

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” Bench, Mumbai**

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

**ITA No.3149/Mum/2017
(Assessment Year: 2010-11)**

Asst. Commissioner of Income
Tax -27(3), 4th Floor, Tower No.6,
Vashi Railway Station Complex,
Vashi, Navi Mumbai.

Vs. M/s Rupesh Corporation &
Infracorps, 108, Charishma
Centre, 1st Floor, 19th Road,
Chembur(E), Mumbai-400071.

PAN – AAAFS1245B

(Appellant)

(Respondent)

Appellant by: Shri D.G. Pansari, Sr.D.R

Respondent by: Shri Mandar Vaidya, A.R

Date of Hearing: 18.06.2019

Date of Pronouncement: 26.06.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-25, Mumbai, dated 06.02.2017, which in turn arises from the order passed by the A.O under Sec. 271(1)(c) of the Income Tax Act, 1961 (for short 'Act'), dated 23.06.2014 for A.Y. 2010-11. The revenue has assailed the order of the CIT(A) on the following grounds of appeal:

- “1. *On the facts and in the circumstances of the case and in law the ld CIT(A) erred in deleting the penalty u/s 271(1)(c) of Rs. 34,04,730/- on the ground that the assessee had not furnished inaccurate particulars of his income in the return of income filed in response to notice u/s 148 as the same was assessed u/s 143(3) r.w.s. 147 without appreciating the fact that the assessee’s action of declaration of the additional*

income in the aforesaid return was prompted by the enquiries conducted by the Department u/s 133A of the Act and thereby the assessee had avoided the legitimate payment of tax thereon.

2. *The appellant prays that the order of the CIT(A) on the above grounds be reversed and that of the Assessing Officer be restored.*
3. *The Appellant craves leave amend or alter any grounds or add a new ground which may be necessary.”*

2. Briefly stated, the assessee firm which is engaged in the business of civil construction & desilting of drains had e-filed its return of income for A.Y. 2010-11 on 29.09.2011, declaring its total income at Rs.1,71,38,170/-. Information was received by the department that the assessee as a beneficiary had obtained bogus purchase bills from certain parties which were declared as hawala operators by the Sales Tax Department, Maharashtra. On the basis of the aforesaid information survey proceedings under Sec. 133A of the Act were conducted on the assessee firm on 03.01.2013. On being confronted with the fact that it had made purchases from certain tainted parties which were blacklisted as accommodation entry providers by the Sales Tax Department, Maharashtra, the assessee accepted that there were certain discrepancies in its purchase bills, and agreed to offer an amount of Rs. 1,02,89,309/- as its additional income for the year under consideration. Subsequently, the case of the assessee was reopened under Sec. 147 of the Act. In the return of income filed by the assessee in compliance to the notice issued under Sec. 148 of the Act, the assessee honoured its commitment made in the course of the survey proceedings and offered the aforesaid additional income in its return of income. Subsequently, the reassessment proceedings were completed on 24.12.2013, and the income of the assessee was assessed under Sec. 143(3) r.w.s. 147 at an income of Rs. 2,74,27,480/-. The A.O while framing the assessment also initiated penalty proceedings under Sec. 271(1)(c).

Thereafter, penalty order under Sec. 271(1)(c) was passed on 23.06.2014, and a penalty of Rs. 34,04,730/- was imposed on the assessee.

3. Aggrieved, the assessee assailed the penalty imposed on it under Sec. 271(1)(c) before the CIT(A). The CIT(A) after extensive deliberations observed, that the additional income offered by the assessee during the course of the survey proceedings was the sum total of the purchases made by the assessee during the year from the aforesaid tainted parties. The CIT(A) was of the view, that as the correlating sales pertaining to the aforesaid purchases under consideration were not disproved, therefore, the A.O was in error in imposing penalty under Sec. 271(1)(c) for furnishing of inaccurate particulars of income by the assessee. In fact, the CIT(A) held a strong conviction that notwithstanding the fact that the assessee had admitted the entire purchases as non-genuine during the survey proceedings and, had offered the same for taxation in the return of income, however, the A.O failed to establish that either the corresponding sales shown by the assessee were bogus, or that there was a malafide intention on the part of the assessee in introducing bogus bills for suppressing its true income. Accordingly, the CIT(A) was of the view, that as the A.O had not established that the assessee had furnished inaccurate particulars of income in its return of income filed pursuant to the survey proceedings, therefore, the penalty imposed by him under Sec. 271(1)(c) was not sustainable and was liable to be vacated.

4. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Learned Departmental Representative (for short 'D.R') relied on the order passed by the A.O. It was submitted by the Ld. D.R, that as the assessee in the course of

the survey proceedings, on being confronted with the purchase bills pertaining to the suppliers which were declared as hawala operators by the Sales Tax Department, Maharashtra had admitted the bogus purchases aggregating to Rs. 1,02,89,309/- for the year under consideration, therefore, the A.O had rightly imposed penalty under Sec. 271(1)(c). It was submitted by the Ld. A.R, that the CIT(A) was in error in vacating the penalty imposed by the A.O under Sec. 271(1)(c).

5. Per contra, the Learned Authorized Representative (for short 'A.R') for the assessee relied on the order of the CIT(A). Apart there from, it was submitted by the Ld. A.R, that as the returned income and the assessed income remained the same, therefore, on the said count also the assessee could not have been visited with penalty under Sec. 271(1)(c).

6. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material as well as the judicial pronouncements relied upon by them. Admittedly, the assessee during the course of the survey proceedings conducted on 03.01.2013, on being confronted with the fact that the three of its supplier parties viz. (i) Krsna Enterprises; (ii) Jain Corporation; and (iii) Om Enterprises were declared as havala operators by the Sales Tax Department, Maharashtra, had offered the entire value of purchases aggregating to Rs. 1,02,89,309/- made from the said parties during the year under consideration viz. A.Y. 2010-11, as its additional income on account of discrepancies in the sale bills of the said parties. However, we find that except for the admission on the part of the assessee, no positive material is discernible from the records which would irrefutably evidence that the purchases made by the assessee from the aforementioned parties was indeed bogus. In

fact, the only basis to support the fact that the purchases made by the assessee from the aforesaid parties were not genuine, was the stand alone information available at the website of the Sales Tax Department, Maharashtra, which we are afraid would though suffice to raise doubts as regards the authenticity of the purchase transactions, but would not conclusively establish that no genuine purchases were made by the assessee from the aforementioned parties. Apart there from, we find that as no material was provided/produced before the assessee either by the survey party or by the A.O, both at the time of survey and the assessment proceedings, therefore, the assessee did not get any chance to rebut the material collected by the survey party to hold that the purchases made from the aforementioned parties was bogus. On the contrary, it is the claim of the assessee that it had sufficient evidence available with it, which proved that the material purchased from the aforementioned parties was actually received by it and was fully consumed in the various project activities undertaken by it. In our considered view, now when the corresponding sales of the assessee had not been shown to be bogus by the A.O, therefore, it was incumbent on his part to have restricted the addition only to the extent of the profit element involved in making of such purchases by the assessee from the open/grey market. Be that as it may, we are of the considered view that the assessee in the course of the survey proceedings, on being appraised with the fact that three of the supplier parties from whom it had claimed to have made purchases during the year were declared as hawala operators by the Sales Tax Department, Maharashtra, had in order to avoid protracted litigation offered the entire value of purchases made from the said parties as its additional income for the year under consideration. In our considered view, an unsubstantiated disclosure of additional income by the

assessee, which as observed by us hereinabove is not backed by any positive material corroborating the factum of suppression of income by the assessee can by any means justify imposition of penalty under Sec. 271(1)(c). As a matter of fact, in our considered view, as the purchases claimed by the assessee to have been made from the aforementioned parties can at the most be held to be in the nature of unproved/unverified purchases and not disproved purchases, therefore, no penalty under Sec. 271(1)(c) on account of such unverified purchases could have been imposed on the assessee. Our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Upendra V. Mithani (ITA (L) No. 1860 of 2009), dated 05.08.2009**, wherein the Hon'ble High Court being of the view that unless the claim of the assessee is disproved, no penalty under Sec. 271(1)(c) could be imposed, had held as under:

“The issue involved in the appeal revolves around deletion of penalty under Section 271(1)(c) of the I.T. Act. The Tribunal has concurred with the view taken by the Commissioner of Income Tax (A). The Commissioner of Income Tax (A) has rightly taken a view that no penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If the assessee gives an explanation which is unproved but not disproved, i.e. it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false. The view taken by the Tribunal is a reasonable and possible view. The appeal is without any substance. The same is dismissed in limine with no order as to costs.”

Accordingly, we are of the considered view that the A.O in the case before us had failed to conclusively establish that either the corresponding sales shown by the assessee were also bogus, or there was any malafide intention on the part of the assessee in introducing bogus bills with a purpose of suppressing its true income. We thus are of the considered view, that merely for the reason that the assessee could not prove the authenticity of the purchase transactions under consideration to the satisfaction of the A.O, penalty under Sec. 271(1)(c) for the said stand alone reason could not have been imposed

on it. On the basis of our aforesaid deliberations, we are persuaded to subscribe to the view taken by the CIT(A) that no penalty under Sec. 271(1)(c) could have been imposed in respect of the additional income offered by the assessee during the course of the survey proceedings. Accordingly, the order of the CIT(A) deleting the penalty under Sec. 271(1)(c) of Rs. 34,04,730/- is upheld.

12. The appeal of the revenue is dismissed.

Order pronounced in the open court on 26/06/2019

Sd/-
(Shamim Yahya)
ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक 26.06.2019
Ps. Rohit

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

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.

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT,
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