

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

**BEFORE SHRI M BALAGANESH (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 1308/MUM/2019 (AY: 2009-10)**

**ITA No. 1309/MUM/2019 (AY: 2010-11)**

**ITA No. 1310/MUM/2019 (AY: 2011-12)**

Income Tax Officer, Ward 1(5), Room No 14, 6 <sup>th</sup> Floor B- Wing Wagale Industrial Estate, Thane (West) - 400604	<b>Vs.</b>	Shri Deju Gudda Bolar Block No 5, Manohar Mahal, Ravi Industrial Compound, Nr Talwarkar Gym, Panchpakhadi, Thane(West) 400602 PAN AAQPB4222K
<b>(Appellant)</b>		<b>(Respondent)</b>

Revenue by :                      Shri Avaneesh Tiwari (DR)  
Assessee by:                      Shri Subodh Ratanaparkhi (AR)

Date of Hearing:                  27/08/2020  
Date of Pronouncement:        07/09/2020

**ORDER**

**PER BENCH**

The revenue has filed these appeals against the common order dated 29.09.2015, passed by the Commissioner of Income Tax (Appeals) -1 Mumbai [for short 'the CIT (A)], for the assessment years 2009-10, 2010-11 and 2011-12, whereby the Ld. CIT (A) has allowed the appeals filed by the assessee against the penalty orders passed u/s 271 (1) (c) of the Income Tax Act, 1961 (for short the 'Act'). Since these appeals pertain to the same assessee and the revenue has taken identical grounds, these were clubbed, heard together and are being disposed of by this common order for the sake of convenience.

2. Brief facts of the case are that the assessee running a proprietary concern filed its return of income for the assessment years 2009-10, 2010-11 and 2011-12, declaring total income of Rs. 5,06,859/-, Rs. 7,10,210/- and Rs. 8,29,323/- respectively, which were processed u/s 143(1) of the Act. Subsequently, cases of the assessee were reopened on the basis of information

received from the Sales Tax Department Govt. of Maharashtra, that during the years relevant to the assessment years under consideration the assessee had obtained bogus purchase bills from 'hawala' dealers, AO reopened the assessment after issuing notice u/s 148 of the Act. Accordingly, the AO passed assessment orders u/s 143 (3) r.w.s. 147 of the Act, determining the total income of the assessee at Rs. 5,60,840/- for the assessment year 2009-10, Rs. Rs. 9,46,070 for the assessment year 2010-11 and Rs. 9,11,070/- for the assessment year 2011-12, after making addition @ 31.50% of the total amount of bogus purchases shown by the assessee during the year relevant to the assessment years 2009-10 and 2010-11 and @ 35.50% of the total amount of bogus purchases shown by the assessee during the year relevant to the assessment year 2011-12. The assessee did not challenge the action of the AO in order to avoid further litigation. On the basis of the said additions, the AO initiated proceedings u/s 271 (1) (c) of the Act and levied penalty of Rs. 16,680/-, Rs. 72,880/- and Rs. 25,260/- for the assessment years 2009-10, 2010-11 and 2011-12 respectively u/s 271(1)(c) of the Act for furnishing inaccurate particulars of income and resultant concealment of its income. The assessee challenged the penalty orders before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee deleted penalties levied by the AO. The revenue is in appeal before this Tribunal against the said order.

3. The revenue has challenged the impugned orders by raising the following common grounds:

*“1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) was justified in deleting the penalty levied u/s 271 (1) (c) without properly appreciating the decisions of the Hon’ble Apex Court in the case of Mak Data Pvt. Ltd. Vs CIT (Civil Appeal No. 9772 of 2013)”, the Hon’ble Gujarat High Court’s decision in the case of N.K. Proteins Ltd. Tax Appeal No. 242 of 2003 dated 20.06.2016 against which the SLP was dismissed by the Hon’ble Supreme Court and also ignoring the fact that Department received specific credible information in this case from the Sales Tax Department of the State Government of Maharashtra” in respect of non-genuine purchases.*

2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) was justified in deleting the penalty levied u/s 271 (1) (c) without appreciating the fact that there was a definite finding in the assessment order in respect of bogus purchases and of furnishing inaccurate particulars of income relating to purchases resulting into concealment of income.*

3. *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 para 10(e) of the said circular. Therefore, the order of the CIT (A) may kindly be vacated and that of the AO may be restored."*

4. Before us, the Ld. departmental representative (DR) submitted that the AO made the aforesaid additions for the reason that the assessee has failed to establish the genuineness of the transaction of purchases. The Ld DR further submitted that since the assessee could not produce delivery challans, lorry receipts and transportation details etc., which were essential to prove the genuineness of the transaction, the AO estimated the profit on the total amount of questioned purchases. The Ld. DR further submitted that since the AO had estimated the profits on such transactions by following the ratio laid down by the Hon'ble Gujarat High Court in the case of *CIT vs. Simit P Seth*, 356 ITR 290, *M/s Bholenath Poly Fab Pvt. Ltd.*, 355 ITR 290 and *Vijay M. Mistry Construction Ltd.* 355 ITR 498 and the decision of the Ahmadabad Bench of the ITAT in the case of *Vijay Proteins*, 58 ITD 482, the Ld CIT(A) ought to have confirmed the penalties levied by the AO.

5. On the other hand the Ld counsel for the assessee supporting the order passed by the Ld. CIT(A) submitted that since the AO had made addition on estimation, the Ld CIT(A) has rightly deleted the penalties in question. The Ld. counsel relying on the decisions of the ITAT Mumbai in the case of *Sh. Ajay Loknath Lohia vs. ITO*, ITA No. 2998/Mum/2017, AY 2009-10 and *Sameer D. Punjabi*, ITA No. 1564/M/2017 submitted that since the addition made on estimation basis does not amount to concealment of income or furnishing inaccurate particulars of the income within the meaning of section 271 (1) (c) of the Act, the Ld. CIT(A) has rightly deleted the penalty levied by the AO. The

Ld. counsel accordingly submitted that since the common issue involved in the present appeals is covered in favour of the assessee by the aforesaid decisions of the Tribunal, there is no merit in the arguments of the Ld. DR and the appeals of the revenue deserve dismissal.

6. We have heard the rival submissions of the parties and perused the material on record in the light of the rival contentions. As pointed out by the Ld. counsel, the AO had made additions in question on estimation basis. In the case of *Sh. Ajay Loknath Lohia vs. ITO* (supra), the coordinate Bench of the Tribunal has deleted the penalty levied u/s 271(1)(c) of the Act, on the basis of addition sustained on estimation basis. The relevant para of the order reads as under:

*“8. Having heard both the sides, we find merit in the arguments of the assessee for the reason that although the AO has estimated 25% gross profit on alleged bogus purchases, never made by observations with regard to the incorrectness in details filed by the assessee to prove such purchases. The AO never disbelieved information filed by the assessee, but he proceeded on the basis of information received from sales-tax department to make additions. The AO has made such addition on adhoc basis by estimating gross profit on alleged bogus purchases. From these facts, it is very clear that the AO failed to make a case of deliberate attempt by the assessee to furnish inaccurate particulars of income. Therefore, we are of the considered view that mere disallowance of purchases on adhoc basis does not tantamount to willful furnishing inaccurate particulars of income within the meaning of section 271 (1) (c) of the Income Tax Act, 1961. Hence, we are of the considered view that the AO was erred in levying penalty u/s 271 (1) (c) of the Act. Accordingly we direct the AO to delete the penalty levied u/s 271 (1) (c) of the Act.”*

7. Similarly, in the case of *Sameer D. Punjabi and ETCO Telecom Ltd.*,(supra), 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 (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.”*

8. In the present cases, the AO made addition of 31.50% and 35.50% of the total amount of bogus purchases on estimation basis. As pointed out by the Ld. counsel, the coordinate Benches of the Tribunal have already held that addition made on estimation does not attract section 271(1)(c) of the Act. The coordinate Bench has decided the identical issue in case of *Sh. Ajay Loknath Lohia vs. ITO and Sameer D. Punjabi, ETCO Telecom Ltd. (supra)*, in favour of the assessee. Since the facts of the present cases are similar to the facts of the cases relied upon by the Ld. counsel for the assessee and the issues involved are identical, we do not find any reason to take a different view in these cases. In our considered view, the orders passed by the Ld. CIT(A) are in accordance with the decisions relied upon by the Ld. counsel discussed above. So far as the decisions relied upon by the Ld. DR is concerned, the same are distinguishable on facts, therefore not applicable to the present cases. Hence, respectfully following the decisions of the coordinate Benches discussed above and the cases relied upon by the Ld. CIT(A) in its orders, we decide this issue in favour of the assessee and uphold the orders passed by the Ld. CIT(A). Accordingly, we direct the AO to delete the penalties levied/s 271(1)(c) of the Act in all the three cases.

In the result, appeal filed by the revenue for assessment year 2009-10, 2010-11 and 2011-2012 are dismissed.

Order pronounced on 7<sup>th</sup> Sept.,2020 under rule 34(4) of the ITAT Rules, 1963.

*Sd/-*  
(M BALAGANESH)  
ACCOUNTANT MEMBER

*Sd/-*  
(RAM LAL NEGI)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 07/09/2020

*Alinder PS*

**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.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

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