

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No. 5932 & 5933/Mum/2018

(Assessment Years: 2010-11 & 2011-12)

Manohar Shambu Suvarna, 3, Suresh Bhavan, Chincholi Bunder Road, Malad (W), Mumbai – 400064.	बनाम/ Vs.	ITO Ward – 31(2)(3) Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABEPS0736L		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by :	Smt Neha Paranj P, AR
प्रत्यर्थी की ओर से/Respondent by :	Shri Aktar H. Ansari, SR. DR

सुनवाई की तारीख / Date of Hearing	17/09/2020
घोषणा की तारीख /Date of Pronouncement	29/09/2020

आदेश / ORDER

PER PAVAN KUMAR GADALE - JM:

These are the appeals filed by the assessee against the common order of the Ld.CIT(A)-42, Mumbai, passed u/s 271(1)(c) and 250 of the Income Tax Act, 1961. The issues in these appeals are identical and similar, hence are clubbed, heard and consolidated order is passed. For the sake of

convenience, we shall take up the ITA No. 5932/Mum/2018 for the A.Y 2010-11. The assessee has raised the following grounds of appeal:

1. *The Ld. CIT(A) failed to consider that all the notices were sent to appellant an old address of the appellant although the new address was known to A.O, which is proven by the fact that the orders and demand notices for the earlier year i.e. for 2009-10 was sent to him on new address.*
2. *The Ld. CIT(A) also failed to consider that the impugned order is passed in contravention of principal of natural justice.*
3. *The Ld. CIT(A) failed to consider that the Ld. A.O has illegally reopened the case of the appellant without verifying the veracity of alleged information, since penalty proceeding is independent of assessment proceeding.*
4. *The Ld. CIT(A) also failed to consider that the impugned order is illegal in view of doctrine of "Res-Judicata" since in the earlier A.Y 2009-10, on the identical facts the A.O had not disallowed the entire alleged bogus purchases.*
5. *The Ld. CIT(A) also erred in not considering that the A.O has made addition of the entire purchase amounting to Rs. 6,31,655/- for A.Y 2010-11 while sales for those years were not doubted.*
6. *Without prejudice to above the Ld. CIT(A) failed to consider that the bills may be bogus since the corresponding sales are reflected.*
7. *The Ld CIT(A) also failed to consider that the A.O has made wrong additions to the returned income of the appellant since issue involved therein is covered by*

various High Courts, Tribunals and A.O by holding that entire alleged purchases cannot be disallowed and addition on account thereon be restricted to certain percentage of gross profit (GP) on such purchases.

8. *It is therefore prayed that the Hon'ble members may be pleased to cancel the impugned penalty order for the A.Y 2010-11 or in alternative the Hon'ble Members may be pleased to pass any such other order or orders in favour of the appellant in the interest of justice.*

2. The assessee has filed the return of income for the A.Y 2010-11 on 13.12.2010 with total income of Rs. 5,41,830/-. Subsequently, the A.O based on the information received from DGIT(Inv)Mumbai found that the assessee has obtained accommodation entries from hawala operators, who are involved in providing the bogus purchase bills without actually delivery of goods. Therefore, the A.O initiated reassessment proceeding u/sec148 of the Act. In the F.Y 2009-10 the assessee has obtained the bills from M/s Disa Enterprises of Rs.6,31,655/-. Since, the assessee could not substantiate the purchases with explanations, the Ld.A.O made addition of Rs. 6,31,655/- and Assessed the total income of Rs. 11,73,490/- and passed u/s 143 r.w.s 147 of the Act, Subsequently, the A.O initiated penalty u/s 271(1)(c) of the Act. The A.O in

the penalty proceedings observed that the assessee could not substantiate the genuineness of the purchases to the extent of Rs. 6,31,665/- and show cause notice was issued on 03.08.2016. None appeared on behalf of the assessee nor any explanations were furnished. The A.O is of the view that the assessee has no satisfactory explanations to offer and levied penalty of Rs. 1,95,183/- and passed order u/s 271(1)(c) of the Act on 29.09.2016.

Aggrieved by the penalty order, the assessee has filed an appeal with the CIT(A). The Ld. AR in the appellate proceedings made detailed explanations for none appearance of the assessee as the address of the assessee is not correctly updated. The A.O has not provided adequate opportunity of hearing to substantiate the case to file the explanations. The contentions of the Ld.AR are that the assessment was made based on the information and no independent enquiry was conducted by the A.O. Therefore, the levy of penalty u/s 271(1)(c) is bad in law. But the CIT(A) has confirmed the penalty and dismissed the appeal of the assessee. Aggrieved by the order, the assessee has filed an appeal with the Tribunal.

3. At the time of hearing, the Ld. AR submitted that the CIT(A) has erred in dismissing the assessee's appeal and has not considered the fact, that the assessee has not received the notices sent in the penalty proceedings and whereas the new address was updated with the A.O. The CIT(A) has accepted the action of the A.O in reopening of the assessment without verifying the alleged information. The purchase bills were treated as bogus but the A.O has not doubted the sales. Further, the Ld.AR submitted that in the quantum appeal, the Ld. CIT(A) has restricted the addition on account of bogus purchases by estimating @12.5% of bogus purchases as income of the assessee and was accepted. Therefore the levy of penalty on the estimated income cannot be sustained and prayed for allowing the appeal.

4. Contra, Ld. DR supported the orders of the lower authorities.

5. We have heard rival submissions and perused the material on record. The sole crux of the disputed issue

as envisaged by the Ld. AR is with respect to levy of penalty u/s 271(1)(c) of the Act by the A.O based on the order of the A.O under 143 r.w.s 147 of the Act. The Ld. AR has emphasized that against the addition of bogus purchases, the assessee has preferred an appeal before the appellate authorities. The Ld. CIT(A) has restricted the addition to the extent of 12.5% of the bogus purchases and was accepted and the penalty cannot be levied on estimated income. We found strength in the submissions of the Ld. AR. The A.O has made total disallowance of bogus purchases but accepted the sales in the books of accounts and the LdCIT(A) has estimated the income of the assessee on purchases. We are of the opinion that where the addition is sustained on the estimated basis, no penalty u/s 271(1)(c) of the Act can be levied on the estimated income. Accordingly, we, considering the facts and principles of natural justice set aside the order of the CIT(A) confirming the penalty and direct the A.O to delete the penalty and allow the grounds of appeal of the assessee.

6. In the result, the appeal of the assessee is allowed.

ITA No. 5933/Mum/2018, A.Y 2011-12.

7. In this assessment year, the facts are similar and identical to the earlier year. We have dealt in the above paragraphs in assessee's case for the A.Y 2009-10. Hence the decision rendered would apply mutatis mutandis for this case also. Accordingly, we set aside the order of the CIT(A) and direct the assessing officer to delete the penalty and allow the grounds of appeal the assessee.

8. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the open court on
29.09.2020

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 29/09/2020

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER.

सत्यापित प्रति //True Copy//

1.

उप/सहायक पंजीकार (Asst. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Mumbai