

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "G", MUMBAI**

**BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA Nos. 1358 & 1357/MUM/2019  
Assessment Years: 2009-10 & 2010-11**

|                            |            |  |
|----------------------------|------------|--|
| DCIT – 9(3)(2),<br>Mumbai. | <b>Vs.</b> | M/s. G.L. Construction Pvt. Ltd.,<br>Plot No. 5, Road No. 6, Hatkesh CHS,<br>JVPD Scheme, Vile Parle (W),<br>Mumbai 400 056.<br>PAN : AAACG3438P |
| <b>(Appellant)</b>         |            | <b>(Respondent)</b>  |

Revenue by : Shri Rahul Raman (CIT DR)

Assessee by : Shri N.R. Agarwal

Date of Hearing: 24/06/2020  
Date of Pronouncement: 25/06/2020

**ORDER**

**PER BENCH**

The Revenue has filed these appeals against the two orders dated 28.12.2018 passed by the learned Commissioner of Income Tax (Appeals)-16 (for short 'the CIT (A)'), Mumbai, for the assessment year 2009-10 & 2010-11, whereby the Ld. CIT (A) has allowed the appeals filed by the assessee against the penalty orders passed by the AO u/s 271(1)(c) of the Income Tax Act, 1961 (for short the 'Act').

2. Since both the appeals pertain to the same assessee company for assessment years 2009-10 & 2010-11 and the issues involved in both the cases are identical, these cases were clubbed, heard together and are being disposed of by this common and consolidated order for the sake of convenience.

**ITA NO. 1358/Mum/2019 (A.Y : 2009-10)**

3. In this case, the assessee filed its return of income for the assessment year under consideration declaring the total income of Rs.3,73,64,826/-. The return was processed and assessment order u/s 143(3) was passed

determining the total income at Rs.3,18,38,780/-. Subsequently, on the basis of information received from the Sales Tax authorities, Maharashtra to the effect that the assessee had obtained bogus/accommodation bills from various entities, which used to issue accommodation bills on commission basis without supplying any goods to various assessees. Accordingly, the case was reopened u/s 147 of the Act after issuing notice u/s 148. After hearing the assessee AO held that during the year relevant to the assessment year under consideration the assessee had obtained bogus bills from different companies amounting to Rs.5,03,85,966/-. Hence, he made addition of the said amount to the total income of the assessee and determined the total income at Rs. 8,22,24,750/-. In the first appeal, the Ld. CIT(A) restricted the addition to 2% of the total amount of bogus purchase determined by AO. The revenue challenged the order passed by the Ld. CIT(A) before the ITAT. The Tribunal after hearing both the sides confirmed the findings of the Ld. CIT(A)

4. On the basis of the addition aforesaid, the AO initiated penalty proceedings against the assessee u/s 271(1)(c) of the Act for concealing its income by furnishing inaccurate particulars of income. The assessee challenged the penalty order before the Ld. CIT(A). The Ld. CIT(A) after hearing the assessee allowed its appeal and directed the AO to delete the penalty levied u/s 271(1)(c) of the Act. The Revenue is in appeal against the said findings of the Ld. CIT(A).

5. The Revenue has challenged the impugned order passed by the Ld. CIT(A) on the following ground:

*“Whether on the facts and circumstances of the case and in law, the ld. CIT(A) erred in deleting the penalty levied by the AO u/s 271(1)(c) of the Income Tax Act thereby the provisions of section 271(1)(c)”.*

6. Before us, the Ld. Departmental Representative (DR) submitted that the Ld. CIT(A) has wrongly deleted the penalty levied by the AO u/s 271(1)(c) of the Act ignoring the fact that the ITAT has sustained the addition to the extent of 2% of the bogus purchases made by the assessee during the previous year. The Ld. DR further submitted that the findings of the Ld. CIT(A) are contrary to the settled principles of law as once it is proved that

the assessee has concealed its income or furnished inaccurate particulars of its income, it becomes liable for penalty u/s 271(1)(c) of the Act. The Ld. DR accordingly submitted that the impugned order passed by the Ld. CIT(A) may be set aside and the order passed by the AO may be restored.

7. On the other hand, the Ld. counsel for the assessee submitted that the Ld. CIT(A) has decided the issue in question in accordance with the decisions of the jurisdictional Benches of the Tribunal. The Ld. counsel further pointed out that the Ld. CIT(A) has decided this issue in favor of the assessee by following the decision of the ITAT Mumbai in the case of *Sameer D. Punjabi*, ITA No. 1564/M/2017 and *ETCO Telecom Ltd. vs. ITO*, ITA No. 5243/M/2012. Since the issue involved in the present appeal is covered in favour of the assessee by the decisions of the Tribunal, there is no merit in the Revenue's appeal.

8. We have heard the rival submissions of the parties and perused the material on record in the light of the rival contentions. We notice that the Ld. CIT(A) has decided the issue in question by following the decisions of the coordinate Bench in the case of *Sameer D. Punjabi and ETCO Telecom Ltd. (supra)*. As pointed out by the Ld. counsel, the sole ground of the Revenue's appeal is covered in favour of the assessee by the decisions of the coordinate Bench referred above. In the case of *Sameer D. Punjabi and ETCO Telecom Ltd.*, the coordinate Bench has categorically held that the addition made on estimation basis does not amount to concealment of income or furnishing of inaccurate particulars of income within the meaning of Section 271(1)(c) of the Act. The findings of the coordinate Bench in the case of *Sameer D. Punjabi and ETCO Telecom Ltd. (supra)* read as under :-

*“3. A perusal of the order of the authorities below reveal that purchases effected by the assessee from four parties totaling to Rs.4,66,133/- were found to be doubtful in view of the information received regarding the four parties from the Maharashtra Sales Tax Department. In the assessment proceedings assessee was not able to produce the four parties for verification and, therefore, the Assessing Officer proceeded to treat the purchases to the extent of Rs.4,66,133/- as bogus. So however, the Assessing Officer did not add the entire*

*amounts of purchases to the returned income but added only profit element attributable to such purchases, which he estimated at 12.50% thereby, resulting in an addition of Rs.58,266/- to the returned income. Subsequently, the Assessing Officer levied penalty under section 271(1)(c) of the Act on the ground that assessee had concealed the income to the above extent and accordingly, a penalty of Rs.18,006/- was imposed. The penalty has since been affirmed by the CIT(A) also.*

*4. We find that the plea of the assessee before the lower authorities has been that the levy of penalty is not automatic and that the transactions of purchase effected from the four parties were well documented and the payments were also made through banking channels. After hearing the Ld. Departmental Representative, we find that there is no justification to levy the penalty under section 271(1)(c) of the Act, inasmuch as, it is a case of failure of the assessee to substantiate an entry of purchase in the books of account and it is not a case where some falsity or untruth has been established. In fact, the Assessing Officer proceeded to add to the returned income only the amount of profit element because of the fact that the sales effected by the assessee corresponding to the impugned purchases were accepted. Be that as it may, it is a case of mere non-substantiation of an expenditure and not a case where falsity has been proved to the hilt. Even if one has to go by the manner in which the addition has been made by the Assessing Officer by resorting to estimating the profit element no penalty is sustainable. Therefore, in this view of the matter, we set-aside the order of the CIT(A) and direct the Assessing Officer to delete the penalty of Rs.18,006/- imposed under section 271(1)(c) of the Act.”*

9. In the present case, the AO made addition of the total amount of bogus purchases. However, the Ld. CIT(A) restricted the addition to 2% of the questioned purchases, which was further confirmed by the coordinate Bench. Since the coordinate Bench has decided the identical issue in case of *Sameer D. Punjabi and ETCO Telecom Ltd. (supra)*, we do not find any reason to take a different view in this case. In our considered view the order passed by the Ld. CIT(A) is in accordance with the decisions of the coordinate Bench discussed above. Hence, we do not find any reason to interfere with the

findings of the Ld. CIT(A). Accordingly, we uphold the decision of the Ld. CIT(A) and dismiss the sole ground of appeal of the Revenue.

**ITA NO. 1357/Mum/2019 (A.Y. 2010-11)**

10. The facts and the issue raised by the Revenue in this case are identical to the facts and the issue raised by the Revenue in assessee's appeal ITA No. 1358/Mum/2019 for the assessment year 2009-10 except the amount of penalty deleted by the Ld. CIT(A). Since we have dismissed the appeal of the Revenue in the assessee's case for the assessment year 2009-10 and since there is no change of facts in the present case, consistent with our findings we dismiss the Revenue's appeal for the assessment year 2010-11 for the same reasons.

In the result, both the appeals filed by the Revenue are dismissed.

Order pronounced under Rule 34(4) of the Income Tax Rules on 25<sup>th</sup> June, 2020.

Sd/-

(RAJESH KUMAR)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 25/06/2020

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**आदेश 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.

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

सत्यापित प्रति //True Copy//

Registrar)

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai