

Rajasthan High Court - Jodhpur

G R Infraprojects Limited vs Assistant Commissioner Of ... on 2 January, 2024

Bench: Vijay Bishnoi, Munnuri Laxman

[2023:RJ-JD:44789-DB] HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR D.B. Civil Writ Petition No. 5594/2023 G R Infraprojects Limited, Through Its General Manager Shri Kuldeep Jain (Age 46 Years), Having Head Office At G R House, Hiran Magri, Sector-11, Udaipur (Rajasthan)- 313002.

----Petitioner Versus

1. Assistant Commissioner Of Income-Tax, Circle-2, Aaykar Bhawan, Subcity Center, Savina, Udaipur Rajasthan - 313001.
2. Principal Chief Commissioner Of Income-Tax, Income-Tax Department, Ncr Building, Statue Circle, Jaipur (Rajasthan)- 302005.
3. Central Board Of Direct Taxes, Through Chairperson, Type-7, Bungalow No. 75, New Moti Bagh, New Delhi - 110021.

----Respondents

For Petitioner(s)	:	Mr. Vikas Balia, Sr. Advocate assisted by Mr. Prateek Gattani
For Respondent(s)	:	Mr. K. K. Bissa

HON'BLE MR. JUSTICE VIJAY BISHNOI
HON'BLE MR. JUSTICE MUNNURI LAXMAN
Judgment

02/01/2024 (Per Hon'ble Vijay Bishnoi, J.)

1. This writ petition is filed by the petitioner seeking following reliefs:

"It is, therefore, most humbly prayed that this Hon'ble Court may kindly be pleased to:-

- a. Issue writ in the nature of mandamus or any other appropriate writ, order or direction for quashing and/or set-aside the Impugned Penalty Order dated 31.03.2023 (Annexure-11) passed under Section 270A of the Income-tax Act, 1961 by the Respondent No.1;
- b. Issue writ in the nature of mandamus or any other appropriate writ, order or direction for quashing and/or [2023:RJ-JD:44789-DB] (2 of 16) [CW-5594/2023] set-aside consequential

demand notice dated 31.03.2023 (Annexure-11) issued under Section 156 of the Income-tax Act, 1961 by the Respondent No.1; c. To issue writ of mandamus and/or any other appropriate writ to declare that disallowance of deduction in respect any surcharge of cess which is not allowable as deduction under Section 40 then in terms of Section 155(18) of the Act for the purpose of levy of penalty under Section 270A of the Act the same shall be considered as under- reported income and therefore immunity from Imposition of penalty as envisaged under Section 270AA of the Act shall not be denied if an assessee qualifies conditions as enumerated under sub section (1) and (2) of Section 270AA of the Act d. Allow the writ petition with costs;

e. Grant any other relief as deemed to be fit and proper under the facts and circumstances of the case."

2. The facts, not in dispute, are that the petitioner is a public limited company and engaged in execution of turnkey infra- projects. The petitioner-company is regularly filing its income tax return as per applicable provisions of Income Tax Act, 1961 (hereinafter referred as 'the Act').

3. The petitioner-company filed return of income for the financial year 2019-2020 i.e. assessment year 2020-21 on 13.02.2021. A show cause notice dated 29.06.2021 under Section 143(2) of the Act was issued to the petitioner-company. Subsequently, notices under Section 142 (1) of the Act were issued to the petitioner- company on 26.11.2021 and 26.02.2022 which were replied by the petitioner-company vide notice dated 16.03.2022. The petitioner-company was asked to show cause why not its claim for deduction of education cess of Rs.12,85,58,982/- be disallowed [2023:RJ-JD:44789-DB] (3 of 16) [CW-5594/2023] and be added back to its income for the relevant financial year and penalty proceeding be initiated under Section 270-A of the Act.

4. In response to the notice dated 16.03.2022, the petitioner- company vide reply dated 19.03.2022 has withdrawn its claim for deduction of education cess and accepted the proposed variation. The Assessing Officer has passed the assessment order dated 22.09.2022 whereby single addition in relation to deduction of education cess of Rs.12,85,58,982/- is made and added it back to the income of the petitioner-company and ordered for initiating penalty proceeding under Section 270A of the Act for misreporting by way of underreporting of income. Simultaneously, notice dated 22.09.2022 is issued to the petitioner-company under Section 274 read with Section 270A of the Act to show cause why penalty be not imposed on it. In response to the notice dated 22.09.2022, the petitioner-company filed its response vide reply dated 18.10.2022 and also filed an application under Section 270AA of the Act seeking immunity from imposition of penalty under Section 270A of the Act under prescribed form. Another show cause notice dated 06.02.2023 under Section 270A of the Act was issued by the Assessing Officer for imposing penalty which is also replied by the petitioner-company on 13.02.2023. Thereafter, again a show cause notice dated 30.03.2023 for imposing penalty under Section 270A of the Act was issued and the petitioner-company was asked to file reply on or before 31.03.2023 at 5:00 PM. As per the petitioner-company, reply to the same has been filed by it on 31.03.2023 before 5:00 PM however, the respondent-department [2023:RJ-JD:44789-DB] (4 of 16) [CW-5594/2023] passed the penalty order dated 31.03.2023 under Section 270A of the income Tax Act and imposed a penalty of 200% of tax upon the petitioner-company. Consequently, notice of demand dated 31.03.2023 under Section 156 of Income

Tax Act was issued to the petitioner-company. Being aggrieved with the same, the petitioner-company has filed this writ petition.

5. Reply to the writ petition has been filed on behalf of the respondents, wherein preliminary objection regarding maintainability of the writ petition is raised on the ground of availability of alternative remedy of filing an appeal. The respondent-department has also justified its action in passing the impugned order dated 31.03.2023 and the impugned notice dated 31.03.2023.

6. Learned counsel for the petitioner has submitted that though the impugned order dated 31.03.2023 passed under Section 270A of the Act is appealable under Section 246A of the Act but as the impugned order has been passed in violation of principle of natural justice and in contravention of the statutory scheme of the Act, the petitioner-company has invoked the extraordinary powers of this Court under Article 226 of the Constitution of India.

7. It is argued that issue raised by the petitioner-company in this petition is purely legal and does not require any investigation into the facts, the writ petition filed by the petitioner-company under Article 226 of the Constitution of India is maintainable. Learned counsel has placed reliance on a decision of Hon'ble Supreme Court rendered in M/s Godrej Sara Lee Ltd. vs. The Excise [2023:RJ-JD:44789-DB] (5 of 16) [CW-5594/2023] and Taxation Officer-cum-Assessing Authority and Ors., 2023 SCC OnLine SC 95.

8. On the other hand, learned counsel for the respondent- department has submitted that in view of the availability of alternative and statutory remedy of appeal to the petitioner- company under Section 246A of the Act, the writ petition filed by the petitioner-company is liable to be dismissed on the ground of alternative remedy only. Learned counsel for the respondent- department has placed reliance on a decision of Division Bench of this Court rendered in Hindustan Zinc Limited vs. National Faceless Assessment Centre & Ors. (D.B.Civil Writ Petition No. 11772/2022) and one another connected writ petition decided on 22.09.2022. He has also placed reliance on a decision of Single Bench of this Court dated 13.12.2021 rendered in Veetrag Buildcon Private Limited vs. Union of India and Ors. (S.B.Civil Writ Petition No.12283/2021).

9. On merits, learned counsel for the petitioner-company has submitted that while filing return for the financial year 2019-20, the petitioner-company claimed the benefit of deduction of education cess, which was permissible during the relevant time of filing return of income in view of the judgment passed by this Court in Chambal Fertilisers and Chemical Ltd. vs. JCIT, Range 2, Kota (D.B. Income Tax Appeal No.52/2018), wherein the Division Bench of this Court has categorically held that cess is not tax. It is further submitted that the Bombay High [2023:RJ-JD:44789-DB] (6 of 16) [CW-5594/2023] Court in Sesa Goa Limited vs. JCIT (ITA No.17/2013) has also held that education cess is allowable expenditure/deduction.

10. It is contended that in the year 2022 vide Finance Act, 2022 sub-section (18) has been inserted in Section 155 of the Act and the said amendment came into force on 01.04.2022. As per the said amendment, it is provided that any deduction of any surcharge or cess, which is not allowable as deduction under Section 40 of the Act has been claimed and allowed in the case of an assessee in

any previous year, such claim shall be deemed to be under-reported income of the assessee for such previous year under sub-section (3) of Section 270A of the Act. It is further provided that such claim of surcharge/cess shall not be considered as under-reported in case the assessee makes an application to the assessing officer in the prescribed form and within the prescribed time, requesting for recomputation of total income of the previous year without allowing the claim for deduction of surcharge/cess and pay the amount of tax due thereon within specified time.

11. Learned counsel has further argued that the benefit of allowable deduction of education cess was claimed by the petitioner-company when it was permitted as per law, however, as soon as the amendment under Section 155 of the Act was introduced by way of inserting sub-section (18), the petitioner-company immediately suo moto withdrew its claim for cess amounting to Rs. 12,85,58,982/- to buy mental peace and to avoid litigation and levy of penalty etc. vide letter dated [2023:RJ-JD:44789-DB] (7 of 16) [CW-5594/2023] 19.03.2022. In such circumstances, it cannot be said that the petitioner-company has concealed any fact or misrepresented. In the above circumstances, it cannot be said that the petitioner-company has under-reported the income by way of misreporting.

12. It is further argued that penalty under Section 270A of the Act can only be levied if an assessee misrepresent its income in consequence of misreporting, which is categorized in sub-section (9) of Section 270A of the Act. It is contended that from the assessment order dated 22.09.2022 and further show-cause notices issued by Assessing Officer, it is nowhere reflected that which part of sub-section (9) of Section 270A is attracted in the case of petitioner-company, hence the action of respondents of rejecting the application of petitioner-company seeking immunity from imposition of penalty under Section 270AA of the Act, holding that the petitioner-company is not fulfilling the condition mentioned in the sub-section (3) of the Section 270AA of the Act, is arbitrary and illegal.

13. It is further submitted that as per the provisions of Section. 270AA of the Act, an assessing officer is bound to decide the application filed by any assessee for granting immunity from imposing penalty under Section 270A within specified time but in the case of the petitioner, the said application has never been decided within the prescribed time limit and straightway the impugned order has been passed, whereby the said application for granting immunity from imposing penalty has also been dismissed in illegal manner.

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14. While relying on the decisions of Delhi High Court rendered in Schneider Electric South East Asia (HQ) Pte Ltd. vs. Asst. Commissioner of Income Tax International Taxation Circle 3(1)(2), New Delhi & Ors. [2022] 443 ITR 186 (Delhi), Ultimate Infratech Private Limited vs. National Faceless Assessment Centre Delhi & Anr., 2022(4) 1086 - DELHI HIGH COURT and Rohit Kapur VS. Principal Commissioner of Income Tax-7, New Delhi & Anr., 2023(3) TMI 930 DELHI HIGH COURT, learned counsel for the petitioner-company has prayed that the writ petition may be allowed and the reliefs claimed in this writ petition may kindly be granted.

15. Per contra, learned counsel for the respondents countering the submissions of counsel for petitioner on merits has argued that the respondent-department has not committed any illegality in passing the impugned order as the petitioner-company is not eligible for immunity from levying of penalty under Section 270AA of the Act.

16. Heard learned counsel for the rival parties.

17. So far as maintainability of this writ petition is concerned, having gone through the material available on record, we find that in the present case, there is no requirement of making an investigation into facts and the question raised by the petitioner in this writ petition is only this that whether the petitioner-company is entitled to claim benefit of immunity from imposition of penalty under Section 270A of the Act or not. The Hon'ble Supreme Court in *M/s Godrej Sara Lee Ltd. vs. The Excise and Taxation* [2023:RJ-JD:44789-DB] (9 of 16) [CW-5594/2023] Officer-cum-Assessing Authority and Ors. (supra) has held that where the controversy is purely legal one and does not involve disputed question of fact but only question of law, then it should be decided by the High Court instead of dismissing the writ petition on the ground of alternative remedy. The relevant portion of the decision is reproduced hereunder:

"8. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (*State of Uttar Pradesh & ors. vs. Indian Hume Pipe Co. Ltd.*) and (2000) 10 SCC 482 (*Union of India vs. State of Haryana*). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available."

18. In view of the above, the preliminary objection raised by the respondents regarding maintainability of the writ petition is rejected.

19. For proper adjudication of controversy involved, we deem it appropriate to quote the relevant provisions of the Income Tax Act, which read thus:

"155. Other amendments [2023:RJ-JD:44789-DB] (10 of 16) [CW-5594/2023] (18) Where any deduction in respect of any surcharge or cess, which is not allowable as deduction under section 40, has been claimed and allowed in the case of an assessee in any previous year, such claim shall be deemed to be under-reported income of the assessee for such previous year for the purposes of sub-

section (3) of section 270A, notwithstanding anything contained in sub-section (6) of section 270A, and the Assessing Officer shall recompute the total income of the assessee for such previous year and make necessary amendment; and the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of section 154 being reckoned from the end of the previous year commencing on the 1st day of April, 2021: Provided that in a case where the assessee makes an application to the Assessing Officer in the prescribed form and within the prescribed time, requesting for recomputation of the total income of the previous year without allowing the claim for deduction of surcharge or cess and pays the amount due thereon within the specified time, such claim shall not be deemed to be under-reported income for the purposes of sub-section (3) of section 270A.

270A. Penalty for under reporting and misreporting of 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.

270AA. Immunity from imposition of penalty, etc. (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:- [2023:RJ-JD:44789-DB] (11 of 16) [CW-5594/2023]

- (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 section [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."

20. Sub-section (18) of Section 155 of the Income Tax Act is inserted vide Finance Act, 2022 w.e.f. 01.04.2022. The above referred provisions provide that deduction of any surcharge, cess, which is not allowable as deduction under Section 40 of the Income Tax Act, then such claim shall be deemed to be under- [2023:RJ-JD:44789-DB] (12 of 16) [CW-5594/2023] reported income of the assessee for the purpose of levy of penalty under Section 270A of the Act. It further provides that if an assessee makes an application to the assessing officer in prescribed form in prescribed time requesting for recomputation of income of previous year deducting the surcharge or cess and pays the difference amount within specified time, his claim shall not be deemed to be unreported income.

21. Section 270A of the Act specifies penalty for under-reporting and misreporting, wherein sub-section (9) of Section 270AA of the Act categorizes the cases of misreporting of income.

22. Sub-section (3) of Section 270AA of the Income Tax Act empowers the assessing officer to grant immunity from imposition of penalty under Section 270A and initiation of proceedings under Section 276C or under Section 276CC of the Income Tax Act on fulfillment of the conditions of sub-section (1) of Section 270AA after the expiry of the period of filing the appeal if the proceeding has not been initiated against the assessee under the circumstances referred to in sub-section (9) of Section 270A.

23. Sub-section (4) of Section 270AA provides that the assessing officer shall pass an order accepting or rejecting any application filed by the assessee seeking immunity from imposition of penalty under Section 270A within a period of one month from the end of month in which the application under sub-section (1) is received.

24. In the case of Schneider Electric South East Asia (HQ) Pte Ltd. (supra), Delhi High Court has held as under: [2023:RJ-JD:44789-DB] (13 of 16) [CW-5594/2023] "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 the assessment order as well and consequently, there is no question of any misreporting.

9. This Court is further of the view that the impugned action of Respondent No.1 is contrary to the avowed Legislative intent of Section 270AA of the Act to encourage/incentivize a taxpayer to (i) fast-track settlement of issue, (ii) recover tax demand; and

(iii) reduce protracted litigation.

[Emphasis supplied]

25. In Ultimate Infratech Private Limited vs. National Faceless Assessment Centre Delhi & Anr.(supra), Delhi High Court has held as under:

"5. Having heard learned counsel for the petitioner, this Court is of the view that it is only in cases where proceedings for levy of penalty have been initiated on account of alleged misreporting of income that an assessee is prohibited from applying and availing the benefit of immunity from penalty and prosecution under Section 270AA.

6. In fact, the statutory scheme for grant of immunity is based on satisfaction of three fundamental conditions, namely, (i) payment of tax demand; (ii) [2023:RJ-JD:44789-DB] (14 of 16) [CW-5594/2023] non-institution of appeal; and (iii) initiation of penalty on account of under reporting of income and not on account of misreporting of income.

7. This Court is also of the view that the petitioner cannot be prejudiced by the inaction of the Assessing Officer in passing an order under Section 270AA of the Act within the statutory time limit as it is settled law that no prejudice can be caused to any assessee on account of delay/default on the part of the Revenue.

8. In the present case, the petitioner has satisfied the aforesaid conditions, inasmuch as, (i) the tax has been paid on the additions; (ii) appeal has undisputedly not been filed; and (iii) penalty (as would be evident from the penalty notice) has been initiated on account of "underreporting" of income."

26. In Rohit Kapur VS. Principal Commissioner of Income Tax-7, New Delhi & Anr. (supra), Delhi High Court has held as under:

"12. Before proceeding further, it is relevant to refer to Sub-section 4 of Section 270AA of the Act, which reads as under:

270AA xxxx xxxx xxxx 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.

xxxx xxxx xxxx

13. The proviso to Sub-section (4) of Section 270AA of the Act makes it amply clear that before an application of rejected, the applicant must be given an opportunity of being heard. In the present case, there is no dispute that the petitioner was not afforded the said opportunity.

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14. In view of the above, this Court considers it apposite to set aside the impugned order as the same has been passed without following the procedure as set out in Section 270AA(4) of the Act."

27. In the present case, neither in the assessment order dated 22.09.2022 nor in the subsequent show-cause notices, the Assessing Officer has specified that the case of the petitioner- company is covered under which part of sub-section (9) of Section 270A of the Act. Even in the impugned order dated 31.03.2023 also, it is not specified that which part of sub-section (9) of Section 270A of the Act is attracted in the case of petitioner.

28. Otherwise also, the petitioner-company in its reply to show cause notice dated 16.03.2022 and subsequent replies to the different show cause notices has justified its claim for deduction of education cess, however, the Assessing Officer without considering the said justification or rejecting the same has passed the impugned order mechanically. We are of the view that once the petitioner-company has withdrawn its claim vide letter dated 19.03.2022 for deduction of education cess in view of insertion of sub-Section (18) of Section 155 before it came into force w.e.f. 01.04.2022, the petitioner-company is entitled for immunity from imposition of penalty under Section 270A of the Act though the proceedings against it were initiated for imposition of penalty. Moreover, while initiating the said proceedings vide order dated 22.09.2022, the Assessing Officer has failed to specify that which part of sub-Section (9) of Section 270A is attracted in the case of petitioner-company, the said initiation is nonest. The respondent [2023:RJ-JD:44789-DB] (16 of 16) [CW-5594/2023] vide impugned order dated 31.03.2022 has clarified that the petitioner-company is fulfilling the conditions mentioned in sub- Section (1) and (2) of Section

270AA, however, its conclusion that the petitioner-company do not fulfill the condition mentioned in sub-section (3) of Section 270AA of the Act is illegal and cannot be sustained.

29. Apart from that the application filed by the petitioner-company under Section 270AA of the Act seeking immunity from imposition of penalty has not been decided by the Assessing Officer within prescribed time as per sub-section (4) of Section 270AA of the Act, the impugned action of the Assessing Officer of imposing penalty against the petitioner-company is liable to be set aside.

30. Resultantly, this writ petition is allowed. The penalty order dated 31.03.2023 passed under Section 270A of the Income Tax Act is set aside. The demand notice issued by the respondent No.1 under Section 156 of the Income Tax Act is also set aside. The respondent No.1 is directed to grant immunity under Section 270AA of the Income Tax Act to the petitioner-company.

31. No order as to cost.

(MUNNURI LAXMAN), J
masif/-D.R.