

**आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।**

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

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष ।

**BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM**

आयकर अपील सं./ ITA No. 6573/Mum/2017

(निर्धारण वर्ष / Assessment Year 2009-10)

Naushad Ahmed Khan E-46-49, G Barve Marg, C.S.T. Road, Kurla Mumbai 400 070	Vs.	The Income Tax Officer, ward 26(2)(3), C-12, R. No. 603, 6 <sup>th</sup> Floor, Pratykshkar Bhavan, Bandra Kurla Complex, Bandra East, Mumbai-400 051
<b>(अपीलार्थी / Appellant)</b>	..	<b>(प्रत्यर्थी / Respondent)</b>
<b>स्थायी लेखा सं./PAN No. AABPK 4762 G</b>		

अपीलार्थी की ओर से / <b>Appellant by</b>	:	Shri M H Patel, AR
प्रत्यर्थी की ओर से / <b>Respondent by</b>	:	Shri Ashish V. Pophare, DR

सुनवाई की तारीख / <b>Date of hearing:</b>	14-01-2019
घोषणा की तारीख / <b>Date of pronouncement :</b>	28-01-2019

**आदेश / ORDER**

महावीर सिंह, न्यायिक सदस्य/  
**PER MAHAVIR SINGH, JM:**

This appeal filed by the assessee is arising out of the order of Commissioner of Income Tax (Appeals)-38, Mumbai [in short CIT(A)], vide order dated 23.08.2017. The Assessment was framed by the Income Tax Officer, Ward-26(2)(3), Mumbai (in short 'ITO'/ AO) for the A.Y. 2010-11



vide order dated 31.12.2015 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of assessee is against the order of CIT(A) confirming the penalty levied by AO u/s 271(1)(c) of the Act on estimated profit on bogus purchases at the rate of 12.5%.

3. Briefly stated facts are that the department received information from DGIT, Investigation Mumbai, who in turn received information from Sales Tax Department of Maharashtra that the assessee has taken bogus bill of purchase from the following parties.

Sr. No.	Name	Particulars of transactions
		Amt in Rs.
1.	Sagar Steel Traders	5,89,056
2.	Rupani & Co.	21,47,906

4. Finally, the assessee accepted that he has taken bills but he also made purchase from grey market and for that he agreed that an estimate of profit @ 12.5% can be made of the bogus purchases and for this the assessee agreed and addition of Rs. 2,68,488/- was made vide Para 2.8 by the AO as under:-

*“2.8 After taking into account all the facts and circumstances of the case and considering the business activity of the assessee, I am of the considered opinion that 12.5% of non-genuine purchases of ₹ 21,47,906/- made from the above mentioned parties which comes to ₹ 2,68,488/- in the quantum of profit element*



*involved. Accordingly, an amount of ₹ 2,68,488/- is taken as non-genuine purchases and added to the business income of the assessee.”*

5. No further appeal was filed by the assessee against this quantum addition. Consequent to this assessment year, the AO initiated the penalty proceedings and for this AO initiated as under: -

*“.... penalty proceedings u/s 271(1)(c) are separately initiated for furnishing inaccurate particulars of income and for concealing the income.”*

6. At the outset, the learned Counsel for the assessee stated that the AO himself was not sure about charge of concealment of income and on charge itself the penalty will not survive. Secondly, the learned Counsel for the assessee stated that even on estimation of penalty of bogus purchase cannot be sustained in view of the decision of this Tribunal in the case of Mrs. Sonali A. Shah vs. ITO in ITA No. 5702/Mum/2013 for AY 2007-08 vide order dated 07.11.2016, wherein the Tribunal vide Para 7 and 8 reads as under: -

*“7. We have heard the rival submissions and perused the orders of the authorities below and the case law relied on. In this case the assessee is into the business of textiles, iron and steel. There was a survey in the premises of the assessee and in the course of survey it was noticed that the assessee was showing very low gross profit on the turnover from the business of textiles as well as iron and steel. The Assessing*



*Officer when requested for furnishing the details of godowns and warehouses addresses the assessee seems to have given evasive replies. The survey party has also found that the assessee is operating her business in a small place on a sharing accommodation without even any furniture/staff etc. The survey party also recorded a statement from assessee's husband who has stated that they did not have any opening stock or closing stock in both the business as they receive orders from the parties they place orders with the members directly and the material is supplied to the parties. The assessee raises bills on her client and in turn her suppliers also raise bills on the assessee. In the course of assessment proceedings, the Assessing Officer issued notices to various parties who have sold materials to the assessee. Many of the notices were returned unserved. However, assessee seems to have produced the confirmations before the Assessing Officer whereas notices were returned unserved. The Assessing Officer after noticing various discrepancies in the confirmations he treated such confirmations as dubious and non-genuine. In view of all these discrepancies the Assessing Officer rejected the books of accounts of the assessee and estimated the gross profit at 20% in respect of*



*sales made in the textile business and 10% in sales made in iron and steel business. The Ld. CIT(A) sustained the action of the Assessing Officer in rejecting books of accounts and estimating of gross profit. However, the Tribunal while sustaining the rejection of books of accounts by the lower authorities as they are not reliable and at the same time held that the gross profit estimated in the iron and steel business and textile business is on higher side. The Tribunal reduced the gross profit rate by 5% in both the businesses of the assessee.”*

7. The Assessing Officer levied penalty holding that there is concealment of income or furnishing of inaccurate particulars which the CIT(A) sustained. On a reading of the orders of the lower authorities i.e. the assessment order and the order of CIT(A), we find that the books of accounts were rejected on noticing various discrepancies such as no proper confirmations from the parties, low GP rate, no proper stock records, no details of warehouses, godowns etc. We notice that it was not established that there is concealment of income or furnishing of inaccurate particulars in this case. The books were rejected as they are not reliable and the addition was made by estimating the gross profit. The activity of the assessee in doing these businesses by placing orders with the dealers who supply the materials directly to the clients of the assessee and the assessee raising invoices on the clients and the dealers on the assessee is also not in dispute. In fact, it is the finding in the survey report that assessee is keeping some margin from such sales. Therefore, the lower authorities could not prove that there is furnishing of inaccurate particulars or concealment of income in showing less GP in



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the businesses. Mere estimation of gross profit will not lead to furnishing of inaccurate particulars or concealment of income.

8. Respectfully, following the co-ordinate Bench decision and the facts of the case that the penalty was levied merely on estimate, we delete the penalty and allow the appeal of the assessee.

9. **In the result, the appeal of assessee is allowed.**

Order pronounced in the open court on 28-01-2019.

Sd/-

(राजेश कुमार / RAJESH KUMAR)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 28-01-2019.

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

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

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 (Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai