

आयकर अपीलीय अधिकरण
कोलकाता 'बी' पीठ, कोलकाता में
**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA**

श्री प्रदीप कुमार चौबे, न्यायिक सदस्य
एवं
श्री रakesh मिश्रा, लेखा सदस्य
के समक्ष
Before

**SRI PRADIP KUMAR CHOUBEY, JUDICIAL MEMBER
&
SRI RAKESH MISHRA, ACCOUNTANT MEMBER**

**I.T.A. No.: 2099/KOL/2024
Assessment Year: 2018-19**

Terai Fruits Company	Vs.	Income Tax Officer, Ward-1(1), Siliguri
(Appellant)		(Respondent)
PAN: AABFT5226E		

Appearances:

Assessee represented by: Sujit Basu & Rajib Mukherjee, Adv.

Department represented by: Akhil Kumar, SR. DR.

Date of concluding the hearing : December 23rd, 2024

Date of pronouncing the order : January 14th, 2025

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of the Ld. Commissioner of Income Tax (Appeals)-NFAC, Delhi [hereinafter referred to as "the Ld. CIT(A)"] passed u/s 250 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for AY 2018-19 dated 27.09.2024, which has been passed against the assessment order u/s 147 read with Section 144B of the Act, dated 23.02.2023.

2. The assessee is in appeal before the Tribunal raising the following grounds of appeal:

“1. For that on the facts and circumstances & legal position of the case, the order u/s. 250 passed by the Hon'ble CIT(A) is against the principle of natural justice.

2. For that on the facts and circumstances and legal position of the case, the initiation of penalty proceeding by the Ld. AO for misreporting of income without reference to any clause of sub-section (9) of section 270A was bad in law. The Ld. CIT(A) ought not to have confirmed the invalid penalty order passed by the Ld. AO.

3. For that on the facts and circumstances and legal position of the case, the Ld. CIT(A) ought to have cancelled the Penalty Order passed by the Ld. AO on the basis of invalid show cause notice u/s 274 of the Act.

4. For that on the facts and circumstances and legal position of the case, the Ld. AO ought not to have levied the penalty as the assessee had paid the demand tax within the due date and had applied for immunity from imposition of penalty u/s 270AA. The Ld. CIT(A) ought not to have confirmed the penalty order of the Ld. AO without considering the fact on record.

5. For that on the facts and circumstances and legal position of the case, the Ld. AO ought not to have rejected the application of the assessee u/s 270AA made in plain paper and not in Form No. 68 due to the ignorance of the assessee about the provisions of law. The Ld. CIT(A) ought not to have confirmed the penalty order of the Ld. AO on mere technical ground as above.

6. For that on the facts and circumstances and legal position of the case, the Ld. AO, CIT(A) ought to have cancelled the penalty order of the Ld. AO as the same had been passed without specifying any specific charge which was incumbent on the Ld. AO.

7. That the appellant craves permission to add, amend, alter or vary all or any of the ground of appeal on or before the date of hearing of the appeal.”

3. Brief facts of the case are that the case of the assessee was selected on the basis of Rules/parameter thereto approved by the Board under Risk Management System (RMS) for identifying potential cases for action u/s 148 of the Act, where the return of income has not been filed for the relevant assessment year. On perusal of Form No. 61A (Statement of Specified Financial Transactions u/s 285BA(1) of the Act) furnished by the Central Bank of India, it was noticed that the assessee

had deposited and withdrawn cash from the current account maintained with the Central Bank of India for the period 2017-18 relevant to the AY 2018-19. The assessee had entered into financial transactions of the value of Rs. 1,03,19,130/- being cash deposited and cash of Rs. 15,87,000/- was withdrawn during the FY 2017-18. However, the assessee failed to furnish the return of income for the AY 2018-19. Hence, the case was reopened u/s 147 of the Act and a notice u/s 148 of the Act was served upon the assessee, in response to which, the assessee filed the return of income declaring total income of Rs. 2,88,770/-.

3.1 In the course of the assessment proceedings, the assessee responded that an existing partner Shri Babul Pal Chaudhary was a partner in the firm M/s. Terai Fruits Company along with his father Mr. Gopal Paul Chowdhury who expired on 08.06.2017 and the partnership had automatically dissolved. A copy of the death certificate of Mr. Gopal Paul Chowdhury was filed. On demise of his father, the other partner, i.e. Shri Babul Pal Chaudhary (PAN: AFHPP8526L) became the sole proprietor of the business and in his return of income he has duly considered the income earned from Terai Fruits Company as its sole proprietor from 19.06.2017 onward and the aforesaid bank account was being used in his individual capacity since 19.06.2017 under the PAN AFHPP8526L. On receipt of the notice u/s 148 of the Act, the surviving partner filed the return of income of the firm considering the income earned up to 18.06.2017 in which out of total receipts, a sum of Rs. 5,75,870/- had been received through banking channel on which profit @ 6% was considered and the balance amount of Rs. 31,77,700/- had been received in cash, on which profit @ 8% was considered and total profit of Rs. 2,88,769/- had been declared under the provisions of

Section 44AD of the Act from the business of trading in fruits. On receiving the reply, the Ld. AO did not propose any variation to the income shown in the return filed in response to the notice u/s 148 of the Act dated 06.07.2022 and the assessment was made at the returned income at Rs. 2,88,769/-.

3.2 At the same time, since the assessee had filed the return of income after issue of notice u/s 148 of the Act, penalty proceedings u/s 270A of the Act were initiated. The assessee requested before the Ld. AO in the course of the penalty proceedings that the penalty may be waived off in view of Section 270AA of the Act as no appeal had been filed. The Ld. AO issued a letter on 08.08.2023 and another on 14.08.2023 for submission of the reply and relevant documents, the contents of which are as follows:

“3. As can be observed from your reply that you have not filed any application within the time provided under the provisions and even beyond the time limit. Even if, you had filed the application for immunity after the time limit prescribed under the provisions, that would also have not been considered. The provisions state that if a person wants to file application for immunity from penalty proceedings, he has to file application for waiving off within the period of the one month from the date the end of the month in which the order referred to in clause (a) of sub-section (1) of u/s 270AA of the I.T. Act, has been received.

In this regard, you are requested to submit whether an application for waiving off/immunity has been filed or not along with documentary evidences by 17.08.2023 Positively, as Penalty Proceedings are going to be barred by limitation on 31.08.2023.”

3.3. The assessee did not make any further submission, therefore, penalty of Rs. 1,78,460/- being the minimum penalty leviable for mis-reporting of the income was imposed.

3.4. Aggrieved with the penalty order, the assessee filed an appeal before Ld. CIT(A), which was dismissed and the relevant extract from the order of the Ld. CIT(A) is as under:

“5.1. The appellant has raised a total of three grounds of appeal in Appeal Memo as reproduced above. The ground 3 is general in nature and does not require any adjudication. The ground 2 pertain to request of the appellant made u/s 270AA for dropping of penalty. The ground 1 pertain to the imposition of penalty for mis-reporting of income which the appellant in the written submissions has withdrawn. During the course of appeal proceedings, the appellant has filed written submissions which are taken on record. The grounds of appeal and written submissions filed by the appellant are taken up for discussion and adjudication in the forthcoming paragraphs.

5.2. The appellant in the written submissions/grounds of appeal for ground 2 has stated that he had not preferred any appeal against the addition made in the assessment order and had paid the tax liability within the due date and requested to drop the penalty proceedings. Further, he had stated that the Ld. AO had imposed penalty on the technical ground that the request was not made in Form 68. The appellant in the written submissions has stated that he was not aware about the provisions of Rule 129 of the IT Rules, 1962 requiring submission of Form 68 to get immunity from imposition of penalty u/s 270AA although he had paid the tax within the due date and had filed prayer for waiver within one month from the end of the month in which the penalty order was passed. The contention of the appellant cannot be accepted for the reason that for granting immunity from imposition of penalty u/s 270A, application shall be made in Form 68. In this connection, attention is drawn to the provisions of Rule 129, Income Tax Rules, 1962 which are reproduced hereunder:

“[Form of application under section 270AA.

129. An application to the Assessing Officer to grant immunity from imposition of penalty under section 270A and from initiation of proceedings under section 276C or section 276CC shall be made in Form No. 68.]”

Mere submission of appellant in writing instead of Form 68 cannot be reason for granting immunity from penalty u/s 270A. Since the appellant has not filed the requisite application for waiving of penalty as per provision of Section 270AA, the AO hence rightly levied penalty u/s 270A and hence the penalty levied by the AO is upheld. Accordingly, the grounds raised by the appellant in this context are dismissed.

5.3. *The appellant in the additional grounds of appeal has stated that the Ld. AO in the assessment order and in the show-cause notice u/s 274 r.w.s. 270A has not specified the offence committed by him under sub-clause of Section 270A(9) and there is no mention of specific violation in the penalty order. Hence, the show-cause issued was not valid and hence the penalty order is unsustainable in law. The contention of the appellant in this regard cannot be accepted for the reason that AO in the assessment order has specifically mentioned that penalty proceedings were initiated for mis-reporting of income. The appellant in the instant case failed to file an application in Form 68 before the AO to grant immunity from imposition of penalty u/s section 270A. The appellant during the course of penalty proceedings failed to avail the opportunities provided by the AO for submitting proper documentary evidences. Hence, the claim of the appellant that the order imposing penalty on the basis of invalid initiation in the assessment order is devoid of any merit and liable to be dismissed. Accordingly, the grounds raised in the context are dismissed.”*

3.5. Aggrieved with the order of the Ld. CIT(A), the assessee has filed the appeal before the Tribunal. Before us, the Ld. AR argued that the firm was an unregistered firm and the deposits in the bank account were disclosed in the return of income showing profit u/s 44AD of the Act. The assessee after receipt of the assessment order applied on plain paper for grant of immunity and had paid tax as well and it was admitted that the assessee did not file Form No. 68 but since substantive compliance had been made, the penalty under section 270A should not have been imposed. He, therefore, requested for cancellation of the same. The Ld. Sr. DR relied upon the order of the Ld. CIT(A).

4. We have considered the rival submissions made and have also gone through the facts of the case and perused the record. The assessee evidently did not file Form No. 68 but had requested for immunity from imposition of penalty on plain paper vide reply dated 18.03.2023 filed in response to the notice for penalty issued on 23.02.2023, i.e. within one month and thereby invoked the applicability of Section 270AA of the Act which is reproduced as under:

“270AA. (1) An assessee may make an application to the Assessing Officer to grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC, if he fulfils the following conditions, namely:—

(a) the tax and interest payable as per the order of assessment or reassessment under sub-section (3) of section 143 or section 147, as the case may be, has been paid within the period specified in such notice of demand; and

(b) no appeal against the order referred to in clause (a) has been filed.

(2) An application referred to in sub-section (1) shall be made 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.

(3) The Assessing Officer shall, subject to fulfilment of the conditions specified in sub-section (1) and after the expiry of the period of filing the appeal as specified in clause (b) of sub-section (2) of section 249, grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC, where the proceedings for penalty under section 270A has not been initiated under the circumstances referred to in sub-section (9) of the said section 270A.

(4) The Assessing Officer shall, within a period of one month from the end of the month in which the application under sub-section (1) is received, pass an order accepting or rejecting such application:

Provided that no order rejecting the application shall be passed unless the assessee has been given an opportunity of being heard.

(5) The order made under sub-section (4) shall be final.

(6) No appeal under 98[section 246 or] section 246A or an application for revision under section 264 shall be admissible against the order of assessment or reassessment, referred to in clause (a) of sub-section (1), in a case where an order under sub-section (4) has been made accepting the application.”

4.1. Since the required Form No. 68 was not filed before the Ld. AO, the Ld. CIT(A) confirmed the penalty imposed by the Ld. AO. However, the Ld. CIT(A) has not appreciated the fact that the assessee had substantively complied with the conditions specified u/s 270AA, not contested the assessment order further and had paid the tax. Hence,

the Ld. CIT(A) has not considered the fact whether for mere non-filing of Form No. 68 but otherwise making the application on a plain paper for waiver of penalty and fulfilling the substantive conditions, the immunity provided u/s 270AA could be denied to the assessee or not when filing of a Form is only a procedural requirement. In this respect, it is imperative to quote the decision of Hon'ble Supreme Court, in the case of **Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner, [1992 Supp (1) Supreme Court Cases 21]** in respect of compliance with the procedural requirements have observed that:

"The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve."

4.2 Further, the higher amount of penalty for mis-reporting of income is specified as per the provisions of sub-section (9) of section 270A and the Ld. AO has not specified under which clause from (a) to (f) the assessee's case fell so as to impose the penalty for misreporting of income. At the most, the case was a case of under reporting of income in the first place. Sub-section (6) of section 270A also excludes cases of under-reported income where the assessee's explanation is found to be *bona fide*. Since the Ld. CIT(A) has gone by the procedural requirement while the assessee had duly complied with the substantive requirement, and neither in the order of the Ld. AO nor in the order of the Ld. CIT(A) a case of mis-reporting of income has been made out and higher amount of penalty has been imposed, hence, in view of the totality of facts and circumstances of the case, it would be in the interest of justice if the

order of the Ld. CIT(A) is set aside and the issue is remitted back to the file of Ld. CIT(A) to decide whether filing of Form 68 could be dispensed with and immunity could be granted when the assessee had paid the taxes, not further contested the order of the Ld. AO and had applied for immunity from imposing of penalty on plain paper. He shall also pass a speaking order as to whether it is a case of mis-reporting of income and which of the clauses of section 270A(9) of the Act, if any is attracted for arriving at his decision. The assessee shall file all necessary evidence before the Ld. CIT(A) for the relief claimed and shall not seek unnecessary adjournments. Needless to say, the assessee shall be given a reasonable opportunity of being heard to make any further submission he wants to make in support of his grounds of appeal. Accordingly, all the grounds taken by the assessee in this appeal are allowed for statistical purposes.

5. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 14th January, 2025.

Sd/-

[Pradip Kumar Choubey]

Judicial Member

Sd/-

[Rakesh Mishra]

Accountant Member

Dated: 14.01.2025

Bidhan (P.S.)

Copy of the order forwarded to:

1. **Terai Fruits Company, Mallaguri, Pradhan Nagar, Siliguri, West Bengal, 734003.**
2. **Income Tax Officer, Ward-1(1), Siliguri.**
3. CIT(A)-NFAC, Delhi.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

// True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata