

THE INCOME TAX APPELLATE TRIBUNAL
"G" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Ramlal Negi (JM)

I.T.A. No. 3731/Mum/2019 (Assessment Year 2011-12)
I.T.A. No. 3732/Mum/2019 (Assessment Year 2011-12)

DCIT, Circle-3 Room No. 02, 6 th Floor Aashar I.T. Park B-Wing, Wagle Industrial Estate, Road No. 16Z Thane(West)-400604.	Vs.	Shri Surendrakumar Mangturam Sharma 603, Building No. 6 Flower Valley Khopat, Thane(W) 400 0601. PAN : AFKPS5043J
(Appellant)		(Respondent)

Assessee by	None
Department by	Shri T.S. Khalsa
Date of Hearing	10.03.2021
Date of Pronouncement	11.03.2021

ORDER

Per Shamim Yahya (AM) :-

ITA No. 3732/Mum/2019

This is an appeal by the revenue wherein the revenue is aggrieved that learned Commissioner of Income Tax (Appeals) [in short learned CIT(A)] has reduced the addition for bogus purchase of Rs. 26,39,695/- done @ 100% by Assessing Officer by sustaining only part for the Assessment Year 2011-12 vide order dated 28.3.2019.

2. The assessee in this case is engaged into contractual work-in-progress. The assessment was reopened upon information from sales tax department that assessee has made purchases from bogus dealers, the Assessing Officer made 100% addition of the bogus purchase. The Assessing Officer did not even issue notice to the alleged bogus supplier.

3. Upon assessee's appeal learned CIT(A) has noted that the sales have not been doubted. Accordingly placing reliance upon several case laws and up on

the facts of the case he sustained part disallowance out of the bogus purchases as under :-

“It is seen a number of cases that the addition has been restricted to certain percentage of the alleged bogus purchases. The appellant is into contract work and has shown 7.03% of the contract receipts as profits. As the percentage of profit is apparently is on lower side and may be due to such purchases which are not duly proved. Therefore, to account for such purchases, an additional profit of the turnover would be sufficient. Another additional 1% profit on the turnover would account for all such purchases and the same would be in line with the various decisions on this matter. As a resultant addition of Rs. 5,50,000/-would meet the ends of justice. Accordingly, the AO is directed to restrict the addition to Rs. 5,50,000/-.”

4. Against above order revenue is in appeal before the ITAT. We have heard Id Learned Departmental Representative and perused the records.

5. We find that Assessing Officer has not bothered to make any enquiry of his own. Addition is solely made upon sales tax department information. We find that in this case the sales or any other aspect of the working have not been doubted. It is settled law that when sales are not doubted, hundred percent disallowance for bogus purchase cannot be done. The rationale being no sales is possible without actual purchases. This proposition is supported from honourable jurisdictional High Court decision in the case of Nikunj Eximp Enterprises (in writ petition no 2860, order dated 18.6.2014). In this case the honourable High Court has upheld hundred percent allowance for the purchases said to be bogus when sales are not doubted. However the facts of the present case indicate that assessee has made purchase from the grey market. Making purchases through the grey market gives the assessee savings on account of non-payment of tax and others at the expense of the exchequer. In such situation in our considered opinion on the facts and circumstances of the case the disallowance out of the bogus purchases done by the learned CIT(A) meets the end of justice. Accordingly we uphold the order of learned CIT(A).

6. In the result this appeal filed by the revenue stands dismissed.

ITA No. 3731/Mum/2019

7. This is an appeals by the Revenue against order's of learned CIT(A) dated 28.3.2019, wherein following penalty levied under 271(1)(c) of the Income Tax Act has been reduced as under :-

assessment year	Amount of penalty
2011-12	Rs. 9,11,330/-

8. The brief facts of the case leading to the levy of penalty are that the assessing officer in these cases made disallowance of 100% on account of bogus purchases solely on Sales Tax Department information, without any enquiry of his own. Assessee has supplied the purchase vouchers and the payment where shown to have been made by banking channel. However drawing adverse inference for the nonproduction of the suppliers the assessing officer disallowed 100 % of the bogus purchases. However the assessing officer did not doubt the sales. The learned CIT(A) partly confirmed the addition. Penalty under section 271(1)(c) of the Act was also levied. Learned CIT(A) granted part relief as under :-

The AO has levied the penalty on the quantum addition at Rs. 26,39,695/- on account of hawala purchases and the quantum appeal has been decided by the undersigned restricting the gross profit @ 8.03% of the total contract receipts and the same is accepted by the appellant. The appellant has requested to restrict the penalty to the amount sustained in the quantum appeal. The penalty is leviable only the amount which has been sustained. Therefore the Assessing Officer is accordingly directed to restrict the levy of penalty to the extent of addition confirmed in the appeal.

9. Against this order revenue is in appeal before us.

10. We have heard learned Departmental Representative and perused the records. As clear from the facts recorded above the disallowance has been made on an estimated basis on account of the nonproduction of suppliers before the assessing officer. The purchase vouchers were duly produced and the payments were through banking channel. In these backgrounds in our considered opinion assessee cannot be visited with the regours of penalty under section 271(1)(c) of the Act. As a matter of fact on many occasions on

similar circumstances in quantum proceedings the disallowance itself has been deleted. In our considered opinion on the facts and circumstances of the case assessee cannot be said to have been guilty of concealment or furnishing of inaccurate particulars of income. In this regard we draw support from the decision of a larger bench of the honourable Supreme Court in the case of Hindustan Steels Ltd. state of Orissa (83 ITR 26) where in it was held that the authority may not levy the penalty if the conduct of the assessee is not found to be contumacious.

11. We further note that tax effect in this case is below the limit fixed by CBDT for filing appeals before ITAT. The revenue has tried to make out a case that since the addition was made pursuant to information from sales tax department, this penalty appeal falls in the exception carved out in the CBDT circular regarding appeals arising out of additions made pursuant to information from outside agencies. We are of the opinion that this plea is not tenable inasmuch as once revenue accepts that penalty is levied on outside agency information the penalty levied will have no legs to stand.

12. We also note that this is revenues appeal, hence we can only uphold the order of Learned CIT(A) and cannot grant more relief than that granted by learned CIT(A).

13. In the background of aforesaid discussion and precedent we uphold the order's of learned CIT(A) and dismiss the Revenue's appeal.

14. In the result, both revenues 's appeals are dismissed.

Pronounced in the open court on 11.3.2021.

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 11/03/2021

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//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai