

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER**

ITA No.1779/Bang/2024
Assessment Year: 2018-19

Mr. Nateshan Sampath No.06, 3 rd Cross, 4 th Main Industrial Town Rajaji Nagar Bengaluru 560 044 Karnataka PAN NO : AESPS6563A	Vs.	DCIT Circle-3(1)(1) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Sri Mahesh G., A.R.
Respondent by	:	Shri V. Parithivel, D.R.

Date of Hearing	:	20.11.2024
Date of Pronouncement	:	22.01.2025

O R D E R

PER KESHAV DUBEY, JUDICIAL MEMBER:

This appeal at the instance of the assessee is directed against the order of ld. CIT(A)/NFAC dated 18.7.2024 vide DIN & Order No.ITBA/NFAC/S/250/2024-25/1066812294(1) passed u/s 250 of the Income Tax Act, 1961 (in short “The Act”) for the AY 2018-19.

2. The assessee has raised following grounds of appeal:

Sl. No.	Grounds
1	The Order of the Authorities below, in so far as these are against the appellant, is opposed to law, weight of the evidence, probabilities, facts and circumstances of the Appellant's case.
2	The learned commissioner of income tax (Appeals) failed to appreciate the fact that the appellant accepted the order with regard to quantum in order to avoid protracted litigation and to buy peace from the department.

3	The learned commissioner concluded the proceedings without appreciating the genuineness of the Valuation report of the building obtained from Registered Valuer after the Construction i.e., dated 31.03.2009 to determine the value of building for the purpose of Bank Loan.
4	For the above and other grounds to be urged during the hearing of the appeal the Appellant prays that the appeal be allowed, and the addition made by the Assessing Officer and sustained by the Commissioner of Income Tax (Appeals) be deleted in the interest of equity and justice.

3. Brief facts of the case are that assessee being an individual had not filed his return of income for the assessment year 2018-19. The case was reopened on the basis of information flagged by Insight Portal that the assessee has received interest of Rs.0.18 lakhs, received contractual receipt of Rs.176.81 lakhs, sold property for a total consideration of Rs.126.93 lakhs and paid Rs.1,000/- to non-residents. Accordingly, notice u/s 148 of the Act was issued and in response to same, the assessee filed return of income on 28.4.2022, wherein the assessee declared loss of Rs.1,02,80,375/- from business and profession and long term capital gains of Rs.20,68,361/- from sale of immovable property. Thereafter, the assessment u/s 147 r.w.s. 144B of the Act was completed on 28.2.2023 on a total income of Rs.20,92,490/-. The AO on or before the completion of assessment proceedings u/s 147 r.w.s. 144B of the Act also initiated the penalty proceedings with the following observations.

“Since the assessee has claimed cost of improvement of Rs.45,60,000/-, the assessee has failed to substantiate the claim of expenditure of cost of improvement, penalty u/s 270A(8) of the Act for under reporting of income in consequence of misreporting is initiated separately”.

3.1 The AO thereafter issued notice dated 28.2.2023 u/s 274 r.w.s. 270A of the Act for the assessment year 2018-19 directing the

assessee to show cause as to why an order imposing penalty u/s 270A of the Act shall not be passed for under reported income, which is in consequence of mis-reported income as per details given in the assessment order.

3.2 During the course of penalty proceedings, in response to notices assessee filed the written submissions and complied in full. The main contentions of the assessee before the AO is that he has constructed a building on the said land in the financial year 2008-09 and had incurred expenses of Rs.45,60,000/- on construction. To substantiate the claim, the assessee produced the valuation report, which the AO found it to be nothing but an estimation of the cost of construction only. As the assessee failed to submit the bills/vouchers for construction, payment details of expenses incurred on construction, ledger account copy of the immovable property, the AO disallowed Rs.90,53,431/- claimed as deduction and accordingly the capital gain is computed at Rs.1,12,15,692/-. The assessee admitted the disallowance made in the assessment order and stated to have make payment of the entire tax liability. The AO was of the opinion that since the assessee has failed to substantiate his claim of expenses of Rs.90,53,431/- with supporting documents in any form and also admitted the payment of liability of accepting the disallowance made in the assessment order, therefore, it is a fit case for imposition of penalty u/s 270A of the Act for making baseless claim without any evidences. In view of the above, the AO calculated the penalty as below:

a) Under reporting income	- Rs.91,47,331/-
b) Tax on above income	- Rs.19,02,645/-
c) Penalty @ 200% on above	- Rs.38,05,290/-

3.3 Aggrieved by the penalty order passed u/s 270A of the Act dated 22.8.2023, the assessee has preferred an appeal before the Id.

CIT(A)/NFAC. The ld. CIT(A)/NFAC dismissed the appeal of the assessee on the ground that assessee has under reported the income in the return of income. It is only because of the revenue action, the under reporting of income was unearthed. The assessee accepted the addition and stated that due to non-availability of the bills, he had admitted the said disallowances. Further, the ld. CIT(A) noticed that assessee's case does not fall in the exceptions provided in levy of penalty and no immunity from the levy of penalty is applicable to the fact of the assessee's case. Therefore, the penalty was rightly levied on the amount of tax payable on under reporting of income as a consequence to mis reporting and accordingly upheld the same.

3.4 Aggrieved by the order of ld. CIT(A)/NFAC dated 18.7.2024, the assessee has filed the present appeal before this Tribunal. The assessee has filed the paper book comprising 100 pages containing therein documents/records filed before the lower authorities as well as case laws relied upon by the assessee.

3.5 Before us, ld. A.R. of the assessee vehemently submitted that the assessee has accepted the addition in order to buy peace of mind and already paid the entire due taxes along with interest. Further, ld. A.R. of the assessee submitted that the show cause notice issued does not specify under which limb the penalty is proposed to be levied. Further, the ld. A.R. submitted that the ld. CIT(A) has observed that assessee has under reported the income but confirmed the penalty on the ground that under reporting of income as a consequence to mis reporting. Further, lastly, the ld. A.R. of the assessee relied on the judgement of the Hon'ble Delhi High Court in the case of Prem Brothers Infrastructure LLP Vs. NFAC & anr. in WPC No.7092/2022 dated 31.5.2022.

4. The Id. D.R. on the other hand supported the order of the authorities below and vehemently submitted that the assessee himself admitted the disallowance of cost of improvement in the order u/s 147 of the Act and therefore the penalty is justifiable.

5. We have heard the rival submissions and perused the materials available on record. The AO passed an assessment order u/s 147 r.w.s. 144B of the Act on 28.2.2023 by making disallowance of Rs.91,47,331/- claimed deduction as cost of improvement. On going through the assessment order, the AO initiated the penalty proceedings on or before the completion of assessment proceedings on the ground of under reporting of income in consequence of mis reporting. Further, on going through the show cause notice issued to the assessee, we find the same allegation of under reporting of income which is in consequence of mis reporting thereof. During the course of penalty proceedings, the assessee submitted that he has admitted the disallowance of cost of improvement in order to buy peace of mind and already paid the entire tax on the disallowed income and therefore, the under reporting shall not arise, whereas while going through the penalty order, we find that on the one hand, the Id. AO observed that immunity from imposition of penalty u/s 270AA of the Act is not applicable but on the other hand calculated the penalty on under reported income of Rs.91,47,331/- but levied the penalty @ 200% for the mis reporting of income. We could not understand when AO himself observed that under reported income is Rs.91,47,331/- then how he has levied penalty @ 200% for mis reporting of income. The AO himself is confused under which limb the assessee is liable for penalty u/s 270A of the Act.

5.1 For the purpose of evaluating the correctness of rival submissions addressed, we deem it apposite to extract section 270A of the Act herein below:

“270A. Penalty for under-reporting and misreporting of income.

(1) The Assessing Officer 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 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 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—(XY) 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, the Commissioner (Appeals), the Commissioner or the Principal Commissioner, as the case may be."

5.2 On plain reading of the same, we are of the opinion that when a notice u/s 270A of the Act is issued, the following step ladder should be followed by the AO while levying penalty u/s 270A of the Act.

1. Underreporting – First the onus is on the AO to establish whether any of the contingency spoken of in clauses (a) to (g) of Section 270A(2) in the case of the assessee are attracted or not. If Yes, under which clause (limb) the assessee has underreported the income?
2. Now the onus shifted on the assessee to refute by establishing that the assessee falls within any of the clauses (a) to (e) of section 270A(6) of the Act & hence there is no underreporting of income & the proceedings end there. Section 270A(6) is a window given by the legislature to give a leave to the Assessee.
3. If the assessee is not able to controvert the charge of under reporting, the under reporting gets confirmed.

4. Once the charge of underreporting is confirmed, then the AO has to establish whether the underreporting is in consequence of any of the clauses (a) to (f) of Section 270A(9) of misreporting. If Yes, under which clause (limb) the assessee has misreported the income?

5.3 Therefore, we are of the considered opinion that without the charge of under reporting of income, the AO cannot straightaway jump with the charge of misreporting of income. In the present case the AO without even a whisper as to how the ingredient of sub-section (2) of section 270A is satisfied, has also not specifically mentioned the exact limb of misreporting as per section 270A(9) of the Act. Further, the AO stated under reported income amounting to Rs.91,47,331/- in his penalty order but levied 200% penalty.

5.4 By respectfully following the judgment of Hon'ble High court of Delhi in the case of Schneider Electric South East Asia (HQ) PTE Ltd. V. Commissioner of Income Tax (International Taxation) & Ors. (2022) 443 ITR 186, we are of the considered view that failure on the part of the AO to show cause which of the specific action of the assessee company from clause (a) to (f) of Section 270A(9) was determinant before imposing penalty u/s 270A of the Act has rendered the proceedings invalid and thus untenable in the eyes of law.

5.5 Therefore, it goes without saying that for the applicability of section 270A of the Act, the condition stated therein must be strictly followed. On going through the order of Id. CIT(A), we find that even Id. CIT(A) was also confused whether the assessee has under reported his income or mis reported his income. We take a note that the Id. CIT(A), in para 5 of the order, on the one hand observed that it is clear from the assessment order that the assessee under reported the

income in the return of income but on the other hand observed that the assessee's case does not fall in the exceptions provided in levy of penalty and no immunity from the levy of penalty applicable to the fact of the case and accordingly upheld that penalty rightly levied for under reporting of income as a consequence to mis reporting. We are of the considered opinion that from the very beginning i.e. on or before completion of the assessment order, issue of show cause notice, while passing penalty order as well as the order of Id. CIT(A), the authorities below were confused whether the assessee has under reported his income or under reported the income in consequence of mis reporting of income. We are of the considered opinion that unless the person has been communicated the specific instance vis-à-vis action triggering of imposition of penalty, it would drastically obstruct an assessee from enforcing his right to dismantle the charge alleged against him. Thus, resulting into a gross violation of principles of natural justice. Therefore, the ladder is discussed in para 5.2 above has to be followed strictly for levying the penalty u/s 270A of the Act.

5.6 We are further of the considered 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 has 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. In view of the above, we delete the penalty of Rs.38,05,290/- u/s 270A of the Act and accordingly allow the appeal of the assessee.

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

Order pronounced in the open court on 22nd Jan, 2025

Sd/-
(Waseem Ahmed)
Accountant Member

Sd/-
(Keshav Dubey)
Judicial Member

Bangalore,
Dated 22nd Jan, 2025.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.