

आयकर अपीलीय अधिकरण

मुंबई पीठ "एफ", मुंबई

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

श्री प्रमोद कुमार, उपाध्यक्ष एवं

श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आअसं. 5081/मुं/2019 (नि.व. 2011-12)

ITA NO.5081/MUM/2019(A.Y.2011-12)

M/s. J. Kumar –RPS Joint Venture,
C-113, Shyam Kamal, Agarwal Market,
Tejpal Road, Vile Parle (East),
Mumbai 400 057

PAN: AABTJ1167E

..... अपीलार्थी

/Appellant

बनाम Vs.

DCIT Central Circle -5(1),
Air India Building, Nariman Point,
Mumbai 400 021

..... प्रतिवादी/Respondent

Assessee by : None
Revenue by : Ms. Usha Gaikwad

सुनवाई की तिथि/ Date of hearing : 04/02/2021

घोषणा की तिथि/ Date of pronouncement : 25/02/2021

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax Appeals-53, Mumbai [in short 'CIT(A)'] dated 06/06/2019 for the assessment year 2011-12 assailing confirmation of penalty under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act').

2. The facts of the case in brief are : In assessment proceedings the Assessing Officer made addition on account of bogus purchases. The penalty under section 271(1)(c) of the Act was also initiated for furnishing inaccurate particulars of income. The assessee filed appeal against the quantum addition. The CIT(A) granted part relief to the assessee by estimating addition @ 12.5% of total alleged bogus purchases. The Assessing Officer vide order dated 31/03/2018 levied penalty of Rs. 1,76,910/- on estimated addition confirmed by CIT(A).

3. Ms. Usha Gaikwad, representing the Department submitted that the assessee failed to substantiate genuineness of the purchases in the impugned assessment year, hence, addition was made in respect of bogus purchases. The penalty was rightly levied by the Assessing Officer for furnishing inaccurate particulars of income qua bogus purchases. The CIT(A) has upheld the penalty order on merits as well as rejecting alleged technical defects pointed by the assessee.

4. We have heard the submissions made by Id.Departmental Representative and have examined the orders of authorities below. A perusal of the assessment order reveals that the addition has been made on account of bogus purchases. The Assessing Officer made addition of entire alleged bogus purchases. In First Appeal, the CIT(A) restricted the addition to 12.5% of such purchases. The Assessing Officer levied penalty on the estimated addition confirmed by the CIT(A). It is an accepted legal position that no penalty under section 271(1)(c) of the Act can be levied on additions that have been made merely on the basis of estimations. Levy of penalty under section 271(1)(c) of the Act is not automatic. Penalty proceedings are distinct and separate from assessment proceedings. The finding given in assessment proceedings are not conclusive so far as the penalty

proceedings are concerned. In the present case we find that the Assessing Officer made addition of the entire alleged bogus purchases, the CIT(A) restricted the addition to 12.5% by estimating escaped profit embedded in alleged bogus purchases. The order of CIT(A) was upheld by the Tribunal in appeal filed by the Revenue i.e. ITA No.6515/Mum/2016 decided on 13/10/2017.

5. The Hon'ble Punjab & Haryana High Court in the case of CIT vs. Sangurur Vanaspati Mills Ltd., 303 ITR 53(P&H) has held that where addition has been made on the basis of estimation and not on account of any concrete evidence of concealment, penalty under section 271(1)(c) of the Act cannot be invoked.

The Hon'ble Rajasthan High Court in the case of CIT vs. Krishi Tyre Retreading Industries, reported as 360 ITR 581(Raj), taking a similar view held that where estimated additions are made, no penalty is leviable under section 271(1)(c) of the Act. The Tribunal in catena of decisions has consistently held that penalty under section 271(1)(c) of the Act levied on addition resulting from estimations is unsustainable.

6. The CIT(A) in impugned order has rejected assessee's contention that no penalty is attracted where additions are made on estimations. The CIT(A) has drawn support from the following decisions to wreck the argument of assessee:-

- (i) Addl. CIT vs. Chandrakantha, 295 ITR 607(MP)
- (ii) CIT vs. Md. Warasat Hussain, 171 ITR 405(Pat),
- (iii) AM Shah & Co. Vs. CIT, 238 ITR 415(Guj)
- (iv) CIT vs. Krishnaswamy & Sons, 219 ITR 157 (Mad)

None of the judgments referred by CIT(A) is from Hon'ble Jurisdictional High Court. The Hon'ble Apex Court in the case of CIT vs. Vegetable Products Ltd., 88 ITR 192 has held that where two reasonable constructions of a taxing provision are possible, that

construction which favours the assessee must be adopted. Thus, in view of above, we find favour in the arguments of the assessee and allow the appeal.

7. In the result, impugned order is set aside and the appeal of assessee is allowed.

Order pronounced in the open court on Thursday the 25th day of February, 2021.

Sd/-

(PRAMOD KUMAR)

उपाध्यक्ष /VICE PRESIDENT

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 25/02/2021

Vm, Sr. PS (O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai