

*Ajay Sir
Please Review*
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**IN THE HON'BLE HIGH COURT OF TELANGANA,
AT HYDERABAD**

W.P.NO. 18549 OF 2022

BETWEEN:

Vista Homes, 5-4-187/3 & 4, 2nd Floor, Soham
Mansion, M.G. Road, Secunderabad 500 003.

... Petitioner

AND

Union of India, Department of Revenue, Ministry of
Finance, North Block, New Delhi - 110 001 &
Another.

... Respondents

REPLY TO THE COUNTER AFFIDAVIT
FILED BY THE RESPONDENTS

I, Soham Satish Modi, S/o. Late Satish Modi, aged about 53 years, R/o. Plot
No. 280, Road No. 25, Jubilee Hills, Hyderabad, do hereby solemnly affirm
and state on oath as follows:

1. I am the Petitioner herein and, as such am well acquainted with the facts
of the case and swear to the contents of this affidavit.
2. It is respectfully submitted that at the outset the Petitioner denies all the
allegations made by the Respondents unless they are specifically
admitted hereunder.
3. The contents of Para 1 of the counter affidavit are general in nature and
need no response.

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4. The contents of Para 2 are a matter of record and are reiteration of facts stated in the writ affidavit. As such the same needs no response.
5. No specific averments have been made in Paragraphs 3 & 4 of the counter affidavit, hence need no response.
6. In reply to the averments made in Para 5 of the counter affidavit, it is submitted that the main allegation of the Petitioner is that Respondent No. 2 without considering the replies filed by the Petitioner, passed the impugned penalty order. A bare perusal of the relevant extract in Para 5 of the counter affidavit would show that except stating 'after going through the reply and submissions made by the Assessee, it is found to be a fit case for levy of penalty u/s. 270A of the Income Tax Act, 1961', nowhere the Respondent No. 2 had discussed the submissions of the Petitioner. The Petitioner in the said para also contended that the view taken by Respondent No. 2 with regard to under-reporting is based only on mere change of opinion. But Respondent No. 2 did not prefer to answer the same. In view of the same, the order passed by Respondent No. 2 is non-speaking and cryptic.
7. No specific allegations have been made in Paragraph 6 of the counter affidavit, hence the same need no response.
8. The contention of Respondent No. 2 in Para 7 of the counter affidavit that the compounding application filed by the Petitioner is time-barred is arbitrary, baseless and without considering the facts on record. A bare perusal of the 'Remarks' column of e-proceedings Response

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Acknowledgement filed by the Petitioner along with the writ petition papers (@Page 65) would show that Form No. 68 was not enabled on the e-portal for filing of an application for grant of immunity from imposition of penalty by the Petitioner. In view of the same, the delay caused in filing of the compounding application is not due to the negligence of the Petitioner but due to the technical glitch in the income tax website. Accordingly, the delay cannot be attributed to the Petitioner. Further, the contention of the Respondent that immunity u/s. 270AA is not applicable to penalty u/s. 270A(9) has never been communicated in response to the Form 68 filed by the Petitioner. The said compounding application was never disposed of by the Respondent.

9. No specific allegations have been made in Para 8 of the counter affidavit, as such the same needs no response.
10. In reply to the averments made in Para 9 and 11 of the counter affidavit, it is submitted that Respondent No. 2 ought to have mentioned the category the case of the Petitioner falls under in the penalty order which is the basic requirement under law. For the first time, in its counter affidavit, Respondent No. 2 stated that the penalty proceedings in the case of the Petitioner have been initiated under clause 270A(9) of the Act. Further, the contention of the Respondent No. 2 that a plain reading of Section 270A reveals that there is no requirement of intent to deceive or willful non-disclosure or mens rea is absolutely wrong. A bare perusal of section 270A(9) of the Act would show that intent to deceive and willful non-disclosure are the pre-requisites for a case to fall under

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clause (9) of Section 270A. These are the pre-conditions basing on which the Legislature has prescribed for a much higher penalty of 200%. This is the reason why the Legislature has provided for different quantum of penalties for the same offence. Hence, the contention of Respondent No. 2 that mere detection of misreporting is sufficient to levy penalty under this section is absolutely arbitrary and baseless. Further, Section 270A(9) prescribes seven categories of misreporting for which penalty @ 200% can be imposed. But Respondent No. 2 failed to bring on record as to which category the case of the Petitioner falls under. Accordingly, Respondent No. 2 ought to have appreciated these facts before passing of the Penalty order.

11. As regards the allegation that if the Petitioner is aggrieved by the penalty order, the right course of action statutorily is to file an appeal before the Commissioner of Income Tax (Appeals) is concerned, it is submitted that even if there is alternate remedy of appeal available to the Petitioner under law, the present case falls within the realm of the exception carved out by several judgments of the Hon'ble Supreme Court and Hon'ble High Courts setting out circumstances where in spite of alternate remedy being available, the Court can exercise the jurisdiction vested in it under Article 226.
12. In reply to the averments made in Para 10 of the counter affidavit, it is submitted that Respondent No. 2 failed to answer the allegations leveled by the Petitioner in its writ affidavit. Respondent No. 2 all along in its counter affidavit stated that under-reporting in the case of the Petitioner

is in consequence of mis-reporting. But Respondent No. 2 failed to appreciate that 270A (6) of the Act prescribes certain exceptions for the income not to be called as under-reported income.

13. In reply to the averments made in Para 12 of the counter affidavit, it is submitted that there is no dispute that Respondent No. 2 has issued three notices before passing the penalty order dated 29-03-2022. The Petitioner also submitted replies to all the notices issued by Respondent No. 2. But Respondent No. 2 failed to consider and discuss the submissions of the Petitioner in the penalty order. In view of the same, mere issuance of notices before passing of the impugned order cannot be considered as compliance of principles of natural justice.
14. In reply to the averments made in Para 13 of the counter affidavit, it is submitted that mere mention of the fact that the Petitioner has under-reported its income which is in consequence of misreporting thereof is vague. It is submitted that there are nearly six categories of deviations mentioned in clause (9) of Section 270A for imposing 200% penalty on the basis of misreporting. It is a basic principle of law to notify the Assessee as to which provision it is coming under before mulcting him with imposition of such huge amount of penalty.
15. In reply to the averments made in Para 14 of the counter affidavit, it is submitted that mere mentioning of the fact that the replies filed by the Petitioner have been considered would not suffice. The order passed should contain discussion on the submissions of the Petitioner as against imposition of penalty, which has not been considered. Hence, the order

passed is a non-speaking order without considering and analyzing all the facts and submissions made by the Petitioner and without substantiating the grounds for imposition of penalty.

16. The averments made in Para 15 of the counter affidavit have been answered in the preceding paragraphs, in view of the same, the same is not answered again in order to avoid repetition.
17. In reply to the averments made in Para 16 of the counter affidavit, it is submitted that Respondent No. 2 contended that sub-sections 270A(6) and 270A(7) are not applicable to Section 270A(8). But Respondent No. 2 ought to have appreciated that Section 270A(8) states only about imposition of penalty @ 200% in case the under-reported income is in consequence of any misreporting. But the grounds for misreporting have been prescribed under Section 270A(9) of the Act. However, Respondent No. 2 failed to specify the clause of Section 270A(9) the Petitioner falls under. In view of the same, the allegation of the Respondent that the underreporting is in consequence of misreporting is very vague and liable to be set aside.
18. The averments made in Para 17 of the counter affidavit are mere reiteration of the same facts and the same have been answered in the preceding paragraphs. Hence, the same needs no response.
19. No specific allegations have been made in Para 18 of the counter affidavit, in view of the same, the same need no response.

20. The averments made in Para 19 of the counter affidavit, it is submitted that as regards availability of alternate remedy of appeal is concerned, this point has already been answered in the earlier paragraphs. In view of the same, the same is not answered again to avoid repetition.
21. In reply to the averments made in Para 20 of the counter affidavit, it is submitted that the contention of the Respondent No. 2 that the penalty order has been passed after following due procedure of law, by providing ample opportunities to the Petitioner is technically wrong. It is a basic principle of law that while recording satisfaction for initiation of penalty proceedings under the Act, Respondent No. 2 should state as to which clause or sub-clause that particular addition falls under. The impugned penalty order passed without stating the same is void ab initio and liable to be set aside. When the impugned order has been passed without following the basic principles of law, a writ petition would lie under Article 226 of the Constitution of India.

In the light of the aforesaid facts and circumstances, it is respectfully prayed that this Hon'ble Court may be pleased to allow the writ petition as prayed for and pass such other order (s) as this Hon'ble Court deems fit and proper in the circumstances of the case.

solemnly affirmed and signed
before me on this the day of
November, 2022

DEPONENT

ADVOCATE: HYDERABAD

VERIFICATION

I, Soham Satish Modi, S/o. Late Satish Modi, aged about 53 years, R/o. Plot No. 280, Road No. 25, Jubilee Hills, Hyderabad, do hereby declare that the contents mentioned above in paras 1 to 21 are true and correct to the best of my knowledge, and based on legal advice believed to be correct.

Hence verified on this day the day of November, 2022 at Hyderabad.

COUNSEL FOR THE PETITIONER

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DEPONENT

DISTRICT: HYDERABAD
IN THE HON'BLE HIGH COURT OF
TELANGANA,
AT HYDERABAD

W. P. No. 18549 of 2022

REPLY TO THE
COUNTER AFFIDAVIT FILED BY
RESPONDENTS

FILED ON:-11-2022

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