



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

BEFORE SHRI S. RIFAUH RAHMAN, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA no.6535/Mum./2019
(Assessment Year : 2010-11)

Dy. Commissioner of Income Tax
Circle-6(2)(1), Mumbai

..... Appellant

v/s

Delta Technica Interior Design P. Ltd.
Rati Villa, Ground Floor, Motibal Street
Opp. Bhatia Hospital Tardeo
Mumbai 400 007 PAN – AABCD2765K

..... Respondent

Revenue by : Shri Gurbinder Singh
Assessee by : Ms. Forum Mehta

Date of Hearing – 13.05.2021

Date of Order – 10.06.2021

ORDER

PER S. RIFAUH RAHMAN, A.M.

The appeal has been filed by the Revenue challenging the impugned order dated 5th June 2019, passed by the learned Commissioner (Appeals) deleting the penalty of ₹ 9,69,000, imposed under section 271(1)(c) of the Income Tax Act, 1961 (for short "*the Act*") by the Assessing Officer for the assessment year 2009-10.

2. Facts in brief:- In the present case, the Assessing Officer for the year under consideration completed the assessment vide his order dated 30th March 2015, determining total income at ₹ 13,43,44,477, as against the returned income at ₹ 9,87,27,550. In the assessment so made, the Assessing Officer made disallowance on account of bogus purchase amounting to ₹ 3,56,16,927, being 100% of such bogus purchase made from 25 parties who had indulged in issuing the bogus purchase bill. The Assessing Officer also initiated penalty proceedings under section 271(1)(c) of the Income Tax Act, 1961 (for short "*the Act*"). The assessee being aggrieved by the assessment order so passed by the Assessing Officer in quantum proceedings, filed appeal before the first appellate authority wherein the learned Commissioner (Appeals) allowed the ground in favour of the assessee. Against this order of the learned Commissioner (Appeals), the Revenue filed appeal before the Tribunal, wherein the Co-ordinate Bench has restricted the disallowance @ 8% of such bogus purchase which quantifies to ₹ 28,49,354, and given partial quantum relief of ₹ 3,27,67,573, to the assessee. Consequent to the order passed by the Co-ordinate Bench of the Tribunal in quantum proceedings granting partial relief to the assessee, the Assessing Officer issued notice dated 14th September 2018, under section 274 r/w section 271(1)(c) of the Act. In response, the assessee filed written submissions vide letter dated 14th

September 2018, and the same was taken into consideration by the Assessing Officer during the penalty proceedings. The Assessing Officer observed that the assessee in its Profit & Loss Account had shown purchases worth ₹ 3,56,16,927, from 25 parties. He received information from the DGIT (Inv.), Mumbai, and subsequently from the Sales Tax Department, Mumbai, regarding suspicious parties who are only providing accommodation entries without doing any actual business. The Sales Tax Department has conducted independent enquiries in each of the Hawala parties and conclusively proved that these parties are engaged in the business of providing accommodation entries only. These enquiries established beyond doubt that the aforesaid parties did not supply any goods to the assessee and issued accommodation bills without actually delivering the goods or service. The Assessing Officer was convinced with the submissions made by the assessee and hence, he was satisfied that the assessee has furnished inaccurate particulars of income. Accordingly, on the basis of disallowance on bogus purchase of ₹ 28,94,354 (restricted the disallowance by the Tribunal @ 8% of the total bogus purchase amounting to ₹ 3,56,16,827). In this view of the matter, the penalty of ₹ 9,69,000, under section 271(1)(c) of the Act was imposed by the Assessing Officer. The assessee being aggrieved, filed appeal before the first appellate authority.

3. The learned Commissioner (Appeals) deleted the penalty so imposed by the Assessing Officer under section 271(1)(c) of the Act by following the decisions of the Co-ordinate Bench. The relevant observations of the learned Commissioner (Appeals) deleting the penalty are as follows:-

"4.2 I have carefully considered the facts of the case, the assessment order, CIT(A) order, the ITAT order, the penalty order and the written submission of the appellant. Considering the failure of the appellant to furnish adequate evidences in support of the purchases of Rs.3/56/16/927 claimed to have been made from the alleged 25 hawala suppliers as well as having regard to the fact that no specific adverse material was brought out by the AO to show that the said purchases are bogus considering assessee's nature of business and overall facts of the case, the Hon'ble Tribunal directed to assess 8% of the amount of impugned purchases as income. The Honble ITAT held that where the assessee could not produce any evidence to substantiate actual delivery of material, the addition which could be made was to account for profit element embedded in these purchase transaction to factorize for profit element earned by the assessee against possible purchase of material in the grey market and undue benefit of VAT against bogus purchases.

4.3 It is therefore, seen that the foundation for sustaining the addition to the extent of 8% of the bogus purchases by the Hon'ble Tribunal is the implicit inference drawn by it that the assessee obtained the bills from hawala suppliers at a higher price. It is seen that this factual inference has been made on the basis of the surrounding circumstances only and there was no positive evidence to, show that the appellant did not make purchases from the said hawala suppliers from whom the bills were obtained and had instead made the purchases from grey market. This aspect is evident from the observation of the Hon'ble Tribunal that no specific adverse material has been brought out by the AO that the impugned purchases are bogus though said purchases remained unverified. Further, though it was stated by the AO that the concerned hawala operators had made a statement on oath before the sales tax authorities, the contents of the said statements have not been brought on record to show that all the sale bills issued by the said parties

are bogus including the sale bills issued to the appellant. Further, it is seen that the addition made on account of bogus purchases was sustained by the Hon'ble Tribunal by estimating the same at 8% of the alleged bogus purchase bills and there was no evidence regarding the actual benefit derived by the appellant by obtaining bogus bills.

Under the facts and circumstances of the appellant's case as mentioned above, it cannot be considered that the appellant has furnished inaccurate particulars of income within the meaning of section 271(1)(c) of the Act. It is seen that in the case of Earthmoving Equipment Service Corporation Vs. ITO (supra), the Hon'ble ITAT, Mumbai deleted the penalty levied in respect of bogus purchases under similar facts and circumstances. It was held by the Hon'ble Tribunal that merely because the suppliers could not be traced at the given address would not automatically lead to a conclusion that there was concealment of income or furnishing of inaccurate particulars by the assessee. It was held that the assessee made a claim which was bona fide and the same was coupled with documentary evidences but the same remained inconclusive for want of confirmation from the suppliers. The relevant part of the decision of the Hon'ble Tribunal is reproduced below:-

7. On merits, Ld. AR has assailed imposition of penalty on various grounds and placed reliance on various judicial pronouncements which we have duly considered. We find that first of all Section 69C could not be applied to the facts of the case as the payments were through banking channels which were duly reflected in the books of accounts and therefore, there was no unexplained expenditure₁ within the meaning of Section 69C incurred by the assessee. Further, we find that the assessee was in possession of purchase invoices and various other documentary evidences qua these purchases. A bare perusal of the purchase invoices reveals that the assessee has purchased consumables etc. from the alleged bogus suppliers, which are connected, at least to some extent, with the business of the assessee. The assessee, during quantum proceedings itself filed revised computation of income after disallowing the alleged bogus purchases by citing the reason that the suppliers were not traceable during assessment proceedings. Nevertheless, the assessee was in possession of vital evidences in his possession to prima facie substantiate his purchases to some extent particularly when the payments were through banking channels. Merely because the suppliers could not be traced at the given address would not automatically lead to a conclusion that there was concealment of income or furnishing of inaccurate particulars by the assessee. The assessee made a claim which was bona fide and the same was coupled with documentary evidences

but the same remained inconclusive for want of confirmation from the suppliers. Therefore, overall facts of the case do not justify imposition of penalty on the assessee and therefore, the same deserves to be deleted on merits of the case. All the cited case laws support the view taken by us in the matter. Therefore, by deleting the impugned penalties, we allow assessee's appeal."

4.5 Respectfully following the above mentioned decision of the Hon'ble ITAT, Mumbai and keeping in view the facts and circumstances of the appellant's case as discussed above, it is held that the levy of penalty u/s 271(1)(c) is not justified on the merits of the case. Hence, the AO is directed to delete the penalty of ₹ 9,69,000 levied u/s 271(1)(c) of the Act. This ground of appeal is therefore allowed."

4. The Revenue being aggrieved by the aforesaid order of the learned Commissioner (Appeals) filed appeal before the Tribunal

5. Considered the submissions of the learned Departmental Authorities and perused the material on record. As it appears, the Assessing Officer imposed penalty under section 271(1)(c) of the Act on estimation basis without adducing any evidence on record for concealment of income. Penalty under section 271(1)(c) of the Act is liable to be imposed only where the assessee has concealed its particulars of income or furnished inaccurate particulars. Action of making addition on ad-hoc basis does not result into imposition of penalty u/s 271(1)(c) of the Act and hence cannot be termed as either concealment or furnishing of inaccurate particulars of income. We find support from the series of decisions by different High Courts as well the decision of the Co-ordinate Benches of the Tribunal, wherein it

was held that when addition is made on estimate basis, penalty is not sustainable in the eyes of law. In support of this contention, following case laws are relied upon:-

- i) *CIT v/s Norton Electronics Systems (P) Ltd. [2014] 41 taxmann.com 280 (Allahabad HC);*
- ii) *ACIT v/s Vision Research Management (P) Ltd., [2015] 63 taxmann.com 8 (Lucknow) (Trib.);*
- iii) *Prem Chand v/s ACIT, [2014] 52 taxmann.com 95 (Chandigarh) (Trib.);*
- iv) *CIT v/s PHI Seeds India Ltd., [2008] 301 ITR 0013 (Del); and*
- v) *Dilip N. Shroff v/s JCIT [2007] 291 ITR 519 (SC).*

6. Even the learned Departmental Authorities has not brought any cogent material to prove otherwise warranting interference at the instance of the Revenue. In this view of the matter, we are of the considered view that the learned Commissioner (Appeals) was indeed justified in directing the Assessing Officer to delete the penalty, as there was no concealment of income on the part of the assessee have been proved by the Revenue and additions made on estimation by the Assessing Officer do not call for initiation of penalty. Consequently, we uphold the order passed by the learned Commissioner (Appeals) by dismissing the grounds of appeal raised by the Revenue.

7. In the result, Revenue's appeal is dismissed.

Order pronounced in the open court on 10.06.2021

Sd/-
PAVAN KUMAR GADALE
JUDICIAL MEMBER

Sd/-
S. RIFAUR RAHMAN
ACCOUNTANT MEMBER

MUMBAI, DATED: 10.06.2021

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