

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI**  
**BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM**

आयकर अपील सं/ I.T.A. No.4075/Mum/2019  
(निर्धारण वर्ष / Assessment Year: 2009-10)

ITO-29(1)(1) Room No.403, 4 <sup>th</sup> Floor, Kautilya Bhavan, Near, Videsh Bhavan, Bandra Kurla Complex, Bandra (E), Mumbai-400051.	<b>बनाम/</b> Vs.	M/s. Ashapura Mould Plast Gala No.100, 2 <sup>nd</sup> Floor, New Unique, Industrial Estate, Dr. R. P. Road, Mulund (W), Mumbai-400080.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADFA1268M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri Brajendra Kumar (DR)	
Assessee by:	None	

सुनवाई की तारीख / Date of Hearing: 01/06/2021  
घोषणा की तारीख /Date of Pronouncement: 27/07/2021

**आदेश / O R D E R**

**PER AMARJIT SINGH, JM:**

The revenue has filed the present appeal against the order dated 05.03.2019 passed by the Commissioner of Income Tax (Appeals) -39, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2009-10.

2. The revenue has raised the following grounds: -

*"(1) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s 271(1)(1)(c) of Rs.81,690/- as the addition was on account*



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*of bogus purchase of Rs.2,64,355/- @ 12.5% on bogus purchased of Rs.21,14,840/- from hawala parties.*

2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the penalty u/s 271(1)(c) of Rs.81,690/- as the addition of Rs.2,64,355/- on account of bogus purchase @ 12.5% on bogus purchased of Rs.21,14,840/- from hawala parties. In view of the decision of Hon'ble Supreme Court in the case of N. K. Protiens Ltd. wherein the Apex Court has dismissed the SLP filed against the High Court's decision of upholding the 100% addition made by the AO on account of bogus purchases.*
3. *The appellant craves leave to add, amend, alter, substitute or modify any of the above ground or add a fresh ground as and when found necessary either before or at the time of hearing."*

3. The brief facts of the case are that the assessee filed its return of income for the A.Y.2009-10 on 24.09.2009 declaring a total income of Rs.46,523/-. The assessment was completed u/s 143(3) of the I. T. Act, 1961 on 02.02.2015 assessing the total income to the tune of Rs.3,10,878/- after making addition to the tune of Rs.2,64,355/- on account of depreciation. Thereafter, the case of the assessee was reopened on the basis of information received from the Investigation Wing of the Department in which it was conveyed by the Maharashtra Sales Tax Department that the assessee had taken the bogus purchase entry in sum of Rs.21,14,840/- from the following the party.:-



1	Payal Enterprise	388960
2	Anikesh Trading Pvt.t Ltd.	280280
3	Bhumi Enterprise	499200
4	Magnum Enterprises	432640
5	Divine Packaging	513760
	Total	2114840

Thereafter, assessment was completed raising the addition to the extent of 12.5% of the bogus purchase and assessed the income to the tune of Rs3,10,878/-.The penalty proceeding u/s 271(1)(c) was initiated. Notice was given and after the reply of the assessee, the penalty in sum of Rs.81,690/- was levied. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who deleted the penalty. The revenue was not satisfied. Therefore, the revenue has filed the present appeal before us.

4. We have heard the argument advanced by the Ld. Representative of the Revenue and has gone through the case carefully. Before going further, we deemed it necessary to advert the finding of the CIT(A) on record: -

*“4.1 I have considered the rival contentions. The penalty was imposed in respect of the estimated addition made on account of unaccounted profit. The AO has stated in the penalty order that the appellant failed to prove the genuineness of the purchases claimed. But I also find that the AO did not treat the entire purchases as bogus. Had the transactions been treated entirely as bogus, the AO would have disallowed the entire purchases. But in this case, the AO disallowed only 12.5% of the disallowances made. I also find that the addition was made which does not appear to be in conformity with the finding that the purchases were bogus. Further, I find that the quantum addition is based on estimate. In my view the penalty is not sustainable in view of the decision of the Hon'ble Punjab & Haryana High Court in the case of Harigopal Singh vs. CIT (2002) 258 ITR 85 (P&H). In that case, the question of law before the Hon'ble Court was whether penalty is attracted under section 271(1)(c) of the Act where income is assessed purely on estimate basis*



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*and additions are made in the declared income on that basis. In that case the Hon'ble High Court of Punjab & Haryana held as under:*

*"3. In order to attract clause (c) of section 271(1), it is necessary that there must be concealment by the assessee of the particulars of his income or if he furnishes inaccurate particulars of such income. What is to be seen is whether the assessee in the present case had concealed his income as held by the Assessing Officer and the Tribunal. He had not maintained any accounts and he filed his return of income on estimate basis. The Assessing Officer did not agree with the estimate of the assessee and brought his income to tax by increasing it to Rs. 2,07,500. This, too, was on estimate basis. The Tribunal agreed that the income of the assessee had to be assessed on an estimate of the turn over but was of the view that the estimate as made by the Assessing Officer was highly excessive and it fixed the total income of the assessee at Rs. 1,50,000 for the year under appeal. It is, thus, clear that there was a difference of opinion as regards the estimate of the income of the assessee. Since the Assessing Officer and the Tribunal adopted different estimates in assessing the income of the assessee, it cannot be said that the assessee had 'concealed the particulars of his income' so as to attract clause (c) of section 271(1). There is not an iota of evidence on the record to show that the income of the assessee during the year under appeal was more than the income returned by him, Additions in his income were made, as already observed on estimate basis and that by itself does not lead to the conclusion that the assessee either concealed the particulars of his income or furnished inaccurate particulars of such income. There has to be a positive act of concealment on his part and the onus to prove this is on the department. We are also of the considered view that the Tribunal grossly erred in law in relying on Explanation 1(8) to section 271(1)(c) to raise a presumption against the assessee. The assessee had justified his estimate of income on the basis of household expenditure and other investments made during the relevant period. It is not the case of the revenue that he had, in fact, incurred expenditure in excess of what he had stated. In this view of the matter, it cannot be said that the explanation furnished by the assessee had not been substantiated or that he had failed to prove that such explanation was not bona fide."*

*5.2 In view of decision of Hon'ble Punjab & Haryana High Court in case of Harigopal Singh vs CIT (2002) 258 ITR 85 (P&H), the penalty imposed is not sustainable. Accordingly, I direct the AO to delete the penalty of Rs 81,690/-.*

*In the result, the ground No. 1 is allowed."*

**5.** On appraisal of the above mentioned finding, we noticed that the CIT(A) has decided the matter of controversy on the basis of decision of



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Hon'ble Punjab & Haryana High Court in the case of **Harigopal Singh Vs. CIT (2002) 258 ITR 85 (P & H)**. We also find support of the decision of the Hon'ble Gujarat High Court in the case of **National Textiles Vs. CIT 2001 164 CTR 2009 (Guj)** in which it is specifically held that the penalty is not leviable when the profit was estimated on estimation basis. Taking into account all the facts and circumstances of the case, we are of the view that the CIT(Appeals) has decided the matter of controversy judiciously and correctly which is not liable to be interfered with at this appellate stage.

6. In the result, the appeal filed by the revenue is hereby dismissed.

Order pronounced in the open court on 27/07/2021

Sd/-

(SHAMIM YAHYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 27/07/2021

Vijay Pal Singh (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai