

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

**BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 3526/MUM/2019  
Assessment Year: 2011-12  
&  
ITA No. 3527/MUM/2019  
Assessment Year: 2010-11**

The Income Tax Officer-28(3)(1), Room No. 316, 3 <sup>rd</sup> Floor, 6 <sup>th</sup> Tower, Vashi Railway Station Complex, Vashi, Navi Mumbai - 400703	<b>Vs.</b>	Sadhana Jaisingh Patel, C/6/6/2/1, Neel Kamal, Sector - 3, CBD Belapur, Navi Mumbai PAN: AEXPP4021M
<b>(Appellant)</b>		<b>(Respondent)</b>

Revenue by : Shri Jeetendra Kumar (DR)

Assessee by : Shri Subodh Ratnaparkhi (AR)

Date of Hearing: 20/10/2020  
Date of Pronouncement: 28/10/2020

**ORDER**

**PER RAM LAL NEGI, JM**

These appeals have been filed by the revenue against the orders dated 20.03.2019 and 28.03.2019 passed by the Commissioner of Income Tax (Appeals)-26 (for short 'the CIT(A), Mumbai, for the assessment years 2010-11 and 2011-12. Vide order dated 20.03.2019, the Ld. CIT (A) has partly allowed the appeal filed by the assessee against the assessment order passed u/s 143 (3) r.w.s. 147 of the Act. Vide order dated 28.03.2019, the Ld. CIT (A) has allowed the appeal of the assessee filed against the order passed by the AO u/s 271 (1) (c) of the Income Tax Act, 1961 (for short the 'Act')

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2. Brief facts of the case are that the assessee engaged in the business of manufacturing of Gyro Screening Machines and its spares parts and other types of engineering goods under the name and style M/s S.P. Enterprises, filed its return of income for the assessment year under consideration declaring total income at Rs. 9,23,072/-. Subsequently, the assessment was reopened on the basis of information received from the Sales Tax Department through Directorate General of Income Tax (DGIT) (Investigation), Mumbai to the effect that the assessee had obtained bogus entries for Rs. 13,83,676/- from five bogus entities which used to provide accommodation entries without supplying goods. Accordingly, the AO made addition of the said amount to the income of the assessee and passed assessment order u/s 143 (3) r.w.s. 147 of the Act. The assessee challenged the assessment order before the Ld. CIT (A). Ld. CIT (A) after hearing the assessee restricted the addition to 12.5% of the alleged bogus purchases. Aggrieved by the impugned order passed by the Ld. CIT (A), the revenue is in appeal before this Tribunal.

3. The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

- “1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in directing the A.O. to restrict the addition of bogus purchases to 12.5% as against 100% addition made by the Assessing Officer on account of bogus purchases without appreciating the fact that parties from whom these purchases were made proven accommodation entry providers, as concluded by Sales Tax Authorities pursuant to the investigation carried out by them?*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in not considering the latest Apex Court decision in the case of N.K. Proteins Ltd. Vs DCIT (769 of 2017), wherein the Hon’ble Supreme*

*Court has confirmed 100% addition made on account of bogus purchases?”*

4. The Ld. Departmental Representative (DR) submitted before us that the Ld. CIT (A) has wrongly restricted the addition to 12.5% without appreciating the fact that the assessee could not establish the genuineness of the purchases. The Ld. DR further pointed out that the Ld. CIT (A) has restricted the addition ignoring the fact the hawala operators have admitted on oath before the Sales Tax Authorities that they did not sell any material to anybody. The Ld. DR further submitted that since the findings of the Ld. CIT (A) are contrary to the ratio laid down by the Hon'ble Apex Court in the case of N.K. Protein Ltd. Vs. DCIT in SLP (Civil) No. 769/2017 the same is liable to be set aside.

5. On the other hand, the Ld. counsel for the assessee submitted that the facts of the cases relied upon by the revenue are different from the facts of the present case. The Ld. counsel further pointed out that the Hon'ble Gujarat High Court in the case of CIT vs. Simit P. Sheth 356 ITR 451, the Hon'ble Court has upheld the addition of 12.5% of alleged bogus purchases holding that the only profit element embedded in such purchases can be added to the income of the assessee. The Ld. counsel further submitted that since the findings of the Ld. CIT (A) are based on the ratio laid down by the Hon'ble Gujarat High Court and the decisions of the jurisdictional Benches of the Tribunal. There is no infirmity in the order passed by the Ld. CIT (A) to interfere with.

6. We have heard the rival submissions of the parties and perused the material on record including the cases relied upon by the parties. As pointed out by the Ld. counsel, the Ld. CIT (A) has restricted the addition to 12.5% of the alleged bogus purchases by following the ratio laid down by the Hon'ble Gujarat High Court in the case of CIT vs. Simit P. Sheth (supra). The concluding paras of the Ld. CIT (A) read as under:-

*“6.1 Ground No. 1 to 4 of the appeal are against addition of Rs. 13,83,676/- being non-genuine purchases. As per*

*the investigations carried out by the Sales Tax Authorities, the aforementioned party was found to be involved in giving accommodation entries only without actually supplying the goods. The logical inference is that the purchases made by the appellant would also be in the nature of accommodation entries only. To verify the same, the AO had made enquiries by issuing notices u/ 133 (6) which were returned unserved by the postal authorities. This party was found to be non-existent at the address given by the appellant. The appellant also failed to provide the latest address of the party. During the scrutiny assessment the appellant furnished details of purchases and corresponding sales. However, the appellant could not produce the party before the AO in spite of opportunity being given. The appellant also failed to produce delivery challans or transportation details. The onus of proving the genuineness of such purchases is on the appellant which the appellant had not been able to discharge fully. When the hawala party had admitted on oath that it had given accommodation entries only without actually supplying goods, the genuineness of purchases made from these parties will have to be considered taking this into consideration while examining the documentation submitted by the appellant in support of its claim. The documentary evidences such as purchase bills, payments by cheques etc. would all have been orchestrated to present a facade of genuineness and does not necessarily mean that the purchases from these parties are genuine. The Courts have held that payment by cheque by itself is not sacrosanct so as to prove genuineness of purchases when the surrounding circumstances are suspect. However, the appellant has shown onward sales which has not been doubted by the Assessing Officer. Since there can be no sales without corresponding purchases, the only logical explanation is that the appellant would have made purchases from undisclosed parties in the grey market at lower rates and purchases were shown as being made from the impugned parties to suppress its profits. In such a situation, the various Courts including the Hon'ble Gujarat High Court in the case of CIT vs Simit P. Sheth, 356 ITR 451 have held that not the entire*

*purchases but only the profit element embedded in these purchases was to be disallowed and accordingly held that 12.5% of the purchases will be reasonable as profit on margin against the bogus purchases. In view of this decision of Hon'ble ITAT 'H' Bench, Mumbai, the addition made by the AO is restricted to 12.5% of the total alleged bogus purchases of Rs. 13,83,676/- which should sufficiently cover the profit element embedded in the impugned purchases. The appellant's grounds of appeal are Partly Allowed."*

7. Admittedly, in the present case the AO has not doubted the sales. As per the settled law, when sales are not doubted 100% disallowance cannot be made. Further, there cannot be any sale without actual purchases. In the present case, the assessee could not establish the genuineness of the transaction to the satisfaction of the AO. This does not mean that the assessee had not made any purchase. However, it can be concluded from the facts of the case that assessee had purchased the goods from grey market. As per ratio laid down by the Hon'ble Gujarat High Court in the case of CIT vs. Simit P. Sheth (supra), when the total sale is accepted by the Assessing Officer then entire purchases cannot be added to the income of the assessee. Therefore, only the profit element embedded in such purchases could be added to the income of the assessee. Since, the Ld. CIT (A) has restricted the addition to 12.5% by following the ratio laid down by the Hon'ble Gujarat High Court discussed above, we do not find any reason to interfere with the findings of the Ld. CIT (A). In our considered view, the addition of 12.5% is reasonable to meet the ends of justice. Further, as pointed out by the Ld. counsel, the facts of the present case are different from the facts of the cases relied upon by the Ld. DR. We therefore, uphold the findings of the Ld. CIT (A) and the dismissed the revenue's appeal.

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In this case, the AO passed the assessment order u/s 143 (3) r.w.s. 147 of the Act after making addition of the entire amount of bogus purchases

shown by the assessee. In the first appeal, the Ld.CIT (A) restricted the addition to 12.5% of the total amount of the bogus purchases. The AO initiated proceedings u/s 271 (1) (c) of the Act and imposed penalty of Rs. 4,99,906/-.

2. The assessee challenged the penalty order passed by the AO before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee deleted the penalty by following the various decisions of the ITAT. Against the said findings of the Ld. CIT (A), the revenue is in appeal before this Tribunal.

The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

- “1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) was correct in deleting the penalty of Rs. 4,99,906/- levied u/s 271 (1) (c) of the Act as the penalty was levied on quantum additions 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 Assessing Officer and the assessee failed to discharge his onus?*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) was correct in holding that the AO has estimated the income without appreciating that the A.O. has levied penalty, only after verifying the fact that the assessee evaded the taxes on quantum of additions made on account of bogus purchases and the assessee failed to establish the genuineness of such purchases?*
3. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) was correct in holding that assessee has neither concealed the particulars of income nor has it furnished inaccurate particulars of income, there being no findings of the A.O. that the details furnished by the assessee in his return are found to be inaccurate or erroneous or false without appreciating the fact that by resorting to bogus purchases/accommodation entry, the assessee made an attempt to reduce the profitability and thereby attempted to avoid taxes, which in itself proves*

*beyond doubt that assessee concealed particulars of income.?*

3. Before us, the Ld. DR submitted that since the assessee failed to establish the genuineness of the purchases in question by adducing cogent and convincing evidence, AO had rightly made addition of the total amount of bogus purchases to the income of the assessee. Even in the first appeal, the Ld. CIT (A) sustained the addition of 12.5% of the total amount of bogus purchases. Under these circumstances, the Ld. CIT (A) ought to have confirmed the penalty levied by the AO u/s 271 (1) (c) of the Act.

4. On the other hand, the Ld. counsel for the assessee supporting the findings of the Ld. CIT (A) submitted that since the Ld. CIT (A) sustained the addition of 12.5% of the total amount of bogus purchases on estimate basis, penalty u/s 271 (1) (c) of the Act levied by the AO is not sustainable. The Ld. counsel further pointed out that the findings of the Ld. CIT (A) are based on the various decisions of the ITAT, therefore, there is no infirmity in the order passed by the Ld. CIT (A) to interfere with.

5. We have heard the rival submissions of the parties and gone through the material on record including the cases relied upon by the authorities below. The Ld. CIT (A) has deleted the penalty, levied u/s 271 (1) (c) of the Act, holding as under:-

*“6.I have gone through the order levying penalty passed by the AO and the statement of facts. The AO had added Rs. 15,14,869/- being entire bogus purchases to the total income of the assessee. Subsequently, the A.O. passed the penalty order u/s 271 (1) (c) of the Act on 31-08-2016 for furnishing inaccurate particulars of income and also for concealing the particulars of income by way of bogus claim of expenditure, levying a minimum leviable penalty of Rs. 4,99,906/- being 100% of the tax sought to be evaded.*

*6.1 The appellant has contended that the purchases made by the appellant are genuine and supported by valid documents. The appellant has also contended that it has not*

*concealed any particulars of income nor has it furnished inaccurate particulars of income. The appellant has also contended that purchase was disallowed on ad-hoc basis which also suggested that concerned purchases were not bogus in nature. It was further contended that CIT(A)-26, Mumbai vide order dated 25-01-2019 has reduced the addition to 12.5% of the bogus purchases. To buttress its claim, the appellant has relied on a number of case laws as mentioned in its statement of facts.*

*6.2 The AO had basically estimated the profit on alleged bogus purchases being the profit element calculated by adopting peak credit and penalty u/s. 271(1)(c) of the Act was levied by the AO on such estimated profit. There is a plethora of court decisions which say that where additions are made on estimation, no penalty u/s. 271(1)(c) is leviable, there being no concealment of particulars of income or furnishing of inaccurate particulars of income. In the present case, the purchase had been duly shown by the appellant in its books of accounts but it could not produce the party from whom the purchase had been made. It is not the case of the AO that the impugned purchases have been proved to be bogus conclusively and there were no corresponding sales. In a recent case before the Allahabad High Court in the case of Naresh C hand Agarwal vs. CIT. 357 ITR 0514 (All), it has been held that:*

*"12. In the instant case, nothing was concealed by the assessee. The A. O. has rejected the books of account in the second round and applied the 8 percent net profit rate prescribed under Section 44 AD. in the instant case, the turnover is more than 40 lacs, so Section 44 AD is not applicable, nonetheless the A. O. has inspired with the provision of Section 44 AD and made the addition by estimating the net profit rate at 8 percent. Rejection of the books of account allowed the A. O. to make the addition on estimate basis. When the addition is made on estimate basis, no penalty under Section 271 (1)(c) of the Income Tax Act, can be imposed as per the ratio laid down in the case of C.!. T. vs. Arjun Prasad Ajit Kumar, (2008) 214 CTR (All) 355, where it was observed that:*

*"Appeal (High Court) -Substantial question of law- Penalty*

*under section 271 (1)(c) CIT (A) deleted penalty under section 271(1)(c) on the ground that there being nothing on record that assessee's explanation lacked bona fides, penalty under section 271(1)(c) could not be imposed on the basis of estimating sales and making addition by applying net profit rate-Same was rightly sustained by Tribunal and no substantial question of law arises"*

*6.2.1 On the similar set of facts, the Hon'ble ITAT, Mumbai has deleted penalty u/s. 271(1)(c) of the Act in ITA No. 5586/Mum/2015 dated 16.01.2017 in the case of DC1T Cir 4(2)(2) vs. M/s. ManoharManak Alloys P. Ltd. On the same lines, the Hon'ble ITAT, Mumbai in ITA No. 7519/Mum/2013 dated 08.07.2015 in the case of M/s. Yashraj Films P. Ltd. vs. The A.C.L.T. Central Circle 29, Mumbai has deleted the penalty u/s. 271(1)(c) of the Act levied on addition made on estimation basis. Likewise, the Hon'ble ITAT, Mumbai in ITA No. 93/Mum/2011 dated 10.04.2015 in the case of DCIT 14(2) vs. M/s. RishabhImpex Gulabdas & Co. deleted the penalty u/s. 271(1)(c) of the Act levied on addition made on estimation basis.*

*Further, in a recent decision of Delhi ITAT in the case of Shruti Fastners Ltd. vs. OC1T (2017) 49 CCH 0183 Del Tub and ITAT Mumbai in the case of Rakeshkumar M. Gupta vs.ITO(2017) 49 CCH 0066 Mum Trib, it has been held that where income has been estimated, the appellant cannot be said to have concealed particulars of income or furnished inaccurate particulars of income and therefore, penalty u/s 271(1)(c) was not leviable.*

*6.3 In the background of the aforesaid discussions and respectfully following the precedents, as above and those relied upon by the appellant, I am of the considered view t the appellant has not concealed the particulars of income and nor has it furnished inaccurate particulars of income, there being are no findings of the AO that the details furnished by the appellant in his return are found to be inaccurate or erroneous or false. Accordingly, I delete the penalty of Rs. 4,99,906/- levied by the AO u/s. 271 (1)(c) of the Act."*

6. As pointed out by the Ld. counsel for the assessee, the Ld. CIT (A) has deleted the penalty levied u/s 271 (1) (c) of the Act, by following the ratio laid down by the Hon'ble Allahabad High Court in the case of *Nareshchand Agarwal vs. CIT 357 ITR 514 (Allahabad)*, wherein the Hon'ble Court has held that where the addition is made on estimate basis, penalty u/s 271 (1) (c) cannot be imposed. We further notice that apart from the judgment of the Hon'ble Allahabad High Court, the Ld. CIT (A) has relied upon the various decisions of the coordinate Benches of the Tribunal. Since, the findings of the Ld. CIT (A) are based on the law laid down by the Hon'ble Allahabad High Court and the decisions of the coordinate Benches; we do not find any reason to interfere with the findings of the Ld. CIT (A). We accordingly uphold the decision of the Ld. CIT (A) and dismiss the appeal filed by the revenue. Accordingly, we direct the AO to delete the penalty levied under section 271 (1) (c) of the Act.

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

Order pronounced on 28<sup>th</sup> October, 2020 under rule 34 (4) of the Income Tax Appellate Tribunal Rules, 1963.

Sd/-  
(SHAMIM YAHYA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 28/10/2020

Sd/-  
(RAM LAL NEGI)  
JUDICIAL MEMBER

Alindra, 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//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai