under Section 143(3) of the Act on 15/01/2021. The Assessing Officer while passing the assessment order, made addition on account of interest received from bank of Rs. 42,550/- and addition of leave encashment of Rs. 6,48,025/-. The Assessing Officer made addition of interest income by taking a view that the assessee has received interest of Rs. 35,617/- from State Bank of India, Bansda, district-Navsari and interest of Rs. 6,933/-, Bank of Baroda, Bansda, Navsari. Such interest income was not disclosed by the assessee in his income tax return. Thus, the assessee underreported this income of Rs. 42,550/-. While making addition of leave encashment, the Assessing Officer noted that in the return filed, the assessee claimed Rs. 9,48,830/- as exempt income under Section 10(10AA) of the Act which was earned as leave encashment on his retirement. The Assessing Officer was of the view that as per provisions of Section 10(10AA) of the Act, the employee other than employee of State of Central Government, cannot claim entire leave encashment as exempt. The employer of assessee furnished Form-16. On perusal of Form-16, it is noted that employer has rightly allowed only Rs. 3.00 lacs under Section 10(10AA) of the Act out of total leave encashment of Rs. 9,48,830/-. The assessee was working as an engineer of Dakshin Gujarat Vij Company Limited, which is a Public Limited Company as

reflected in Form-16. The employer of assessee has rightly treated only Rs. 3.00 lacs as exempt income and also deducted TDS on remaining amount of leave encashment. The assessee on show cause, could not furnish any documentary evidence to prove the eligibility to get entire leave encashment as exempt. The Assessing Officer allowed exempt income to the extent of Rs. 3.00 lacs out of Rs. 9,48,830/- thereby made addition of Rs. 6,48,830/- and initiated penalty for misreporting of income. The Assessing Officer issued show cause notice for levy of penalty under Section 270A read with section 274 of the Act vide notice dated 15/01/2021 to file reply on or before 01/02/2021. The Assessing Officer recorded that no reply was furnished by assessee despite giving one more opportunity. The Assessing Officer thereby levied the penalty of Rs. 1,04,600/- being 200% of tax liability on the total addition of Rs. 6,91,380/- (648,830 + 42,550). The order of penalty was passed with prior approval of Joint Commissioner of Income Tax.

3. Aggrieved by the order of penalty, the assessee filed appeal before the Id. CIT(A). Before the Id. CIT(A), the assessee filed detailed statement of fact. In the statement of fact, the assessee contended that during the assessment, the assessee filed response to the notices under Section 142(1) of the Act and explained the facts in detail. On the addition of interest income of Rs. 42,550/-, the assessee stated that he was under impression that he is a senior citizen and interest income

was not included in the total taxable income as it would be eligible for deduction under Section 80TTB of the Act. For other addition of Rs. 6,48,025/- on account of leave encashment, the assessee submitted that he was employee of Dakshin Gujarat Vij Company Limited which was set up by splitting erstwhile Gujarat Electricity Board, which was a State Government entity. Further CIN allotted to Dakshin Gujarat Vij Company Limited also contain the word "SGC" and its CIN number U40102GJ2003SGC042909, which denotes the "State Government Company". The assessee was under impression that he falls in the category of State Government employee and entire amount of leave encashment of Rs. 9,48,830/- is exempt. The Assessing Officer was not satisfied with the reply of assessee and finalized the assessment order by making these two additions. The assessee could not file reply to the show cause notice as the assessee was not aware about such notice and the assessing officer levied the penalty of Rs. 1,04,600/-.

4. The Id. CIT(A) dismissed the appeal of assessee and confirmed the order of Assessing Officer by taking a view that after going through the record he was of the view that the Assessing Officer has rightly levied the penalty as no compliance was received from assessee despite repeated notices. Further aggrieved, the assessee has filed present appeal before the Tribunal.

5. I have heard the submissions of the learned Authorised Representative (Id. AR) of the assessee and the learned Senior Departmental Representative (Id. Sr. DR) for the revenue. The Id. AR of the assessee submits that the Assessing Officer while passing the assessment order, initiated penalty proceedings under Section 270A of the Act and allegedly issued show cause notice under Section 274 r.w.s. 270A of the Act. The assessee was not aware about penalty proceedings and could not make any required compliance. No appeal in the quantum assessment against the disallowance were filed by the assessee. The assessee during the course of assessment proceedings, explained all the facts regarding the alleged addition. The Id. AR of the assessee submits that as per clause (a) of sub-section (6) of Section 270A, the underreporting income or the purpose of this section shall not include the amount in respect of which the assessee offers explanation and the Assessing Officer or the Id. CIT(A) as the case may be, is satisfied that explanation is bonafide and the assessee has disclosed all the material facts to substantiate the explanation offered. Further as per Section 270A(9) of the Act which provides non-obstante clause, list out the cases where underreporting shall be considered to be misreporting of income which are misrepresentation or suppression of facts, failure to record investments in the books of account, claim of expenditure not substantiated by any evidence, recording of any false entry in the books

of account, failure to record any receipt in books of account having a bearing on total income and failure to report any international transaction of any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter-X apply. The Id. AR of the assessee submits that sub-section (9) of Section 270A defines misreporting of income in the form of six position/cases which is exhaustive and ordinary meaning suggest culpability or existence of guilty mind. The burden lies on the department to prove that the assessee has malice intention to invade tax and the case falls in six categories of sub-section (9) of Section 270A of the Act. It is for the revenue to prove that there is misrepresentation, suppression, failure and falsify in terms of six cases of misreporting. Neither during the course of assessment order nor in penalty proceedings, the revenue has discharged its onus to specify and prove the para meters of the said provisions. The Id. AR of the assessee submits that the assessee was under impression that he is a senior citizen and interest income is not to be shown in the return of income being eligible for deduction under Section 80TTB as has been inserted by the Finance Act, 2018. About leave encashment, the Id. AR of the assessee submits that the assessee was under impression that he falls under the category of Government employee and treated the entire amount as exempt under Section 10(10AA) of the Act. Thus, as the

assessee was under bonafide impression that no penalty under Section 270A of the Act is to be levied. Even otherwise, the assessee in his reply before the assessing officer in his explanation has shown reasonable cause in not including both the component of income, which was added, which is a reasonable cause within the meaning of Section 273B of the Act. The levy of penalty is not automatic on mere making addition, if the assessee has explained his bonafide belief.

6. The Id. AR of the assessee submits that Gujarat Electricity Board was restructured into seven independent corporate entities. Dakshin Gujarat Vij Company Limited is one of such entity. The assessee was employee of Gujarat Electricity Board and on splitting it w.e.f. 01/01/2005, the assessee became employee of Dakshin Gujarat Vij Company Limited. Hence, the assessee was having bonafide belief that leave encashment is exempt. The Id. AR further submits that the assessee may not have been considered as a government employee, however, he was working in a public sector undertaking, therefore, his bonafide believe cannot be belied. The case of assessee does not fall under any of the para meter of clause (a) to (f) of Section 270A(9) of the Act. Clause (a) is also not applicable as there is no misrepresentation or suppression of facts as has been held by the Tribunal in Parasben Jivanbhai Vadhiya Vs DCIT in ITA No. 47/Srt/2023 and that explanation is bonafide within the scope of sub-section (6) of Section 270A of the act. The assessee has disclosed

all the material facts. The assessee has disclosed all material facts, thus the penalty under Section 270A cannot be levied.

7. In alternative submission, the Id. AR of the assessee submits that the Assessing Officer has not specified the misreporting by pinpointing from item (a) to (f) of Section 270A(9) of the Act either in the assessment order or in penalty order. If the Assessing Officer failed to mention specific charge, the penalty is not justified. To support such submission, the Id. AR of the assessee relied upon the decision of Hon'ble Gujarat High Court in the case of Nayan C Shah Vs ITO (2016) 386 ITR 304 (Guj).
8. On the other hand, the Id. Sr. DR for the revenue supported the orders of lower authorities. The Id. Sr. DR for the revenue submits that the assessee was not a State Government or Central Government employee. The employer of assessee in Form AS-26 has clearly mentioned that only Rs. 3.00 lacs is exempt, out of total leave encashment of Rs. 9.48 lacs. The case of assessee clearly falls in clause (a) of sub-section (9) of Section 270A of the Act. The assessee was given opportunity to file reply in response to show cause notice for levy of penalty but no reply was filed by the assessee nor any specific submission was made before the Id. CIT(A). The Id. Sr. DR for the revenue submits that the assessee is not entitled for any relief.

9. I have considered the submissions of both the parties and have gone through the orders of the lower authorities carefully. I have also deliberated on various case laws relied by the Id. AR of the assessee. The Assessing Officer while passing the assessment order, made addition of Rs. 42,550/- on account of interest earned from State Bank of India and Bank of Baroda, Navsari. The Assessing Officer initiated penalty for "underreporting of income". The Assessing Officer also made addition/disallowance of exemption of leave encashment of Rs. 6,48,025/-. The Assessing Officer initiated penalty for misreporting on this component of addition in the income. However, while passing the penalty order, the Assessing officer levied penalty on both the addition for misreporting of income of Rs. 6,91,380/- (42,550 + 6,48,380) and computed/worked out penalty @ 200% of tax liability. I find that with regard to addition of interest income the assessee explained that he was under impression that being retired person he is senior citizen and interest income is exempt under section 80TTB, thus, I find merit in the submissions of Id AR for the assessee. Moreover, the assessing officer initiated penalty on interest income for under reporting of income, however, at the time of levying penalty it was levied for misreporting of income thus, no penalty for misreporting income is justified on this addition. Hence, I direct to delete penalty under section 270A on such addition.

10. So far as other penalty for misreporting of income on the addition of leave encashment of Rs. 6,48,380/- is concerned, the assessee explained that initially he was employed Gujarat State Electricity Board, an organ of State Government, which was splitted in to seven state owned company and that he was under the bonafide belief that he is Government employee and that he has disclosed all the particulars of his income. Thus, considering such facts I also find convincing merit in the submissions of assessee that he was under bonafide belief of State Government employee. It is settled position under law that levy of penalty is not automatic on mere making addition, if the assessee has explained his bonafide belief about deduction of exemption of any component of income, no penalty is leviable on such component of income. Hence, in my view no penalty under section 270A is leviable on the addition of leave encashment. In the result, the grounds of appeal raised by the assessee are allowed.

11. In the result, this appeal of assessee is allowed.

Order announced in open court on 06th July, 2023.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated: 06/07/2023

**Ranjan*

Copy to:

1. Assessee –
2. Revenue –

3. CIT
4. DR
5. Guard File

By order

Sr. Private Secretary, ITAT, Surat