IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 1262/MUM/2019 (A.Y: 2009-10)

Income Tax Officer -3(2) Room No. 4, B-Wing, 6th Floor Ashar I.T Park, 6th Floor Road No. 16Z Wagle Industrial Estate Thane – 400 604	*v.*	Shri Premkumar Shehgal Gala No. 09, Gupta Deshpande Estate Pokhran Road No.1, Upavan Thane – 400 604 **PAN:ACCPS1803K**
(Appellant)		**(Respondent)**

Assessee by : **Ms. Sandhya Rathi**

Department by : **Shri Bheraram**

Date of Hearing : **03.03.2020**

Date of Pronouncement : **13.03.2020**

O R D E R

PER C.N. PRASAD (JM)

1. This appeal is filed by the revenue against the order of the Learned Commissioner of Income Tax (Appeals) – 2, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 03.12.2018 for the Assessment Year 2009-10.

2. Revenue has raised the following grounds in its appeal: -

> *"1. On the facts & in the circumstances of the case, and in law, the Ld.CIT(A) has erred in deleting the penalty by not appreciating the fact that the assessee failed to prove the genuineness of the alleged bogus purchases from the Hawala parties during the course of assessment as well as penalty proceedings.*

2. On the facts & in the circumstances of the case, and in law, the Ld.CIT(A) has erred in deleting the penalty by not appreciating the fact that the assessee could not produce the alleged bogus parties for verification of genuineness of transaction during assessment proceedings as well as penalty proceedings and voluntary disclosure of his concealed income does not absolve the assessee from penalty.

3. On the facts and in the circumstances of the case, and in law, the Ld.CIT(A) has erred in deleting the penalty by not appreciating the fact that there was clear intention on the part of the assessee to reduce the taxable income by claiming purchases from non-genuine parties.

4. On the facts & in the circumstances of the case, and in law, the Ld.CIT(A) has erred in deleting the penalty without appreciating the ratio laid down by the Hon'ble Supreme Court in the case of MAK Data (P) Ltd Vs CIT(358 ITR 593)(SC).

5. It is respectfully submitted that the penalty was levied for the additions made on the basis of information received from Law enforcement agency of the State Government of Maharashtra i.e. Sale Tax Department.

6. It is humbly requested that present appeal is being filed in accordance with the CBDT's Instruction No. 3/2018 dated 11/07/2018 amended vide letter dated 20.08.2018 as per per para 10(e) of the said circular. Therefore, the order of the CIT(A) may be vacated & that of the Assessing Officer may be restored

7. The appellant craves leave to add, amend, alter or delete any ground of appeal."

3. Briefly stated the facts are that, assessee an individual engaged in the business of "Manufacturing and trading of Machinery parts" filed return of income on 29.09.2009 declaring income of ₹.5,23,110/-. Assessment was reopened u/s. 147 of the Act and reassessment was completed on 19.02.2014 u/s. 143(3) r.w.s 147 of the Act determining the income at ₹.28,15,940/-. While completing the reassessment the Assessing Officer treated purchases of ₹.22,82,508/- made from various dealers as non-

genuine on the basis of the information received from Sales Tax Department, Government of Maharashtra that assessee has received accommodation entries from those parties' without making any purchases but made purchases only in gray market. The Assessing Officer treated such purchases from various parties as non-genuine as the assessee could not produce the parties and also could not establish the movement of goods. Thus, the Assessing Officer estimated the profit element from the non-genuine purchases at 15% and brought to tax. The Assessing Officer initiated the penalty proceedings and levied penalty u/s. 271(1)(c) of the Act stating that the assessee has furnished inaccurate particulars of its income within the meaning of section 271(1)(c) of the Act. On appeal the Ld.CIT(A) deleted the penalty. Against this order of the Ld.CIT(A), revenue is in appeal before us.

4. Ld. Counsel for the assessee supported the order of the Ld.CIT(A) and on the other hand, Ld. DR vehemently supported the order of the Assessing Officer.

5. We have heard the rival submissions, perused the orders of the authorities below. It is a settled position of law that penalty cannot be levied when an adhoc estimation is made. In this case an adhoc estimation was made by the Assessing Officer restricting the profit

element in the purchases @15%. On identical situations the Coordinate Bench in the case of Shri Deepak Gogri *v.* Income Tax Officer in ITA.No. 1396/MUM/2017 dated 23.11.2017 held that no penalty is leviable observing as under: -

> *"6. We have heard the rival submissions, perused the orders of the authorities below. In so far as the penalty levied on estimation of profit element on purchases is concerned, we are of the view that Assessing Officer had made only adhoc estimation of profit on certain purchases treated as unexplained expenditure. Assessing Officer did not doubt the sales made by the assessee from out of such purchases. Assessing Officer based on the decision of the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Seth [356 ITR 451] estimated the profit element in such purchases at 12.5% and by reducing the Gross Profit already declared by the assessee. In the circumstances, we hold that there is no concealment of income or furnishing of inaccurate particulars as the profit element was determined by way of adhoc estimation. Coming to the interest, the assessee furnished complete details in the return of income and made a claim and simply because the claim is denied and cannot lead to furnishing of inaccurate particulars or concealment of income. No allegation by Assessing Officer that the assessee failed to disclose the particulars relating to its claim in the return of income. Thus we hold that there is no concealment of income or furnishing of inaccurate particulars of income. Thus we direct the Assessing Officer to delete the penalty levied u/s. 271(1)(c) of the Act."*

6. Similarly, in the case of DCIT *v.* Manohar Manak, Alloys Pvt. Ltd in ITA No. 5586/MUM/2015 dated 16.01.2017 the Coordinate Bench held as under: -

> *"9. We have heard the rival parties and carefully considered material placed before us including the order of the authorities below. We find from the assessment order that the AO has made an addition of Rs.45,76,587/- being 5% on total purchases on estimated basis in order to bring the bogus purchases to tax on the basis of information received from the third party i.e. State Sales Tax Department and DDIT(Inv) V(I), Mumbai which was not challenged by the assessee before the FAA and attained finality. Thereafter the AO levied penalty u/s 271(1)(c) of the Act on the ground that the assessee did not challenge the assessment order and accepted additions so made thereby accepting the concealment of income. We find from the record that the additions as made by the AO was a pure estimate and nothing concrete as to bogus purchases were brought on records by the AO by making any further enquiries or investigation. In our view the penalty cannot be imposed where the additions are made on estimate basis. The Tribunal has considered an identical issue in the case of Deepak Popatlal Gala, in ITA No. 5920/M/13 and vide order dated 27.3.2015, it has held as under:-*

"10. The next issue relates to disallowance made out of purchases and assessed u/s 69C of the Act. We heard the parties and perused the record. The total purchase expenditure claimed by the assessee during the year under consideration was Rs.7,36,27,555/-. The AO noticed that the Sales Tax Department of Government of Maharashtra has listed out names of certain dealers, who were alleged to have been providing accommodation entries without doing actual business. The AO noticed that the assessee made purchases to the tune of Rs.38.69 lakhs from two parties named M/s Umiya Sales Agency Pvt Ltd and M/s Mercury Enterprises, whose names found place in the list provided by the Sales Tax Department. The AO placed full reliance on the enquiries conducted by Sales Tax Department in respect of the parties, referred above. Accordingly, the AO took the view that the purchases to the tune of Rs.38.69 lakhs have to be treated as unexplained expenditure. Accordingly, he assessed the same u/s 69C of the Act.

11. The ld. CIT(A) deleted the addition and hence the Revenue is in appeal before the Tribunal.

12. The ld. DR strongly placed reliance on the order of Assessing Officer.

13. On the other hand, the ld. AR submitted that the additions made in the case of some other assesses on identical reasons have been deleted by the Co-ordinate Benches of the Tribunal in the following cases :

- *a) Ramesh Kumar and Co V/s ACIT in ITA No.2959/Mum/2014 (AY-2010-11) dated 28.11.2014;*
- *b) DCIT V/s Shri Rajeev G Kalathil in ITA No.6727/Mum/2012 (AY-2009-10) dated 20.8.2014; and*
- *c) Shri Ganpatraj A Sanghavi V/s ACIT in ITA No. 2826/Mum/2013 (AY-2009-10) dated 5.11.2014*

In all the above said cases, the Co-ordinate Benches of the Tribunal has held that the AO was not justified in making the addition on the basis of statements given by the third parties before the Sales Tax Department, without conducting any other investigation. In the instant case also, the assessing officer has made the impugned addition on the basis of statements given by the parties before the Sales tax department. We notice that the ld.CIT(A) has taken note of the fact that no sales could be effected without purchases. He has further placed reliance on the decision rendered by Hon'ble Gujarat High Court in the case of CIT Vs. M.K. Brothers (163 ITR 249). He has further relied upon the decision rendered by the Tribunal in the case of ITO Vs. Premanand (2008)(25 SOT 11)(Jodh), wherein it has been held that where the

AO has made addition merely on the basis of observations made by the Sales tax dept and has not conducted any independent enquiries for making the addition especially in a case where the assessee has discharged its primary onus of showing books of account, payment by way of account payee cheque and producing vouchers for sale of goods, such an addition could not be sustained. The Ld CIT(A) has also appreciated the contentions of the assessee that he was not provided with an opportunity to cross examine the sellers, which is required to be given as per the decision of Hon'ble Kerala High Court in the case of Ponkunnam Traders (83 ITR 508 & 102 ITR 366). Accordingly, the Ld CIT(A) has deleted the impugned addition. On a careful perusal of the decision rendered by Ld CIT(A) would show that the first appellate authority has analysed the issue in all angles and applied the ratio laid down by the High Courts and Tribunals in deciding this issue. Hence, we do not find any reason to interfere with his order on this issue. "

We also find that in the following cases the Tribunal has taken similar view in some of the case that on the basis of third party evidence, addition made by the AO cannot be held as good law and deleted the addition which are as under: -

a) Ramesh Kumar and Co V/s ACIT in ITA No.2959/Mum/2014 (AY-2010-11) dated 28.11.2014;
b) DCIT V/s Shri Rajeev G Kalathil in ITA No.6727/Mum/2012 (AY-2009-10) dated 20.8.2014; and
c) Shri Ganpatraj A Sanghavi V/s ACIT in ITA No. 2826/Mum/2013 (AY-2009-10) dated 5.11.2014

10. In all the above said cases, the Co-ordinate Benches of the Tribunal has held that the AO was not justified in making the addition on the basis of statements given by the third parties before the Sales Tax Department, without conducting any other investigation. In the instant case also, the assessing officer has made the impugned addition on the basis of statements given by the parties before the Sales tax department. Considering the facts as discussed hereinabove, we are of the considered opinion that in view of the ratio in the various decisions as above penalty cannot be sustained. It is also a settled legal position of law that penalty cannot be levied wherein the assessment is made on estimation basis. Accordingly, we are inclined to uphold the order passed by the ld.CIT(A) by dismissing the appeal of the revenue."

7. Further, the Hon'ble Punjab & Haryana High Court in the case of Harigopal Singh *v*. CIT [258 ITR 85] held as under: -

"3. On further appeal, the Tribunal reduced the addition to Rs.1,50,000. Hence, the income was finally assessed at Rs.1,50,000 against the declared income of Rs. 52,000. The Assessing Officer initiated penalty proceedings against the assessee by invoking Section 271(1)(c) along with the Explanation 1(B) of the Act on the plea that he had concealed the particulars of his income. A show-cause notice was issued to him under Section 274 read with Section 271(l)'(c) of the Act. In reply thereto, the assessee pleaded that since no positive concealment had been detected by the Department and the addition was made in his income only on estimate basis, no penalty under Section 271(1)(c) of the Act could be imposed because the assessee's income on estimate basis keeping in view his household expenses as well as the statement of accretion to his assets during the year under consideration, was bona fide. The Assessing Officer did not accept the reply and found that since the assessee had not filed any fresh evidence in penalty proceedings to prove that there was no attempt on his part to conceal his income, he, by his order dated March 10, 1992, imposed a penalty of Rs. 50,000. Feeling aggrieved by this order, the assessee filed an appeal before the Commissioner of Income-tax (Appeals), Patiala, who allowed the same holding that there was indeed no positive evidence whatever to show that the appellant's income during the year in question was, in fact, more than the income returned by him and that estimated additions in the returned income do not attract penalty under Section 271(1)(c)of the Act. The Revenue went up in appeal before the Income-tax Appellate Tribunal which was allowed by order dated May 30, 2001. It is against this order that the present appeal has been filed which raises the aforesaid question of law.

4. In order to attract Clause (c) of Section 271(1) of the Act, it is necessary that there must be concealment by the assessee of the particulars of his income or if he furnishes inaccurate particulars of such income. What is to be seen is whether the assessee in the present case had concealed his income as held by the Assessing Officer and the Tribunal. He had not maintained any accounts and he filed his return of income on estimate basis. The Assessing Officer did not agree with the estimate of the assessee and brought his income to tax by increasing it to Rs. 2,07,500. This, too, was on estimate basis. The Tribunal agreed that the income of the assessee had to be assessed on an estimate of the turnover but was of the view that the estimate as made by the Assessing Officer was highly excessive and it fixed the total income of the assessee at Rs.

1,50,000 for the year under appeal. It is, thus, clear that there was a difference of opinion as regards the estimate of the income of the assessee. Since the Assessing Officer and the Tribunal adopted different estimates in assessing the income of the assessee, it cannot be said that the assessee had "concealed the particulars of his income" so as to attract Clause (c) of Section 271(1) of the Act. There is not even an iota of evidence on the record to show that the income of the assessee during the year under appeal was more than the income returned by him. Additions in his income were made, as already observed, on estimate basis and that by itself does not lead to the conclusion that the assessee either concealed the particulars of his income or furnished inaccurate particulars of such income. There has to be a positive act of concealment on his part and the onus to prove this is on the Department. We are also of the considered view that the Tribunal grossly erred in law in relying on Explanation 1(B) to Section 271(1)(c) of the Act to raise a presumption against the assessee. The assessee had justified his estimate of income on the basis of household expenditure and other investments made during the relevant period. It is not the case of the Revenue that he had, in fact, incurred expenditure in excess of what he had stated. In this view of the matter, it cannot be said that the explanation furnished by the assessee had not been substantiated or that he had failed to prove that such explanation was not bona fide.

5. In the result, the appeal is allowed and the question posed in the earlier part of the order is answered in the negative holding that the provisions of Section 271(1)(c) of the Act are not attracted to cases where the income of an assessee is assessed on estimate basis and additions are made therein on that basis."

8. Similar view has been taken by the Hon'ble Delhi High Court in the case of CIT v. Aero Traders Pvt. Ltd., [322 ITR 316] wherein the Hon'ble High Court affirmed the order of the Tribunal in holding that estimated rate of profit applied on the turnover of the assessee does not amount to concealment or furnishing inaccurate particulars.

9. In the case on hand the Assessing Officer has only estimated the Gross Profit on the alleged non-genuine purchases without there being any conclusive proof of concealment of income or furnishing inaccurate particulars of such income. Thus, we do not observe any infirmity in the order passed by the Ld.CIT(A) in deleting the penalty u/s. 271(1)(c) of the Act levied by the Assessing Officer. Grounds raised by the revenue are rejected.

10. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on the 13th March, 2020

Sd/-	Sd/-
(S. RIFAUR RAHMAN)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 13/03/2020
Giridhar, Sr.PS

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum