

आयकर अपीलीय अधिकरण "D" न्यायपीठ मुंबई में।

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

श्री महावीर सिंह, उपाध्यक्ष एवं श्री एस रिफौर रहमान, लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, VP AND SRI S RIFAUR RAHMAN, AM

आयकर अपील सं./ ITA No. 5617/Mum/2019

(निर्धारण वर्ष / Assessment Year 2009-10)

आयकर अपील सं./ ITA No. 5651/Mum/2019

(निर्धारण वर्ष / Assessment Year 2011-12)

The Income Tax Officer, Ward 28(2)(5), Room No.308, 3 rd Floor, 6 th Tower, Vashi Railway Station Complex, Vashi-400 703	बनाम/ Vs.	Rajul H Doshi Flat No. B-42, Parswanath Garden Bhaudji Road, King Circle, Matunga, Mumbai-400 019
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AEPPD8047F		

अपीलार्थी की ओर से/ Appellant by	:	Shri Kailash Kanojia, DR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Satyaprakash Singh, AR

सुनवाई की तारीख / Date of hearing:	25.03.2021
घोषणा की तारीख / Date of pronouncement:	25.03.2021

आदेश / ORDER

महावीर सिंह, उपाध्यक्ष के द्वारा /

PER MAHAVIR SINGH, VP:

These appeals of Revenue are arising out of the orders of the Commissioner of Income Tax (Appeals)]-26, Mumbai, [in short CIT(A)], in appeal Nos. CIT(A)-26/IT/10002/2018-19 dated 12.06.2019. The assessments were framed by the Income Tax Officer, Ward-22(3)(3),

Mumbai (in short ITO/ AO), for the A.Ys. 2009-10 & 2011-12 vide even dated 19.03.2014 under section 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

2. The only common issue in these two appeals of Revenue is against the order of CIT(A) deleting the levy of penalty by the Assessing Officer under section 271(1)(c) of the Act on account of bogus purchases. The Revenue has raised the identical worded grounds in both the years and the issue is exactly identical and hence, we will take the facts and grounds from AY 2009-10 in ITA No. 5617/Mum/2019. For this assessee has raised the following ground. The relevant ground raised i.e. ground Nos. 1 to 3 reads as under: -

"(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.6,63,190/- levied u/s 27 1(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 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 AO 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 the assessee has neither concealed the particulars of income nor has it furnished inaccurate particulars of income, there being no finding of the AO 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 the particulars of income?"

3. We have gone through the rival contentions and the facts and circumstances of the case. We noted that the assessment was completed under section 143(3) of the Act after making addition of unexplained expenditure in relation to obtaining of bogus bills from hawala parties under section 69C of the Act amounting to Rs.1,57,12,013/-. In assessee's appeal, the CIT(A) reduced the addition and restricted the same to the profit element of 15% of the alleged bogus purchases and ITAT, further reduced 3.5%. The Assessing Officer started the penalty

proceedings and levied the penalty of Rs.6,63,190/- for furnishing of inaccurate particulars of income by submitting the bogus bills obtaining from hawala operators. Aggrieved, assessee preferred the appeal before Commissioner of Income Tax (Appeals). The CIT(A) after going through the facts of the case deleted the penalty by stating that the addition made only on estimation basis. The CIT(A) deleted the addition by observing in Para 6 as under:-

"6.1 The Grounds No 1 & 2 of the appeal are against levying of penalty of Rs. 6,63,190/- 271(1)(c) of the Act. The AO had added the entire bogus purchase of Rs. 1,57,12,013/- to the total income of the assessee. Subsequently after the order of Hon'ble ITAT, the A.O. passed the penalty order u/s 271 (1)(c) of the Act 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. 6,63,190/- being 100% of the tax sought to be evaded.

6.2 The AO had added entire bogus purchases which was reduced to 15% by the CIT(A), order dated 13/12/2016, Hon'ble ITAT enhanced the addition to 3.50% vide order dated 31107/2017, i.e. much after the passing of penalty order. There are 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 Chand Agarwal vs. CIT, 357/YR 0514 (All), it has been held that:

"12. In the instant case, nothing was concealed by the assessee. It was the A. O. who 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. 1. TT 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"

6.4 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 DCIT Cir 4(2)(2) vs. M/s. Manohar Manak Alloys P. Ltd.

On the same times, 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.I.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/Mum1201 1 dated 10.04.2015 in the case of DCIT 14(2) vs. M/s. Rishabh Impex 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. DCIT (2017) 49 CCH 0183 Del Trib. 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.

6.5 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 that 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. 6,63,190/- levied by the AO u/s

*271(i)(c) of the Act and the grounds of appeal are
'Allowed'."*

4. We noted that the CIT(A) has relied on the findings of the Assessing Officer that once, the sales has not doubted, he has only estimated the profit and on estimation of profit, the penalty cannot be levied. Even otherwise, the assessee has produced the complete invoices of purchases, payment was made by account payee cheque and further, the stock tally was also produced before the Assessing Officer during the assessment proceedings. Once, all the documentary evidences were produced before the Assessing Officer and sales are no doubted, it is doubtful, whether the purchases are bogus or not. Once, there is doubt, the penalty cannot be levied under section 271(1)(c) of the Act for furnishing of inaccurate particulars of income because, the assessee has not furnished any inaccurate particulars of income in this case. Hence, we are of the view that CIT(A) has rightly deleted the penalty and we confirm the same.

5. In the result, both the appeals of Revenue are dismissed.

Order pronounced in the open court on 25.03.2021.

Sd/-

(एस रिफ़ौर रहमान / S RIFAUR RAHMAN)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(उपाध्यक्ष / VICE PRESIDENT)

मुंबई, दिनांक/ Mumbai, Dated: 25.03.2021

सुदीप सरकार, व. निजी सचिव/ Sudip Sarkar, Sr.PS

आदेश की 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//

उप/सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**