



**IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR**

**BEFORE: DR. S. SEETHALAKSHMI, JJUDICIAL MEMBER &
SHRI RATHOD KAMLESH JAYANTBHAI, ACCOUNTANT MEMBER**

**I.T.A. No. 454/Jodh/2023
Assessment year 2017-18**

Punam Kanwar Bhati Pugal Road, Bikaner. [PAN: AFKPB7152B] (Appellant)	Vs.	ITO, Ward-1(1), Bikaner. (Respondent)
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Appellant by	Sh. Amit Kothari,C.A.
Respondent by	Sh. A.S Nehra Sr.-DR

Date of Hearing	19.03.2024
Date of Pronouncement	21.03.2024

ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by assessee is arising out of the order of the Id. CIT(A), National Faceless Appeal Centre, Delhi dated 15.02.2023 [here in after "CIT(A)/NFAC"] for the assessment year 2017-18, which in turn arise from the order dated 03.02.2022 passed under section 270A of the Income Tax Act, 1961 (here in after "Act") by the AO

2.1 At the outset of hearing, the Bench observed that there is delay of 218 days in filing of the appeal by the assessee for which the Id. AR of

the assessee filed an application for condonation of delay with following prayers and the assessee to this effect also filed an affidavit :-

“In this case appeal order u/s 250 arising out of order u/s 270A was passed on 15/02/2023 by worthy CIT(A), NFAC, New Delhi. The appellant aggrieved from the order preferred an appeal before the Hon'ble Bench by filing it online on government portal. The appellant is not convergent with technical rules of law, therefore I thought that filing of appeal online means the said appeal has been filed in all respect and in accordance with law. But sir, at that time hard copy of the said appeal was also required to be filed within 60 days from the date of service of order passed by CIT(A) but assessee could not file the hard copy before the Hon'ble Bench. Sir, in this manner technical violation has been caused in filing the said appeal while the filing of appeal online was within the prescribed time. Sir, government itself has done away with the requirement of filing hard copy before the Bench w.e.f. 01/07/2023 and from this date the appeal can be filed either online or offline. Sir, therefore it is very legitimate expectation from Hon'ble Bench in these circumstances to kindly condone the delay in filing hard copy of the said appeal before the Bench.

To this effect, the assessee has filed an affidavit as to the condonation of delay in filing the appeal.

2.2 The Id. AR of the assessee appearing in this appeal submitted that the assessee is serious on the duties and the delay of 218 days is on account of the lack of knowledge of procedure that after filling the appeal online the same is already to be filed physically. Considering the various judicial precedent where in the courts has considered the explanation prevented the assessee and thereby ignored the delay on account of the technicality of the reasons. Even the apex court in the case of Collector, Land & Acquisition Vs. Mst. Katiji& Others 167 ITR 471(SC) directed the

other courts to consider the liber approach in deciding the petition for condonation as the assessee is not going to achieve any benefit for the delay in fact the assessee is at risk.

2.3. During the course of hearing, the Id. DR did not objected to assessee's application for condonation of delay and prayed that Court may decide the issue as deem fit and proper in the interest of justice as the assessee has already filed the appeal on line as claimed in the affidavit.

2.4 We have heard both the parties and perused the materials available on record. The Bench Noted that the assessee for condonation of delay of 218 days has merit as the appeal has been filed online and only the physical copy of the same was filed late and therefore, we concur with the submission of the assessee. Thus, the delay of 218 days in filing the appeal by the assessee is condoned in view of the decision of Hon'ble Supreme Court in the case of Collector, land Acquisition vs. Mst. Katiji and Others, 167 ITR 471 (SC) as the assessee is prevented by sufficient cause.

3. In this appeal, the assessee has raised following grounds: -

“1. That order passed u/s 250 of Income Tax Act, 1961 for the AY 2017-18 by CIT(Appeal) confirming the order passed by Assessing Officer u/s 270 A of the Income Tax Act is bad on law and on facts.

2. That the CIT(Appeal) has wrongly upheld penalty @50% u/s 270A(7) of Rs. 5666/-in the facts and circumstances of the case, therefore penalty upheld may please be deleted.

3. That the CIT(Appeal) has wrongly upheld penalty @200% u/s 270A(9) of Rs. 43482/- in facts and circumstances of the case, therefore penalty upheld may please be deleted.

4. That no personal hearing was provided to us during the proceeding therefore it violates the principles of natural justice in the facts and circumstances of the case.

5. That the Assessing Officer issued notice for underreporting of income u/s 274 r.w.s 270A not for misreporting of income. Therefore no penalty for misreporting of income can be imposed by the Assessing Officer and the CIT(Appeal) has wrongly confirmed the penalty in the facts and circumstances of the case.

6. That appellant prays for justice and may please be allowed to add/ amend/ alter further or any grounds of appeal on or before hearing on the case.”

4. Brief fact of the case is that in this case, the return of income in this case was filed for A.Y. 2017-18 electronically on 01.10.2017, declaring total income of Rs.6,21,760/- which was, subsequently, selected for Scrutiny (Computer Aided Scrutiny Selection). Assessment under section 143(3) of the Income Tax Act, 1961 (hereinafter called the Act) was completed on 11.12.2019 by assessing income at Rs. 8,03,310/-. During the year under consideration, assessing officer has added Rs.28,388/- on account of violation of section 40A(3) of the Income Tax Act, Rs. 26,811/- on account of Interest income under the

head Income from Other Sources and disallowed excess depreciation claimed amounting to Rs.1,00,000/-. The Id. Assessing officer also initiated penalty proceedings for misreporting of income to the extent of Rs.1,00,000/- as per the provision of section 270A(9)(d) of the Income Tax Act, 1961. After the introduction of Faceless Penalty Scheme. 2021, this case is assigned/transferred to ReFAC Unit for the purpose of completion of said penalty proceedings on 20.02.2021. Thereafter, show cause notice for penalty under section 270A of the Income-tax Act, 1961 was issued on 04.03.2021 with compliance date fixed on or before 11.03.2021. But the assessee did not file reply to the show cause notice. Thereafter, as an opportunity of being heard, letter dated 30.08.2021 issued to the assessee but again the assessee did not file any response. Thereafter, as a matter of natural justice, show-cause notice dated 25.11.2021 and reminder letter dated 29.12.2021 issued to the assessee and served on the assessee but the assessee did not file any submissions and/ or reply with respect to the show cause notices issued till the finalization of the penalty proceedings on merits. Accordingly an order u/s 270A of the Act was passed on 03.02.2022 levy of penalty of Rs. 49,148/-.

5. Aggrieved from the above order of the levy of penalty u/s 270A of the Act, the assessee preferred an appeal before the Id. CIT(A). Apropos to the grounds of the appeal so raised by the assessee, the relevant finding of the Id. CIT(A) is reiterated here in below:-

“4.3. The impugned penalty order and the submissions made by the appellant have been considered thoroughly. It is noted that the AO has initiated and imposed penalty u/s 270A(7) of Rs. 5,666/- @50% on account of disallowance made by Assessing Officer u/s 40A(3) of Rs. 28,381/- and Rs. 26,811/- interest received and not offered by the appellant in her Rol. Further the AO levied penalty of Rs. 43,482/- against the disallowance made on account of excess depreciation claimed. As mentioned by the appellant herself, she has not preferred any appeal against the additions/ disallowances made by the Assessing officer, therefore, it is clear that she has accepted the additions made by the AO. As the penalty provisions are consequential in nature and it was only during the assessment proceedings that income under- reported by the appellant came to light and same were added to the total income of the appellant. Had it not been for the assessment the appellant could have escaped paying the due taxes. Therefore, the AO was just and right in initiating and levying the penalty in the case of the appellant.

4.3.1 In respect of the claim of the appellant regarding eligibility of immunity from penalty, it is noted that in the case of the appellant, the assessment proceedings were completed on 11.12.2019 and penalty was levied vide order dated 03.02.2022. As per the requirement of section 270AA of the Act, which contains the provisions of immunity from levy of penalty, the appellant was required to file an application in Form 68 as prescribed in Rule 129. The provisions of the section 270AA are reproduced hereunder.

Section 270AA.

4.4. On perusal of the provisions of the section 270AA of the Act, it is clearly evident that the assessee is mandatorily required to file an application to avail immunity benefits referred in sub-section (1) within one month from the end of the month in which the order referred to in clause (a) of sub-section (1) has been received and shall be made in such form and verified in such manner as may be prescribed. However, in the instant case the appellant has not filed application in form 68 as prescribed in rule 129 of Income-tax Rule. Thus, the appellant is not eligible for immunity from levy of penalty. Therefore, in view of

the above facts and discussion the grounds 1 to 4 are dismissed and the penalty levied by the AO is confirmed.”

6. As the assessee did not find any favour from the appeal filed before Id. CIT(A). The present appeal filed against the said order of the Id. CIT(A) before this Tribunal on the grounds as reiterated in para 3 above. The Id. AR of the assessee also filed a detailed paper book in support of the contentions raised. The index of the document submitted by the Id. AR of the assessee are as under:-

S. No.	Particulars	Page No.
1.	Copy of computation, form 3CD and balance sheet of M/s Bhati Petroleum.	1-21
2.	Balance sheet of Poonam Kanwar Bhati	22-26
3.	Copy of Bills of solar System & Invertor	27-28
4.	Copy of judgement of Kavita Jasjit Sing vs. CIT, (2023) 37 NYPTTJ 1315 (Mumbai)	29-30
5.	Copy of judgment of G.R. Infraprojects Ltd. Vs. ACIT & Ors, (2024) 336CTR (Raj.) 249	31-33
6.	Copy of Judgment of Shivaji Dattatray Sonawane vs. ITO, (2024) 38 NYPTTJ 128 (Pune)	34-35

6.1 In support of the ground so raised before us, the Id. AR of the assessee submitted that considering the amount added in the hands of the assessee, though the additions are not on merits but considering the tax disputed the assessee has not disputed the same on merits. But penalty proceedings and assessment proceedings both being a different assessee challenged that the nature of addition made in the hands of the

assessee does not attract the provisions of section 270A of the Act and therefore, the orders of the lower authorities are not correct and the order of the Id. AO levy the penalty u/s 270A is required to be quashed.

7. Per contra, the Id. DR relied on the orders of the lower authorities CIT(E) and submitted that the addition has not been disputed by the assessee, the appeal of the assessee is required to be dismissed.

8. We have heard the rival contentions and perused material available on record. The Bench noted that the Id. AO in the original assessment proceedings made disallowances of 40A(3) of the Act, amount of Rs.28,388/- and Rs. 26,811/- on account of interest income in the other sources and has also disallowed the claim of the assessee u/s 32 of the Act disputing the period use of the asset of the assessee for an amount of Rs. 1,00,000/-. Therefore, we find force in the arguments of the Id. AR of the assessee that the additions/disallowance made by the Assessing Officer are not in the nature of misreporting of the income of the assessee to drive home to this contention, the Id. AR of the assessee relied upon the decision of the jurisdictional high court in the case of G. R. Infraprojects Ltd. Vs. ACIT 336 CTR 249 wherein the jurisdiction high court held that the case of levy penalty without

specifying the limb of under reported or misreported the income the levy of penalty is not correct. Here in this case the claim of assessee denied though assessee did not challenge it on merits. The bench noted that the Id. CIT(A) has treated assessment and penalty proceedings at par. While it is settled law that penalty proceeding are different from assessment proceeding and that mere addition in assessment could not automatically lead to concealment. Further addition made in assessment is not conclusive in the penalty proceeding in which the assessee is free to place further material to substantiate the claim that there was no concealment. Merely non-filing of appeal by the assessee against addition made in assessment cannot be a ground to conclude that assessee accepted the concealment. The Id. AR of the relied on the decision of Earth Castle vs. DCIT ITA No. 3064/Mumbai/2008 dated 17.06.2011 and decision of Hon'ble SC in the case Anantharam Veerasingaiah & Co. 123 ITR 457. Therefore in these facts the CIT Appeal has wrongly upheld the penalty imposed by the Assessing Officer. It is further submitted that the provisions of Income Tax Act as provided in section 270AA of the Act provides for immunity from imposition of penalty for underreporting of income if assessee has deposited the demand created by the Assessing Officer within 30 days from receipt of demand notice and intimated to him under rule 129 in

Form No. 68. In this case assessee duly deposited the demand created against her within 30 days but she failed to file Form No. 68 within the prescribed time before the Assessing Officer but while responding to the penalty proceeding subsequently the assessee filed Form No. 68 before the Assessing Officer but he did not consider it. The CIT(Appeal) has also did not consider the filing of Form No. 68 belatedly. The delay in filing the Form is only a procedural lapse on the part of the assessee not the substantive failure. In substance the assessee deposited the demand within 30 days, which is the part of substantive law and merely filing the Form No. 68 is only a technical or venial breach of procedural law. Therefore benefit of substantive law is required to be given to the assessee. The CIT(Appeal) has also not considered this aspect. The Assessing Officer further levied penalty @200% on account of misreporting of income on depreciation of fixed assets claimed by the assessee for full year as against half year since the asset was put to use for less than 180 days during the year. The assessee due to inadvertence claimed the depreciation for full year this is certainly not the misreporting of income. The misreporting of income is something in which mensrea on the part of assessee is required to be present. The willful default constitutes misreporting of income which is not the case. The assessee has made inadvertent wrong claim but has disclosed the

facts fully and truly therefore old law in this regard hold good and the penalty imposition is not warranted. Please refer to CIT vs. Reliance Petrol Products Private Limited (2010) 322 ITR 15 Dilip Shroff 291 ITR 519(SC). Considering the fact that the nature of addition/disallowance are not in the nature of misreporting or misreporting income of the assessee and the assessee has paid the demand within 30 days and filed the required form no. 68 since that form being procedural nature we condone that aspect of the matter and direct the Id. AO to delete the penalty levied u/s. 270A of the Act. In terms of these observations, the appeal of the assessee is allowed.

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

Order pronounced in the open Court on 21/03/2024.

Sd/-

(Dr. S. Seethalakshmi)
Judicial Member

Sd/-

(Rathod Kamlesh Jayantbhai)
Accountant Member

Dated 21/03/2024

Santosh

(On Tour)

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

True Copy
By order