

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A" MUMBAI**

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4641/MUM/2019
Assessment Year: 2009-10**

Income Tax Officer, 12(1)(2),
Room No. 146A, 1st floor,
Aayakar Bhavan, Churchgate,
Mumbai-400020.

Appellant

Vs. M/s Ashish Waterproofing
(India) Pvt. Ltd.,
Gala No. 2085, 2nd floor, Nirman
Industrial Estate, Village
Chincholi Link Road, Malad (W),
Mumbai-400064
PAN No. AABCA 3892 Q
Respondent

Revenue by : Mr. Brajendra Kumar, DR
Assessee by : None

Date of Hearing : 07/01/2021
Date of pronouncement : 11/01/2021

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the Revenue. The relevant assessment year is 2009-10. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-20, Mumbai [in short 'CIT(A)'] and arises out of the penalty levied u/s 271(1)(c) of the Income Tax Act 1961, (the 'Act').

2. Though the case was fixed for hearing on 7.01.2021, neither the assessee nor its authorized representative appeared before the Tribunal on the above date. As there is non-compliance by the assessee, the present

appeal is disposed off after examining the materials available on record and after hearing the Ld. Departmental Representative (DR).

3. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2009-10 on 23.09.2009 declaring total income of Rs.5,86,344/-. The assessment was completed u/s 143(3) by the Assessing Officer (AO) on 20.03.2015 determining the total income at Rs.10,93,521/- by making an addition of Rs.5,07,182/- on account of bogus purchases.

Subsequently, on appeal by the assessee, the Ld. CIT(A) restricted the disallowance to Rs.63,398/- being 12.5% of the disputed purchases. Thereafter, the AO levied a penalty of Rs.19,590/- u/s 271(1)(c) on the income sought to be concealed of Rs.63,398/-.

4. Against the penalty of Rs.93,590/- levied by the AO, the assessee filed an appeal before the Ld. CIT(A). We find that *vide* order dated 30.04.2019, the Ld. CIT(A) deleted the above penalty on the following ground :

“5.1 I have considered the rival contentions. I find from para 5.5 of the order of the CIT(A) that the sum of Rs.63,398/- in respect of which the penalty was imposed was based on estimate. I find that the AO failed to bring any concrete evidence to prove that the sum of Rs.63,398/- actually represented income in respect of which inaccurate particulars had been furnished by the appellant. I find that the facts in the case cited by the appellant [Harigopal Singh vs. CIT (2002) (supra)] is similar to the facts of the appellant's case. In that case, the question of law before the Hon'ble Court was whether penalty is attracted under section 271(1)(c) of the Act where income is assessed purely on estimate basis and additions are made in the declared income on that basis. In that case, the Hon'ble High Court of Punjab & Haryana held as under:

"3. In order to attract clause (c) of section 271(1), it is necessary that there must be concealment by the assessee of the particulars of his income or if he furnishes inaccurate particulars of such income. What is to be seen is whether the assessee in the present case had concealed his income as held by the Assessing Officer and the Tribunal. He had not maintained any accounts and he filed his return of income on estimate basis. The Assessing Officer did not agree with the estimate of the assessee and brought his income to tax by increasing it to Rs.2,07,500/-. This, too, was on estimate basis. The Tribunal agreed that the income of the assessee had to be assessed on an estimate of the turnover but was of the view that the estimate as made by the Assessing Officer was highly excessive and it fixed the total income of the assessee at Rs.1,50,000/- for the year under appeal. It is, thus, clear that there was a difference of opinion as regards the estimate of the income of the assessee. Since the Assessing Officer and the Tribunal adopted different estimates in assessing the income of the assessee, it cannot be said that the assessee had 'concealed the particulars of his income' so as to attract clause (c) of section 271(1). There is not even an iota of evidence on the record to show that the income of the assessee during the year under appeal was more than the income returned by him. Additions in his income were made, as already observed on estimate basis and that by itself does not lead to the conclusion that the assessee either concealed the particulars of his income or furnished inaccurate particulars of such income. There has to be a positive act of concealment on his part and the onus to prove this is on the department. We are also of the considered view that the Tribunal grossly erred in law in relying on Explanation 1(B) to section 271(1)(c) to raise a presumption against the assessee. The assessee had justified his estimate of income on the basis of household expenditure and other investments made during the relevant period. It is not the case of the revenue that he had, in fact, incurred expenditure in excess of what he had stated. In this view of the matter, it cannot be said that the

explanation furnished by the assessee had not been substantiated or that he had failed to prove that such explanation was not bona fide.

5.2 In view of the decision of the Hon'ble Punjab & Haryana High Court discussed above, the penalty imposed is not sustainable. Accordingly I direct the AO to delete the penalty of Rs.19,590/-.”

5. The Ld. DR relies on the order of the Tribunal, Jaipur Bench in the case of *ITO v. M/s Bhansali Trading Corporation* (ITA No. 735/JP/2012) for AY 2005-06 and submits that the penalty of Rs.19,590/- levied by the AO be restored.

6. We heard the Ld. DR and perused the relevant materials on record. The reasons for our decisions are given below.

In the case of *M/s Bhansali Trading Corporation* (supra), the Tribunal observed that the addition made by the AO was specific on account of unverifiable purchases on which GP @ 25% was applied and added to income ; the assessee was not able to produce the concerned parties for verification and also summons were returned back to the AO un-served. On that ground, the Tribunal reversed the order of the Ld. CIT(A) and restored the penalty levied by the AO.

In the instant case, in response to the show cause notice during the course of penalty proceedings, the assessee filed a reply dated 21.02.2018 stating that they had submitted copy of the ledger account, bills of the concerned parties along with delivery challans, bank statements where payments had been reflected to prove the genuineness of the purchases. It was stated before the AO that raw materials were purchased from the concerned parties who were having TIN number and were registered dealers. It was stated that during the year under consideration, the

assessee had no transaction with the said parties and therefore, it was not able to produce them before the AO.

In view of the facts and circumstances of the case, we are persuaded by the judgment of the Hon'ble Punjab & Haryana High Court in *Harigopal Singh* (supra) instead of the order of the Tribunal in the case of Bhansali Trading Corporation (supra).

We are of the considered view that the Ld. CIT(A) has rightly followed the judgment of the Hon'ble Punjab & Haryana High Court in *Harigopal Singh* (supra) and deleted the penalty of Rs.19,590/-.

7. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 11/01/2021.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 11/01/2021

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Assistant Registrar)
ITAT, Mumbai