

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

(SPECIAL ORIGINAL JURISDICTION)

W.P. No. 18549 of 2022

BETWEEN:

Vista Homes, 5-4-187/3 & 4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad 500003, Telangana, represented by its Managing Partner Sri Soham Satish Modi, S/o. Late Satish Modi, aged about 53 years, R/o. Plot No. 280, Road No. 25, Jubilee Hills, Hyderabad.

...PETITIONER

AND

1. Union of India represented by its Secretary, Department of Revenue, Ministry of Finance, North Block, New Delhi -110001.
2. Additional/ Joint/ Deputy/ Assistant Commissioner of Income Tax/Income Tax Officer, National Faceless Assessment Centre, Delhi.

...RESPONDENTS

AFFIDAVIT

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

1. I am the Managing Partner of the Petitioner firm herein and as such well acquainted with the facts of the case and I swear to the contents of this affidavit.


For VISTA HOMES
Managing Partner

2. The present Writ Petition is filed challenging the penalty order passed vide DIN No. ITBA/PNL/F/270A/2021-22/1041977416(1) dated 29-03-2022 by Respondent No. 2 u/s. 270A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the Assessment Year 2018-19. A copy of penalty order dated 29-03-2022 is being filed as **Annexure P1**.
3. The Petitioner herein is a partnership firm and is engaged in real estate business. In the course of its business, it has undertaken a housing development project named "Vista Homes" situated at Sy. No. 193, 194 and 195 of Kushaiguda, Hyderabad. The Petitioner filed its return of income for the AY: 2018-19 on 04-10-2018 showing total income of Rs. 71,49,954/-. The case was selected for complete scrutiny assessment under the E-assessment scheme, 2019 on the issue of "income from real estate business". Accordingly, notices u/s. 143(2) dated 22-09-2019 and u/s. 142(1) dated 03-12-2020 were issued asking to submit details/clarification.
4. In response, the Petitioner filed all the details as asked for by the Department. During the course of assessment proceedings, Respondent No. 2 found that the Petitioner followed percentage completion method in order to recognize profit from its real estate business which resulted in recognition of lower amount of cost even though at the end of the project the amount of tax on the profits shown is same. It is submitted that the project commenced during the year 2013-14; the revenue and the cost have been recognized for the first time in the Assessment Year

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2015-16 as the percentage of work completed has reached 38% (i.e., above 25% which is considered as reasonable stage of completion as per percentage completion method).

5. It is pertinent to mention here that the Petitioner has consistently adopted the above computation method from the AY: 2015-16 onwards and the same was never objected by the Respondent and the same was accepted by the Department for the assessment years 2015-16, 2016-17 and 2017-18 under scrutiny assessment proceedings. For the first time in the assessment year 2018-19, Respondent No. 2 did not accept the method of accounting adopted by the Petitioner and had taken a view that the correct manner of calculation under percentage completion method is cost to be recognized for the percentage of total area sold to the total project construction area. Even though both belong to the same method i.e., percentage completion method, the Petitioner recognized the cost based on the estimated gross profit percentage on the project whereas Respondent No.2 has recognized the cost on the basis of the percentage of the total area sold to the total project construction area. Accordingly, Respondent No. 2 arrived at the cost to be recognized till 31-03-2018 at Rs. 37,13,31,132/- as against the Petitioner's working of Rs. 40,33,49,495/-. Accordingly, the difference of Rs. 3,20,18,364/- is added to the income returned vide assessment order bearing DIN No. ITBA/AST/S/143(3)/2021-22/1034367586(1) dated 22-07-2021 passed by Respondent No. 2. It is submitted that the project got completed (99%) in the AY: 2021-22 and the final profit got determined. As such the cost of Rs. 3,20,18,364/- determined by Respondent No. 2 for the

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AY: 2018-19 has been included in the final cost incurred at the end of the project. Respondent No. 2 also expressed his satisfaction for initiation of penalty proceedings u/s. 270A of the Act. A copy of such assessment order dated 22-07-2021 is being filed as **Annexure P2**.

6. In view of the same, Respondent No. 2 issued a notice for penalty u/s. 274 read with section 270A of the Act dated 22-07-2021 alleging that for the assessment year 2018-19, the Petitioner had under-reported income which is in consequence of misreporting. As such the Petitioner was asked to show cause as to why an order imposing penalty u/s. 270A should not be passed. In response to the same, the Petitioner herein had filed a detailed reply dated 17-08-2021 explaining its position. Copies of notice dated 22-07-2021 and reply dated 17-08-2021 are being filed as **Annexures P3 & P4**.
7. Respondent No. 2 without considering the reply filed by the Petitioner again issued two show cause notices dated 10-11-2021 and 29-12-2021 asking the Petitioner to show cause as to why order imposing penalty u/s. 270A should not be passed in the case of the Petitioner. In response to the notice dated 10-11-2021, the Petitioner filed its reply dated 11-11-2021 stating that the satisfaction recorded by Respondent No. 2 in the case of the Petitioner that under-reporting of income as a consequence of mis-reporting is not correct on the facts and circumstances of the case and based only on mere change of opinion by Respondent No. 2. Further, the Petitioner contended that Respondent No. 2 not concurring to the consistent method adopted by the Petitioner

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with respect to the cost to be recognized per se cannot be a case for falling under any limb of the provisions of Section 270A(9) of the Act. Copies of notices dated 10-11-2021, 29-12-2021 and reply dated 11-11-2021 are being filed as **Annexures P5, P6 & P7**.

8. Once again Respondent No. 2 issued a final notice dated 05-01-2022 to the Petitioner to show cause as to why penalty u/s. 270A of the Act should not be imposed. Vide this notice Respondent No. 2 asked the Petitioner to submit certain documents. As such the Petitioner herein had filed those documents vide its letter dated 10-01-2022. Copies of such notice and reply thereto filed by the Petitioner are being filed as **Annexures P8 & P9**.
9. It is pertinent to mention here that the Petitioner herein has filed a petition in Form No. 68 dated 20-09-2021 u/s. 270AA of the Act asking for immunity from imposition of penalty u/s. 270A of the Act. The Petitioner also filed the necessary documentary evidence required for filing of such petition. Copy of such application filed along with the challans showing the taxes paid by the Petitioner are being filed as **Annexure P10** colly.
10. It is submitted that although Respondent No. 2 has given a finding that though the Petitioner has adopted a right method of recognizing revenue, the calculation is flawed and accordingly he reached to a conclusion that there is under-reporting as a consequence of mis-reporting. Further, to counter the submissions made by the Petitioner as regards adoption of such method for the earlier assessment years


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concerned, Respondent No. 2 in the assessment order held that this proposition is not applicable as res judicata is not applicable to tax proceedings. In view of the same, it is inevitable to analyze Section 270A of the Income Tax Act, 1961 which is reproduced below for ready reference:

"270A. Penalty for under reporting and misreporting of income.—

(1) The Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner may, during the course of any proceedings under this Act, direct that any person who has under-reported his income shall be liable to pay a penalty in addition to tax, if any, on the under-reported income.

.....

(6) The under-reported income, for the purposes of this section, shall not include the following, namely:—

(a) the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, is satisfied that the explanation is bona fide and the assessee has disclosed all the material facts to substantiate the explanation offered;

(b) the amount of under-reported income determined on the basis of an estimate, if the accounts are correct and complete to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be,

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but the method employed is such that the income cannot properly be deduced therefrom;

(c) the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of his income and has disclosed all the facts material to the addition or disallowance;

(d) the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer, where the assessee had maintained information and documents as prescribed under section 92D, declared the international transaction under Chapter X, and, disclosed all the material facts relating to the transaction; and

(e) the amount of undisclosed income referred to in section 271AAB.

(7) The penalty referred to in sub-section (1) shall be a sum equal to fifty per cent of the amount of tax payable on under-reported income.

(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.

(9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—

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- (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.*

.....”

11. A bare perusal of the above provision makes it crystal clear that sub-clause (1) of Section 270A prescribes for imposition of penalty in case of underreporting of income. Sub-clause (6) prescribes for certain exceptions for imposition of penalty in case the income fall under those categories. Sub-clause (7) prescribes for 50% penalty in case of under-reporting of income. Sub-clause (8) of Section 270A prescribes 200% penalty in case the under-reporting of income is in consequence of any misreporting. Sub-clause (9) to Section 270A of the Act enumerate the instances for misreporting of income. In the case in hand, Respondent No. 2 has levied 200% penalty on the Petitioner. But Respondent No. 2 failed to mention in its penalty order as to which category the case of the Petitioner falls under. A bare perusal of Section 270A(9) shows that all the instances mentioned under this presupposes presence of mens rea or guilty mind. It implies that under-reporting of the income should be intentional or willful on the part of the Petitioner in order to evade

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tax. Then only, such under reporting shall be considered to be misreporting of income. Mis-reporting must be made with intent to deceive and wilful non-disclosure must be there.

12. Further, Section 270A (6) prescribes certain exceptions for the income not to be called as under-reported income. Clause (b) of Section 270A(6) prescribes if the underreported income is estimated and accounts are correct and complete but the method employed is such that it did not enable proper determination, then it does not come under the term "under-reported income". In such a case, penalty cannot be imposed u/s. 270A of the Act. Respondent No.2 nowhere in its assessment order or penalty order rendered a finding that the books of accounts maintained by the Petitioner are false or inaccurate or the figures mentioned by the Petitioner in order to determine the cost are false or incomplete; as such the case of the Petitioner does not fall under the four walls of the term "misreporting" as mentioned under Section 270A (9) of the Act. The term "Misreporting" means giving a false or inaccurate particulars and the same has never been alleged by Respondent No. 2 against the Petitioner neither in the assessment order nor in the penalty order. Further, penalty provisions are quasi-criminal in nature and before mulcting the Petitioner with 200% penalty which is very harsh, Respondent No. 2 ought to have mentioned the clause under which the Petitioner falls. As such imposition of penalty without specifying the head under which penalty is imposed, is bad and unsustainable.


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13. It is a basic principle of law that while recording satisfaction for initiation of penalty proceedings under the Act, the Assessing Officer should identify under which clause or sub-clause that particular addition falls. Similarly, in the penalty order also the relevant clause or sub-clause should be specified. A bare perusal of the penalty order passed by Respondent No. 2 would show that nothing has been mentioned except stating that the Petitioner has under reported his income in respect of addition of Rs. 3,20,18,364/- made in the assessment order and liable to penalty u/s. 270A of the Income Tax Act, 1961. Further, there is no discussion about the submissions made by the Petitioner in its replies except saying 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. In view of the same, the order passed by Respondent No. 2 is laconic, unreasoned and a non-speaking order.
14. It is well-settled that the Petitioner should know the grounds on which he is being prosecuted or penalized. Otherwise it would amount to violation of principles of natural justice. Courts have consistently held that at the time of initiation of penalty proceedings, charge should be clearly specified. Further, penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the

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authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. In the case in hand, the Petitioner all along believed that the method adopted by it is correct and the same was never objected by Respondent No. 2 for the earlier years. All of a sudden for the assessment year 2018-19, Respondent No. 2 for the first time pointed out that the method adopted by the Petitioner is not correct and found flaw with it. Further, Respondent No. 2 nowhere alleged suppression or deliberate concealment on the part of the Petitioner. Taking into consideration all the above facts and circumstances of the case, initiation of penalty proceedings that too u/s. 270A(9) of the Act is arbitrary, illegal and unreasonable.

15. Further, penalty has no application in the case of an honest and bona fide transaction where there is no concealment or suppression. Absence of intention to deceive does not amount to penalty. The order passed by Respondent No. 2 also does not specifically speak about mala fides on the part of the Petitioner. Respondent No. 2 in the penalty order neither discussed anything about the replies filed by the Petitioner nor considered its petition filed for granting of immunity from penalty. Without citing any reasons, by merely stating that the Petitioner has underreported his income and he is liable to penalty, penalty has been


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imposed. In view of the same, the imposition of penalty on the Petitioner is unjust and unreasonable.

16. Aggrieved by the penalty order bearing DIN No. ITBA/PNL/F/270A/2021-22/1041977416(1) dated 29-03-2022, the Petitioner herein is filing the present writ petition on the following grounds, which are without prejudice to one another, amongst others which will be raised at the time of hearing:

GROUND

- A. The impugned penalty order dated 29-03-2022 passed u/s. 270A of the Income Tax Act, 1961 has been passed in gross violation of principles of natural justice and is liable to be set aside.
- B. The imposition of penalty @ 200% without mentioning the clause under which the Petitioner falls is in gross violation of principles of natural justice and as such unsustainable.
- C. The impugned penalty order passed without taking into consideration the replies filed by the Petitioner and the application filed for granting of immunity from penalty is bad and has no legs to stand.
- D. Imposition of penalty by Respondent No. 2 on the ground of under-reporting as a consequence of misreporting presupposes wilful misrepresentation or non-disclosure of income which is absent in the present case, as such imposition of penalty u/s. 270A of the Act is bad and unsustainable.


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- E. Respondent No. 2 ought to have considered that the case of the Petitioner falls under sub-clause (b) of clause (6) of Section 270A of the Act which carves out certain exceptions for imposition of penalty u/s. 270A(8) if the method employed by the Assessee to determine income is wrong or improper.
- F. Respondent No. 2 ought to have considered that in order to impose penalty u/s. 270A(8) of the Act, under-reporting of income should be as a consequence of mis-reporting which presupposes wilful intent to deceive or wilful non-disclosure of income.
- G. The Petitioner reserves liberty to add or amend any grounds at the time of hearing.
17. It is submitted that the Impugned order passed by Respondent No. 2 is in clear violation of principles of natural justice and therefore my challenge to the Impugned Order relates to the very legality of the orders. Further, as there is no provision of appeal provided under the Act against the order passed u/s. 270A of the Act, the Petitioner has no other alternate and efficacious remedy except to approach this Hon'ble Court under Article 226 of the Constitution of India. Hence, the Petitioner is constrained to invoke the writ jurisdiction of this Hon'ble Court under Article 226 of the Constitution of India as the order is arbitrary and illegal.

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18. It is submitted that the Impugned order is illegal and void. It is further submitted that the Petitioner is also entitled to interim and ad-interim reliefs. It is submitted that if the reliefs are not allowed, the present petition will be rendered infructuous which will cause great hardship and inconvenience to the Petitioner.
19. It is most respectfully submitted that if the orders as prayed for are not granted, great harm, irreparable loss, injustice and inconvenience will be caused to the Petitioner. The balance of convenience is overwhelmingly in favour of the Petitioner and against the Respondents. No harm whatsoever will be caused to the Respondents if interim and ad-interim orders as prayed for are granted.
20. The Petitioner has not filed any writ or suit or case before this Hon'ble Court or before any other forum seeking the relief prayed for in this writ petition.

PRAYER

For the reasons aforesaid, it is humbly prayed that this Hon'ble Court may be pleased to issue a writ, direction or order more particularly in the nature of a writ of mandamus declaring the penalty order bearing DIN No. ITBA/PNL/F/270A/2021-22/1041977416(1) dated 29-03-2022 passed by Respondent No. 2 u/s. 270A of the Income Tax Act, 1961 for the Assessment Year 2018-19 as being void, illegal, arbitrary, violative of Article 14 of the Constitution of India and violative of principles of natural justice and consequently set aside the same and pass such further or other

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order(s) as this Hon'ble Court may deem fit and proper in the circumstances of the case.

Pending disposal of the writ petition, it is humbly prayed that this Hon'ble Court may be pleased to stay all further proceedings including collection of tax pursuant to the penalty order bearing DIN No. ITBA/PNL/F/270A/2021-22/1041977416(1) dated 29-03-2022 passed by Respondent No. 2 for the Assessment Year 2018-19 and pass such further or other order(s) as this Hon'ble Court may deem fit and proper in the circumstances of the case.

Solemnly sworn and signed before me
On this the day of April, 2022

For VISTA HOMES
Managing Partner
DEPONENT

ADVOCATE::HYDERABAD

VERIFICATION STATEMENT

I, Soham Satish Modi, S/o. Late Satish Modi, aged about 53 years, R/o. Plot No. 280, Road No. 25, Jubilee Hills, Hyderabad, Telangana being the Petitioner herein do hereby verify and state that the contents of paras (1) to (20) etc., of the affidavit filed in support of the writ petition are true to my personal knowledge, based on records and believed to be correct and are based on legal advice believed to be correct.

Verified at Hyderabad on this the day of April, 2022

ADVOCATE

For VISTA HOMES
DEPONENT
Managing Partner

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

W.P. NO. 18549 OF 2022

....PETITIONER

VERSUS

..RESPONDENTS

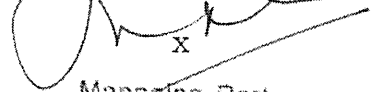
I/WE,

Appellant-Petitioner in the above Appeal/Petition do hereby
appoint and Respondent retain

R.S ASSOCIATES (21278)
K. PRABHAVATHI (12333)
M. NAGA DEEPAK (18411)
ROHAN ALOOR (20354)
HIMANGINI SANGHI
SHIV ROHAN SINGH
NISHITA B.
ADVOCATES

Advocate/s of the High Court to appeal for me/us in the above
Appeal/Petition and to conduct and prosecute (or defend) the same and
all proceedings that may be taken in respect of any application
connected with the same or any decree or order passed therein,
including application for return of documents or the receipt of any
money that may be payable to me/us in the said Appeal/Petition and to
also to appear in all applications under Clause XV of the Letters Patents
and in all applications for review and for leave to the Supreme Court of
India and in all applications for review of judgment.

For VISTA HOMES



Managing Partner

I certify that the contents of this Vakalatnama were read out and
explained in () in my presence to the executant, or
executants who appeared perfectly to understand the same and made
his/her/their signatures or marks in my presence.

Executed before me this day of April, 2022

ADVOCATE::HYDERABAD

