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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 500/2024

PR. COMMISSIONER OF

INCOME TAX (CENTRAL)-2 .....Appellant

Through: Mr. Sanjay Kumar, Advocate.

versus

JAINA MARKETING AND ASSOCIATES .....Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% 23.09.2024

1. The Principal Commissioner impugns the order of the Income Tax Appellate Tribunal [‘**Tribunal**’] which has annulled the imposition of penalty under Section 270(A)(9) of the Income Tax Act, 1961 [‘**Ac**t’], observing as follows: -

> 7. As could be seen from the above penalty notice, the Ld. A.O. has mentioned the provision of Section 270A of the Act, the A.O. has not specified as to how the Assessee's case falls within the instances given in Clauses (a) to (g) of the sub-Section (2) or Clauses (a) to (f) of Sub-Section (9) of Section 270 of the Act, as per the said notice, apparently the penalty was intended for 'under reported income'. But the order of the penalty passed u/s 270A of the Act by the A.O levying penalty for 'mis-reporting of income’. The various High Courts and Benches of the Tribunal repeatedly held that the defective penalty notice issued by the Department without mentioning the proper limbs and details will be fatal to the entire penalty proceeding.
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> 8. The Hon'ble Jurisdictional High Court in the case of *Schneider Electric South East Asia (HQ) Pte Ltd vs. ACIT in W.P.(C) 5111/ 2022 (Del)* dated 28.03.2022 held as under: -
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> > "6. Having perused the impugned order dated 09th March, 2022, this Court is of the view that the Respondents' action of denying the benefit of immunity on the ground that the penalty was initiated under Section 270A of the Act for misreporting of income is not only erroneous but also arbitrary and bereft of any reason as in the penalty notice the Respondents have failed to specify the limb

"underreporting" or "misreporting" of income, under which the penalty proceedings had been initiated.

7. This Court also finds that there is not even a whisper as to which limb of Section 270A of the Act is attracted and how the ingredient of sub- section (9) of Section 270A is satisfied. In the absence of such particulars, the mere reference to the word "misreporting" by the Respondents in the assessment order to deny immunity from imposition of penalty and prosecution makes the impugned order manifestly arbitrary.

8 This Court is of the opinion that the entire edifice of the assessment order framed by Respondent No. 1 was actually voluntary computation of income filed by the Petitioner to buy peace and avoid litigation, which fact has been duly noted and accepted in assessment order as well and consequently, there is no question of any misreporting.

9. The Hon'ble Jurisdictional High Court in the case *of Prem Brothers Infrastructure LLP v NFAC reported in 288 Taxman 768 (Del):*

"7. This Court is of the opinion that the only addition in the assessment order framed by Respondent No. 1 is in respect of disallowance under section 14A of the Act. The Petitioner has made a disallowance of Rs.3.20,14,010- which was recomputed by the Assessing Officer at Rs. 6,82,45.759/ -. Thus, this is a case where the amount of underreporting of income is consequent to increase in the disallowance voluntarily estimated by the assessee. This court is conscious of the fact that there can be cases where underreporting of income may result in. misreporting of income, however, in peculiar facts of the present case, the underreporting allegedly done by the assessee cannot amount to misreporting as the assessee had furnished all the details of the transactions relating to disallowance made under section 14A of the Act and the AO as well as assessee has used the same details to arrive at different conclusions i.e. differing quantum of disallowances under section 14A of the Act. This by no stretch of imagination can be held to be 'misreporting'.

8. This Court also finds that there is not even a whisper as to which limb of section 270A of the Act is attracted and how the ingredient of sub- section (9) of section 270A is satisfied. In the absence of such particulars, the mere reference to the word "misreporting" by the Respondents in the penalty order to deny immunity from imposition of penalty and prosecution makes the impugned order manifestly arbitrary.

9. Consequently, the impugned penalty order dated 28th March 2022 passed by Respondent No. 1 under section 270A of the Act is quashed and Respondent No. 1 is directed to grant immunity under section 270AA of the Act to the Petitioner.

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13. The issue of not mentioning specific limb in the penalty notice is fully covered by the decision of the Hon'ble Delhi High Court in the case of *Sahara India Life Insurance Ltd reported in 432 ITR 84 (Del)* wherein it was held that: -

"21. The Respondent had challenged the upholding of the penalty imposed under section 271(1) (c) of the Act, which was accepted by the ITAT. It followed the decision of the Karnataka High. Court in CIT v. Manjunatha Cotton 86 Ginning Factory [2013] 35 taxmann.com 250/218 Taxman 423/359 ITR 565 and observed that the notice issued by the AO would be bad in law if it did not specify which limb of section 271(1)(c) the penalty proceedings had been initiated under i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. The Karnataka High Court had followed the above judgment in the subsequent order in CIT v. SSA's Emerald Meadows [2016] 73 taxmann.com 241, the appeal against which was dismissed by the Supreme Court of India in SLP No. 11485 of 2016 by order dated 5th August, 2016.
22. On this issue again this Court is unable to find any error having been committed by the ITAT. No substantial question of law arises.
23. Appeals are dismissed accordingly.

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15. In the instant case, on perusal of the penalty notice placed on record dated 02/06/2021, it is evident that the Ld. AO had show caused the assessee as to why the assessee should not be imposed with penalty for *'under reporting of income'*. The assessee had filed its submissions stating that he had not *'under reported its income'*. We are unable to comprehend ourselves to accept to the argument of the Ld. DR that assessee did not make any submissions with regard to *`mis reporting of income'*. The assessee could be expected to give reply only in respect of show cause notice that is put to him. Why at all the assessee should infer/ assume/presume that the Ld. AO having recorded satisfaction in the quantum assessment order that offence of both 'under reporting' and 'mis reporting' is committed by the assessee and accordingly the penalty would be levied on the assessee for both in terms of section 270A(9) of the Act?

16. It is well settled that penalty proceedings and assessment proceedings are separate and distinct. Reliance in this regard is placed on the decision of Hon’ble Supreme Court in the case of Anantharam Veera Singhaiah & Co. Vs. CIT reported in 123 ITR 457 (SC) wherein it was held that findings recorded in assessment proceedings cannot be taken as conclusive for penalty proceedings. Even the provisions of section 270A (6) of the Act provides for granting immunity from penalty if the case falls in “under reporting of income”. Moreover, different rates of penalty are prescribed for `under reporting of income' alone and for 'under reporting' in consequence of 'misreporting of income'. Hence it is all the more essential to mention in the show cause notice itself as to which of the offence is committed by the assessee for which explanations are being sought for by the Ld. AO. There is no whisper at all in the notice issued u/s 270A read with section 274 of the Act about

"misreporting of income". In-fact two notices were issued by the Ld. AO and in both the notices, the A.O. had only directed the assessee to reply with regard to 'under reporting of income'. But we find that the penalty had been levied ultimately for both 'under reporting' and 'misreporting of income' @ 200% in terms of section 270A(9) of the Act for which show cause notice was never issued to the assessee. The ratio laid down in the aforesaid Full Bench decision of Hon'ble Bombay High Court, the decision of Hon'ble Jurisdictional High Court in the case of Sahara India Life Insurance reported in 432 ITR 84 (Del) and other decision reared supra squarely applies to the facts of the instant case before us. Hence we direct the Ld. AO to delete the penalty levied u/s 270A of the Act for the Assessment Year 2017-18. Accordingly, we allow the Appeal of the Assessee on this technical ground and leave the grounds raised on levy of penalty on merits left open as adjudication of the same becomes academic in nature.

2. As is manifest from the above, there was an apparent and ex facie absence of reference to the particular limb which was sought to be invoked for the purposes of imposition of penalties. This aspect had also been examined by us in **GE Capital US Holding Inc vs. Dy. Commissioner of Income Tax (International Taxation) Circle 1(13)(1), New Delhi & Ors. [2024 SCC OnLine Del 4233]** and where we had held: -

"**22.** As is evident from a reading of Section 270A(1), a person would be liable to be considered to have under-reported its income if the contingencies spoken of in clauses (a) to (g) of Section 270A(2) were attracted. In terms of Section 270A(3), the under-reported income is thereafter liable to be computed in accordance with the stipulations prescribed therein. However, the subject of misreporting of income is dealt with separately in accordance with the provisions comprised in sub-sections (9) and (10) of Section 270A. It is thus evident that both under-reporting as well as misreporting are viewed as separate and distinct misdemeanors.

23. However, and as we read the orders of assessment which were passed, the same carry no findings which may be viewed as indicative of the contingencies spelt out in clauses (a) to (f) of Section 270A(9) being attracted. In our considered opinion, in the absence of the AO having specified the transgression of the petitioner and which could be shown to fall within the ambit of sub-section (9) of Section 270A, proceedings for imposition of

penalty could not have been mechanically commenced.

24. Notwithstanding the above, we note that the SCNs' which came to be issued for commencement of action under Section 270A were themselves vague and unclear. This since they failed to specify whether the petitioner was being charged with under-reporting or misreporting of income. The aforesaid aspect assumes added significance bearing in mind the indisputable position that a prayer for immunity could have been denied in terms of Section 270AA(3) only if it were a case of misreporting. The SCNs' failed to indicate the specific charge which was sought to be laid against the petitioner. This, since they sought to invoke both sub-sections (2) as well as sub-section (9) of Section 270A. There was thus an abject failure on the part of the respondents to indicate the branch of Section 270A which was sought to be invoked. The SCNs' would thus clearly fall foul of the principles which had been enunciated in *Minu Bakshi* and *Schneider Electric*.

25. Turning then to Section 270AA, we find that sub-section (3) of that provision requires the AO to confer consideration on the following three aspects: -
(a) Whether the conditions precedent specified in sub-section (1) of Section 270AA have been complied with?
(b) The period for filing an appeal under Section 249(2)(b) having passed.
(c) The subject matter of penalty not falling within the ambit of Section 270A (9).

26. Since an application for grant of immunity cannot possibly be pursued unless the assessee complies with clauses (a) and (b) of Section 270AA (1), the observation of the respondent that mere payment of demand would not lead to a prayer for immunity being pursued is wholly unsustainable.

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29. Since there was a clear and apparent failure on the part of the respondents to base the impugned proceedings on a contravention relatable to Section 270A (9), the application for immunity could not have been rejected. As was noticed hereinabove, neither the AO nor the impugned SCNs' laid an allegation which could be said to be reflective of the petitioner having been found to have violated Section 270 A (9). In fact, the notices themselves sought to take a wholly ambivalent stance while alleging that the petitioner had indulged in "underreporting/misreporting". We thus have no hesitation in holding that the impugned SCNs' are rendered unsustainable on this short ground alone.

30. The importance of clarity and comprehensiveness which must imbue show cause notices came to be duly emphasised by us in our decision in **Puri Constructions (P) Ltd. Vs. CIT**:-

> "**78.** The requisites of a valid show-cause notice were lucidly explained by the Supreme Court in *Gorkha Security Services v. Government (NCT of Delhi)* as under: —
> "Contents of the show-cause notice
> 21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.
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> **79.** Similar observations find place in *UMC Technologies Pvt. Ltd. v. Food Corporation of India*:
> "13. At the outset, it must be noted that it is the first principle of civilised jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should be given a reasonable opportunity to defend himself. The basic principle of natural justice is that before adjudication starts, the authority concerned should give to the affected party a notice of the case against him so that he can defend himself. Such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. An order travelling beyond the bounds of notice is impermissible and without jurisdiction to that extent. This court in Nasir Ahmad v. Custodian General, Evacuee Property- has held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard."
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> **80**. The reliance which is placed by Mr. Hossain on the decisions in *Isha Beevi v. TRO* and *CIT v. Rajinder Nath* is clearly misconceived. We note that in Isha Beevi, the writ petitioner had sought the issuance of a writ of prohibition seeking quashing of notices that were impugned. It was in the aforesaid context and the prerequisites of a writ of prohibition that the Supreme Court observed that the mere mentioning of a wrong provision would not justify the issuance of that prerogative writ and more so where the writ petitioner had failed to establish a total absence of jurisdiction.\
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> **83**. The principle of a power otherwise inhering or existing and not being impacted by the mere mention of a wrong provision is one which we apply to ratify, save and uphold a decision which is

otherwise found to be valid and sustainable. We would be wary of either readily or unhesitatingly adopting or invoking that precept at the stage of a show-cause notice especially where the noticee is left to fathom which of the more than fifty variable obligations it is alleged to have violated."

31. We are further constrained to observe that even the assessment orders fail to base the direction for initiation of proceedings under Section 270A on any considered finding of the conduct of the petitioner being liable to be placed within the sweep of sub-section (9) of that provision. The order of assessment as well as the SCNs' clearly fail to meet the test of —"specific limb" as propounded in *Minu Bakshi* and *Schneider Electric*. A case of misreporting, in any case, cannot possibly be said to have been made out bearing in mind the fact that the petitioner had questioned the taxability of income asserting that the same would not constitute royalty. The issue as raised was based on an understanding of the legal regime which prevailed. The contentions addressed on that score can neither be said to be baseless nor specious. In fact, that stand as taken by the petitioner was based on a judgment rendered by the jurisdictional High Court which was indisputably binding upon the AO who, for reasons unfathomable, thought it fit to base its decision on a judgment rendered by the Karnataka High Court. The AO, it would be pertinent to recall, chose to distinguish the judgment of the Supreme Court in *Engineering Analysis* itself. In any event, the position which the petitioner sought to assert and canvass clearly stood redeemed in light of the decision rendered by the Supreme Court.

32. Undisputedly, the petitioner had duly complied with the statutory pre-conditions set out in Section 270AA(1). It was thus incumbent upon the respondent to have come to the firm conclusion that the case of the petitioner fell in the category of misreporting since that alone would have warranted a rejection of its application for immunity. On an overall conspectus of the aforesaid, we come to the firm conclusion that the impugned orders would not sustain."

3. We, consequently, find no ground to interfere with the order impugned. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

SEPTEMBER 23, 2024/*vp*