Direct Tax Refresher Course (DTRC)-2024

Important Judgements of Hon’ble ITAT Pune Bench

Organised by : Pune Branch of WIRC of ICAI

By CA PRAMOD S SHINGTE (PUNE)

CASE NO. 1

Sohanlal Mohanlal Bhandari

v.

Assistant Commissioner of Income Tax, Circle-1, Nashik

IT APPEAL NO. 294/PUN/2017

ASSESSMENT YEAR 2013-14

FACTS OF THE CASE

- The assessee transferred certain plot of land (being, original asset) on 11-6-2012 which resulted into long-term capital gain of Rs. 97.47 lakhs.
- Against this Capital Gain assessee claimed exemption under section 54F for a sum ofRs.87.73 lakhs on proportionate basis towards investment of Rs.113 lakhs on purchase of plot and construction of a new residential house thereon.
- The plot purchased by assessee could be divided into two parts, *viz.*, the first part of the plot purchased on 11-10-2010 and the second part of the plot purchased in the year 2011/12. In addition, the assessee incurred cost of construction amounting to Rs.67.60 lakhs on the above common plot for a new residential house.
- The Assessing Officer held that such purchase of land by the assessee for Rs.44.15 lakhs made prior to the date of the transfer of original asset, could not be considered as qualifying amount. Allowing exemption under section 54F on the cost of construction incurred by the assessee to the tune of Rs.67.60 lakhs, the Assessing Officer rejected the claim of the assessee for exemption *qua* purchase of total plot amounting toRs.44.15 lakhs.
- On appeal, the Commissioner (Appeals) restricted the disallowance only to purchase of the first part of plot of land on 11-10-2010 for Rs.34.83 lakhs which was beyond a period of one year before the date of transfer of the original asset.

HELD

- Sub-section (1) of section 54F provides that where the capital gain arises from transfer of any long-term capital asset (original asset), other than a residential house and the assessee has within a period of one year before or two years after the date on which the transfer took place purchased or has within a period of three years after that date constructed a new residential house, then no capital gain on transfer of the original asset shall be charged if the cost of new asset is more than the net consideration in respect of the original asset.
- On a careful circumspection of sub-section (1), it is clearly discernible that the legislature has given three disjunctive and mutual exclusive modes in which the exemption can be claimed.
- The use of word 'or' at the relevant places in the above provision leaves nothing to doubt that there are three distinct non-overlapping modes providing for exemption, namely:—
- i. where the assessee has, within a period of one year before the date on which the transfer took place purchased ….. a residential house;
- ii. where the assessee has, within a period of two years after the date on which the transfer took place purchased, …. a residential house ;
- iii. where the assessee has, has within a period of three years after that date constructed, a residential house. [Para 6]

- The reference to the cost of purchase or construction of residential house includes the cost of plot also and accordingly, the cost of land is liable to be considered for the purpose of granting exemption along with the amount spent on purchase or construction of superstructure thereon.
- The position that the cost of plot should also be considered as eligible for exemption under section 54F along with the cost of construction has not been agitated by the authorities below and rightly so. The CBDT has also accepted this position vide Circular No.667 dated 18-10-1993 by providing that 'the Board are of the view that the cost of land is an integral part of the cost of the residential house, whether purchased or built.
- Accordingly, if the amount of capital gain for the purposes of section 54 and the net consideration for the purposes of section 54F, is appropriated towards purchase of a plot and also towards construction of a residential house thereon, the aggregate cost should be considered for determining the quantum of deduction under section 54/54F….'.[Para 7]
- The first mode grants exemption when the assessee purchases a residential house within a period of one year before the date of transfer of the asset. This part of the provision straight away talks of purchasing a residential house.
- The process of purchasing a new residential house may have kick started at any point of time, but it must culminate with completion of purchase of a new residential house within a period of one year before the date of transfer of the original asset.

- The second mode provides for exemption when the assessee purchases a new residential house within a period of two years after the date of transfer of the asset.
- Here again, it is manifest that the process of purchasing a new residential house may have started at any point of time, but it must terminate with the completion of purchase of a new residential house within a period of two years from the date of transfer of the original asset.
- The third mode, in the like manner ,also provides for exemption to the assessee constructing a new residential house within a period of three years from the date of transfer of the original asset.

Reference to the period of three years for constructing a new residential house is only for completing the construction and not commencing the construction.

The above view emerges on a harmonious reading of different limbs of section 54F including sub-section (4),whose proviso provides that if the amount deposited under this sub-section is not utilized wholly or partly for the purchase or construction of the new asset within the period specified in sub-section (1), then, (*i*)the amount by which— (a) the amount of capital gain arising from the transfer of the original asset not charged under section 45 on the basis of the cost of the new asset as provided in clause (a) or, as the case maybe, clause (b) of sub-section (1), exceeds (b) the amount that would not have been so charged had the amount actually utilised by the assessee for the purchase or construction of the new asset within the period specified in sub-section (1) been the cost of the new asset, shall be charged under section 45 as income of the previous year in which the period of three years from the date of the transfer of the original asset expires.

It, therefore, follows that in all the three modes discussed *supra*, the period of one/two/three years respectively is the outer limit for completing the process of purchasing or constructing a new residential house. [Para 8]

- At this juncture it would be relevant to comprehend the object of enactment of section 54F, which can be culled out from its language. Sub-section (1) provides for exemption from capital gain arising from the transfer of original asset where the assessee has purchased within a period of one year before or two years after or constructed within three years a new residential house. Sub-section (4) provides that where the new residential house is not purchased or constructed within the stipulated periods as given under sub-section (1), the assessee will be obliged to deposit the unutilized net sale consideration in a designated capital gain scheme bank account before the date of furnishing of return under section 139(1).
- In such a scenario, the assessee will be allowed exemption qua such amount of deposit as well. Sub-section (2)provides that where the assessee purchases or constructs another residential house within the two/three years, which is different from the residential house purchased/constructed by the assessee qualifying for exemption under section 54F, then the amount of exemption allowed under sub-section (1) of section 54Fshall be deemed to be the income of the year in which new non-qualifying residential house is purchased or constructed.

- Sub-section (3) provides that where the new qualifying residential house is transferred within a period of three years from the date of its purchase or construction *etc*., the amount for which exemption under sub-section (1) of section 54F was allowed on account of investment in such purchase/construction of new house, shall be deemed to be the income chargeable under the head 'Capital gains' for the year in which such new qualifying residential house is transferred.
- On a conjoint reading of all the four sub-sections of section 54F, it becomes vivid that the exemption under this section is granted from capital gain arising on the transfer of original asset when an assessee purchases or constructs a new residential house within the prescribed period.
- It is further pertinent to note that such an exemption is not available for any number of residential houses constructed/purchased by the assessee but there is a cap contained in sub-section (2).
- At the same time, there is another deterrent provision in sub-section (3)which restricts transfer of qualifying new residential house within the stipulated period.
- An overview of section 54F, in totality, indicates that the object or purpose of its enactment is to encourage building of new residential house for an assessee and then staying invested in it for certain duration. So long as such an object is achieved and there is no breach of any of the express conditions, the provision should be interpreted in such a manner as advances its purpose and not frustrates it.

- What the legislature has contemplated for allowing exemption under section 54F is that : 'the assessee …. has within a period of three years after that date constructed, one residential house'. It is only the closing deadline of three years from the date of transfer of the original asset, which has been stipulated for completing the construction.[Para 9]
- The contention of the revenue that even though no opening time limit is enshrined in the provision for starting construction of a new qualifying residential house, it should be logically inferred with respect to the date of transfer of original asset as is the case with the purchase of a new residential house within one year before or two years after the date of transfer of the original asset sans merits.
- It is palpable on a simple reading of the provision that there is no reference whatsoever to the opening time limit from which the process of purchasing or constructing a new residential house has to begin. Similar to a situation when an assessee completes the process of purchasing a new residential house within one/two years, if an assessee completes the process of construction of a new residential house within a period of three years from the date of transfer of the original asset, he becomes entitled to exemption.
- In the absence of any opening deadline given in the provision for purchase of land or start of construction thereon, it is wholly impermissible to read the date of transfer of the original asset as the starting period under this mode. [Para10]

- It is important to bear in mind that sale of an original asset and side-by-side purchase or construction of anew residential house is not only an important decision of one's life having repercussions for a longer period of time, but is also a time consuming matter as the concerned person has to mobilise his resources.
- If a plot is purchased in contemplation of ensuing construction within a reasonable time even before the transfer of the original asset, there can be no fetters on the allowability of exemption under section 54F, if other conditions are fulfilled.
- What is a reasonable period, depends on the facts and circumstances of each case, which should normally not exceed two years before the date of transfer of the original asset, albeit such a period of two years cannot be a benchmark.
- A plot of land purchased prior to such a reasonable period cannot ordinarily be viewed as having been purchased for starting construction of a new residential house.
- It, ergo, follows that so long as the construction of a new residential house is completed within a period of three years from the date of transfer of the original asset, the benefit of exemption under section54F has to be allowed with reference to whole of the cost of plot or the cost of construction thereon, even if such a process of purchasing the plot or constructing the house started within a reasonable time anterior to the date of transfer of the original asset.

- Ex consequenti, Circular 667, providing for acquisition of plot and also completing construction within a period of three years from the date of transfer of the asset, being contrary to the intent and language of the provision, cannot be given effect to that extent. [Para 11]
- The revenue tried to fortify his point of view of having the date of transfer of the original asset as the date of initiation of process of construction by arguing that the same is implicit in the provision inasmuch as the net consideration from the transfer of original asset is required to be utilized for constructing a new residential house and it is not possible to start constructing a new residential house unless the original asset is transferred and the full value of consideration is realized.
- This argument tendered on behalf of the revenue cannot be approved.
- It is nowhere stipulated in the provision that only the sale consideration realized from the transfer of the original asset has to be necessarily used for purchasing or constructing anew residential house so as to qualify for exemption under section 54F. The requirement, couched in the language of sub-section (1) itself, is that :
- It is seen from the impugned order that the assessee acquired land in two parts for construction of a new residential house, *viz*, the first part of the plot purchased on 11-10-2010 and the second part of the plot purchased in the year 2011/12.

- The date of certificate for commencement of construction is 26-7-2011.The assessee actually started construction work on 21-4-2012 which went on up to 27-9-2013 and the date of completion of construction as per the certificate is 15-9-2014. The original asset was transferred by the assessee on 11-6-2012.
- The date of completion of construction, being 15-9-2014 is within a period of three years from the date of transfer of the original asset. In such circumstances, the date of purchase of the first part of the plot on 11-10-2010, which is within the reasonable period as discussed above, constitutes the date of initiation of process of construction, and the deadline for the completion of construction would be 10-6-2015.
- As the construction actually got concluded latest by 15-9-2014, it is held that the assessee is entitled to exemption under section 54F with reference to the full amount ofRs.1.12 crores spent on purchase of two parts of land and construction of new residential house thereon . The impugned order is overturned *pro tanto*. [Para 14]
- In the result, the appeal is allowed to this extent. [Para 16]

CASES REFERRED TO

Pr. CIT v. *Aarham Softronics* [2019] 102 taxmann.com 343 (SC) (para 9).

CASE NO. 2

Ramrao Dhondiba Pimple
v.
Income Tax Officer,
Ward 8(3), Pune.

IT APPEAL NO. 473/PUN/2015
ASSESSMENT YEAR 2011-12

FACTS OF THE CASE

- The assessee had sold three parcels of agricultural land for total consideration of Rs.5.88 Crore and had earned total long term capital gain to the tune of Rs.5.70 Crore.
- The assessee invested Rs.2.66 Crore towards purchasing of new agricultural land and claimed exemption u/s. 54B of the Act.
- During the course of scrutiny assessment proceedings, the Assessing Officer discovered that three parcels of land were purchased by the assessee for aggregate consideration of Rs. 71,56,000/-after due date for filing return of income u/s. 139(1) of the Act had elapsed.
- As per documents on record, the aforesaid three pieces of agricultural land on which the Assessing Officer disallowed the benefit of exemption u/s. 54B were purchased in the month of August, 2012, whereas, the due date for filing return of income u/s. 139(1) was 30.09.2011

HELD

- We have heard the submission made by representatives of rival sides and have perused the orders of authorities below.
- The ground no. 1 raised in the appeal by assessee is against rejecting assessee’s claim of exemption Rs.71,56,000/- u/s. 54B of the Act on the ground that investment has been made after due date for filing return of income u/s. 139(1) of the Act.
- It is an undisputed fact that assessee has invested Rs.71,56,000/- in three properties in August, 2012 i.e. after due date for furnishing return of income u/s. 139 (1) of the Act had elapsed.
- The Assessing Officer rejected assessee’s claim of exemption in respect of aforesaid investment for the reason that as per the provision of section 54B(2), the assessee should have invested/deposited the amount before the due date for furnishing return of income under sub-section (1) of Section 139 of the Act.

- In the case of Humayun Suleman Merchant Vs. CCIT (supra.), we find that the Hon'ble Bombay High Court has not disapproved the ratio laid down in Rajesh Kumar Jalan case. However, the assessee's claim of exemption u/s. 54F was rejected therein as the ratio laid down in Rajesh Kumar Jalan's case was not applicable on the facts and circumstances of that particular case. Relevant extract of the findings and observation of Hon'ble Jurisdictional High Court reads as under:

"(v) Lastly and in the alternative, it is submitted by Mr. Chatterji, that as the entire amount has been paid to the developer/builder before the last date to file the return of Income under Section 139 of the Act, the exemption is available to the appellant under section 54F(4) of the Act. In support, the decision of Gauhati High Court in Rajesh Kumar Jalan's case (supra.) is relied upon. The Gauhati High Court in the above case was concerned with the interpretation of Section 54 of the Act. It construed the provision of sub-Section (2) of Section 54 of the Act which is identically worded to sub-section (4) of Section 54F of the Act The Court in the aforesaid decision held that the requirement of depositing before the date of furnishing of return of Income under Section 139 of the Act has not to be restricted only to the date specified in Section 139(1) of the Act but would include all sub-section of 139 including sub-section (4) of the Act. On the above basis it concluded that if the amount is utilized before the last date of filing of the return under section 139 of the Act then the provision of Section 54(2) of the Act would not hit the assessee before it. It is not very clear in the above case whether the amounts were utilized before the assessee filed its return or not.

(w) However, the factual situation arising in the present case is different. The return of income is admittedly filed on 4th November, 1996. In terms of Section 54F(4) of the Act as interpreted by the Gauhati High Court in Rajesh Kumar Jalan's case (supra.) the amounts subject to capital gain on sale of the capital asset for purpose of exemption, has to be utilized before the date of filing of return of income. In this case 4th November, 1996 is the date of filing the return of Income. It is not disputed that on 4th November, 1996 when the return of income was filed, the entire amount which was subject to capital gain tax had not been utilized for the purpose of construction of new house nor were the unutilized amounts deposited in the notified Bank Accounts in terms of Section 54F (4) of the Act before filing the return of income. It is also to be noted that in line with the interpretation of Gauhati High Court on Section 54F(4) of the Act, the Assessing Officer had taken into account all amounts utilized for construction of a house before filing the return of income on 4th November, 1996 for extending the benefit of exemption under Section 54F of the Act. Therefore, in the present facts, the decision of the Gauhati High Court in Rajesh Kumar Jalan's case (supra) would not apply so as to hold that the appellant had complied with the Section 54F(4) of the Act.”

- In the present case, the assessee has claimed exemption u/s. 54B of the Act. We observe that the provision of sub section (2) of Section 54, provision of sub section (2) of section 54B and provisions of sub section (4) of Section 54F are *perimeteria*.
- The judgments on which the ld. AR has placed reliance are rendered with reference to claim of exemption u/s. 54/54F. Since provisions of sub section (2) of section 54 and 54B and (4) of section 54F are identical, therefore, ratio laid down by the various Hon'ble High Courts would apply to provisions of section 54B (2) as well.
- Thus, in the light of facts of the case and various decisions as discussed above, we find merit in ground No. 1 raised by the assessee in appeal and the same is accepted.
- The assessee is eligible to claim exemption u/s. 54B in respect of investment made towards purchase of agriculture land within the time limit for filing return of income specified under section 139(4).

CASE NO. 3

Buttepatil Properties
v.
Income Tax Officer, Ward 3(1), Pune.

IT APPEAL NO. 682/PUN/2018
ASSESSMENT YEAR 2014-15

FACTS OF THE CASE

- The assessee is a partnership firm carrying on business of Builders, Promoters and Developers since 2011 and assessed to income tax by the ITO, Ward 7(1), Pune.
- The assessee has declared total income of Rs.2,45,750/- for the assessment year 2014-15 by filing revised return dated 08.12.2014 and the assessment was completed u/s.143(3) of the Act vide assessment order dated 22.12.2016.
- During the year under consideration, the assessee has sold a flat to Premal Vasant Wagh for actual consideration of Rs.67,20,000/- vide document No.5363/2013 dated 22.04.2013 whereas stamp duty value adopted by the government was Rs.72,94,924/- which is more than the value recorded in the books of accounts.
- Accordingly, the Assessing Officer added Rs.5,74,924/- to the total income of the assessee u/s.43CA of the Act.
- During the First Appellate Proceedings, the Ld. CIT(Appeal) upheld the addition made by the Assessing Officer and also observed that the case laws relied on by the assessee are related to Section 50C of the Act, whereas, the provisions of section 43CA were invoked which is inserted by the Finance Act, 2013, w.e.f. 01.04.2014.

HELD

- At the time of hearing, the Ld. AR of the assessee submitted that provision of section 43CA is identical in nature with respect to Section 50C of the Act. The Ld. AR has placed reliance on the following decisions :

  i) Rahul Construction Vs. DCIT, Pune ITA No.1543/PN/2007 for A.Y.2004-05

  ii) Smt. Sita Bai Khetan Vs. Income Tax Officer, Jaipur, ITA No.826/JP/2013 for A.Y.2010-11.

While placing reliance on the aforesaid decisions, it was contended by the Ld.AR that in these cases, there was difference between stamp duty valuation adopted by the Government & the actual consideration received. It was held that, if the difference is less than 10% then stamp duty/market value, the difference shall not be considered for the purpose of section 50C of the Act. Since Section 43CA is having identical situation as referred to in Section 50C therefore, decisions of the above cases shall apply also and covered by section 43CA of the Act.

- The Ld. DR has placed reliance on the orders of the Sub-ordinate Authorities.
- We have perused the case records and considered the relevant provisions of the Act i.e. Section 50C and Section 43CA.

- Section 50C deals with special provision for full value of consideration in certain cases with regard to capital asset.
- Section 43CA is also special provision for full value of consideration for transfer of assets other than capital assets in certain cases. In this context, the application of the case laws with regard to Section 50C is applicable to Section 43CA as well.
- With these observations, we refer to the decision of the Co-ordinate Bench of the Tribunal, Pune in the case of Rahul Construction Vs. Deputy Commissioner of Income Tax (supra.).
- In that case, assessee received an amount of Rs.19,00,000/- as sale consideration on account of sale of basement of a building. Stamp Valuation authorities have adopted the value at Rs.28,73,000/- for the purpose of stamp duty on being objected by the assessee for substitution of the same figure under section 50C(2).
- The Assessing Officer referred the matter to the DVO who determined the fair market value of the property on the date of sale at Rs.20,55,000/-.
- The Pune Bench of the Tribunal observed that this itself shows that there is a wide variation between the two values and that they are based on some estimate.

- Difference between the sale consideration shown by the assessee and the fair market value determined by the DVO is only Rs.1,55,000/- which is less than 10%.
- In view of the fact that valuation is always a matter of estimation where some difference is bound to occur. The Assessing Officer was not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee.
- Therefore, Assessing Officer was directed to take Rs.19,00,000/- only as the sale consideration of the property.

This case of Rahul Construction Vs. DCIT (supra.) was also followed by the Pune Bench of the Tribunal in ITA No.2704/PUN/2016, therein also, the benefit of 10% difference of sale value was allowed in favour of the assessee. Thus, following the aforesaid decisions, we are of the considered view that difference between the sale consideration of the property shown by the assessee and the fair market value determined by the DVO under section 50C(2) being less than 10%, the Assessing Officer is not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee.

- In view of the matter, we set aside the order of the Ld. CIT(Appeal) and allow the appeal of the assessee.

CASE NO. 4

Sai Bhargavanath Infra
v.
Assistant Commissioner of Income-tax

IT APPEAL NO. 1332/PUN/2019
ASSESSMENT YEAR 2015-16

FACTS OF THE CASE

- The assessee filed its return of income on 27-09-2015 declaring total income of Rs. 47,17,490/-The assessee is a builder and developer.
- Assessment order was passed u/s 143(3)of the Income-tax Act, 1961 (hereinafter referred to as "the Act") assessing total income at Rs. 66.76,365/-.
- In the assessment order, the A.O made an addition of Rs. 19,58,875/- u/s 43CA of the Act being the difference between sale value of the flats sold and the stamp duty value of the same.
- It was contended by the assessee that stamp value was at uniform rate without taking into consideration the peculiar features of a particular property.
- It was also contended that the A.O has ignored the fact that the difference of Rs. 19,58,875/- was less than 10% and therefore, not required to be added.

- Section 43CA of the Act provides that where a consideration received or accruing as a result of the transfer by an assessee of an asset other than the capital asset being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the difference will be taxed as deemed income.
- In this case, the assessee had sold 10 flats for a consideration of Rs. 43,32,266/- which is lower than the stamp duty value of the flats of Rs.43,67,500/-. Therefore, the A.O added the difference of Rs. 19,58,875/- u/s 43CA of the Act.
- Apart from reiterating the submissions made before the revenue authorities, the ld. A.R submitted before us that when the difference in the sale value shown by the assessee and the D.V.O's report is less than 10% then the addition is not warranted.
- In this regard, he has placed reliance on the decision of Pune Tribunal in V.K Developers v. ACIT [IT Appeal No. 923 (Pune) of 2019, dated 4-8-2022].
- The ld. A.R also submitted that in assessee's own case in Sai Bhargavnath v. Dy. CIT [IT Appeal No. 2417 (Pune) of 2017, dated 8-9-2020] for A.Y. 2014-15,the Tribunal on the very similar issue had remanded the matter back to the file of the A.O for fresh adjudication .

HELD

- If any liability has to be fastened with the assessee tax-payer retrospectively then the statute and the provision must spell out specifically regarding such retrospective applicability. However, if the provision is beneficial for the assessee, in view of the welfare legislation spirit imbibed in the Income-tax Act, such beneficial provision can be applied in a retrospective manner.
- In the case of the assessee before us for the preceding assessment year i.e. A.Y. 2014-15, the difference of the consideration received from transfer of asset and the value adopted for stamp duty valuation was apparently not less than 10% tolerance margin which has been brought into effect from 1-4-2021 in the first proviso to section 43CA and therefore, the Tribunal in its wisdom had restored the matter to the file of the A.O for fresh adjudication (supra).
- Before us, admittedly such difference of tolerance margin is less than 10%. Now the question of applicability of this proviso of section 43CA retrospectively covering the assessment year in question i.e. A.Y. 2015-16, from the spirit of Supreme Court decision in Vatika Township (P.) Ltd. (supra) case is analysed.
- Now, the intent of the legislature is to provide relief to the assessee in case such difference is less than 10% which has been brought into effect from 1-04-2021 thereby providing benefit to the assessee. This being the beneficial provision therefore will even have retrospective effect and would apply to the present assessment year 2015-16.

- At this juncture we would also refer to the decision of Pune Tribunal in Dinar Umesh kumar More v. ITO [IT Appeal No. 1503 (Pune) of 2015, dated 25-1-2019], where the said proposition of applicability of a beneficial provision was considered in light of Hon'ble Apex Court decision in the case of Vatika Township (P.) Ltd. (supra). In the said Tribunal order, the Bench observed that if the legislature is going to confer a benefit then such an averment will have a retrospective effect.
- The Tribunal observed that while discussing this issue in para 33 of the said judgment, the Hon'ble Apex Court held that "We would also like to point out, for the sake of completeness, that where a benefit is conferred by legislation, the rule against a retrospective construction is different.
- If legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such legislation, giving it a purposive construction, would warrant it to be given a retrospective effect".
- The net effect of this judgment is that if a fresh benefit is provided by the Parliament in an existing provision, then such an amendment should be given retrospective effect. Therefore, even without going into the merits of the case by the application of first proviso to section 43CA having retrospective effect, the grounds of appeal of the assessee stands allowed.

CASES REFERRED TO

V.K Developers v. *ACIT* [IT Appeal No. 923 (Pune) of 2019, order dated 4-8-2022] (para 3), *Sai Bhargavnath*v. *Dy. CIT* [IT Appeal No. 2417 (Pune) of 2017, dated 8-9-2020] (para 3),

Maria Fernandes Cheryl v. *ITO(International Taxation)* [2021] 123 taxmann.com 252/187 ITD 738 (Mum) (para 4),

CIT v. *Vatika Township(P.) Ltd.* [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC) (para 4),

CIT v. *Suresh N. Gupta*[2008] 166 Taxman 313/297 ITR 322 (SC) (para 4),

CIT v. *Rajiv Bhatara* [2009] 178 Taxman 285/310 ITR 105 (SC) (para 4)

and *Dinar Umeshkumar More* v. *ITO* [IT Appeal No. 1503 (Pune) of 2015, dated 25-1-2019] (para 5-6).

CASE NO. 5

Kishor Digambar Patil
v.
Income Tax Officer, Ward 2(1), Nashik

IT APPEAL NO. 54 & 55/PUN/2019
ASSESSMENT YEAR 2017-18 & 2018-19

FACTS OF THE CASE

- The appellant assessee is a salaried employee had filed his original return of income [in short **‘ITR’**] u/s 139(1) of the Act on 19/07/2017 declaring income of Rs.8,82,790/- after claiming deduction u/c VI-A for sum of Rs.1,65,284/-.
- Subsequently the assessee revised his ITR u/s 139(5) of the Act thereby slicing down the total income to ₹4,90,810/- consequent to higher claim of deduction u/c VI-A of Rs.3,59,844/- as against original claim of deductions made in original return filed u/s 139(1) of the Act.
- A survey action u/s 133A of the Act was carried out on a third party wherein certain information about the appellant was gathered which was shared by the Investigation wing to the jurisdiction AO of the assessee.
- Pursuant to such information, the case of the appellant was subjected for reassessment u/s 147 of the Act following the due procedure laid therefore.

- In response to notice u/s 148 of the Act, the appellant filed his ITR correcting spurious claim of deductions and thus restored original state as was then returned in the ITR filed u/s 139(1) of the Act i.e. withdrawn additional claim of deductions made in ITR filed u/s 139(5) of the Act.
- The said reassessment proceedings culminated accepting income retuned pursuant to notice u/s 148 of the Act. Thus the department recovered the refund of tax earlier paid on revision of return.
- The Ld. AO underlining the variation between income returned pursuant to notice u/s 148 with that of revised ITR filed u/s 139(5) of the Act, has invoked the penal provision and after considering the submission of the appellant has finally by an order dt. 14/01/2022 u/s 270A of the Act imposed a penalty of Rs.1,64,392/- i.e. @200% of tax sought to be evaded for under-reporting of income holding it is in the nature of mis-reporting .

HELD

- In adjudicating the issue under consideration we are heedful to state that, the penalty provisions of section 270A like provision of section 271(1)(c) are detrimental, albeit commercial consequences and being mandatory brooks no trifling or dilution therewith.
- Thus a contravention of a mandatory condition or requirement is fatal with no further proof and as a result in our considered view the ratio decidendi laid in context of section 271(1)(c) of the Act by the Hon’ble Supreme Court in ‚Dilip N Shroff Vs JCIT‛ reported in 291 ITR 519 (SC) and ‚Ashok Pai Vs CIT‛ reported at 292 ITR 11(SC), further by Jurisdictional Bombay High Court in plethora judgements including ‚CIT Vs Samson Pericherry‛, ‚PCIT Vs Goa Dorado‛ and ‚PCIT Vs New Era Sova Mine‛ shall still hold good even in impugned penal proceedings of section 270A of the Act.
- Having aforesaid, in our opinion, the non-application of mind by tax authorities while dealing with the penal provisions cannot at this stage be improved by remanding the matter back for de-nova consideration, hence prayer of the Ld. DR stands meritless.

- In the light of aforestated reasoning and discussion, we observed that, the notice initiating the penal proceedings is silent on the circumstance or incidence triggering the very initiation in this case.
- Further the order of penalty did neither mention the circumstance or incidence nor make a mention of alleged action in reaching the final imposition.
- In the event respectfully applying similar analogy as laid in aforestated judicial precedents to the case in hand, we find force in the argument of the appellant that, the failure on the part of lower tax authorities to identify and communicate the specific circumstance or incidence from clause (a) to (g) of s/s (2) of section 270A by virtue of which the income of the appellant held as under-reported and further failure on the part of lower tax authorities to showcase which of the specific action of the appellant from clause (a) to (f) of s/s (9) was determinant before imposing the impugned penalty u/s 270A of the Act has rendered the entire proceedings invalid and thus untenable in the eyes of law. Consequently the penalty imposed u/s 270A of the Act being bad in law deserves to be quashed, ergo we order accordingly.
- In result, both these appeals stands **ALLOWED**.

CONCURRENT ORDER
of case no. 05

HELD

- There would be hardly any dispute that the Assessing Officer had framed his assessments, both dated 22.08.2021, for the impugned assessment years 2017-2018 and 2018-2019. And that he had also initiated these identical sec.270A penalty proceedings against the assessee alleging "under reporting of income in consequence of misreporting" thereof.
- The same admittedly pertained to the assessee's chapter-VIA deduction claims raised to the tune of Rs.3,59,844/- in his revised return as against that of Rs.1,65,284/- in the original one which was reduced to Rs.1,70,727/- in the former assessment year 2017- 2018. The corresponding figures in the latter assessment year 2018-2019 read Rs.3,71,686/- and Rs.1,77,924/- respectively.
- I now advert to the section 270A proceedings in issue. The Assessing Officer's twin penalty orders, both dated 14.01.2022, rejected the assessee's stand to impose these penalties of Rs.1,64,392/- i.e., @ 200% of the tax sought to be evaded of Rs.82,196/- holding "under reporting of income which is in consequence of misreporting of income" amounting to Rs.3,99,010/- in the former assessment year 2017-2018 and Rs.1,51,866/- in assessment year 2018-2019, for taxes sought to be evaded of Rs.75,933/- regarding the income in issue of Rs.3,68,610/- respectively.

- The learned NFAC's identical detailed discussion has affirmed the impugned penalties as under : *"5. It's an admitted fact that the appellant filed revised return claiming false deduction under chapter Vl-A, which had resulted in the refund. The act of filing original return of income and subsequently revising the same with reduced returned income on account of claiming false deduction cannot be executed without the active knowledge of the appellant and active collusion with the tax practitioner.*
- *The appellant, but for the action of assessing officer, which was based on information gathered from the survey proceeding, would not have come forward to voluntarily file return of income excluding false deduction claimed earlier through the revised return.*
- *It is to be noted that the appellant is an educated taxpayer working in with a reputed Multi National Company and cannot claim being ignorant about the law. Also, it is to be noted that a false claim of deduction made had resulted in refund, despite the fact that there was no such deduction claimed before/reported by the employer through Form 16.*
- *Therefore, on the facts and circumstances, there is an element of mens rea and actus reus on the part of the appellant to make fraudulent claim of refund and to defraud the public exchequer. Therefore, the action of the Assessing Officer to levy penalty u/s. 270A of the Act is in order and requires no interference."* This leaves the assessee aggrieved.

- Both the learned representatives vehemently reiterated their respective stands against and in support of the impugned penalties. The assessee more particularly argued that both the learned lower authorities have erred in law and on facts in imposing sec.270A penalties in issue without even specifying the relevant limb under sub-section (9) thereof pertaining to “misreporting of income”.
- Learned counsel quoted the erstwhile earlier penalty mechanism provided u/sec.271(1)(c) of the Act wherein the law stood duly settled in light of Mohd. Farhan A Shaikh vs. ACIT [2021] 434 ITR 1 (Bom.) (FB); CIT vs. M/s. SSA’s Emerald Meadows [2016] 386 ITR (St.) 13 (SC) and CIT vs. Manjunatha Cotton Ginning Factory (2013) 359 ITR 565 (Kar) (HC) that an assessing authority has to specify the corresponding limb in the show cause notice to be issued u/sec.274 of the Act.
- Learned counsel’s case is that the legal position would hardly be any different wherein the legislature has now prescribed clauses (a) to (f) in sec.270A (9) of the Act only to “rationalise and bring objectivity, certainty and clarity in the penalty provisions” as per the CBDT’s circular no.3/2017 [F.No.370142/20/2016-TPL].
- AR strongly argued in tune thereof that the very line of reasoning is required to be adopted herein as well whilst dealing with penalty proceedings under this new scheme of u/s.270A introduced by the legislature by the Finance Act, 2016 w.e.f. 01.04.2017.

- DR on the other hand strongly supported the learned lower authorities action imposing the impugned penalties. He took us to the Assessing Officer's corresponding assessments, penalty orders as well as the lower appellate discussion extracted in the preceding paragraphs that the rigor of sub-section (9) stands duly complied with once it has been categorically concluded that this is a fit case to impose penalty u/sec.270A of the Act for "under reporting which is in consequence of misreporting of income".
- His further contention is that such a penalty @ 200% is levied u/sec.270A(8) of the Act reading as under : "Sec.270A(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."
- DR lastly sought to buttress the point that section 270A(8) nowhere makes it mandatory to include any of the clause "(a) to (f)" provided in sub-section (9) thereof. He further submitted that various judicial precedents quoted at the assessee's behest in the preceding paragraphs are no more applicable once the legislature has amended the penalty provision i.e., sec.271 itself.
- I have given my thoughtful consideration to the vehement rival stands and find no merit in the Revenue's arguments.

- It is made clear that the assessee's case law indeed relates to the earlier penalty provision i.e., sec.271(1)(c) of the Act only wherein various hon'ble higher judicial forums had settled the law that the Assessing Officer ought to specify as to whether the concerned taxpayer had concealed or furnished inaccurate particulars of his taxable income during the course of assessment.
- I am of the view that the very line of judicial precedents would squarely apply even for the amended penalty provision i.e., sec.270A of the Act as well wherein the legislature has not only prescribed twin limbs of "under reporting of income as well as misreporting of income", but also, unlike the earlier provision u/sec.271, this time it has stipulated specific deeming illustrations under both the twin foregoing heads of the "under reported income" and "misreporting of income" in sub-sections (2) and (9) (a to f) respectively.
- In my considered opinion, once the instant twin appeals involve levy of penalty @ 200% of the taxes sought to be evaded and the learned lower authorities have held the assessee to have "under-reported his taxable income in consequence to misreporting", the latter limb of misreporting containing six "sub-limbs" in clauses (a to f) under sub-section- (9) deserve to be read as an extension of sub-section (8) to section 270A only.
- This indeed seems to be the only possible view as the legislature has incorporated the non-obstante clause "Notwithstanding anything contained in sub-sec.(6) or sub-sec.(7)" thereby not including the sub-section (9) envisaging the six instances defining "misreporting of income" in section 270A of the Act.

- DR could further not dispute the fact that right from the Assessing Officer's twin assessments to his impugned penalty orders as well the NFAC's detailed discussion, the learned lower authorities have nowhere specified the corresponding "sub-limbs" (a to f) in sub-sec.(9) of sec.270A of the Act.
- That being the case, I wish to quote para 62.10 in the CBDT's circular no.3/2017 (supra) making it explicitly clear that these six clauses (a to f) would indeed form part of sub-section (8) to sec.270A as under *:*
- *The rate of penalty shall be fifty per cent of the tax payable on under-reported income. However in a case where under reporting of income results from misreporting of income by the assessee, the person shall be liable for penalty at the rate of two hundred per cent of the tax payable on such misreported income. The cases of misreporting of income have been specified as under :*

(i) misrepresentation or suppression of facts;

(ii) non-recording of investments in books of account;

(iii) claiming of expenditure not substantiated by evidence;

(iv) recording of false entry in books of account;

(v) failure to record any receipt in books of account having a bearing on total income;

(vi) failure to report any international transaction or deemed international transaction under Chapter X of the Income-tax Act."

- Faced with the situation and in light of overwhelming material strongly supporting the assessee's case and going by stricter interpretation as per Commissioner of Customs (Imports), Mumbai vs. Dilipkumar And Co. & Ors. 2018 (9) SCC 1 (SC) (FB), I am of the view that the above stated judicial precedents regarding the "limb theory" would squarely apply even in case of failure of the Assessing Officer to quote any of the six sub-limbs as well prescribed in sec.270A(9) (a) to (f) of the Act introduced by the legislature in order "to rationalize and bring objectivity, certainty and clarity in the penalty provisions". And that his non-compliance to this clinching effect would not only defeat the legislative mandate but also it renders the amending provisions an otiose.
- I accordingly hold in these peculiar facts and circumstances that both the impugned penalties deserve to be quashed as not sustainable in the eye of law. Ordered accordingly.
- These assessee's twin appeals are allowed in above terms. A copy of this common order be placed in the respective case files.

CASE NO. 6

Mr. & Mrs. S.M. Batha Education Trust

v.

Income Tax Officer, Ward 2(1), Nashik

IT APPEAL NO. 239/PUN/2023

ASSESSMENT YEAR

FACTS OF THE CASE

- The appellant is a trust incorporated in the year 1961 with the object of imparting education. The appellant trust had applied for grant of registration u/s.12A of theAct on 20-09-2005 which remained undisposed of.
- Then the appellant trust filed another application u/s.12AA of the Act on 26-03-2007 which came to be rejected vide order dated 21-09-2007.
- Being aggrieved by the said order, an appeal was filed before this Tribunal. The Tribunal vide order dated 15-04-2009 in ITA No.1421/PUN/2007 allowed the appeal.
- The appellant trust was granted registration u/s.12AA of the Act vide order dated 09-12-2020. Subsequent to the grant of registration u/s.12A, the ld. CIT(Exemption) noticed occurrence of certain violations attracting the cancellation of registration.
- Therefore, he issued a show cause notice to the assessee for cancellation of registration through e-portal. The violations as noticed by the ld. CIT(Exemption) are that :

(i) Clause (3) of the trust deed provided that settlor shall be entitled to reside, use a portion of property for herself, family and guests during her life time; (ii) Clause (4) of the trust deed had made a provision for payment of honorarium to the settlor; (iii) Clause (12) of the trust deed had also provided for power to revoke the trust deed at her discretion; and (iv) The appellant trust is engaged in the business of investment, redemption of mutual funds.

- The assessee submitted that the question of utilising the trust property for the benefit of the settlor does not arise as the settlor had passed away in the year 1965. It is further submitted that the clauses in trust deed providing for accommodation to the settlor of the trust had become infructuous since the settlor had expired in the year 1965 itself.
- Therefore, there was no scope for the violation of provisions of section 13(3) of the Act. As regards to the violation of objects of the trust deed, it was submitted that the investment in the mutual funds are only made in order to meet statutory requirement of section 11(5) of the Act.
- However, all the above contentions were rejected by the CIT(Exemption) vide order dated 31-12-2022. Being aggrieved by the order of ld. CIT(Exemption), the appellant is in appeal before us in the present appeal.

HELD

- The solitary issue that arises for consideration before us is whether or not the ld. CIT(Exemption) was justified in cancelling the registration granted u/s.12AA of the Act.
- The provisions of section 12AA(3) empower the CIT to cancel the registration granted u/s.12A of the Act only on the existence of one of the two conditions in the said section, i.e., (1) the activities of the trust are not genuine; and (2) the activities of the trust are not being carried out in accordance with the objects of the trust.
- it would reveal that the entire proceedings of the ld. CIT(Exemption) are based on the covenants of the trust deed but not based on the actual activities carried out by the appellant trust.
- Mere fact that the trust deed contain a covenant that enables the settlor to utilize the premises for her use or family use, cannot empower the CIT to cancel the registration, as it does not lead to any conclusion that either the activities of the trust are not genuine or the activities are not being carried out in accordance with the objects of the trust.

- The fact that huge investments are made in mutual funds, cannot also lead to the conclusion that the activities of the trust are not genuine. It is an admitted fact that the settlor died in the year 1965, therefore, the relevant clause had become infructuous and thus there is no question of violation of provisions of section 13(3).
- The investments in mutual funds are only in order to meet the statutory requirements of section 11(5) of the Act. The reasons assigned for cancellation of registration as enumerated above neither lead to conclusion that the activities of the trust are not genuine and are not carried out in accordance with the objects of the trust.
- The Hon'ble jurisdictional High Court in the *CIT Vs. Institute Management Committee of Industrial Training Institute (2017) 393 ITR 161 (Bom.)* held that exercise of power u/s.12AA(3) can be done by the CIT(Exemption) only on being satisfied that one of the two conditions satisfied therein.

- The relevant excerpt from the judgment is reproduced below :

“9. On plain reading of section 12AA(3) of the Act, it is selfevident that the power can only be exercised to cancel the registration only for the two breaches which are mentioned therein. This is not so in the present facts. Thus, no fault can be found with the impugned order setting aside the order of the Commissioner of Income-Tax, cancelling the registration granted to the respondent-assessee.”

- In view of the above binding precedent by the Hon’ble jurisdictional High Court, we are of the opinion that the impugned order by the CIT(Exemption) cannot be sustained in the eyes of law. The same is therefore, set-side. The appeal filed by the assessee stands allowed.
- In the result, the appeal is allowed.

THANK YOU

CA PRAMOD S SHINGTE