



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

BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA no.5768/Mum./2019
(Assessment Year : 2011-12)

Income Tax Officer
Ward-32(3)(3), Mumbai

..... Appellant

v/s

Sunil Trading Company
03, Subh Jivan Apartment
Ram Kuvar Thakur Road
Dahisar (W), Mumbai 400 092
PAN - AAAFS3376H

..... Respondent

Revenue by : Shri Vijay Kumar Menon
Assessee by : None

Date of Hearing - 10.03.2021

Date of Order - 24.03.2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

The captioned appeal has been filed by the Revenue challenging the order dated 26th June 2019, passed by the learned Commissioner (Appeals)-44, Mumbai, deleting the penalty under section 271(1)(c) of the Act of the Income Tax Act, 1961 (for short "*the Act*") imposed by the Assessing Officer for the assessment year 2011-12.

2. Facts in brief:- As it transpires from the facts on record, the assessee being a firm for the year under consideration had filed its

return of income on 29th September 2011 declaring total income at ₹ 2,19,630. The return of income so filed by the assessee was initially processed under section 143(1) of the Act. Subsequently, on the basis of some information received from the DGIT (Inv.), Mumbai, the Assessing Officer re-opened the assessment under section 147 of the Act and issued notice dated 25th August 2015, under section 148 of the Act. The Assessing Officer considering the submissions of the assessee completed the assessment under section 143(1) r/w section 147 of the Act on 9th December 2016, determining total income at ₹ 8,46,941, on account of non-genuine purchase worth ₹ 50,18,496, made by the assessee from 12 parties. As a result of such addition made by the Assessing Officer on account of non-genuine purchases, penalty proceedings were initiated by issuing notice dated 9th December 2016, under section 271(1)(c) of the Act seeking explanation from the assessee as to why penalty should not be levied on account of furnishing inaccurate particulars of income thereby concealing particulars of income which are prejudicial to the interests of Revenue. The assessee, in response to such notices, furnished details of purchases from 12 parties from whom the assessee had purchased material worth ₹ 50,18,4963. The Assessing Officer, during the penalty proceedings, observed that the certain information were received from the DIT (Inv.), Mumbai, and the Sales Tax Department that some of the persons from whom the assessee had made purchases were found

to be non-genuine from bogus concerns and they were engaged in the business of providing bills without actual delivery of goods. The Assessing Officer completed assessment proceedings making addition of ₹ 6,27,311 being 12.5% of such bogus purchases worth ₹ 50,18,493. Consequently, penalty under section 271(1)(c) of the Act was also imposed levying penalty of ₹ 2,55,000. The assessee being aggrieved by the penalty order so passed by the Assessing Officer, the assessee proceeded to contest the levying of penalty by filing appeal before the first appellate authority.

3. During the course of first appellate proceedings, the assessee submitted that the ad-hoc addition made by the Assessing Officer was based on suspicious purchases and against such ad-hoc addition, penalty cannot be imposed under section 271(1)(c) of the Act. The learned Commissioner (Appeals), however, considering the submissions of the assessee deleted the penalty by relying upon the Co-ordinate Bench decision of the Tribunal, Mumbai Bench, in *Shri Ajay Loknath Lohia v/s ITO*, ITA no.2998/Mum./2017, dated 5th October 2018, wherein the Tribunal deleted the penalty levied under section 271(1)(c) on account of alleged bogus purchases made from hawala dealers based on the information received from the Sales Tax Department. As a matter of convenience, the relevant portion of the

observations made by the learned Commissioner (Appeals) in its order are reproduced below:—

*"7.4.1 I have considered the submissions of the appellant and perused the materials available on record. The appellant has requested to delete the impugned penalty levied u/s 271(1)(c) of the Act at Rs. 2,55,000/-. The main contentions of the appellant are that it has neither concealed particulars of income nor furnished inaccurate particulars of income; mere rejection of appellant's claim would not automatically lead to levy of penalty and it had submitted necessary evidences in support of its claim, but the same was not accepted by the Ld. AO and where the addition has been made or sustained on estimation basis the penalty u/s 271(1)(c) of the Act is not leviable. In support of its claim the appellant has placed reliance on various judicial precedents as detailed above. The contentions of the appellant have been considered carefully. The Ld. AO had made the addition on account of bogus purchases at Rs. 6,27,311/-, being 12.5% of total of such bogus/suspicious purchases at Rs.50,18,493/-. The facts of the case suggest that the Ld. AO had made said addition on the ground that the appellant could not prove the purchases under consideration from the parties concerned. It is also an admitted fact that the Ld. AO has made addition @ 12.5% on estimated/ad-hoc basis. In the case of *M/s Earthmoving Equipment Service Corporation* in ITA No. 6617/2014, the Hon'ble JTAT Mumbai vide its order dated 02.05.2017 has deleted the penalty levied u/s 271(1)(c) of the Act, where the addition u/s 69C of the Act was made on account of bogus purchases, on the ground that the assessee made a claim which was bonafide and the same was coupled with documentary evidences but the same remained inconclusive for want of confirmation from the suppliers as they could not be traced at given address. Further, the Hon'ble ITAT. Mumbai in the case of *Ajay Loknath Lohia* in ITA No. 2998/Mum/2017, vide its order dated 05.10.2018 has deleted the penalty levied u/s 271 (1) (c) of the Act, on the disallowance/addition made @25% on alleged bogus purchases made from hawala dealers based on the information received from the Sales Tax Department and where the appellant had accepted such estimated addition, after holding that though the AO had estimated 25% gross profit on alleged bogus purchase, never made any observation with regard to the correctness in details filed by the assessee to prove such purchases.*

7.4.2 From the above it is evident that the facts and circumstances of the present case are similar as to the facts adjudicated by the Hon'ble FIAT Mumbai in above referred cases. Respectfully following the same, I am of the considered opinion that this is not a fit case to levy penalty u/s 271 (1)(c) of the

Act. Hence, the impugned penalty levied u/s 271 (1)(c) at Rs. 2.55,000/- is DELETED. Accordingly the Ground Nos. 1 to 3 raised in appeal are ALLOWED. The appellant has also submitted that the Ld. AO has computed the quantum of levy of penalty wrongly. However, since the entire penalty levied has been deleted, so the issue of wrong computation of penalty amount has become academic and hence not adjudicated."

4. Being aggrieved by the order of the learned Commissioner (Appeals), the Revenue is in appeal before the Tribunal.

5. When the case was called for hearing, neither the respondent assessee nor any of her authorised representatives appeared before us to represent its case. There is no application for adjournment either. Consequently, we proceed to dispose off the Revenue's appeal qua the respondent assessee and after hearing the learned Departmental Representative and on the basis of material available on record.

6. Considered the submissions of the learned Departmental Representative and perused the material on record. From the order of the authorities below, we find that the assessee has accepted the addition made by the Assessing Officer on account of ₹ 6,27,311 being 12.5% of bogus purchases worth ₹ 50,18,493. This addition led to levying of penalty of ₹ 2,55,000, under section 271(1)(c) of the Act. Since the assessee refrained to contest the addition/disallowance made by the Assessing Officer before the first appellate authority, the Assessing Officer cannot impose penalty under section 271(1)(c) of the Act alleging that the assessee has furnished inaccurate particulars of

income thereby concealing particulars of income, particularly when income was estimated on percentage basis upon the alleged bogus purchase. Consequently, we find no cogent reason to disturb the order passed by the learned Commissioner (Appeals) as well warrants us to interfere in the order of the first appellate authority either. In view of these observations, we uphold the order of the learned Commissioner (Appeals) by dismissing the grounds of appeal raised by the Revenue.

7. In the result, appeal stands dismissed.

Order pronounced in the open court on 24.03.2021

Sd/-
C.N. PRASAD
JUDICIAL MEMBER

Sd/-
S. RIFAUH RAHMAN
ACCOUNTANT MEMBER

MUMBAI, DATED: 24.03.2021

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai