

**IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM**

I.T.A. Nos.5400 & 5401/Mum/2017
(Assessment Years: 2012-13)

Shreeji Construction A-402, Aadarsh Galaxy Off Marve Road Malad (W), Mumbai-400 064	Vs.	DCIT-30(3) C 10/709 Pratyakshkar Bhavan Bandra Kurla Complex Bandra (East) Mumbai-400 050
PAN/GIR No. AAOFS9070J		
(Appellant)	:	(Respondent)

Appellant by	:	None
Respondent by	:	Asish Kumar

Date of Hearing	:	03.01.2019
Date of Pronouncement	:	15.03.2019

O R D E R

Per Shamim Yahya, A. M.:

These are assessee's appeals relating to additions sustained on account of bogus purchase and penalty levied there on.

ITA No.5401/Mum/2017

2. This is an appeal by the assessee wherein the assessee is aggrieved that the Ld. CIT(A) has erred in sustaining 30% disallowance on account of bogus purchases resulting in addition of Rs.5,08,399/-

3. The Assessing Officer in this case has made 100% addition on account of bogus purchase amounting to Rs.16,94,665/-. Upon assessee's appeal Ld. CIT(A) reduced the same to 30%.

4. Against above order assessee is in appeal before the ITAT. We have heard the Ld. DR and perused the records. None appeared on behalf of assessee despite notice.

5. Upon careful consideration we find that assessee has provided the documentary evidence for the purchase. Adverse inference have been drawn due to the inability of the assessee to produce the suppliers. We find that in this case the sales have not been doubted. It is settled law that when sales are not doubted, 100% disallowance for bogus purchase cannot be done. The rationale being no sales is possible without actual purchases. This proposition is supported from Hon'ble jurisdictional High court decision in the case of Nikunj eximp enterprises (in writ petition no 2860, order dated 18/06/2014). In this case the Hon'ble High Court has upheld 100% allowance for the purchases said to be bogus when sales are not doubted. However, in that case all the supplies were to government agency. In the present case the facts of the case indicate that assessee has made purchase from the grey market. Making purchases through the grey market give the assessee saving on account of non-payment of tax and others at the expense of the exchequer. In such situation in our consideration opinion on the facts and circumstances of the case the 12.5% disallowance out of bogus purchases meets the end of justice.

Accordingly, we modify the order of Ld. CIT(A) and direct that the disallowance in this case be restricted to 12.5% of the bogus purchases.

6. In the result, this appeal filed by the assessee stands partly allowed.

ITA NO.5400/Mum/2017

7. In this appeal the assessee has challenged the confirmation of levy of penalty under section 271(1)(c) amounting to Rs.5,08,399/- by the Ld. CIT vide order dated 06.06.2017.

8. With respect to the addition on account of bogus purchase as dealt with by us in ITA No. 5401/Mum/2017 above the AO has levy of penalty of Rs.5,25,000/-. Upon assessee's appeal Ld. CIT(A) had reduced the penalty to Rs.5,08,399/- in accordance with the additions sustained by him.

9. Against the above order assessee has filed appeal before the ITAT

10. Upon careful consideration, we find that the additions sustained in this regard has been considerably reduced by us as detailed in our order in ITA. No. 5041/Mum/2017 above.

11. Further, we note that the penalty u/s. 271(1)(c) is levied on account of concealment of income or furnishing of inaccurate particulars.

12. In the present case we find that there is no case of concealment or furnishing of inaccurate particulars of income by the assessee. All the particulars'details of purchase were duly submitted. Adverse inference and

adhoc disallowances is sustained only for non-appearance of suppliers before the AO. No contumacious conduct is attributable to the assessee. Hon'ble Apex Court in the case of Hindustan Steel Ltd vs. State of Orissa 83 ITR 26 has expounded that the authorities can decline to levy of penalty if the conduct of the assessee is bonafide and has been not found to be contumacious.

13. In the facts and circumstances of the case in our considered opinion the assessee's case doesn't deserve the rigours of penalty under section 271(1)(c). Accordingly, we set aside the order's of authorities below and delete the penalty.

14. In the result, assessee appeal is allowed.

Order pronounced in the open court on 15th March, 2019.

Sd/-
(Amarjit Singh)
Judicial Member

Sd/-
(Shamim Yahya)
Accountant Member

Mumbai; Dated : 15.03.2019
Thirumalesh, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai