

IN THE INCOME TAX APPELLATE TRIBUNAL
"G" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Saktijit Dey (JM)

I.T.A. No.62/Mum/2021 (Assessment Year 2009-10)

DCIT, Circle-1 Room No.22, B-Wing 6 th Floor, Ashar IT Park Wagle Industrial Estate Thane(W)-400 064	Vs.	Girija Infra Projects Pvt.Ltd. C/o Director Shri Madan G.Talange 302, 3 rd Floor Mohandeeep Opp. Chiranjivi Hospital Almeida, Thane(W) Mumbai-400 603 PAN : AAACG6500E
(Appellant)		(Respondent)

Assessee by	None
Department by	Shri Hoshang Boman Irani
Date of Hearing	09.11.2021
Date of Pronouncement	10.11.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the revenue is directed against the order of learned Commissioner of Income Tax (Appeals)-01 dated 28.07.2020 wherein penalty levied under section 271(1)(c) of the Act amounting to Rs. 5,11,024/- has been deleted for assessment year 2009-10.

2. The brief facts of the case leading to the levy of penalty are that the AO in this case 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 non production of the suppliers, the AO disallowed 12.5% of the bogus purchases. However, the AO did not

doubt the sales. Penalty u/s. 271(1)(c) was also levied. Ld.CIT(A) delete the penalty holding as under:-

“I have carefully considered the facts of the case and assessment order of the AO and material placed on record. In the statement of facts, the appellant has that due to huge losses suffered by him, his business is closed down and therefore, he was unable to respond to the notices issued during assessment proceedings. On perusal of the penalty order, it is seen that the AO has placed reliance on the judgement of Hon'ble Apex Court in the case of Mak Data P. . Vs. CIT (Civil Appeal No. 9772 of 2013) in which the assessee surrendered a sum of Rs.40.74 lakhs on the basis of impounded documents, with a view to avoid litigation and buy peace of mind and to make an amicable settlement of the dispute after survey action u/s 133A was conducted on 16.12.2003. However, the facts of the instant case are entirely different addition in the case on hand has been made on the information available from the sales tax department, Maharashtra and on the basis of unserved notices u/s. 133(6). The penalty is merely levied on the ground that appellant agreed for addition during assessment proceedings, @12.5% to avoid litigation. The fact that the AO has not made 100% addition of bogus purchases also implies that penalty is merely levied on the basis of agreed addition of assessee and not on the satisfaction of the AO that inaccurate particulars were furnished or income has been concealed. Before levying penalty, the AO has to satisfy in a particular manner, whether penalty is to be levied or not. It is observed that there is a normal tendency to subject an appellant to penalty u/s 271(1)(c) in all cases where the appellant refrains to file an appeal pursuant to an assessment order, with a hope to end the nightmare which began with selection of case for scrutiny by accepting the general additions in assessment order. Penalty is straightaway levied merely because no appeal has been filed against the quantum order. The Hon'ble Supreme Court in the case of Sir Shadilal Sugar Mills (168 ITR 7051) held that there may be a hundred and one reasons for not protesting and agreeing to an addition but that does not follow to the conclusion that the amount agreed to be added was concealed income. The Hon'ble Karnataka High Court in case of CIT v. Manjunatha Cotton & Ginning Factory (2013 35 [taxmann.com](#) 250) categorically held that-

"...The very fact that the assessee agreed to pay tax and did not challenge the assessment order, cannot be construed as mala fide"

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 it was 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.

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 concern's case (supra), we hold that the impugned penalty is liable to deleted. "

8. The levy of penalty is merely on disallowance of a percent of purchases. There is no finding of concealment or furnishing of inaccurate particulars. Addition made on account of disallowance of purchases as bogus automatically cannot justify the penalty levied u/s 271(1)(c) of the Act. Accordingly, the penalty of Rs. 5,11,024/- imposed u/s 271(1)(c) of the IT. Act, by the AO, is hereby deleted and the ground of appeal, raised as above, is allowed."

3. Against the above order revenue is in appeal before us.

4. We have heard the Ld. DR and perused the record. As clear from the facts recorded above, the disallowances has been made on an estimated basis on account of the non production of suppliers before the AO. 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 u.s 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 Hon'ble Supreme Court in the case of the State of Orissa 82 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.

5. We further note that tax effect in this case is below the limit fixed by CBDT for filing appeal 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.

6. In the background of aforesaid discussion and precedent, we uphold the order's of Ld.CIT(A) and delete the levy of penalty.

7. In the result, this revenue's appeal is dismissed.

Pronounced in the open court on 10 .11.2021.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 10 /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