

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

**BEFORE SHRI S. RIFAUH RAHMAN (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No. 6121/MUM/2019
Assessment Year: 2010-11**

Shrim Bhanu Construction
Private Limited (formerly
known as Bhanu
Construction, a partnership
firm),
811, Neelkant Corporate Park,
Kiroh Road, Vidyavihar (West),
Mumbai-400086.

PAN No. AAPCS 6963 E

Appellant

Vs. ACIT, Circle 27(1),
4th floor, Room No. 415, 6th
Tower, Vashi Railway Station
Complex, Vashi,
Navi Mumbai-400703.

Respondent

Assessee by : Mr. Devendra Jain, AR
Revenue by : Mr. Vijay Kumar Menon, DR

Date of Hearing : 01/04/2021
Date of pronouncement : 15/06/2021

ORDER

PER S. RIFAUH RAHMAN, A.M.

The present appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-25, Mumbai [in short 'CIT(A)'] for the assessment year 2010-11 dated 10.06.2019 and arises out of penalty levied u/s 271(1)(c) of the Income Tax Act, 1961 (in short the Act).

2. The brief facts are, the assessee filed its return of income on 29.09.2010 for the assessment year 2010-11 declaring total income at Rs.20,07,780/-. The assessment year was completed u/s 143(3) of the Act, on 18.03.2013

determining the total income at Rs.1,10,41,140/-. The addition was made on account of bogus purchases amounting to Rs.90,33,362/-. The assessee preferred an appeal before the Ld. CIT(A)-25, Mumbai and Ld. CIT(A) confirmed the addition on the basis of estimation @ 25% of the bogus purchase for Rs.22,58,340/-. Subsequently, Assessing Officer initiated penalty proceedings u/s 271(1)(c) of the Act and issued the relevant notices. After considering the submissions of the assessee, Assessing Officer levied the penalty u/s 271(1)(c) of the Act. Considering the case of the assessee that assessee has concealed the particulars of income and accordingly it is a fit case to levy penalty u/s 271(1)(c) of the Act.

3. Aggrieved with the above order, the assessee preferred an appeal before the Ld. CIT(A). After considering the submissions of the assessee, Ld. CIT(A) deleted the penalty levied by the Assessing Officer with the following observations:

“13. The issues involved in the present appeal are identical to the issues involved in the appeal No. CIT(A)-25/IT-20/18-19 in the assessee's own case for A.Y. 2010-11. The assessee has also made the same submissions. In view of the same, the observations given in the context of the issues under consideration in the appellate order for A-Y. 2010-11 shall apply mutatis mutandis in the present appeal also. It is noted that there is a difference in facts in this year. The AO had initialed penalty for furnishing inaccurate particulars of income as mentioned in the assessment order dated 23.3.2014. However, the penalty has been levied u/s 271(1)(c) for concealment of particulars of income. This is an incurable defect. In the case of CIT v. Manjunatha Colton & Ginning Factory [2013] 35 taxmann.com 250 (Karnataka) it has been clearly held as under:-

60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overtopping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another

offence or finding him guilty for either the one or the other cannot be sustained in law.

The decision in *GT vs. Manjunatha Cotton & Ginning Factory* (supra) has implicitly been the Supreme Court in the case of *CIT vs. SSA's Emerald Meadows* [2016] 73 taxmann.com 248 (SC).

13.1 It is to be noted that the Courts have regularly deleted such penalty orders where the AO had proceeded to initiate penalty proceedings on one limb but found the assessee guilty of another limb- Such orders were held to be bad in law. In the decision of Bombay High Court in the case of *CIT vs. Samson Ferinchery* in ITA No. 1154, 953, 1097 and 1226 of 2014 the facts were that the penalty proceedings were initiated "for furnishing inaccurate particulars of the Income" but the penalty was levied for "concealment of income". Further the concerned Assessing Officer has not specified if the notice was issued for "concealment of the particulars of income" or "furnishing inaccurate particulars of such income". Thus, the initiation was done under one limb of the provisions of the Act and penalty was levied on another limb of the section 271(1)(c) of the Act. Under these circumstances the High Court had dismissed the appeal of the Revenue. It was cited that the Supreme Court in *Ashok Pai vs. CIT* 292 ITR 11 had categorically observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1)(c) of the Act carry different meanings/ connotations. Therefore, the satisfaction of the AO with regard to only one of the two breaches mentioned under section 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/permit penalty being imposed for the other breach. This order of *Samson Perinchery* (supra) is squarely applicable to the facts of the present assesses."

4. Aggrieved with the above order, assessee preferred an appeal before us raising following grounds of appeal :

1. The Ld. CIT(A) has erred in confirming the action of AO of levying penalty of Rs.6,97,900/- u/s 271(1)(c) in respect of 25% of addition to the tune of Rs.22,58,340/- retained by the then CIT(A) in quantum appeal on account of alleged bogus purchases.
2. The Ld. CIT(A) has erred in confirming the action of AO of levying penalty of Rs.6,97,900/- in spite of the fact that various decisions of High Courts and ITATs in favour of the appellant were kept on record where the penalty of hawala purchases was deleted.

5. On the other hand, the Ld. DR relied on orders passed by lower authorities.

6. Considered the rival submissions and perused the material on record. As it appears, the Assessing Officer imposed penalty under section 271(1)(c) of the Act on ad-hoc 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).

7. After considering the totality of the facts and circumstances and while considering the series of judgments as mentioned above, we are of the view that there is no active concealment of income on the part of the assessee and additions made on estimation by the AO do not called for initiation of penalty.

Thus, in our view, the penalty levied by AO and confirmed by Ld. CIT(A) is hereby deleted. Accordingly, the grounds raised by the assessee are allowed.

8. In the net result, the appeal filed by the assessee stands allowed.

Order pronounced in the open Court on 15/06/2021.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 15/06/2021

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Assistant Registrar)
ITAT, Mumbai