

आयकर अपीलिय अधिकरण
मुंबई पीठ "एच" , मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एम बालागनेश, लेखा सदस्य के समक्ष
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER
आअसं. 5986/मुं/2019 (नि.व.2009-10)
ITA NO.5986/MUM/2019 (A.Y.2009-10)

M/s. Sher Mohammed & Co.,
Flat No. 23, 6A, Taxi Men Colony,
LBS Marg, Kurla (West),
Mumbai-400070.

PAN: AASFS7479M

..... अपीलार्थी / Appellant

बनाम Vs.

ACIT- Ward (26(3)),
C-11, 5th Floor, R.No. 501,
Pratyakshakar Bhavan,
BKC, Bandra (E),
Mumbai-400051.

..... प्रतिवादी / Respondent

अपीलार्थी द्वारा/ Appellant by : None
प्रतिवादी द्वारा/Respondent by : Ms. Bharti Singh
सुनवाई की तिथि/ Date of hearing : 18/03/2021
घोषणा की तिथि/ Date of pronouncement : 21/05/2021

आदेश / ORDER

PER VIKAS AWASTHY, J.M:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-38, Mumbai [hereinafter referred to as 'the CIT(A)'] dated 21.05.2019 for the Assessment Year (AY) 2009-10, confirming levy of penalty under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The notice of appeal was sent to the assessee through RPAD on 19.02.2021 for appearance on 18.03.2021. As per the acknowledgement available on record, the notice was duly served on the assessee. Despite service of notice, neither the assessee/appellant nor any Authorised Representative (AR) of the assessee has appeared in the Court. No request seeking adjournment has either been received. It appears that the assessee is not keen to pursue his appeal before the Tribunal. Therefore, the appeal is taken up for hearing with the assistance of Id. Departmental Representative and material available on record.

3. Ms. Bharti Singh representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee. The Id. DR submitted that the assessee has failed to discharge its onus in proving genuineness of the purchases and the dealers from whom bogus purchase bills were procured by the assessee. The CIT(A) has rightly rejected various contentions raised by the assessee including levy of penalty on estimated additions.

4. We have heard the submissions made by Id. DR and have examined the orders of authorities below. Undisputedly, the addition in the case of assessee was made by the AO on account of alleged bogus purchases from hawala dealers. The AO disallowed 12.5% of total purchases and made addition of Rs. 19,00,771/-. The assessee assailed the addition before the CIT(A). The CIT(A) restricted the addition to Rs. 12,16,494/- by estimating Gross Profit (GP) at the rate of 8%. The AO levied penalty under section 271(1)(c) of the Act on the estimated addition confirmed by CIT(A). The AO vide order dated 21.03.2018 levied penalty of R. 3,75,897/-.

5. On perusal of penalty order dated 21.03.2018, we find that the assessee had made a categorical submission that no penalty under section 271(1)(c) of the Act is to be imposed on estimated additions. To support this contention reliance was placed on following decisions:

- (1) CIT v/s Harparshad & Co. Ltd. [328 ITR 53 (Del.)]
- (2) Vidya Sagar Oswal v/s CIT [108 ITR 861 (P&H)].
- (3) Samundar Bhan Sadh v/s CIT [188 ITR 638 (P&H)]
- (4) CIT v/s Md. Warasat Hussain [171 ITR 405 (Patna)]

The CIT(A) rejected the contentions of the assessee and upheld levy of penalty under section 271(1)(c) of the Act on the additions made by AO by estimating GP on bogus purchases. The CIT(A) to support his decision relied on following decisions:

- (1) Kalpak Bazar v/s CIT [1 taxmann.com 215 (Karala)]
- (2) CIT v/s Harparshad & Co. Ltd. [328 ITR 53 (Del.)]
- (3) ITO v/s Bhansali Trading Corporation [2016] 69 taxmann.com 60 (Jaipur Trib.)
- (4) Nitesh G. Thakkar (ITA No. 215/Ahd/2015 in A.Y 2008-09.

6. Undisputedly, in the present case addition was made on estimation of GP on bogus purchases, there are several decisions by Hon'ble High Courts in support of the view that no penalty under section 271(1)(c) is to be levied where addition is made on estimation basis.

7. The Hon'ble Delhi High Court in the case of CIT vs. Aero Traders Pvt. Ltd. reported as 322 ITR 326 has held that no penalty under section 271(1)(c) of the Act can be imposed where the income is determined on estimate basis. Penalty

being quasi criminal proceedings, duty is cast upon the AO to establish guilt of the assessee in concealing the income or furnishing inaccurate particulars of such income.

The Hon'ble Gujarat High Court in the case of CIT vs. Subhas Trading Co. reported as 221 ITR 110 has held that where the AO after rejecting accounts of the assessee has assessed the income by applying estimated Gross Profit (GP) rate, no penalty under section 271(1)(c) is leviable. Similar view has been taken by the Hon'ble Gujarat High Court in the case of CIT vs. S.P. Bhatt reported as 97 ITR 440.

The Hon'ble Punjab & Haryana High Court in the case of CIT vs. Sangrur Vanaspati Mills Ltd. reported as 303 ITR 53 has held that where an addition has been made on the basis of estimates and no concrete evidence of concealment is established, penalty under section 271(1)(c) of the Act is not leviable.

8. There are other catina of judgments by various Hon'ble High Courts in support of the view that no penalty under section 271(1)(c) of the Act, can be levied on estimated additions. The CIT(A) has relied on some of the decisions of the Hon'ble High Courts where contrary view has been taken. No judgment of Hon'ble Jurisdictional High Court on this issue has been brought to our notice. Under such circumstances, the Hon'ble Bombay High Court in the case of K. Subramanian v/s Siemens India Ltd. reported as 156 ITR 11 has held that when two conflicting decisions of non-jurisdictional High Courts are available, the view that favours the assessee is to be preferred.

9. Thus, in the light of decisions discussed above and the facts of the case, we reverse the findings of the CIT(A) and delete penalty levied under section

271(1)(c) of the Act. The impugned order is set-aside and the appeal of assessee is allowed.

Order pronounced in the open court on **Friday**, the **21st** day of May, 2021.

Sd/-

(M. BALAGANESH)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai, दिनांक/Dated: 21/05/2021

SK, PS

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषित **Copy 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