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

BEFORE SHRI SHAMIM YAHYA, AM

ITA No. 1996/Mum/2019
(Assessment Year: 2010-11)

ITO Ward (1), R. No. 23, B Wing, 6th Floor, Ashar I. T. Park, Wagle Estate Road No.16Z, Thane – 400 604	Vs.	M/s. Amar Diamond Tools 1st Floor, Shivdarshan Building, Pune Road, Opp. Shivsena Shaka, Mumbai-400 612
PAN/GIR No. AAHFA 7543 D		
(**Appellant**)	:	(**Respondent**)

Appellant by	:	Shri Somnath Wajale
Respondent by	:	Ms. Murti Shah

Date of Hearing	:	06.10.2020
Date of Pronouncement	:	06.10.2020

O R D E R

Per Shamim Yahya, A. M.:

This is an appeal where the Revenue is aggrieved that the learned Commissioner of Income Tax (Appeals)-1, Thane, ('ld.CIT(A) for short) has erred in deleting the penalty levied u/s. 271(1)(c) of the Income Tax Act, 1961 ('the Act' for short) amounting to Rs.33,601/- by order dated 07.01.2019.

2. Brief facts of the case are that the assessee in this case is engaged in the business of manufacturing and trading in industrial tools.

3. During the course of assessment proceedings, the Assessing Officer (A.O. for short) made the disallowance of 12.5% of the purchases amounting to Rs.1,08,736/- and penalty u/s. 271(1)(c) amounting to Rs.33,601/- was also levied.

4. Upon the assessee's appeal, the ld. CIT(A) deleted the penalty by observing as under:

6. I have carefully considered the facts of the case, findings of the AO, submission of the AR and material placed on record. It is observed that there is a normal tendency to subject an assessee to penalty u7s 271(1)(c) in all cases where the assessee refrains to file an appeal pursuant to an assessment order, with a hope to end the nightmare which began with selection of case for scrutiny by accepting the general additions in assessment order. Penalty is straightaway levied merely because no appeal has been filed against the quantum order. The Hon'ble Supreme Court in the case of Sir Shadilal Sugar Mills (168 ITR 7051) held that there may be a hundred and one reasons for not protesting and agreeing to an addition but that does not follow to the conclusion that the amount agreed to be added was concealed income.

6.1 The Supreme Court has recently reiterated the law in case of Dilip N. Shroff *v.* CIT [2007] 291 ITR 519 by holding in para 62 .that-finding in assessment proceedings cannot automatically adopted in penalty proceedings and the authorities have to consider the matter afresh from different angle. Moreover, in the case of Ajay Loknath Lohia, order dated 5.10.2018, Mumbai ITAT has addressed that when AO had estimated cost GP on alleged purchases, such disallowance does not tantamount to willful furnishing of inaccurate particulars of income within the meaning of section 271(1)(c) of the Income Tax Act, 1961.

6.2 In the case of ETCO Profiles Pvt. Ltd. vs. ACIT, in ITA No. 5351/Mum/2012, Hon'ble Mumbai ITAT had held that:

> *"...the AO has disallowed 20% of purchases only on presumptions without establishing fully that the* assesses *has made purchases from grey market. Even, if it is assumed for a moment that the assessee might have purchased goods from grey market, it was not Wished that the amount of purchases was less than that recorded in the books of account. Under these set of facts, it has to be held that me impugned addition has been made only on estimated basis that too on presumptions only. Hence, by following the decision rendered by the Tribunal in the assessee's sister concern's case (supra), we hold that the impugned penalty is liable to deleted."*

6.3 In the case of C1T v. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158 (SC) it was held as under:

> *"We do not agree,* as *the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which 'claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under section 271(1)(c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature".*

6.4 The levy of penalty is merely on disallowance of purchases and not finding of concealment of any particular or mala-fide intention to reduce taxable income. Addition made on account of disallowance of purchases as bogus automatically cannot justify the penalty levied u/s 271(1)(c) of the Act. Accordingly, the penalty of Rs. 33,601/-, imposed u7s 271(1)(c) of the IT. Act, by the AO, is hereby deleted and both these grounds of appeal, are allowed.

5. Against the order, the Revenue is in appeal before the ITAT.

6. I have heard the ld. Counsel of the assessee and perused the material available on record. I find the addition on account of bogus purchases has been done on estimated basis. The ld. CIT(A) is correct in holding that the penalty u/s. 271(1)(c) of the Act in this case is not sustainable. I further note that the conduct of the assessee in this case cannot be considered, to be contumacious to warrant levy of penalty u/s. 271(1)(c) of the Act. This proposition is supported by the decision of Hon'ble Supreme Court rendered by a larger Bench comprising of three of their Lordships in the case of *Hindustan Steel Ltd. vs. State of Orissa* [1972] 83 ITR 26 (SC) wherein it was held as under:

> "An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act, or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute."

7. Moreover, the ld. ld. Counsel of the assessee has pointed out that the tax effect in this case is below the limit of Rs.50 lacs fixed by CBDT vide Circular No. 17/2019 vide order dated 08.08.2015.

8. The ld. Departmental Representative (ld. DR for short) tried to mention that since the addition is based upon the information from Sales Tax Authority, an outside agency, the penalty can also considered to be so based and hence would fall under the exemption carved out in the said CBDT Circular. I am not convinced by the argument. Once the revenue concedes that the penalty has been levied based upon outside agency

information, the penalty would have no legs to stand. Be as it may, I uphold the order of ld. CIT(A) in deleting the penalty.

9. In the result, this appeal filed by the Revenue stands dismissed.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board on 06.10.2020

Sd/-
(Shamim Yahya)
Accountant Member

Mumbai; Dated : 06.10.2020
Roshani, Sr. PS

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai