

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

I.T.A. No. 163/Mum/2021 (Assessment Year 2010-11)

ITO-32(1)(1) Room No. 703 Kautilya Bhavan Bandra Kurla Complex Bandra East Mumbai-400 052.	Vs.	Hitesh Babulal Kanti A-301, Padmavati Palace, L.T. Road Opp. Shri Sagar Hotel Borivali West Mumbai-400 092. PAN : AABPK5203E
(Appellant)		(Respondent)

Assessee by	Shri CA Manish Sheth
Department by	Shri Hoshang Booman Irani
Date of Hearing	28.10.2021
Date of Pronouncement	01.11.2021

ORDER

Per Shamim Yahya (AM) :

This appeals by the revenue is against orders of learned CIT-A dated 24.2.2020 wherein following penalty levied under section 271(1)(c) of the I.T. Act of Rs. 2,30,339/- has been deleted for A.Y. 2010-11.

2. Brief facts of the case leading to the levy of penalty are that the assessing officer in this case made disallowance of 12.5% on account of bogus purchases. Assessee has supplied the purchase vouchers and the payment were shown to have been made by banking channel. However drawing adverse inference for the non-production of the suppliers the assessing officer disallowed 12.5% of the bogus purchases. However the assessing officer did not doubt the sales. Ld CIT(A) reduced it to 67%. Penalty under section 271(1)(c) of the Act was also levied. Learned CIT(A) deleted the penalty holding as under :

3.3 I have gone through the assessment order, penalty order passed by the AO and the submissions made by the appellant. In this case the assessment

was completed by the AO adding Rs.7,91,327 being 12.50% of bogus purchases on estimation, on which penalty is also levied. The AO made only presumption based on the information received and ignored the primary documents and books entries made by the AO for the purchases, even when the payments were made through banking channels and the source for the purchases was on the record. On appeal the CIT(A) reduced the profit estimated to 7% of the disputed purchases.

3.4 It is noted that the addition made by the AO on estimation on the assumption that purchases were made in grey market instead of the bills produced. An assumption however believable it -s, it cannot take place of a fact. Penalty u/s 271 (1) of the Act is leviable for concealment of income under clause (c). Explanation 1 placed u/s 271(1), makes it clear that, where penalty relates to computation of total income, the amount added or disallowed in computing the total income, be deemed to represent the concealed income only if the assessee fails to offer an explanation, or the explanation offered by the assessee is found to be false or the assessee offers an explanation, which he is no: able to substantiate. In the present case, the assessee offered an explanation, which the AO did not accept, but did not found it to be false.

3.5 Assessment proceedings and penalty proceedings are separate. Reason good enough for addition may not be sufficient enough for imposition of penalty u/s 271(1)(c). In this case furnishing of inaccurate particulars or concealment of income been not been conclusively established by the Assessing Officer, therefore, in such a case penalty u/s 271(1)(c) cannot be levied. In support of this proposition, reliance is placed on the decision of jurisdictional ITAT in the case of Earthmoving Equipment Service Corporation v. Dy. CIT, 22(2), Mumbai [2017] 84 taxmann.com 51 (Mumbai - Trib.) wherein, on similar set of facts, it has been held that penalty u/s 271(1)(c) cannot be levied. Further, in the case of M/s Chempure vs. ITO (ITA No's 451. 452 & 453/M/2006), the income was estimated at 25% of alleged bogus purchases and penalty u/s 271(1)(c) was levied on estimated income. The ITAT, Mumbai has held that penalty under section 271(1)(c) cannot be levied on adhoc addition. The facts of the instant case are exactly identical to the facts of M/s. Chempure Vs. ITO (supra).”

3. Thereafter learned CIT(A) referred to some other case law and directed that this penalty is to be deleted.
4. Against this order revenue is in appeal before us.
5. We have heard both the parties and perused the records. As clear from the facts recorded above the disallowance has been made on an estimated basis on account of the non-production 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 honourable Supreme Court in the case of the Hindustan Steel Ltd. Vs. 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.

6. 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.

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

8. In the result Revenue's appeal is dismissed.

Pronounced in the open court on 1.11.2021.

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

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 01/11/2021

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//

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BY ORDER,

(Assistant Registrar)
ITAT, Mumbai