

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव,लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष  
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos. 203 & 204/PUN/2017

निर्धारण वर्ष / Assessment Year: 2010-11

The Income Tax Officer,  
Ward 2(2), Nashik.

.....अपीलार्थी / Appellant

**बनाम / V/s.**

Shri Deepak Shankar Panaskar,  
Prop. M/s. New Jyoti Power Controls,  
Plot No. 368/2, Jagannath  
Bhadure Mala, Old Ambad Road,  
Satpur, Nashik-422 007.  
PAN : AMFPP6337E

.....प्रत्यर्थी / Respondent

Assessee by : Shri Sanket Joshi

Revenue by : Shri Pankaj Garg

सुनवाई की तारीख / Date of Hearing : 20.03.2019

घोषणा की तारीख / Date of Pronouncement : 03.06.2019

**आदेश / ORDER**

**PER VIKAS AWASTHY, JM**

These two appeals by the Revenue are directed against the orders of the Commissioner of Income Tax (Appeals)-2, Nashik, deleting addition made in respect of bogus purchases and deleting penalty levied u/s.271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') on the addition made in respect of bogus purchases.

ITA No.203/PUN/2017 by Revenue is directed against the order of Commissioner of Income Tax(Appeals)-2, Nashik dated 02.11.2016 in quantum appeal and ITA No.204/PUN/2017 by Revenue is directed against the order of Commissioner of Income Tax(Appeals)-2, Nashik dated 04.11.2016 deleting penalty levied u/s.271(1)(c) of the Act.

2. The brief facts of the case as emanating from records are: The assessee is engaged in manufacturing of electrical equipments and is a Government Contractor. Information was received from Sales Tax Department that the assessee is engaged in bogus purchases. Survey action u/s.133A of the Act was carried out in the case of assessee on 22.08.2013. During the course of survey, statement of Shri Sagar Shankar Panaskar, brother of assessee was recorded on oath u/s.131 of the Act, wherein he admitted that in absence of supporting bills, octroi receipts and transport receipts etc., genuineness of the purchases made from eight parties aggregating to Rs.85,98,876/- could not be proved. The Assessing Officer made addition of entire Rs.85,98,876/- on account of bogus purchases. Further, the Assessing Officer initiated penalty proceedings u/s.271(1)(c) of the Act for 'furnishing inaccurate particulars of income'.

3. Aggrieved against the assessment order dated 30.01.2015 passed u/s.143(3) of the Act, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax(Appeals) upheld the purchase of goods from bogus parties. However, the Commissioner of Income Tax (Appeals) restricted the addition to 10% of the alleged bogus purchases i.e.8,59,887/- and deleted the remaining addition. Against the

findings of the Commissioner of Income Tax (Appeals), the Revenue is in appeal before the Tribunal by raising following grounds:

*“1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A)-2, Nashik was justified in deleting the addition of Rs.77,38,989/- made by the Assessing Officer on the issue of alleged bogus purchases?”*

*2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A)-2, Nashik was justified in ignoring the facts that the AO had brought on record credible evidence to prove that the purchases are not genuine?”*

*3. The appellant prays leave to add, alter, clarify/amend and or withdraw any grounds of appeal as and when the occasion demands.”*

4. Shri Pankaj Garg representing the Department submitted that the assessee had failed to furnish supporting documents to show trail of goods. The assessee neither furnished invoices, octroi receipts and transport receipts nor the assessee was maintaining stock register. Further, the assessee could not prove genuineness of the suppliers. No confirmations were filed by the assessee from suppliers of goods. In the statement recorded u/s.131 of the Act, Shri Sagar Shankar Panaskar, brother of assessee admitted that the genuineness of the purchases could not be proved. Thus, the Assessing Officer rightly made addition of entire bogus purchases. The ld. DR in support of his contentions placed reliance on the decision of Pune Bench of the Tribunal in the case of Mukeshkumar Pukhraj Mehta Vs. The Income Tax Officer in ITA No.2026/PUN/2014 for assessment year 2010-11 decided on 03.11.2015.

5. On the other hand, Shri Sanket Joshi appearing on behalf of the assessee vehemently defended the impugned order. The ld. AR of the assessee submitted that the assessee had made payments for the purchases of goods held to be bogus purchases through cheque. The Assessing Officer

has not been able to show that the amount paid by cheque was immediately withdrawn by suppliers and were paid back to the assessee. No efforts were made by the Assessing Officer to find out genuineness of the suppliers and verify the authenticity of the transactions. The assessee had furnished copies of VAT challans. Further, the sales made by assessee were not disputed by the Assessing Officer and books of account were not rejected. Thus, without purchases there cannot be sales. The Id. AR submitted that the entire purchases cannot be added as bogus purchases where sales are not questioned.

6. We have heard the submissions made by representatives of rival sides and have perused the orders of the Authorities below. The Revenue in appeal has assailed the findings of Commissioner of Income Tax (Appeals) in restricting addition made on account of bogus purchases to 10% of the bogus purchases. It is an undisputed fact that Revenue has accepted the total turnover of the assessee. The total turnover of the assessee during impugned period is Rs.1,15,71,310/-, whereas, the alleged bogus purchases disallowed by the Assessing Officer are Rs.85,98,876/-. Without purchases, there cannot be sales. The books of account of the assessee have also not been rejected by the Assessing Officer before making addition of the entire alleged bogus purchases. Undoubtedly, the primary onus to prove genuineness of purchase transactions is on the assessee and he should have in first place furnished cogent evidences to prove the genuineness of the purchases and suppliers. No confirmations were filed by the assessee from suppliers. We also observe that at the time of assessment proceedings, the Assessing Officer has also not exercised his power to summon the Vendors u/s. 133(6) of the Act. If the assessee had failed to produce Vendors, the Assessing Officer could have summoned them. Thus, there

was lack of effort from both the sides to bring the true colour of purchase transaction to fore. The Commissioner of Income Tax (Appeals) after considering entire facts came to the conclusion that it is a case of purchases from gray market and thereafter, bills have been procured from hawala operators. In the given facts, the entire purchases cannot be considered as bogus. At the same time, the assessee cannot be allowed to go scot free for not proving the genuineness of the purchases. The Co-ordinate Bench of the Tribunal in the case of M/s. Chhabi Electricals Pvt. Ltd. Vs. DCIT in ITA No. 795/PUN/2014 for the assessment year 2010-11 has held that in the cases of purchases from suspicious dealers, addition of 10% of the bogus purchases over and above the GP declared by the assessee for the year should be made. In the instant case, the Commissioner of Income Tax (Appeals) has restricted the addition to 10% of the alleged bogus purchases. Hence, the impugned order is modified; the addition is restricted to 10% of alleged bogus purchases over and above the GP declared by the assessee.

7. We have considered the decision in the case of Mukeshkumar Pukhraj Mehta Vs. The Income Tax Officer (supra.) on which the ld. DR has placed reliance. In the said case, the assessee had admitted to the addition of purchases made from the hawala dealers. No supporting documents substantiating genuineness of purchases were furnished by assessee. In view of assessee's admission no further verification was carried out by the Assessing Officer. Whereas, in the instant case, the assessee had not given any such concession. We find that the decision cited is distinguishable on facts and hence, does not support the case of Revenue.

8. In the result, appeal of the Revenue in ITA No.203/PUN/2017 is partly allowed in the terms aforesaid.

**ITA No.204/PUN/2017**  
**Assessment Year 2010-11**

9. This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals) in deleting penalty of Rs.26,57,053/- levied u/s.271(1)(c) of the Act.

10. The ld. AR of the assessee defending the order of Commissioner of Income Tax (Appeals) submitted that the penalty has been deleted by the Commissioner of Income Tax (Appeals) on the ground of ambiguity in mentioning the charge while levying penalty u/s.271(1)(c) of the Act. The ld. AR submitted that while initiating penalty u/s.271(1)(c) of the Act, the Assessing Officer mentioned that the penalty proceedings u/s. u/s.271(1)(c) of the Act are separately initiated for 'furnishing inaccurate particulars of income', whereas, at the time of levy of penalty, the Assessing Officer levied penalty for 'concealment of income'. 'Furnishing of inaccurate particulars of income' and 'concealment of income' are two different expressions having different connotation. Penalty initiated under one limb of section 271(1)(c) of the Act and levied on another limb would make the penalty order bad in law. In support of his submissions, the ld. AR placed reliance on the decision of Hon'ble Bombay High Court in the case of CIT Vs. Samson Perinchery reported as 392 ITR 4 (Bom.)

11. On the other hand, the ld. DR vehemently defended the order of Assessing Officer dated 22.07.2015 in levying penalty u/s. 271(1)(c) of the Act and prayed for reversing the impugned order.

12. Both sides heard. Orders of the Authorities below perused. A perusal of assessment order shows that penalty proceedings u/s.271(1)(c) of the Act were initiated for 'furnishing of inaccurate particulars of income'. The relevant extract of the assessment order whereby penalty proceedings were initiated reads as under:

*"Further, for furnishing of inaccurate particulars of income, penalty proceeding u/s.271(1)(c) of the IT Act is separately initiated."*

A perusal of the order levying penalty dated 22.07.2015 reveals that though penalty was initiated for 'furnishing inaccurate particulars of income', the Assessing Officer invoked the other limb of section 271(1)(c) of the Act while levying penalty i.e. 'concealment of income'. The relevant extract of the penalty order reads as under:

*"5. Considering the tax bracket and the amount of concealment, it is clear that the assessee has intentionally concealed the taxable income which was detected by the department. If the assessee's case had not been selected for the scrutiny, the correct income would not have been taxed. I am therefore satisfied that the assessee has furnished inaccurate particulars of his income for the A.Y.2010-11 and thus concealed his income as per the provision (c) of sub section (1) of section 271 of the Income Tax Act, 1961."*

13. The manner in which penalty has been levied by the Assessing Officer u/s.271(1)(c) of the Act clearly shows that there was ambiguity in the mind of Assessing Officer with regard to charge u/s.271(1)(c) of the Act that is to be invoked for levy of penalty. It is a well settle law that penalty cannot be levied on the charge other than the charge for which it was initiated. The Hon'ble Bombay High Court in the case of in the case CIT Vs. Samson Perinchery(supra.) has held:

*"6. The above submission on the part of the Revenue is in the face of the decision of the Supreme Court in Ashok Pai v/s. CIT 292 ITR 11 [relied upon in Manjunath Cotton & Ginning Factory (supra)] - wherein*

*it is observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1)(c) of the Act, carry different meanings/ connotations. Therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under Section 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/ permit penalty being imposed for the other breach. This is more so, as an Assessee would respond to the ground on which the penalty has been initiated/ notice issued. It must, therefore, follow that the order imposing penalty has to be made only on the ground of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the Assessee has no notice."*

*[Emphasized by us ]*

14. Thus, in view of the facts of the case and the decision of Hon'ble Jurisdictional High Court, we find no reason to interfere with the order of the Commissioner of Income Tax (Appeals) in deleting penalty levied u/s.271(1)(c) of the Act. Hence, the impugned order is upheld and appeal of the Revenue is dismissed being devoid of any merit.

15. In the result, appeal of the Revenue in ITA No.204/PUN/2017 is dismissed.

16. To sum up, appeal of the Revenue in ITA No.203/PUN/2017 is partly allowed and appeal of the Revenue in ITA No.204/PUN/2017 is dismissed.

Order pronounced on Monday, the 03<sup>rd</sup> day of June, 2019.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. KARUNAKARA RAO)	(विकास अवस्थी /VIKAS AWASTHY)
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 03<sup>rd</sup> June, 2019

SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-2, Nashik.
4. The Pr. CIT-2, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,  
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	20.03.2019	Sr.PS/PS
2	Draft placed before author	28.05.2019	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		