

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

**Before Shri Ravish Sood, Judicial Member  
and Shri N.K. Pradhan, Accountant Member**

**ITA No. 5344/Mum/2018  
(Assessment Year: 2009-10)**

ITO 27(1)(3)  
Tower No. 6, 4<sup>th</sup> Floor,  
Room No. 409, Vashi Rly. Station,  
Complex, Vashi,  
Navi Mumbai.

Harish Kantilal Pooj  
14, Anand Mangal,  
Sainath Nagar, Ghatkopar (W),  
Mumbai- 400 086  
Vs.

PAN – AABPP1355Q

**(Appellant)**

**(Respondent)**

Appellant by: Shri Ajit Pal Singh Daia, D.R

Respondent by: None

Date of Hearing: 22.01.2020

Date of Pronouncement: 29.01.2020

**ORDER**

**PER RAVISH SOOD, JM**

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-26, Mumbai, dated 28.06.2018, 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 29.09.2015 for A.Y. 2009-10. The revenue has assailed the impugned order on the following grounds of appeal before us:

- “1. On the facts and circumstances of the case and in law, the Ld. CIT(A) was correct in deleting the penalty levied of Rs. 2,76,710/- of the Income-tax Act 1961, as the penalty was levied on quantum addition made on account of bogus purchases, without appreciating that the onus was on the assessee to establish the genuineness of such purchases by producing such parties before the AO and the assessee failed to discharge its onus?
2. On the facts and circumstances and in law, the Ld. CIT(A) was correct in holding that the AC has made adhoc additions without appreciating that he AO has levied penalty, only after verifying the fact that the assessee evaded the taxes on quantum of addition made on account of bogus purchases and the assessee failed to establish the genuineness of such purchases?

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

2. Briefly stated, the assessee who is engaged in the business of trading in iron and steel had filed his return of income for A.Y. 2009-10 on 25.09.2009, declaring his total income at Rs.4,56,780/-. On the basis of information received from the DGIT(Inv.) Mumbai, that the assessee as a beneficiary had obtained accommodation entries of bogus purchases of Rs.64,15,572/- from 3 hawala parties, his case was reopened under Sec. 147 of the Act.

3. During the course of the assessment proceedings it was observed by the A.O that the assessee had claimed to have made purchases from the following three tainted parties:

Sr. No.	Name of the party	Amount (Rs.)
1.	Shriji Traders	13,54,059/-
2.	Bhagwati Trading Company	39,35,193/-
3.	Sanjay & Company	11,26,320/-

In order to verify the genuineness and veracity of the aforesaid purchase transactions, the A.O issued notices under Sec.133(6) to the aforementioned parties wherein they were called upon to furnish certain documentary evidence in respect of the sales made to the assessee. However, the notices issued under Sec. 133(6) were returned unserved by the postal authorities. In the backdrop of the aforesaid facts, the A.O directed the assessee to produce the abovementioned parties along with documentary evidence supporting the genuineness of the purchase transactions under consideration. However, the assessee not only failed to produce the aforementioned parties but even failed to furnish their latest address to the A.O. Observing, that the assessee had failed to substantiate the authenticity of the aforesaid purchase transactions the A.O held a conviction that no genuine purchases were made by the assessee from the aforementioned parties. Insofar the claim of the assessee that payments to the aforementioned parties were made through banking channels, the A.O was of the view that the same would not conclusively evidence the authenticity of the impugned purchase transactions. Observing, that the G.P rate of the assessee for the year under consideration was on the lower side the A.O made an addition @ 12.5% of the aggregate value of the impugned purchases of Rs.64,15,572/- in the hands of the assessee. As such, the A.O made an addition of Rs.8,14,446/- under Sec. 69C of the Act. The A.O while culminating the assessment also

initiated penalty proceedings under Sec. 271(1)(c) of the Act. The A.O thereafter called upon the assessee to show cause as to why penalty under Sec. 271(1)(c) as regards the addition of Rs.8,14,446/- that was made in respect of the bogus purchases may not be imposed on him. As the assessee failed to furnish any explanation, therefore, the A.O after necessary deliberations on the facts of the case imposed a penalty of Rs.2,76,710/- under Sec. 271(1)(c) of the Act.

4. Aggrieved, the assessee assailed the penalty imposed by the A.O under Sec. 271(1)(c) before the CIT(A). Observing, that the addition in the case of the assessee was made for the reason that he could not substantiate his claim of purchases to the satisfaction of the A.O, the CIT(A) was of the view that an addition made on an estimate basis would not justify imposition of penalty under Sec.271(1)(c) of the Act. Accordingly, the CIT(A) vacated the penalty imposed by the A.O under Sec. 271(1)(c) of the Act.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee relied on the order passed by the CIT(A). It was submitted by the Id. A.R that as the addition made in the case of the assessee was merely backed by an estimation, therefore, the CIT(A) had rightly vacated the penalty that was imposed by the A.O under Sec. 271(1)(c) of the Act.

6. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the order passed by the A.O under Sec. 271(1)(c) of the Act. It was submitted by the Id. D.R that as the assessee had booked bogus purchases in his books of accounts, therefore, he was rightly visited with penalty under Sec.271(1)(c) of the Act.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. Admittedly, the assessee in the course of the assessment proceedings could not substantiate the authenticity of his claim of having made purchases from the aforementioned parties on the basis of clinching documentary evidence to the satisfaction of the A.O. At the same time, we also cannot remain oblivious of the fact that certain material was furnished by the assessee in order to drive home his claim of having made genuine purchases from the abovementioned parties. Be that as it may, the addition in the hands of the assessee in respect of the impugned bogus purchases i.e @ 12.5% of the

aggregate value of such purchases is merely backed by a process of estimation and not on the basis of any concrete material dislodging the genuineness of such claim. We are of the considered view that the failure on the part of the assessee to substantiate the genuineness of the impugned purchase transactions would have though justified an addition in respect of the same, but we are afraid that the same on the said standalone basis could not by any means justify imposition of penalty under Sec. 271(1)(c) of the Act. 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 it was observed 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, in the case before us, as the revenue had failed to disprove to the hilt on the basis of clinching documentary evidence the authenticity of the claim of the assessee of having made purchases from the aforementioned parties, therefore, merely on the basis of such unproved claim of purchases penalty under Sec. 271(1)(c) could not have been validly imposed upon him. As such, finding no infirmity in the view taken by the CIT(A), who in our considered view had rightly concluded that as the addition sustained in the hands of the assessee was merely backed by a process of estimation and not on the basis of any concrete material disproving the veracity of such claim of having made genuine purchases from the aforementioned parties, therefore, no penalty under Sec. 271(1)(c) could have been validly imposed on the assessee, we uphold his order.

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

Order pronounced in the open court on 29.01.2020

Sd/-

(N.K. Pradhan)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 29/01/2020

Rohit, P.S.

Sd/-

(Ravish Sood)  
JUDICIAL MEMBER

**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**