

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

I.T.A. No. 160/Mum/2021 (Assessment Year 2010-11)

ITO Ward-32(1)(1) Room No. 703 Kautilya Bhavan Bandra Kurla Complex Bandra East Mumbai-400 051. (Appellant)	Vs.	Haresh Ramanbhai Barot A-401, Cosmos Park M.G. Road, Borivali-East Mumbai-400 066. PAN : AADPB8615P (Respondent)
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Assessee by	None
Department by	Shri Hoshang Booman Irani
Date of Hearing	27.10.2021
Date of Pronouncement	01.11.2021

ORDER

Per Shamim Yahya (AM) :-

This is an appeal by the Revenue against the order of learned CIT(A) dated 17.2.2020 wherein penalty levied under section 271(1)(c) of the I.T. Act of Rs. 17,728/- 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. Penalty under section 271(1)(c) of the Act 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.57,365 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

12.5 percentage of purchases on estimation. It is noted that the addition made by the AO was an adhoc addition on estimation. The AO made only presumption based on the information received and ignored the primary documents and entries in the book of accounts made 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 with documentary evidence, which the AO did not accept, but he 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 has 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 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).

3.6 Reliance is placed on the decision on Hon'ble Punjab & Haryana High Court in the case of Harigopal Singh v. CIT [258 ITR 85] wherein it was held as. under:

"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 (he 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 turnover 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 adoptee¹ 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)."

3.7 Reliance is also placed on the decision of Hon'ble Mumbai in case of Sushil Chhatrabhuj Raheja v. ACIT [ITA No. 1375/Mum/2017] dated 29.09.2017 wherein on the estimation of profits, the Hon'ble Tribunal has deleted penalty u/s 271(1)(c) of the Act. Relevant extracts are reproduced as under:

"We have considered the rival submission of the parties and have gone through the orders of authorities below. The perusal of assessment order reveals that the assessing officer, while passing the assessment order under section 143(3) rws 147, made the addition on the basis of estimation. The assessing officer made addition @ 25% of the alleged bogus purchases. The revenue has not disputed that additions were made merely on the basis of estimation. It is settled law that no penalties is leviable under section 271(1)(c) for adhoc/estimated additions. Similar view has been taken in the various decisions cited by learned AR for the assessee. Accordingly, we are of the opinion that this is not a fit case for levy of penalty. In the result the grounds of appeal raised by the assessee is allowed."

3.8 The facts on record where income has been estimated do not indicate any deliberate attempt by the assessee to conceal or furnish inaccurate particulars of Income. In view of the above facts and case laws, the penalty levied is held not to be justified. The AO is therefore directed to delete the penalty levied u/s 271(1)(c) of the Act. Accordingly, the ground raised in the appeal is allowed."

3. Against this order revenue is in appeal before us.

4. We have heard Ld DR 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. 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 deptt, 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.

5. In the background of aforesaid discussion and precedent we uphold the order's of Ld CITA and delete the levy of penalty.

6. 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