

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

I.T.A. No. 181/Mum/2021 (Assessment Year 2010-11)

ITO-32(1)(1) Room No. 703 Kautilya Bhavan Bandra Kurla Complex Bandra East Mumbai-400 052.	Vs.	Harnish D. Chitalia A-702, Eden Garden Building, Opp MCA Club, Mahavir Nagar Kandivali West Mumbai-400 067. PAN : AAAPC6597L
(Appellant)		(Respondent)

Assessee by	Shri Akshay Jain
Department by	Shri Hoshang Booman Irani
Date of Hearing	28.10.2021
Date of Pronouncement	01.11.2021

ORDER

Per Shamim Yahya (AM) :

This appeal by the revenue is against orders of learned CIT-A dated 25.2.2020 wherein following penalty levied under section 271(1)(c) of the I.T. Act of Rs. 30,232/- has been deleted for A.Y. 2020-11.

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 nonproduction of the suppliers the assessing officer disallowed 12.5% of the bogus purchases. However the assessing officer did not doubt the sales. Penalty under section 271(1)(c) was also levied. Ld 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. 1,43,204 being 12.5% of bogus

purchases as non-genuine purchases. In this case, the AO for want of minor documents like lorry transportation receipts, delivery challans added certain percentage of purchases on estimation. 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.

3.4 It is observed that addition was made in the assessment order even when the payments were made through banking channels and the source for the purchases was on the record. It is noted that the addition made by the AO was an adhoc addition on the assumption that purchases were made in grey market instead of the bills produced. An assumption however believable it is, 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 not able to substantiate. In the present case, the assessee offered an explanation, which the AO did not accept but 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 Chernpure 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 u/s 271(1)(c) cannot be levied on ad hoc 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 the penalty 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 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 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's of Ld CITA and delete the levy of penalty.

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

Pronounced in the open court on 01.11.2021.

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