

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

**BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.2408/M/2018
Assessment Year: 2009-10**

Mr. Mohammed Sharif, D-6, Ganraya CHS Ltd., Plot No.34, Ganesh Nagar, Kandivali (West), Mumbai - 400 067 PAN: AJSPS2522A	Vs.	Income Tax Officer, Ward 30(3)(3), C-13, Pratyaksha Kar Bhawan, Bandar Kurla Complex, Bandra (East), Mumbai - 400051
(Appellant)		(Respondent)

Present for:

Assessee by : None
Revenue by : Mrs. Jothilakshmi Nayak, D.R.

Date of Hearing : 14.05.2019
Date of Pronouncement : 20.05.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 19.02.2018 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2009-10.

2. The only issue raised by the assessee in the grounds of appeal is against the confirmation of penalty of Rs.5,53,318/- by Ld. CIT(A) as levied by the AO under section 271(1)(c) of the Act.

3. The facts in brief are that the assessment was framed under section 143(3) read with section 147 vide order dated 24.03.2015 assessing the income at Rs.20,45,180/- as against the return of income of Rs.3,91,034/- by adding Rs.16,54,146/- on account of bogus purchases. The penalty proceedings were

also initiated for furnishing of inaccurate particulars of income and concealment of two particulars of income in the assessment order by issuing penalty notice under section 271(1)(c) dated 26.08.2015 which was not replied by the assessee. Thereafter, the AO framed the assessment by levying minimum penalty equal to 100% of the tax sought to be evaded at Rs.5,53,318/- by relying on the decision of Apex Court in the case of Union of India vs. Dharmendra Textile Processors Ltd. (2008) 166 taxman.com 65 (SC) and also the decision of Apex Court in the case of Vegetable Products Ltd. 88 ITR 192 (SC) vide order dated 28.09.2015 passed under section 271(1)(c) of the Act.

4. In the appellate proceedings, the Ld. CIT(A) also affirmed the order of AO by holding that the AO has rightly imposed penalty for furnishing of inaccurate particulars of income and thus justified the imposition of penalty.

5. The Ld. A.R. submitted before us that the co-ordinate bench of the Tribunal in ITA No.2409/M/2018 A.Y. 2009-10 vide order dated 19.12.2018 partly allowed the appeal of the assessee in quantum by directing the AO to apply a profit rate of 12.5% on the said bogus purchases and thus the Ld. A.R. submitted that it is a case of estimation of income on which the penalty is not imposable. This is a clear cut case of difference of opinion as the AO added 100% of the amount whereas the co-ordinate bench of the Tribunal has sustained the addition to the tune of 12.5% and therefore penalty in such a scenario can not be imposed as has been decided by the co-ordinate benches of the Tribunal in a number of cases .The ld AR therefore prayed before the bench to set aside the order of CIT(A) and direct the AO to delete the penalty.

6. The Ld. D.R., on the other hand, strongly relied on the order of authorities below.

7. We have heard the Ld. D.R. and perused the material on record. We find that in this case the assessment was framed by the AO after making ex-parte addition of Rs.16,54,146/- towards 100% of the bogus purchases which the co-ordinate bench of the Tribunal in quantum proceedings reduced to 12.5% of such purchases. In our opinion, this is a clear cut case where the income has been estimated by applying a percentage of 12.5% and therefore the penalty under section 271(1)(c) can not be imposed. We are, therefore, setting aside the order of Ld. CIT(A) and direct the AO to delete the penalty.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 20.05.2019.

**Sd/-
(Sandeep Gosain)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 20.05.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.