**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI**

**BEFORE SHRI R. C. SHARMA, AM AND SHRI AMARJIT SINGH, JM**

आयकर अपील सं/ I.T.A. No.3203/Mum/2015

(**निर्धारण वर्ष** / Assessment Year: 2010-11)

| | | |
|---|---|---|
| Midland Animal Nutrition Pvt. Ltd. 6W, Merchant Chambers, 6th Floor, No.41, New Marine Lines, Opp, Patkar Hall, Mumbai-400020. | **बनाम**/ Vs. | ITO Ward-2(1)(2), Mumbai-400020. |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACC2964Q | | |
| (अपीलार्थी /**Appellant**) | .. | (प्रत्यर्थी / **Respondent**) |

| | |
|---|---|
| Assessee by: | Shri D Dharmesh Shah & Dhaval Shah |
| Revenue by: | Shri Suman Kumar (DR) |

सुनवाई की तारीख / Date of Hearing: 11.07.2018

घोषणा की तारीख /Date of Pronouncement: 26.09.2018

**आदेश / O R D E R**

**PER AMARJIT SINGH, JM:**

The assessee has filed the present appeal against the order dated 11.05.2015 passed by the Commissioner of Income Tax (Appeals)-4, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y. 2010-11 wherein the penalty levied by the AO u/s 271(1)(c) of the I.t. Act, 1961 has been ordered to be upheld.

**2**. The assessee has raised the following grounds: -

> "1. *On* the facts and circumstances of the case and in law. the learned CIT(A) erred in confirming the penalty levied

u/s.27l(l)(c) of the Act of Rs,3,24,450/- on alleged bogus purchases of Rs.10,50,000/-.

1.1 On the facts and circumstances of the case and in law. the CIT(A) erred in not considering the purchase bills, delivery challans and confirmation of the party from whom the alleged bogus purchases were made and thereby holding that the same were not bogus in view of the decision of the Hon'ble Bombay High Court in the case of Nikunj **Eximp Enterprises** Pvt **Mil.** (372 ITR 619).

1.2 On the facts and circumstances of the case and in law, without prejudice without admitting and in the alternative, the CIT(A) erred m not restricting the penalty levied to the gross loss incurred as [he alleged bogus purchases were subsequently sold for a iota I consideration of Rs.7,48,500 and therefore at best the penalty could be levied on the loss incurred of Rs.3.01,500 (10,50,000-7,48,500).

*2.* The appellant craves leave to add, alter or amend the grounds of Appeal on or before the hearing of this appeal."

**3**. The brief facts of the case are that the assessee company is engaged in the business of trading in animal feed, poultry fee supplements and pharmaceutical products and money lending. It furnished its e-return of income for A.Y.2010-11 on 27.09.2010 declared total income to the tune of Rs.18,182/-. The Assessing Officer completed the assessment u/s 143(3) of the Act on 27.12.2012 assessing the total income to the tune of Rs.11,19,510/- under the normal provisions of the Act and Rs.1,04,078/- u/s 115JB of the Act. In the assessment order, the Assessing Officer raised the addition of Rs.10,50,000/- on account of bogus purchase. Notice was given and the assessee failed to prove the bogus purchase wroth of Rs.10.50 lakhs from M/s. Ajanta Enterprises, Bhiwandi despite of opportunity given to the assessee. The Assessing Officer made necessary efforts to

verify the claim by issuing notice u/s 133(6) of the Act but to no use. Assessee failed to produce the creditors i.e. M/s. Ajanta Enterprises even on the notice u/s 133(6) of the Act. It was conveyed that the M/s. Ajanta Enterprises was not existing at the given address. The assessee failed to produce the challan transport detail etc. The assessee failed to furnished the bank statement transaction in connection with M/s. Ajanta Enterprises. The confirmation letter produce by assessee nowhere disclose the necessary detail of the transaction. The AO held that the transaction to the tune of Rs.10,50,000/- was taxable hence added to the income of the assessee. After completion of the assessment, notice u/s 271(1)(c) of the Act was given and the AO levied the penalty to the tune of Rs.3,24,450/- being 100% of the tax sought to be evaded u/s 271(1)(c) r.w.s. 274 of the Act. Thereafter, the assessee filed an appeal before the CIT(A) who confirmed the penalty order, therefore, the assessee filed the present appeal before us.

**4.** We have heard the argument advanced by the Ld. Representative of the parties and perused the record. The Ld. Representative of the assessee has argued that the addition of Rs.10,50,000/- was made on account bogus purchase whereas the assessee has placed on record sufficient documents to prove the identity, genuineness, creditworthiness of the claim. It is argued that the assessee has produced the purchase bill and other challan and confirmation receipt from the Ajanta Enterprises and extract of the

bank statement of the appellant showing in the payment made to the Ajanta Enterprises and sale record made to the various parties out of good purchased from Ajanta Enterprises and sale bill issued and transport bills in respect of the sale against the Ajanta Enterprises etc. but these documents were not considered by the AO as well as the CIT(A) and wrongly levied the penalty, therefore, the finding of the CIT(A) is not justifiable and is liable to be set aside. In support of his claim the Ld. Representative of the assessee has placed reliance upon by the Hon'ble ITAT in the case of **Balaji Construction (ITA. No.217/M/2015) dated dated 15.02.2017 for the A.Y.2009-10 and** decision of the Bombay High Court in the case of **CIT Vs. Upendra V. Mithani (ITA. No. 1860 of 2009) dated 05.08.2009 & National Textiles Vs. CIT 249 ITR 125.** However, on the other hand, the Ld. Representative of the Department has refuted the said contention. On appraisal of the order passed by the CIT(A) on record, we noticed that the CIT(A) has confirmed the penalty levied by the AO on account of non-proving the claim of the purchase of Rs.10,50,000/- by the assessee. No doubt, the confirmation has been produced before the AO and in this regard the AO has mentioned in the assessment order. The Assessing Officer issued the notice u/s 133(6) of the Act to M/s. Ajanta Enterprises but no notice was served. Assessee failed to produce the parties before AO and also failed to submit other necessary documents. We find that the assessee had submitted the necessary documents before the Authority below but these documents

nowhere examined and discussed. The assessee produced the purchase bill dated 03.04.2009 on record which lies at page no. 1 of the paper book. The assessee has also furnished the copy of challan which lies at page no. 2 of the paper book and confirmation letter which lies at page no.3 of the paper book. The bank statement of the assessee lies at page no. 4 to 5 of the paper book in which the assessee has made the payment to Ajanta Enterprises through banking channel. The assessee has also showed the sale to various parties out of good purchase from Ajanta Enterprises and in this regard document has placed on record which lies at page no. 6 of the paper book. No doubt, the documents produce before the AO as well as CIT(A) were not being considered properly before adjudication of the matter of controvery but these documents speaks about the reasonable claim of assessee in connection with purchase from Ajanta Enterprises. The facts of the present case are quite similar to the case decided by Hon'ble ITAT in ITA. No. **Balaji Construction (ITA. No.217/M/2015) dated 15.02.2017.** The relevant finding has been produced below.: -

> *"5. Per contra, Ms. Chandani Patel, Ld. Counsel of the assessee vehemently supported order of the Ld. CIT (A). It was submitted by her that the assessee submitted in detail that exhaustive evidences were filed in support of claim of purchase made by the assessee before the lower authorities. However, the AO alleged that purchases were bogus. But the allegations of the AO were without support of any adverse material having been brought on record. Neither any material was provided to the assessee indicating that purchases made by the assessee were bogus nor any opportunity of cross examination was given by the AO to the assessee. The AO merely alleged that supplier was not produced by the assessee, but mere non-production of the supplier*

*would not prove that purchases were bogus and income was concealed. Thus, levy of penalty was not legally possible on that ground alone. She placed reliance on the following judgments in support of her argument that no penalty was leviable in the given facts of this case:*

*1. CIT v. Reliance Petroproducts (P.) Ltd. 2010] 322 ITR 158 (SC).*
*2. ACIT v. Manish Organics India Ltd. [2012] 17 taxman.com 25 (Ahmedabad).*
*3. Ruchi Developers v. ITO [ITA 1170/Ahd/2014, decision dated 05.06.2015].*
*4. DCIT v. Rajeev G. Kalathil[[2014] 51 taxman.com 514 (Mumbai-Trib.)*
*5. Chempure v. ITO [2010] 40 SOT 164 (MUM)*
*6. HOE Leather Garments Ltd. V. Dy. Commissioner of Income Tax [2010] 39 SOT 210 (Hyderabad)."*

**5.** In the similar circumstances, the Hon'ble ITAT has also given the finding in **ITA. No.217/M/2015 title as ACIT Vs. Balaji Construction.** The relevant finding has been given in para no. 7 below.:-

*"7. We have carefully examined the findings recorded by the Ld. CIT(A). With the assistance of the parties, it was noted by us that assessee had filed ample evidences to discharge its primary onus. Our attention was drawn upon the invoice as well as delivery challans issued by the supplier establishing delivery of the goods purchased by the assessee. Our attention was also drawn upon the weighment slip wherein particulars of the vehicle number and weight of the material purchased was mentioned. Our attention was also drawn upon Quality Inspection Report issued by M/s Bhagwati Steel Cast Ltd., wherein chemical composition and mechanical properties purchased by assessee are narrated. This report not only contained particulars about the quality of product conformed to the Standard Rolling and Mass Tolerances but also confirmed the fact that the material was supplied to the assessee. Our attention was also drawn upon the bank statement establishing that payment was made by cheque. We have also been shown confirmed copy of account issued by the supplier to the assessee, wherein complete entries of transactions done by the assessee with the said supplier were mentioned. These evidences establish that assessee had successfully discharged its primary onus in support of his claim.*

*However, the AO had made the addition on the ground that assessee was not able to produce the said supplier and as per the website of the Sales Tax Department, the name of the said supplier is placed in the list of hawala dealers. In our opinion, the basis adopted by the Assessing Officer for making addition or disallowance may or may not be justified as far as legality of the addition made in the quantum proceedings is concerned, but for levy of penalty these basis are indeed insufficient and not tenable in the eyes of Law. It is well established law that parameters for making the addition/disallowances are a different from levy of the penalty u/s 271 (1) (c) of the Act. There may be cases where claim of the assessee may remain unproved during the course of assessment proceedings for want of substantiation, but for the purpose of levy of penalty the AO is required to 'disprove' the claim of assessee. The AO must show that the claim of the assessee is bogus or false. In the facts of this as were brought before us, in our opinion, the claim of the assessee was not proved as bogus or false. The AO levied the penalty merely on the basis of his allegations which were unsupported with any cogent material or evidences. We find that in the facts as have been brought out before us, the case of the assessee should not have been visited with levy of penalty. The assessee brought on record all the primary evidences as could have been adduced by the him, but AO did not place on record even a single piece of evidence to controvert or negate the evidences brought on record by the assessee. Thus, the peculiar facts of this case do not permit the AO to levy penalty on the assessee. We also find support from the judgement of Hon'ble Gujarat High Court in the case of National Textiles vs. CIT 249 ITR 125 (Guj), wherein after analysing fundamental aspects of jurisprudence with respect to levy of penalty as envisaged in section 271(1)(c), it was observed as under:*

> "The provisions of s. 68 permitting the AO to treat unexplained cash credit as income are enabling provisions for making certain additions, where there is failure by the assessee to give an explanation or where the explanation is not to the satisfaction of the AO. However, the addition made on this count would not automatically justify imposition of penalty under s. 271(1)(c) by recourse only to Explanation 1 below s. 271(1)(c). In order to justify the levy of penalty, two factors must co-exist, (i) there must be some material or circumstances leading to the reasonable conclusion that the amount does represent the assessee's income. It is not enough for the purpose of penalty that the amount has been assessed as income, and (ii) the circumstances must show that there was animus i.e., conscious concealment or act of furnishing of inaccurate particulars on the

part of the assessee. The Explanation has no bearing on factor No. 1 but it has bearing only on factor No. 2. The Explanation does not make the assessment order conclusive evidence that the amount assessed was in fact the income of the assessee. No penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If an assessee gives an explanation which is unproved but not disproved i.e., it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false, the Explanation cannot help the Department because there will be no material to show that the amount in question was the income of the assessee. Alternatively, treating the Explanation as dealing with both the ingredients (i) and (ii) above, where the circumstances do not lead to the reasonable and positive inference that the assessee's explanation is false, the assessee must be held to have proved that there was no mens rea or guilty mind on his part. Even in this view of the matter, the Explanation alone cannot justify levy of penalty. Absence of proof acceptable to the Department cannot be equated with fraud or wilful default. As there is no material difference between the original Explanation 1 and Explanation 1 as substituted, it has to be so construed as to harmonise it with basic principles of justice and fairness, as in the case of original Explanation. On the state of accounts and evidence in the quantum proceedings, the Department was justified in treating the cash credit as income of the assessee but merely on that basis by recourse to Explanation 1, penalty under s. 271(1)(c) could not have been imposed without the Department making any other effort to come to a conclusion that the cash credits could in no circumstances would have been amounts received as temporary loans from various parties. The assessee in the quantum proceedings failed to produce the accountant but the Department also in penalty proceedings made no effort to summon him. Applying the test (ii) discussed above, therefore, it was a case where there was no circumstance to lead to a reasonable and positive inference that the assessee's case—that the cash credits were arranged as temporary loans, was false. The facts and circumstances are equally consistent with the hypothesis that it could have been sundry loans in small amounts obtained from different parties. Therefore, even taking

> recourse to Explanation 1, same circumstances or state of evidence on which the cash credit were treated as income, could not by themselves justify imposition of penalty without anything more on record produced by the assessee or the Department. "
>
> Therefore, keeping in view the peculiar facts and circumstances of this case and legal position as discussed above, we find that penalty has been rightly deleted by Ld. CIT (A). No interference is called for in her order and therefore, same is upheld.

**6.** The assessee has also placed reliance upon the decision of Hon'ble Bombay High Court in ITA. No.1860 of 2009 title as CIT Vs. Upendra V. Mithani dated 05.08.2009. The assessee has also placed reliance upon the law settled by Gujarat High Court in the case of National Textiles Vs. CIT (249 ITR 125). In the said circumstances, we are of the view that the penalty order confirmed by CIT(A) is not justifiable, therefore, we set aside the finding of the CIT(A) on this issue and delete the penalty.

**6**. In the result, the appeal filed by the **assessee is hereby ordered to be allowed.**

Order pronounced in the open court on 26.09.2018.

| Sd/- | Sd/- |
|---|---|
| **(R. C. SHARMA)** | **(AMARJIT SINGH)** |
| **लेखा सदस्य / ACCOUNTANT MEMBER** | **न्यायिक सदस्य/JUDICIAL MEMBER** |

मुंबई Mumbai; दिनांक Dated : 26.09.2018.
*vijay*

**<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/** BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार** /(Dy./Asstt. Registrar)
**आयकर अपीलीय अधिकरण,** मुंबई **/ ITAT, Mumbai**