

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

**Before Shri S. Rifaur Rahman, Accountant Member  
and Shri Ravish Sood, Judicial Member**

**ITA No.5535/Mum/2018  
(Assessment Year: 2010-11)**

DCIT-29(3), Room No.208, Second Floor, C-10, Pratyankshakar Bhavan, B.K.C., Bandra (East), Mumbai 400 051

Vs. Shri Sandeep S. Tamhankar, 706, Green Acres, Off B.R. Road, Yogi Hills, Mulund(W) Mumbai 400 080

PAN – AADPT1176H

**(Appellant)**

**(Respondent)**

Appellant by: Shri V.Vinod Kumar, Id. Sr. D.R

Respondent by: Shri Vishesh Srivastav, Id.AR

Date of Hearing: 28.11.2019

Date of Pronouncement: 11.12.2019

**ORDER**

**PER RAVISH SOOD, JM**

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-40, Mumbai, dated 04.06.2018, 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 23.03.2016 for A.Y. 2010-11. The revenue has assailed the impugned order on the following grounds of appeal before us :-

- “1. On the facts and circumstances of the case the Id CIT(A) has erred in quashing the order passed u/s 271(1)(c) by the AO without appreciating the facts that the assessee has furnished inaccurate particulars of income in respect of certain alleged purchases made by the assessee.
2. The appellant crave leave to add, to amend, alter, substitute or modify any of the above ground or add a fresh ground as and when found necessary either before or at the time of hearing.”

2. Briefly stated, the assessee who is engaged in the business of a designer, processor, assembler, contractor for erection and commissioning of telecommunication equipments had filed his return of income for A.Y. 2010-11 on 15.09.2010, declaring his total income at Rs. 25,38,530/-. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings information was received by the A.O that the assessee as a beneficiary had obtained accommodation entry without any actual purchase of goods from the following havala party :

Sr.No.	Name of the party from whom non genuine purchases have been made.	TIN No. of the party from whom purchases have been shown	Amount involved (in Rs.)
1.	Romex Metals and Tubes Pvt. Ltd.	2703061011V	12,32,400/-

In order to verify the genuineness and veracity of the aforesaid purchase transaction, the A.O called upon the assessee to produce the aforesaid party along with supporting documentary evidence viz. books of account, bills, bank statements/bank passbooks for the year under consideration. Although, the assessee placed on record the copy of the ledger account and the copy of its bank account evidencing payments made to the aforementioned party, however, it failed to produce the aforementioned party for necessary examination by the A.O. Notice under Sec. 133(6) issued by the A.O to the aforementioned party was also returned unserved for the reason that the said party was not existing at the given address. In the backdrop of the aforesaid facts, the A.O disallowed the impugned purchases by characterizing the same as bogus purchases and added the same under Sec. 69C of the Act. As the assessee had failed to substantiate the genuineness of purchases amounting to Rs. 8,65,280/- which were claimed to have been made from M/s Mateshwari Metals, therefore, the A.O also added the same under Sec. 69C to the returned income of the assessee. Also, an addition of Rs. 59,870/- was made by the A.O on account of interest on Income tax refund for A.Y. 2008-09 which was not included by the assessee in his returned income. After inter alia making the aforesaid additions, the A.O assessed the income of the assessee at Rs. 49,74,630/-, vide his order passed under Sec. 143(3), dated 21.01.2013. The A.O while culminating the assessment also initiated penalty proceedings under Sec. 271(1)(c) in respect of the aforesaid additions/disallowances.

4. Aggrieved, the assessee assailed the aforesaid additions/disallowances before the CIT(A). After necessary deliberations, the CIT(A), vide his order dated 26.02.2015 restricted the addition/disallowance as regards the impugned bogus purchases to an amount of Rs. 2,51,721/- i.e. @ 12.5% of the aggregate value of the impugned purchases. Insofar the addition of the interest on income tax refund of Rs. 59,870/- made by the A.O was concerned, the assessee did not assail the said addition before the CIT(A).

5. Subsequently, the A.O after receiving the order passed by the CIT(A), dated 26.02.2015, therein called upon the assessee to explain as to why penalty under Sec. 271(1)(c) in respect of the additions/disallowances to the extent the same had been sustained by the CIT(A) may not be imposed on him. As the explanation of the assessee wherein he had tried to impress upon the A.O that no penalty under Sec. 271(1)(c) was liable to be imposed in his case did not find favour with the A.O, therefore, he vide his order dated 23.03.2016 imposed a penalty of Rs. 96,280/- under Sec. 271(1)(c).

6. On appeal, the CIT(A) finding favour with the claim of the assessee that as the quantum addition of 12.5% of the aggregate value of the impugned purchases that was sustained by his predecessor was merely backed by an estimate, therefore, was of the view that no penalty under Sec. 271(1)(c) could have been validly imposed on the assessee on the said count. The CIT(A) while concluding as hereinabove relied upon the orders of the ITAT, Mumbai viz. (i) Earthmoving Equipment Service Corporation Vs. DCIT 22(2), Mumbai [ITA No. 6617/Mum/2014]; (ii) ITO 8(1)-3, Mumbai Vs. M/s Etco Telecom Limited [ITA No(s). 5243,5998 & 5999/Mum/2012, dated 17.12.2014]; and (iii) ACIT Vs. M/s Balaji Construction [ITA No. 217/Mum/2015]. Insofar the addition of Rs. 59,870/- that was made by the A.O on account of interest on income tax refund for A.Y. 2008-09 was concerned, the CIT(A) was of the view that as the said amount but for an inadvertent mistake on the part of the assessee had remained omitted to be accounted for by him in his return of income, therefore, the same could not have been subjected to levy of penalty under Sec. 271(1)(c). Accordingly, on the basis of his aforesaid observations the CIT(A) vacated the penalty of Rs. 96,280/- imposed by the A.O under Sec. 271(1)(c) of the Act.

7. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. As is discernible from the orders of the lower authorities, the additions/disallowances of the impugned purchases of Rs. 20,97,680/- (Rs. 12,32,400/- (+) Rs. 8,65,280/-) made by the A.O, was thereafter restricted by the CIT(A) on an estimate basis to the extent of profit of 12.5% (of the aggregate value of the impugned purchases) embedded in making of such purchases by the assessee at a discounted value from the open/grey market. Accordingly, the addition sustained by the CIT(A) as regards the aforesaid unproved/unsubstantiated purchases is merely backed by a process of estimation, and not based on any concrete evidence disproving the genuineness of the aforesaid purchase transactions. Although the assessee had not been able to substantiate the authenticity of the aforesaid purchase transactions to the satisfaction of the A.O, however, we also cannot remain oblivious of the fact that certain documentary evidence in support of the genuineness of the impugned purchases were furnished by the assessee in the course of the proceedings before the lower authorities. In our considered view, in the absence of sufficient documentary evidence substantiating the genuineness of the purchase transactions to the hilt, it could though safely be concluded that the assessee had purchased the goods at a discounted value from the open/grey market, however, the same on the said standalone basis would not justify imposition of penalty under Sec. 271(1)(c) in the hands of the assessee. Accordingly, we are persuaded to subscribe to the view taken by the CIT(A) that no penalty under Sec. 271(1)(c) as regards the impugned addition of Rs. 2,51,721/- [i.e. 12.5% of Rs. 20,97,680/-] could have been imposed on the assessee. Our aforesaid view is supported 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]**. In the aforesaid case, it was observed by the Hon'ble High Court that no penalty can be imposed under Sec. 271(1)(c) 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. It was further observed, that 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, then no penalty under Sec. 271(1)(c) could justifiably be imposed. Accordingly, not finding any infirmity in the view taken by the CIT(A), we uphold his order and sustain the deletion of penalty under Sec. 271(1)(c) to the said extent. As regards the failure on the part of the assessee in not including the amount of

interest of Rs. 59,870/- (forming part of the income tax refund for A.Y. 2008-09) in his returned income, we are of the considered view, that the said omission was backed by a bonafide mistake on the part of the assessee. Our aforesaid conviction is fortified by the fact, that the assessee had duly accounted for the income tax refund for A.Y. 2008-09 in his 'Capital account' (forming part of his financials which were filed alongwith the return of income for the year under consideration). Accordingly, we are of the considered view that the assessee could not have been saddled with penalty under Sec. 271(1)(c) for the aforesaid bonafide mistake on his part. Our aforesaid view is supported by the judgment of the **Hon'ble Supreme Court** in the case of **Price Water House Coopers Pvt. Ltd. Vs. CIT (2012) 348 ITR 306 (SC)**. In the aforesaid case, the Hon'ble Apex Court had observed that an assessee cannot be visited with penalty under Sec. 271(1)(c) for bonafide mistakes on its part. As such, finding no infirmity with the view taken by the CIT(A), who we find had rightly vacated the penalty under Sec. 271(1)(c) in respect of the aforesaid addition of interest on income tax refund amounting to Rs. 59,870/-, we uphold his order to the said extent. We thus in terms of our aforesaid observations, finding no infirmity in the order of the CIT(A), uphold the same

8. Resultantly, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 11.12.2019

Sd/-  
(S. Rifaur Rahman)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 11.12.2019  
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//

**आदेशानुसार/ BY ORDER,**  
**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**  
**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**