

**IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI****BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND  
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**ITA No.4183/Mum/2019  
(Assessment Year: 2009-10)

ME Infraprojects P. Ltd. 404, Man Excellenza, Opp. Pawan Hans, S. V. Road, Vile Parle (E), Mumbai-400 056	Vs.	DCIT-10(2)(2) Mumbai
PAN/GIR No. AAFCM 5012 N		
<b>(Appellant)</b>	:	<b>(Respondent)</b>

<b>Appellant by</b>	:	Shri Rahul Hakani
<b>Respondent by</b>	:	Shri Vidhyadhar V

<b>Date of Hearing</b>	:	18.03.2021
<b>Date of Pronouncement</b>	:	18.03.2021

**ORDER****Per Mahavir Singh, VP:**

This appeal by the assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-17, Mumbai ('CIT(A)' for short) in appeal no. CIT(A)-17/IT-521/10005/18-19 vide order dated 14.05.2019. The assessment was framed by the DCIT, Circle-10(2)(2), Mumbai u/s. 143(3) r.w.s 147 of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2009-10 vide his order dated 16.02.2015.

2. The only issue in this appeal of the assessee is against the order of the Id. CIT(A) confirming the levy of penalty u/s.271(1)(c) of the Act on account of bogus purchases from suspicious dealers. For this, the assessee has raised the following ground no.1:

Ground 1:

*On the facts and circumstances of the case and in law the ld. Commissioner of Income Tax (Appeals) erred in confirming penalty levied by the DCIT-10(2)(2) ('AO") under section 271(1)© on addition on account of purchase from suspicious dealers.*

3. Briefly stated the facts are that the A.O. during the course of assessment proceedings noticed that the assessee has obtained the bogus purchases to the tune of Rs.1,69,99,483/- from hawala dealers identified by the Sales Tax Department. The A.O. added the profit element of bogus purchase and commission paid for arranging such bogus purchase. Thereby, the A.O. made the addition of the following:

Add:	G.P. addition on bogus purchases	1,69,99,483	
	Bogus purchases	6,79,979	
	Commission paid for arranging bogus purchases	1,69,995	1,78,49,457

Aggrieved, the assessee preferred an appeal before the ld. CIT(A).

4. The ld. CIT(A) vide order dated 27.02.2017 restricted the profit element of 12.5% vide para 6.2.12 and 7 as under:

6.2.12 Since, the A.O. has not challenged the credits, and thus, there is no case for the total disallowance of the purchase figure. But, the figure of purchases are certainly exaggerated as held in various judicial scrutiny of cases related to hawala dealers, such purchases do have element of profitability higher than the normal one. Infact, the assessee company itself has taken a ground number 3 that

*"On the facts and circumstances of the case and in law, the A.O. has not found any infirmity with the books of accounts in terms of the purchase or utilization of the materials in different contracts in which the appellant was engaged. Therefore, the ratio laid down by the Gujarat High Court in the case of CIT vs. CIT vs. Simit P. Sheth (2013) 356 ITR 451(Guj) that when the total sales and purchases has been accepted by the A.O. then it would be reasonable to estimate the profit made on such purchases and that profit has to be added to the income, ought to be applied to the case of the Appellant.'*

Considering the facts and circumstances of case in totality, the element of profit out of such unproven purchases from hawala dealers is estimated @ 12.5% of Rs.1,89,99,483/-. The A.O. is directed to modify the disallowance/additions accordingly.

7. As far as Ground No. 4 and 5 pertaining to VAT and commission paid for purchases are concerned, the above estimation of 12.5% of profit out of bogus purchases will cover all such related disallowance/additions. Hence, addition made on this grounds are deleted and appeal filed by the assessee on this issues are Allowed.

5. The A.O. levied the penalty u/s.271(1)(c) of the Act on the amount restricted by the Id. CIT(A) at Rs.21,24,935/- and levied penalty at Rs.7,20,353/-.

6. Aggrieved, the assessee preferred an appeal before the Id. CIT(A). The Id. CIT(A) also confirmed the action of the A.O. by observing as under:

Once it is established that the actual purchases had not been made from the party which has been claimed in the books of account, but from some other party claims no longer remain bonafide. All the facts available in the return of income are also not true and claim of the appellant company is not bonafide. The assessee was unable to substantiate its purchases from the claim of suppliers who are already established hawala dealers by the Sales Tax Department and Investigation wing of the Income Tax Department. The suppliers were neither produced during the assessment proceedings nor during the appellate proceedings when opportunity was so provided. The appellant company is established to be one of the beneficiary. In such a situation, any addition cannot be treated as adhoc addition or estimated addition.

The arguments filed during the penalty proceeding as well as during appellate proceeding is based on certain decisions which lays down emphasis on estimated income. There is no dispute on the fact that the penalty u/s. 271(1)(c) should not be levied on a pure estimation of gross profit on declared slae. However, the instant case is not a case of pure estimation of gross profit rather here the appellant is using accommodation entry from hawala operators knowing fully well that he is trying to give a cover of something which is not genuine. In such situation neither claim is bonafide nor the actual facts are available to decide the issue. If that is so then Explanation to section 271(1)(c) is clearly attracted. There are number of judgments/decisions, which have been quoted in above para, which justifies levy of penalty in case of estimated disallowance out of bogus purchases.

Aggrieved, now the assessee is in appeal before the Tribunal.

7. We have heard the rival contentions and gone through the facts and circumstances of the case. We note that the assessee before the assessment proceedings as well as before the Id. CIT(A) filed the details of the purchase of material, source is mainly through suppliers, brokers, agents, copies of bills and invoices raised, payment by account payee cheque and details of stock register where these purchases are recorded. In view of this, the Id. CIT(A) restricted the disallowance at 12.5% of the bogus purchases on purely an estimated basis. Once this is the position, we are of the view that the penalty u/s.

271(1)(c) cannot be levied. We reverse the orders of the lower authorities and allow the appeal of the assessee.

10. In the result, the appeal filed by the assessee is allowed.

*Order pronounced in the open court on 18.03.2021.*

Sd/-

(S. Rifaur Rahman)  
Accountant Member

Mumbai; Dated : 18.03.2021

Roshani, Sr. PS

Sd/-

(Mahavir Singh)  
Vice President

**Copy of the Order forwarded to :**

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

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai