

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI PAWAN SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 5367/MUM/2016
Assessment Year: 2010-11**

M/s Ashtavinayaka Construction, Plot No. R-478, TTC Industrial area, MIDC, Rabale, Navi Mumbai- 400701. PAN No. AADFA1724G	Vs.	JCIT Circle 22(3), Mumbai.
Appellant		Respondent

Assessee by	:	Mr. Bhadresh Doshi, AR
Revenue by	:	Mr. S.K. Mishra, DR

Date of Hearing	:	12/07/2019
Date of pronouncement	:	30/09/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2010-11. The appeal is directed against the order of the Commissioner of Income Tax-26, Mumbai [in short 'CIT(A)'] and arises out of the penalty order u/s 271(1)(c) of the Income Tax Act 1961, (the 'Act').

2. The ground of appeal filed by the assessee reads as under :

The Ld. CIT(A) has erred in confirming the action of the AO of levying penalty of Rs.8,56,765/- in respect of disallowance of alleged bogus purchases to the tune of Rs.27,72,702/-. The said penalty may please be deleted.

3. Briefly stated, the facts are that the assessee filed its return of income for the assessment year (AY) 2010-11 on 15.10.2010 declaring total income of Rs.2,53,94,153/-. The addition made by the Assessing Officer (AO) which is relevant to the instant appeal is the alleged bogus purchases of Rs.27,72,702/- made by the assessee from the following parties :

1.	Dhruv Sales Corporation	Rs.7,65,847/-
2.	Nidhish Impex Pvt. Ltd.	Rs.10,24,145/-
3.	Toral Enterprises	Rs.4,67,460/-
4.	Tulsiani Trading Pvt. Ltd.	Rs.5,15,250/-
	Total	Rs. 27,72,702/-

In the assessment order dated 20.03.2013, the AO made an addition of Rs.27,72,702/- towards bogus purchases and also initiated penalty proceedings u/s 271(1)(c) of the Act separately. During the course of penalty proceedings, the AO gave another opportunity to the assessee *vide* show cause notice dated 18.09.2013 asking to explain why penalty u/s 271(1)(c) should not be levied in his case. The Authorized Representative of the assessee filed a reply dated 23.09.2013 explaining it.

However, the AO was not convinced with the above explanation of the assessee of the ground that both during the course of assessment proceedings and penalty proceedings, the assessee could not produce any

documentary evidence to prove the genuineness of these transactions. Therefore, he levied a penalty of Rs.8,56,765/- u/s 271(1)(c) of the Act.

4. In appeal, the Ld. CIT(A) observed that the assessee has merely given the names of suppliers and the amount of purchases done through them. Though the AO had specifically (by order sheet entry dated 16.01.2013) called for address of the parties and other details of purchases from each party, neither during the assessment proceeding nor during appellate proceeding, the assessee gave any documentary evidence relating to actual delivery and utilization of goods. Further observing that the initial burden cast on the assessee has not been discharged, the Ld. CIT(A) confirmed the penalty of Rs.8,56,765/- levied by the AO u/s 271(1)(c) of the Act.

5. Before us, the Ld. counsel for the assessee files a copy of the decision in *DCIT v. Shri Dhaval D. Shah* (ITA No. 1337/Mum/2016 for AY 2009-10) of ITAT 'D' Bench, Mumbai, *DCIT v. M/s Ashtavinayaka Construction* (ITA No. 3821/Mum/2015 for AY 2011-12) of ITAT 'F' Bench, Mumbai, *Ashok Narayanan v. DCIT* (ITA No. 6464/Mum/2014 for AY 2010-11) by ITAT 'A' Bench, Mumbai ; *Sachin Arora v. ITO* (2017) 51 CCH 0615 Agra Trib.

Further, the Ld. counsel submits that though the disallowance of bogus purchases to the extent of 100% as made by the AO was not disputed by the assessee for this year, similar disallowance made in the subsequent year was disputed by it. The ITAT vide order dated 09.10.2017 had directed the AO to restrict the disallowance only to the extent of 12.5% of the impugned purchases. Thus it is stated that the

disallowance even for the year under appeal should have been restricted to the profit element contained in the bogus purchases estimated at 12.5% and it is well accepted principle that penalty is not leviable when the addition is made on an estimated basis.

It is also submitted by the Ld. counsel that the AO had not clarified the charge under which he had initiated the penalty proceeding i.e. whether for “furnishing inaccurate particulars of income or for concealing particulars of income. It is stated that he neither clarified about a charge in the assessment order nor struck off the concerned details in the notice issued by him u/s 274. Accordingly, it is stated that the penalty proceedings are required to be quashed altogether only on this ground. In this regard reliance is placed by him on the decision in *Ashok Narayanan* (supra) and *Dhaval D. Shah* (supra).

6. On the other hand, the Ld. Departmental Representative (DR) relies on the decision in *Union of India v. Dharamendra Textile Processors* (2007) 295 ITR 244, *R L Traders v. ITO* (2017-TIOL-2583-HC-DEL-IT), *CIT v. Zoom Communication (P.) Ltd.* 191 Taxman 179 (Delhi), *CIT v. Moser Baer India Ltd.* 184 Taxman 8 (SC), *CIT v. Gold Coin Health Food (P.) Ltd.* 172 Taxman 386 (SC), *MAK Data P. Ltd. v. CIT* 38 taxmann.com 448 (SC), *B.A. Balasubramaniam & Bros. Co v. CIT* 116 Taxman 842, *CIT v. Gates Foam & Rubber Co* 91 ITR 467, *CIT v. India Seafood* 105 ITR 708, *Steel Ingots Ltd v. CIT* 296 ITR 228, *CIT Vs Escorts Finance Ltd* 183 Taxman 453 (Delhi), *CIT v. R.M.P. Plasto (P.) Ltd* 184 Taxman 372 (SC), *K.P. Madhusudhanan v. CIT* [2001] 118 Taxman 324 (SC), *Earthmoving Equipment Service Corporation v. DCIT* 22(2) Mumbai, *Dilip N. Shroff v. JCIT* (2007) 291 ITR 519 (SC), *CIT*

v. Reliance Petroproducts Pvt. Ltd (2010) 322 ITR 0158(SC), UOI v. Rajasthan Spinning & Weaving Mills (2010) 1 GSTR 66 (SC), CIT v. Atul Mohan Bindal (2009) 317 ITR 1 (SC), Price Water House Coopers Pvt. Ltd. v. CIT (2012)348 ITR 306(SC), CIT v. Somany Evergreen Knits Ltd (2013)352 ITR 592 (Bom.), CIT v. Smt. Kaushalya (1994) 75 Taxman 549 (Bombay), Maharaj Garage & Co. v. CIT Nagpur 85 taxmann.com 86 (Bombay), Jain Brothers Vs Union of India (1970) 77 ITR 107(SC) and M/s Manjunatha Cotton Ginning Factory.

7. In a rejoinder the Ld. counsel files a written submission in response to the decisions referred by the Ld. DR. The same is produced below.

S. No.	Decision	Comments
1.	Union of India vs. Dharmendra Textile Processors (SC)	A favourable view has been taken even after referring to this decision in the case of Meherjee Cassinath Holdings Pvt. Ltd. vs. ACIT [ITA No. 2555/M/12] which has been relied upon in the case of Ashok Narayanan vs. DCIT which we have relied upon.
2.	R L Traders vs. ITO (2017-TIOL-2583-HC-DEL-IT)	Not relevant to the issue under consideration.
3.	CIT vs. Zoom Communication (P) Ltd. [2010] 327 ITR 510 (Delhi)	It deals with the Explanation 1 deeming concealment of particulars of income whereas in the appellant's case the penalty is levied for furnishing inaccurate particulars of income.
4.	CIT vs. Moser Baer India Ltd. [2009] 315 ITR 460 (SC)	It is not relevant as the matter was set aside to the Tribunal without giving any findings.
5.	CIT vs. Gold Coin Health Food (P) Ltd. [2008] 304 ITR 308 (SC)	It deals with the levy of penalty in case of a loss by virtue of Explanation 4 which is not the case here.
6.	MAK Data P. Ltd. vs. CIT [2013] 358 ITR 593 (SC)	It merely provides that the AO is not required to record his satisfaction in a particular manner. It does not deal with non-striking off issue.
7.	B. A. Balasubramaniam & Bros. Co. vs. CIT 236 ITR 977	It deals with the old Explanation providing for deemed concealment of the particulars of income where there was a difference of 20% between the assessed income and returned income

8.	CIT vs. Gates Foam & Rubber Co. 91 ITR 467	Not relevant to the issue under consideration.
9.	CIT vs. India Seafood 105 ITR 708	Not relevant to the issue under consideration.
10.	Steel Ingots Ltd. vs. CIT 296 ITR 228	It deals with the Explanation 1 deeming concealment of particulars of income whereas in the appellant's case the penalty is levied for furnishing inaccurate particulars of income.
11.	CIT vs. Escorts Finance Ltd. [2010] 328 ITR 44 (Delhi)	Not relevant to the issue under consideration.
12.	CIT vs. R.M.P. Plasto (P) Ltd. [2009] 313 ITR 397 (SC)	It deals with the levy of penalty in case of a loss by virtue of Explanation 4 which is not the case here.
13.	K. P. Madhusudhanan vs. CIT [2001] 251 ITR 99 (SC)	It merely provides that no express invocation of the Explanation to section 271 in the notice under section 271 is necessary before the provisions of the Explanation therein are applied. It does not deal with the non-striking off issue.
14.	Earthmoving Equipment Service Corporation vs. DCIT 166 ITD 113 (Mum)	This decision has been considered in the case of Jeetmal Choraria vs. ACIT [2018] 91 taxmann.com 311(Kolkata - Trib.) in detail. The issue has been decided in favour of the assessee in the case of Syed Ahmed Abbas Naqvi vs. ACIT ITA No. 2230/Mum/2014 even after considering this decision.
15.	Dilip N. Shroff vs. JCIT (2007) 291 ITR 519 (SC)	In fact, the reliance has been placed on this decision while deciding the issue in favour of the assessee in both the cases relied upon by us.
16.	CIT vs. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 (SC)	In fact, this decision is in favour of the assessee.
17.	UOI vs. Rajasthan Spinning & Weaving Mills	Not relevant to the issue under consideration as it merely provides that mens rea is not essential.
18.	CIT vs. Atul Mohan Bindal (2009) 317 ITR 1 (SC)	The matter was remitted back to the High Court on account of subsequent SC decisions relevant for the issue and, hence, not relevant for the issue under consideration.
19.	Price Water House Coopers Pvt. Ltd. vs. CIT (2012) 348 ITR 306 (SC)	In fact, this decision is in favour of the assessee.
20.	CIT vs. Somany Evergreen Knits Ltd. (2013) 352 ITR 592 (Bom)	The penalty has been deleted in this case and, hence, it is in favour of the assessee.
21.	CIT vs. Smt. Kaushalya (1994) 75 Taxman 549 (Bom)	It has already been considered and distinguished in both the decisions of Mumbai ITAT relied upon by us.

22.	Maharaj Garage & Co. vs. CIT 85 taxmann.com 86 (Bom)	It has already been considered and distinguished in one of the decision of Mumbai ITAT relied upon by us i.e. DCIT vs. Dhaval D. Shah.
23.	Jain Borhters vs. Union of India (1970) 77 ITR 107 (SC)	It deals with the levy of penalty for non-filing of return and, hence, not relevant to the issue under consideration.
24.	Manjunatha Cotton Ginning Factory (Kar)	In fact, this decision is in favour of the assessee wherein it has been held that it is necessary for the AO to clearly specify the charge under which the penalty proceeding has been initiated.

8. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the notice u/s 274 r.w.s. 271(1)(c) of the Act dated 20.03.2013, the AO has mentioned, it appears that the assessee has concealed the particulars of its income or furnished inaccurate particulars of such income. Therefore, he requested the assessee to appear before him on 05.04.2013 at 10.30 a.m. and show cause why an order imposing a penalty u/s 271(1)(c) should not be passed on the assessee.

As mentioned earlier, the AO during the penalty proceedings *vide* show cause notice dated 18.09.2013 asked the assessee to explain why penalty u/s 271(1)(c) should not be levied in its case. The assessee through its authorized representative filed a reply dated 23.09.2013, which is produced below :

"During the assessment proceedings, we were asked to file details of suppliers from whom the goods were purchased. Out of them, few parties from whom materials worth Rs.27,72,702/- was purchased were from the list of suspicious dealers published by the Sales Tax Department on its website. Hence the purchases were disallowed as bogus purchases.

However we reiterate that the purchases were genuine and the material was received and utilized. It may also please be noted that the list published Sales Tax Authorities is subject to objections raised by the parties. In other words, it is not confirmed that the suppliers are not genuine. Thus the disallowance was itself not correct. Levying of penalty will be further unreasonable. In the light of the foregoing, you are requested to drop the penalty proceedings."

8.1 In the instant appeal, if the case of the assessee is that they have been put to prejudice and the principles of natural justice were violated on account of not being able to submit an effective reply, it would be a different matter. This was never the plea of the assessee either before the AO or before the First Appellate Authority or before the Tribunal. Thus on facts, we could safely conclude that in the instant case no prejudice is caused to the assessee and the assessee clearly understood what was the purport and import of notice issued u/s 274 r.w.s. 271(1) of the Act.

In *Mak Data P. Ltd. vs. CIT* (Civil Appeal No.9772 of 2013), it is held by the Hon'ble Supreme Court that " the AO has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing".

8.2 In the case of *CIT vs. Smt. Kaushalya and Others* (1995) 216 ITR 660 (Bom), the Hon'ble Bombay High Court held:

"9. We will first take up the show-cause notice dated March 29, 1972, pertaining to the assessment years 1968-69 and 1969-70. The assessment orders were already made and the reasons for issuing the notice under section 274 read with section 271(1)(c) were recorded by the Income-tax Officer. The assessee fully knew in detail the exact charge of the Department against him. In

this background, it could not be said that either there was non-application of mind by the Income-tax Officer or the so-called ambiguous wording in the notice impaired or prejudiced the right of the assessee to reasonable opportunity of being heard. After all, section 274 or any other provision in the Act or the Rules, does not either mandate the giving of notice or its issuance in a particular form. Penalty proceedings are quasi-criminal in nature. Section 274 contains the principle of natural justice of the assessee being heard before levying penalty. Rules of natural justice cannot be imprisoned in any straight-jacket formula. For sustaining a complaint of failure of the principles of natural justice on the ground of absence of opportunity, it has to be established that prejudice is caused to the concerned person by the procedure followed. The issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking of the inaccurate portion cannot by itself invalidate the notice. The entire factual background would fall for consideration in the matter and no one aspect would be decisive. In this context, useful reference may be made to the following observation in the case of CIT v. Mithila Motor's (P.) Ltd. [1984] 149 ITR 751 (Patna) (head note):

Under section 274 of the Income-tax Act, 1961, all that is required is that the assessee should be given an opportunity to show cause. No statutory notice has been prescribed in this behalf. Hence, it is sufficient if the assessee was aware of the charges he had to meet and was given an opportunity of being heard. A mistake in the notice would not invalidate penalty proceedings."

Thus the instant case is distinguishable from the decisions at para 5 hereinabove relied on by the Ld. counsel in respect of his contentions that the AO neither clarified about a charge in the assessment order nor struck off the concerned details in the notice issued by him u/s 274 of the Act.

Following the ratio laid down in *Mak Data P. Ltd* (supra) and *Smt. Kaushalya and Others* (supra), we hold that the AO has rightly initiated penalty proceedings u/s 271(1)(c) of the Act.

8.3 The Hon'ble Supreme Court in *Sir Kikabhai Prem Chand v. CIT* [1953] 24 ITR 506 and *P.M. Mohammed Meerakhan v. CIT* [1969] 73 ITR 735 has held that : 'For income-tax purposes, each year is a self-contained accounting period'.

The contention of the Ld. counsel that similar disallowance made by the AO in subsequent has been restricted by the ITAT to 12.5% is not relevant here because each assessment year is a self-contained accounting period.

8.4 As mentioned earlier, the dispute here is the penalty levied u/s 271(1)(c) on the addition of Rs.27,72,702/- made by the AO towards bogus purchases. The penalty has been levied by the AO on the reason that there was no actual delivery of goods from the purchasers and only bills were issued which is evident from the fact that no supporting documents relating to the delivery of goods such as delivery challan, place of delivery, lorry receipts were furnished. As recorded by the AO, even during the course of penalty proceedings, the assessee could not produce any documentary evidence to establish the genuineness of the transaction.

The Ld. CIT(A) has rightly recorded the following findings at para 16 of the order dated 03.06.2016 :

“In view of absence of material / evidence on record regarding genuine nature of purchases, the onus of proving actual consumption shifts to the appellant. The appellant has not been shown that the material was actually consumed. Without furnishing any explanation, the appellant has tried to shift the onus on the Revenue. On the importance of explanation , Hon'ble Supreme Court in the case of Mak Data Pvt Ltd, 92014) 1 SCC 674 held as under:

"The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise."

8.5 In *Union of India v. Dharmendra Textiles Processors* (2007) 295 ITR 244(SC), the Hon'ble Supreme Court has held that penalty u/s 271(1)(c) is a civil liability and the wilful concealment is not an essential ingredient for attracting civil liability, unlike the matter of prosecution u/s 276C. While considering an appeal against an order made u/s 271(1)(c), what is required to be examined is the record which the officer imposing penalty had before him and if that record can sustain the finding that there has been concealment, that would be sufficient to sustain penalty.

In *CIT v. Atul Mohan Bindal* [2009] 183 Taxman 444 (SC), the Hon'ble Supreme Court observed at para 11:

“The penalty spoken of in section 271(1)(c) is neither criminal nor quasi-criminal but a civil liability; albeit a strict liability. Such liability being civil in nature, *mens rea* is not essential.

Having examined the present factual matrix on the anvil of the aforesaid enunciation of law, we uphold the order of the Ld. CIT(A).

9. In the result, the appeal is dismissed.

Order pronounced in the open Court on 30/09/2019.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 30/09/2019

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai