IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI

BEFORE SHRI RAJESH KUMAR (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)

ITA No.4602/MUM/2019
(Assessment Year: 2011-12)

Venus Industries Sr. No. 25, House No.3, Part No. 4, Near Satyam Indl. Estate, Govandi, Mumbai – 400088	Vs.	Income Tax Officer Ward 27(3)(5), Room No. 428, 4th Floor, Tower No. 6, Vashi Railway Station Complex, Vashi, Navi Mumbai- 400703

PAN No. AADFV2546D

(Assessee) **(Revenue)**

Assessee by : None
Revenue by : Ms. Usha Gaikwad, D.R

Date of Hearing : 22/02/2021
Date of pronouncement : 22/02/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the assessee firm is directed against the order passed by the CIT(A)-25, Mumbai, dated 11.04.2019, which in turn arises from the order passed by the A.O under Sec. 271(1)(c) of the Income Tax Act, 1961 (for short 'Act'), dated 27.09.2016 for A.Y. 2011-12. The assessee has assailed the impugned order on the following grounds of appeal before us:

> "The following grounds of appeal are without prejudice to one another.
>
> 1. On the facts and circumstances of the case and in Law the Ld. Commissioner of Income Tax (Appeals) (referred as CIT(A)) erred in confirming the penalty levied under section 271(1)(c) of Rs.93,426/- on the ground or grounds as contained in the appellate order or otherwise.
> 2. The Appellant crave leaves to add, amend, alter, modify and or withdraw any of the above grounds of appeal which are without prejudice to one another.
>
> The appellant prays this Hon'ble Tribunal to direct the A.O. to delete the penalty and allow the appeal."

2. Briefly stated, the assessee firm which is engaged in the business of manufacturing of engineering goods had e-filed its return of income for A.Y. 2011-12 on 10.09.2011, declaring its total income at Rs.4,18,436/-. Subsequently, on the basis of information received from the Investigation

Wing of the Income Tax Department that the assessee as a beneficiary had obtained accommodation purchase bills through certain hawala parties, its case was reopened under Sec. 147 of the Act. During the course of the assessment proceedings it was observed by the A.O that the assessee had claimed to have made purchases of Rs.9,73,640/- from a tainted party viz. M/s Avantika Metal Industries. In order to verify the genuineness and veracity of the aforesaid purchase transactions the A.O called upon the assessee to substantiate the same on the basis of irrefutable documentary evidence. Also, notice under Sec. 133(6) was issued to the aforementioned party, which however was returned unserved by the postal authority with a remark unknown/left etc. In the backdrop of the aforesaid facts the A.O directed the assessee to produce the aforementioned supplier party for necessary verification and also furnish its current address. However, the assessee failed to comply with the aforesaid directions of the assessee and neither produced the aforementioned party nor furnished its contact address. As the assessee failed to substantiate the genuineness of the aforesaid impugned purchase transactions the A.O, therein held a conviction that no genuine purchases were made by the assessee from the aforementioned party. At the same time, it was noticed by the A.O that the assessee had duly accounted for the sales corresponding to the impugned purchases in its books of account. In the backdrop of the aforesaid facts, the A.O was of the view that the assessee had purchases the goods in question not from the aforementioned party but had procured the same at a discounted value from the open/grey market. Before the A.O, it was submitted by the assessee that in its case for A.Y. 2009-10 a peak addition of Rs.4,14,731/- w.r.t certain impugned purchases which were held to be bogus/accommodation entries procured in the said year was made. It was the claim of the assessee, that in the backdrop of the aforesaid facts no addition w.r.t the impugned purchases was liable to be made during the year in question. However, the A.O being of the view that as the assessee had failed to substantiate as to how the aforesaid impugned addition made in its case for A.Y. 2009-10 was lying with it during the year in question i.e A.Y. 2010-11, rejected the aforesaid claim of the assessee. At the same time, the A.O holding a conviction that the assessee adopting the same *modus operandi* as it had adopted in A.Y. 2009-10, had procured the goods in question from the open/grey market in cash, and had obtained the bogus bills from the aforesaid accommodation entry provider thus, made an addition towards the peak of the purchases of Rs.3,02,349/- under Sec. 69C of the Act. At the time of culminating the assessment the A.O also initiated penalty proceedings under Sec. 271(1)(c) for furnishing inaccurate particulars of income and for concealing income.

3. After the culmination of the assessment proceedings the A.O vide his order passed under Sec. 271(1)(c), dated 27.09.2016 imposed a penalty of Rs.93,426/-.

4. Aggrieved, the assessee assailed the penalty imposed under Sec.271(1)(c) in appeal before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee that no penalty under Sec. 271(1)(c) was liable to be imposed in its case, dismissed the appeal.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. As the assessee appellant despite having been put to notice about the hearing of the appeal had failed to appear before us, we, thus, are constrained to proceed with as per Rule 24 of the Appellate Tribunal Rules, 1963 and therein dispose off the appeal after hearing the respondent revenue and perusing the orders of the lower authorities.

6 Admittedly, on a perusal of the orders of the lower authorities, we concur with the view taken by them that the assessee had failed to substantiate the genuineness and veracity of the purchases which were claimed to have made from aforementioned tainted party. Also, as the sales corresponding to the impugned purchases were duly accounted for by the assessee in its books of account, thus, the addition in the hands of the assessee as rightly observed by the A.O was liable to be restricted only to the extent of the profit which it would have made by procuring the goods at a discounted value from the open/grey market. Insofar the quantum proceedings are concerned, we are in agreement with the view taken by the lower authorities that as the assessee had failed to substantiate the authenticity of the impugned purchase transactions, the same, thus, were to be held as bogus purchase transactions, specifically in the backdrop of the information that was shared by the Sales Tax Department, Maharashtra, as per which the aforesaid supplier party figured in the list of the tainted parties which were involved in providing bogus/accommodation bills without any actual supply of material. But then, we cannot also remain oblivious of the fact that on the said standalone basis the authenticity of the impugned purchases could not be conclusively disproved to the extent that the same would justify levy of penalty under Sec. 271(1)(c) of the Act. As is discernible from the orders of the lower authorities, we find that the assessee in order to substantiate the authenticity of the impugned purchases had placed on record certain documentary evidence and also had drawn support from the fact that the payments to the aforementioned parties towards the purchase consideration were made through account payee cheques only. Be that as it may, we are of the considered view that in the absence of sufficient documentary evidence substantiating the genuineness of the purchase transactions to the hilt, it could though safely be concluded that the assessee had purchased the goods at a discounted value from the open/grey market which, thus, would justify an addition in its hands, however, the same on the said standalone basis would not justify imposition of penalty under Sec. 271(1)(c) in its hands. Accordingly, we are unable to persuade ourselves to subscribe to the view taken by the lower authorities, wherein they have imposed/sustained penalty u/s 271(1)(c) of Rs.93,426/- in the hands of the assessee. Our

aforesaid view is supported by the judgment of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Upendra V. Mithani [(ITA (L) No. 1860 of 2009; dated 05.08.2009]**. In the aforesaid case, it was observed by the Hon'ble High Court that no penalty can be imposed under Sec. 271(1)(c) if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. It was further observed, that if the assessee gives an explanation which is unproved but not disproved i.e. it is not accepted but circumstances do not lead to the reasonable and positive inference that the assesses case is false, then no penalty under Sec. 271(1)(c) could justifiably be imposed. Accordingly, we herein set aside the order of the CIT(A) wherein he had upheld the penalty imposed by the A.O under Sec. 271(1)(c). We thus in terms of our aforesaid observations, not being persuaded to subscribe to the view taken by the lower authorities therein vacate the penalty of Rs.93,426/- imposed by the A.O under Sec. 271(1)(c) of the Act.

7. The appeal filed by the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 22.02.2021

Sd/-	Sd/-
Rajesh Kumar	Ravish Sood
(ACCOUNTANT MEMBER)	(JUDICIAL MEMBER)

Mumbai, Date: 22.02.2021
PS: Rohit

Copy of the Order forwarded to :
1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "F" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai