

IN THE INCOME TAX APPELLATE TRIBUNAL
“H” Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri C.N.Prasad (JM)

I.T.A. No.276/Mum/2021 (Assessment Year 2008-09)

Kamlesh M.Kanungo C/o D.C.Bothra & Co.LLP(CA) (formerly known as D.C.Bothra&Co) 297, Tardeo Road, Wille Mansion, 1 st Floor, Opp. Bank of India, Nana Chowk Mumbai-400 004 PAN : ABBPK9675R (Appellant)	Vs.	DCIT,CC-1(4) 9 th Floor, Old CGO Annexue Building, M.K.Road Mumbai-400 020 (Respondent)
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Assessee by	Shri Rajkumar Singh
Department by	Shri Hoshang Boman Irani
Date of Hearing	03.11.2021
Date of Pronouncement	08 .11.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals)-47 dated 22.1.2021 and pertains to assessment year 2008-09.

2. Grounds of appeal read as under:-

1. That the Id. C.I.T. (Appeals) has erred in upholding the validity of impugned penalty order dated 28/09/2018 passed u/ s 271 (1)(c) imposing the penalty at Rs. 4,36,249/- consequent to invalid show cause notice issued on 27/03/2014 by Id, A.O. in standard computer generated form without striking out the inapplicable words and provisions depriving the assessee to present his case in effective, proper and lawful manner in absence of specification of exact default in the show cause notice.
2. That on merit of the case and also in law penalty imposed by Id. A.O. u/s. 271(1)(c) at Rs. 4,36,249/- and upheld by Id. C.I.T.(Appeals) to the extent of Rs.

2,05,023/- in respect of debatable disallowance which has been upheld on adhoc basis and modified differently by the different appellate authorities that too without properly appreciating the various contention raised by appellant in the detailed written submission filed being wrong on facts and bad in law therefore may kindly be deleted.

3. Brief facts of the case leading to the levy of penalty are as under:-

Assessee is engaged in the business of trading in steel items. Assessment was reopened on the basis of information from search and seizure action that assessee was engaged in bogus purchases. Assessee supplied the purchased vouchers and payments were through banking channel. However, drawing adverse inference on the failure of assessee to produce the alleged suppliers and findings defects in other supporting documents, and without doubting the sales, the AO made peak credit addition, which resulted in addition of Rs. 1,60,43,273/-

4. Upon assessee's appeal Ld.CIT(A) held that addition should be restricted to the gross profit @3.28% on the bogus purchases of Rs. 3,01,59,357/- Upon further appeal ITAT restricted the disallowance to 2% of the bogus purchases . Penalty was also levied on the aforesaid addition. The AO has computed the disallowance confirmed by the ITAT @8% amounting to Rs. 12,83,462/-. The penalty levied is Rs. 4,36,249/-. This was confirmed by Ld.CIT(A).

5. Against this order assessee is in appeal before ITAT.

6. We have heard both the parties and perused the record. Apparently, the quantum of penalty is not correct as ITAT has upheld only 2% of the addition. Hence, the quantum of penalty is liable to corrected accordingly. As regards, the merits of the penalty levied, We find that the same has been done on an addition, which is made on

estimated basis. In the facts and circumstances of the case, assessee cannot be visited with the rigors of penalty in terms of section 271(1)(c) of the Act. The assessee here is not guilty of concealment or furnishing of inaccurate particulars. Moreover, Hon'ble Supreme Court in the case of State of Orissa 82 ITR 26 has held that the authority may not levy penalty, if the conduct of the assessee is not found to be contumacious. On the facts and circumstances of the case, in our considered opinion, assessee conduct cannot be said to be contumacious.

7. In the background of aforesaid discussion and precedent, we set aside order of authorities below and delete the levy of penalty.

8. Assessee has also raised a plea regarding non-ticking off the relevant limb of charge in the penalty notice. Ld.CIT(A) has rejected the same. Ld. Counsel of the assessee submitted that the issue is squarely covered in favour of the assessee by the decision of full bench of the Hon'ble Bombay High Court in the case of Farhan A. Shaikh Vs. PCIT (125 taxamnn.com 253) vide order dt. 11.3.2021

9. Upon careful consideration, we find that since, we have already deleted the penalty on merit the adjudication on this preliminary aspect is only of academic interest, hence we are not engaging to the same.

10. In the result, this appeal by the assessee stands allowed.

Pronounced in the open court on 08 .11.2021.

Sd/-
(C.N.PRASAD)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 08 /11/2021
Thirumalesh, Sr.PS

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