

IN THE INCOME TAX APPELLATE TRIBUNAL  
"A" Bench, Mumbai  
Before Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No's. 73,74 & 75/Mum/2020  
(Assessment Years 2009-10,2010-11 & 2011-12)

ITO Ward-1(1) Room No.21, B-Wing 6 <sup>th</sup> Floor, Ashar IT Park Wagle Industrial Estate Thane(W)-400 604	Vs.	Anantai Manilal Sheth, HUF b-601, 6 <sup>th</sup> Floor, Smita CHS Dr.Ambedkar Road, Mulund(W) Mumbai-400 080  PAN : AAGHA5836G
(Appellant)		(Respondent)

Assessee by	Shri Nitesh Dedhia
Department by	Shri Brajendra Kumar
Date of Hearing	13.07.2021
Date of Pronouncement	15. 07.2021

O R D E R

Per Bench :-

These appeals by the Revenue are directed against the order of learned CIT(A)-11, Mumbai dated 07.10.2019 wherein following penalty levied under 271(1)(c) has been deleted.

S.No	Assessment Year	Amount of penalty
1	2009-10	Rs.593434
2	2010-11	Rs.401803
3	2011-12	Rs.372380

2. The brief facts of the case leading to the levy of penalty are that the assessing officer in these cases made disallowance of 12.5% on account of bogus purchases. 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 12.5% of the bogus

purchases. However, the assessing officer did not doubt the sales. The Ld.CIT(A) confirmed the addition. Penalty under section 271(1)(C) was also levied. Ld CIT (A) deleted the penalty holding as under:-

5. I have carefully considered the facts of the case, findings of the AO, submission of the AR of the appellant and material placed on record. During the course of assessment proceedings the AO had restricted the addition to the extent of 12.5% of bogus purchases, hence the addition to income has been sustained on estimation basis.

6. The Supreme Court has recently reiterated the law in case of Dilip N. Shroff v. Jt. CIT [2007] 291 ITR 519 by holding in para 62 that finding in assessment proceedings cannot automatically adopted in penalty proceedings and the authorities have to consider the matter afresh from different angle. Moreover, in the case of Ajay Loknath Lohia, order dated 5.10.2018, Mumbai ITAT has addressed that when AO had estimated cost GP on alleged purchases, such disallowance does not tantamount to willful furnishing of inaccurate particulars of income within the meaning of section 271(1)(c) of the Income Tax Act, 1961.

7. In the case of ETCO Profiles Pvt. Ltd. vs. ACIT, in ITA No. 5351/Mum/2012, Hon'ble Mumbai ITAT had held that:

*"the AO has disallowed 20% of purchases only on presumptions without establishing fully that the assessee has made purchases from grey market. Even, if it is assumed for a moment that the assessee might have purchased goods from grey market, it was not established that the amount of purchases was less than that recorded in the books of account. Under these set of facts, it has to be held that the impugned addition has been made only on estimated basis that too on presumptions only. Hence, by following the decision rendered by the Tribunal in the assessee's sister concerns case (supra), we hold that the impugned penalty is liable to deleted."*

8. In the case of CIT v. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158 (SC) it was held as under-

*We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under section 271(1)(c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature".*

9. The levy of penalty is merely on disallowance of a percentage of expenditure and not finding of concealment to reduce taxable income. Relying on the numerous decisions on this issue by higher judicial authorities, I hold that addition made on account of disallowance of a percentage of expenditure as bogus automatically cannot justify the penalty levied u/s 271(1)(c) of the Act. Accordingly, the penalty of Rs. 5,93,434/-, imposed u/s 271(1)(c) of the IT. Act, by the AO, is hereby deleted and the grounds of appeal, raised as above, are allowed.

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

4. We have heard Ld. DR 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 rigours of penalty under section 271(1)(C). 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 honorable Supreme Court in the case of the state of Orissa 82 ITR 26 wherein, it was held that the authority may not levy the penalty if the conduct of the assessee is not found to be contumacious.

5. 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. The reference by the revenue is grounds of appeal to Hon'ble Supreme Court decision in Mak Data Pvt.Ltd. and Gujrarat High Court decision in N.K.Proteins are not relevant here.

6. In the background of aforesaid discussion and precedent we uphold the order's of Ld CITA and delete the levy of penalty.

7. In the result revenues 's appeal is dismissed.

Pronounced in the open court on 15.07.2021

Sd/-  
(PAVAN KUMAR GADALE)  
JUDICIAL MEMBER

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 15/07/2021

Sr.PS. Thirumalesh

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,

(Assistant Registrar)  
ITAT, Mumbai