

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "H", MUMBAI**

**Before Shri Shamim Yahya, Accountant Member and  
Shri Ravish Sood, Judicial Member and**

**ITA No.302/Mum/2018  
Assessment Year-2010-11**

ACIT, Circle-4, Room No.02, A-wing, 6 <sup>th</sup> Floor, Ashar IT Park, Wagle Industrial Estate, Road No.16-Z, Thane (W)-400604	<b>बनाम/ Vs.</b>	M/s Kundan Industries Ltd. Kundan House, Goraipada, Vasai (E), Dist-Palghar
		<b>PAN No.AAACK6811G</b>
(राजस्व /Revenue)		(निर्धारिती /Assessee)

राजस्व की ओर से / Revenue by	Shri Manoj Kumar Singh
निर्धारिती की ओर से / Assessee by	Shri K. Gopal

सुनवाई की तारीख / <b>Date of Hearing :</b>	<b>24/04/2019</b>
देश की तारीख / <b>Date of Order:</b>	<b>26/04/2019</b>

**देश / O R D E R**

**Per Shamim Yahya, Accountant Member**

This appeal by the Revenue directed against order's of learned CIT(A)-3, Thane, dated 24/10/2017 and pertains to Assessment Year 2010-11. The grounds of appeal reads as under:-

*"1. Whether on the fact and circumstances of the case, the Ld. CIT(A) failed to consider the fact that the assessee wrongfully adjusted profit on sale of office building with that of loss on sale of vehicle, which shall deemed to represent the income in respect of which inaccurate particulars have been filed.*

2. *Whether on the facts and circumstances of the case, the Ld. CIT(A) failed to consider the fact that bogus purchases which was limited to the extent to @ 15% of gross purchases by Ld. CIT(A), shall deemed to represent the income in respect of which inaccurate particulars have been filed.*

3. *The order of the CIT(A)-3, Thane should be set-aside and that of the A.O. should be restored.*

2. The brief facts of the case leading to the levy of penalty and the deletion thereof by the learned CIT(A) are as under:

The assessee company is engaged in the business of manufacturing of Steel Fasteners i.e. nuts, bolts, plates etc. under the brand name 'KUN'. The assessee has filed its Return of Income on 07/10/2010 declaring total income of Rs.3,73,87,220/-.

The case was selected for scrutiny as per scrutiny guidelines issued for A.Y. 201112. During the course of assessment proceedings, the then AO made the following additions/ disallowances:

On account of interest u/s 36(1)(iii) and 37 of Rs. 19,58,059/-.

Profit on sale of flat at 501, Pratap Enclave, Goregaon (W), Mumbai computed at Rs.54,06,348/- was added to the returned income and taxed as STCG u/s 50 of the IT Act. In this case, the assessee has made adjustment of profit and loss on sale of premises with loss incurred on account of sale of cars. Therefore, in the instant case, although the rate of depreciation was 10% for office building (flats) and vehicles, they did not belong to the same class of assets and therefore interclass set off of profit and loss was not allowable. The A.R. admitted the lapse on his part which was due to an erroneous understanding of the concept of block of assets and agreed to the addition of Short Term Capital Gain on sale of flats. Penalty proceedings u/s. 271(1)(c) of the I T Act was initiated for furnishing inaccurate particulars of income.

During the assessment proceedings, from the submission of the assessee company, it was found by the then AO that assessee company had made purchases amounting to Rs.2,96,38,387/- from the 17 parties. As, the

assessee had not been able to lead any evidence to show the genuineness of the so-called purchases of consumables/stores, it was concluded that the said amount of Rs.2,96,38,387/- debited in the accounts on the basis of accommodation bills/hawalas obtained from these 17 bogus suppliers, were unexplained and bogus purchases. Penalty proceedings u/s. 271(1)(c) of the IT Act was initiated for furnishing inaccurate particulars of income.

The assessee company had filed an appeal before the Ld. CIT(A)-II, Thane against the order passed u/s 143(3) on 28/03/2013. Hence, the penal proceedings initiated u/s 271(1)(c) of the Act vide notice dated 28/03/2013 were kept in abeyance till the disposal of first appeal.

The Ld. CIT(A)-3, Thane has passed an order dated 19/10/2015. The CIT(A) has partly allowed the appeal of the assessee company and stated in para 6 of the order that "During the appellate proceedings, the AR of the appellant had agreed to withdraw this ground and had given in writing, vide letter dated 09.10.2015; therefore, the disallowance of interest paid of Rs. 19,58,0591- by the then AO was confirmed and the assessee ground of appeal on this issue was dismissed."

Considering the totality of the facts of the case and also various courts had up held the disallowance on such purchases from 12.5 % to 25%, therefore, I was of the considered opinion to disallow 15% as inflated purchases on the total purchases made from unverifiable parties. The purchases made from M/s. Ami Traders of Rs. 14,12,4381- was added as bogus purchases because they had denied having any transaction with the assessee in reply to notice issued u/s. 133(6) of the Act. Therefore, the disallowance @ 15% would be on Rs.(2,96,38,387- 14,12,438)= 2,82,25,949/-

In view of the above stated facts, the disallowance @ 15% of Rs. Rs. 2,82,25,94 9/ - works out to Rs. 42,33,8921 - was added to the total income of the assessee plus Rs. 14,12,438 = Rs.56,46,3301 -The appellant get relief ofRs. (2,82,25,949- 42,33,892) = 2,39,92,057/-."

Further as per para 8 of the appeal order dated 19/10/2015, the Ld. CIT(A)-3, Thane has stated that "During the appellate proceedings, the AR of the appellant has agreed to withdraw

this ground and had given in writing, vide letter dated 09.10.2015. Therefore, the addition made on account of Short Term Capital Gain on sale of flat of Rs. 54,06,348/- by the then AO was confirmed."

Thereafter, AO after giving opportunity to assessee & considering the submission of the AR of the assessee, has levied the penalty of Rs. 32,76,718/- u/s 271(1)(c) of the Act on account of additions of Short Term Capital Gain of Rs.54,06,348/-, unexplained and bogus purchases to extent of Rs.56,46,330/- for AY 2010-11 on 31.03.2017.

Aggrieved by the penalty order, the assessee has filed an appeal before the Ld. CIT(A)-3, Thane on 02.05.2017, wherein it was held by the CIT(A) that on the entire addition of bogus purchases made by the AO, the CIT(A) has restricted the disallowance by estimating @ 15% of the total bogus purchases in quantum appeal, vide Appeal Number 256-THN/13-14 dated 19.10.2015. Therefore considering the various Tribunal's decision, it was held that no penalty can be levied in a case where assessee has made purchases from hawala parties though the quantum appeal has been confirmed & thus penalty on account of bogus addition was allowed to the assessee. On the issue of profit on sale of premises, the Ld. CIT(A)-3, Thane has held that the profit on account of sale of premises is already reflected in the depreciation chart as well as in computation of income filed with the return of income. Therefore, it is not a false claim but it is a wrong claim made by the appellant, therefore, in such a situation penalty is not attracted.

3. The order of learned CIT-A deleting the penalty may be gainfully referred as under

"On the entire addition of bogus purchases made by the AO, the undersigned has restricted the disallowance by estimating @ 15% of the total bogus purchases in quantum appeal, vide Appeal Number:256-THN/13-14 dated 19.10.2015. After considering the above stated facts, I am of considered view that it is not a fit case to levy penalty as the addition confirmed was made on estimated basis to the extent 15% of the total purchases made from unverifiable supplier and this fact has been supported by the various judicial pronouncements-

a) In this regard, the Hon'ble Ahmedabad ITAT in the case of Bidiwala Brothers vs. ITO in ITA No.2451 & 2452/AHD/2012 has held that, no

penalty u/s.271(1)(c) for furnishing inaccurate particulars of income can be levied when additions in respect of alleged bogus purchases were made only on estimated basis.

b) On similar facts, in the case of M/s.Ruchi Developer vs. ITO (2015) ITA No.1170/Ahd/2014 order dated 05.06.2015 has held that the parties from whom purchases were made is reported to be left by the postal authorities. This reason may be sufficient to sustain the addition, but in our considered view, this basis is not sufficient to confirm the penalty in view of Ahmedabad Tribunal in case of Manish Organics (ITA No.2155/Ahd/2010) and also Gujarat High Court In National Textiles 249 ITR 125.

c) On similar facts, the Hon'ble Mumbai Tribunal in the case of Chempure vs. ITO in ITA No.451,452, & 453 /Mum/2006 A.Ys. 1996-97, 1997-98 & 1998- 99 order dated 07.05.2010 has held that no penalty can be levied in a case where assessee has made purchases from Hawala parties even though the quantum appeal has been confirmed.

In view of the above stated facts and legal decisions, the penalty imposed by the AO is not justified and accordingly, deleted. The appeal of the appellant on this ground is allowed.

d) Profit on sale of premises:-

Regarding the addition made on account of capital gain on sale of premises of Rs.54,46,330/-, the profit on sale of premises is already reflected in the depreciation chart as well as in computation of income filed with the return of income. Therefore, it is not a false claim but it is a wrong claim made by the appellant, therefore, in such a situation penalty is not attracted. In support of his explanation, the appellant has placed reliance in the case of Buildbyte.com vs. ACIT of Mumbai Bench reported in ITA No.7350/Mum/2013 A.Y.2002-03 order dated 13.09.2017, which is squarely applicable in the case of appellant. Further, the appellant has also relied upon on various judicial pronouncements viz, HLS Asia Ltd. vs. ACIT Cir 12(1), New Delhi reported in ITA No.483/Del./2012 A.Y.2001-02 order dated 22.06.2012; A.H.Wheelers & Co.(P) ltd. reported in (2011) 12 taxmann.com 358 (All-ITAT); CIT vs. Caplin Point Laboratories Ltd. reported in (2007) 293 ITR 0524

In view of the above facts, the appeal of the appellant on this ground is allowed and penalty imposed by the AO is deleted.”

4. Against above order revenue is in appeal before us.
5. Learned counsel for the assessee submitted that learned CIT(A) has correctly deleted the addition. He submitted that addition on account of bogus purchase was solely done on

account of estimate basis, just because assessee was not in a position to produce the sellers. In these circumstances he pleaded that there cannot be any case of furnishing of inaccurate particulars of income or concealment of income. As regards the issue of wrong booking of project on sale of premises, with adjustment for loss on sale of car. learned counsel submitted that all the materials were disclosed. It was only inadvertent error on the part of the assessee to make the wrong treatment in the books of account. He submitted that on this issue also there is no case of concealment or furnishing of inaccurate particulars of income. Hence learned counsel pleaded that learned CIT(A) has rightly deleted the penalty.

6. Learned departmental representative relied upon the order's of the Assessing Officer

7. We have carefully considered the submission perused the records .Up on careful consideration we find that learned CIT-A has passed a reasonable order. As regards the penalty on account of bogus purchase, we note that the addition was made in an ad hoc manner on estimated basis solely on the ground that assessee was not in a position to produce the sellers. The sales are not doubted. In these circumstances in our

considered opinion there is no infirmity in the order of learned CIT(A) deleted the penalty.

8. As regards the deletion of penalty on account of wrongfully adjustment of gain on premises sale with loss on sale of car, we find that on this issue also all the necessary particulars were duly disclosed by the assessee. It was up on examination of those particulars only that the Assessing Officer made the additions. The assessee also has accepted the same that there has been inadvertent error in the treatment in accounting. In these circumstances, in our considered opinion the assessee's conduct is not contumacious so as to warrant levy of penalty under section 271(1)(c) of the Act.

9. In these circumstances, in our considered opinion, there is no infirmity in the reasonable order passed by the learned CIT(A) deleting the penalty. Accordingly we uphold the order of learned CIT(A).

10. In the result, this appeal by the revenue is dismissed.

Order pronounced in the Open Court on 26/04/2019.

**Sd/-**  
**(Ravish Sood)**

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 26/04/2019

*Shekhar, P.S./नि.स.*

**Sd/-**  
**(Shamim Yahya)**

लेखा सदस्य / ACCOUNTANT MEMBER

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

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

□ देशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

□ यकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**