

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “SMC” BENCH**

**(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI AMARJIT SINGH, ACCOUNTANT MEMBER)**

[Through Virtual Court]

**ITA. Nos: 699 & 2461/Ahd/2018
(Assessment Years: 2013-14)**

Optart Electronics Pvt. Ltd. 380/2, Nr. Sola Over bridge B/H Ishwar Petrol Pump S.G. Highway, Ahmedabad	V/S	ITO, Ahmedabad	Ward-3(1)(3), Ahmedabad
PAN No. AAACO1836B			
(Appellant)		(Respondent)	

**Appellant by : Shri S. N. Divatia, A.R.
Respondent by : Shri V. K. Singh, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 22-10-2021
Date of Pronouncement : 10 -11-2021

PER MAHAVIR PRASAD, J.M.

1. These two appeals have been filed by the Assessee are directed against the order of the Ld. CIT(A) in ITA No. 699/Ahd/2018 vide Appeal No. CIT(A)-9/10721/TTO

Wd-3(1)(3)/2016-17 order dated 21/02/2018 arising out of assessment order dated 18/03/2016. The assessee has taken following grounds of appeal:

1.1 The order passed u/s 250 on 21-2-2018 by CIT(A)-6 Abad confirming aggregate addition/disallowance of Rs.13,84,663/- is wholly illegal, unlawful and against the principles

1.2 The Ld.CIT(A) has grievously erred in law and or on facts in not considering fully and properly the explanations furnished and the evidence produced by the appellant and confirming the addition of RS. 13,84,663/-on surmise and presumption.

2.1 The Ld. CIT(A) has grievously erred in law and or on facts in upholding that the purchases of RS. 13,84,663/- were bogus and thereby confirming the addition/disallowance by way of profit @ 25 % and cash payments towards purchases u/s 40A(3).

2.2 That in the facts and circumstances of the case as well as in law, the Id. CIT(A) has grievously erred in upholding that the purchases of RS. 13,84,663/- were bogus and thereby confirming the addition/disallowance by way of profit @ 25 % and cash payments towards purchases u/s 40A(3).

2.3 The Ld. CIT(A) has grievously erred in upholding the addition/disallowance of Rs. 13,84,663/- without giving any notice. It was in excess of the powers of CIT(A) to uphold the impugned addition in respect of new source/ground so that it was illegal and unlawful.

It is therefore prayed that the disallowance of Rs. 13,84,663/- made by the A.O. should be delted.

2. Brief facts of the case are that the assessee in the business of manufacturing and Trading of electronic Weighing Machine. In this case, a search u/s. 132 of the I.T. Act was conducted by DIT (Inv.) Ahmedabad on 05.12.2012. And during the search, it was found that M/s. Tricon Construction, Ahmedabad had obtained bogus bills for material/labour. During post search investigation details in respect of payments made to various entities towards such bogus bills and their clearing banks were called for from the bankers of M/s. Tricon Construction, Ahmedabad. And on the basis of detailed analysis of information received, bogus billers and bogus bills related bank accounts were identified.

3. And during the enquiry proceedings before Investigation Wing statement on oath of one Shri Bhavesh Ramesh Patel was recorded and he admitted that he did not render any actual services or supply goods but enterprise was only. And as per information received, assessee company has paid 13,84,663/- by cheque to the bogus billers Akshar Enterprise, but no actual services of goods were provided by the said company. As assessee could not discharge its onus that it has actually purchased any goods from the bogus billers as the biller has admitted that he was not maintaining any bill book but only signing the cheque book. Therefore, Ld. A.O. u/s. 40A(3) as purchases were made in cash were liable for 100% disallowance and made addition of Rs. 13,84,663/-.
4. Against the said order, assessee preferred first statutory appeal before the Ld. CIT(A) and Ld. CIT(A) relying upon the judgment of N.K. Proteins/Vijay Proteins etc. wherein ITAT has held 25% as reasonable rate of profit on purchases made from bogus billers and directed A.O. to consider 25% of 13,84,663/- i.e. Rs. 3,46,165/- as the profit of the appellant.
5. Now assessee has come before us by way of second statutory appeal. The confirming of 25% all the profit of the total addition made by the A.O.
6. We have heard both the parties and perused material available on record. Ld. A.R. cited a judgment of ITAT, Mumbai Bench in ITA No. 5350/MUM/2015 in the case of ACIT vs. M/s. Shankheshwar Real Estate Co., wherein additions of 12.5% alleged bogus purchases was confirmed after relying the following judgment:

(i) *Indwell Construction v. CIT [232 ITR 776 (AP)]*

(ii) *Teja Construction v. ACIT [39 SOT 13 (Hyd)]*

(iii) *ITO v. Sahadev Pradhan [33 taxmann.com 563]*

(iv) *CIT v. Banwarilal Banshidhar [229 ITR 229]*

(v) CIT v. Smt. Santosh Jain [159 taxmann.com 392]

(vi) ITO v. Nardev Kumar Gupta [32 taxmann.com 388]

7. Since above said order by the ITAT Mumbai have been passed after considering this different Tribunal/High Court and thereafter confirmed 12.5% of the alleged bogus purchases. Thus, in parity with the aforesaid order, we direct A.O. to confirm 12.5% instead of 25% confirmed of the bogus purchase by the Ld. CIT(A).
8. In the result, appeal filed by the Assessee is partly allowed.
9. Now we come to Penalty Appeal in ITA No. 2461/Ahd/2018 wherein penalty of Rs. 4,27,861/- was confirmed by the lower authorities.
10. In this case, addition have been made on the basis of estimation only and it is a basic need of provisions of law that definite finding is required to be recorded by the Assessing Officer for reaching to a conclusion with regard to concealment of income or furnishing inaccurate particular of income and without such finding, there cannot be any question of imposition of penalty u/s. 271(1)(c). We find that Ld. CIT(A) confirmed 25% of the total so called bogus purchases but the Hon'ble Delhi High Court in the matter of CIT vs. Aero Traders Pvt. Ltd. (supra) has held no penalty u/s. 271(1)(c) of the Act can be imposed when income is determined on estimation basis.
11. And the Hon'ble Gujarat High Court in the matter of CIT vs. Subhash Trading Company has held that " where income is assessed on estimate basis after rejecting book results penalty 271(1)(c) cannot be imposed by mere application of explanation thereof in the absence of any evidence to conclude a position finding that there was concealment of income.

12. And similar view has been taken by the Hon'ble Punjab & Haryana High Court in the case of Harigopal Singh vs. CIT (supra) by observing when provisions of section 271(1)(c) are not attractive cases where income of assessee assessee's assessed on estimate basis and additions are made therein on that basis.

13. Respectfully following the aforesaid judgment, we delete the penalty of the assessee.

14. In the result, Penalty appeal filed by the Assessee is allowed.

Order pronounced in Open Court on 10 - 11 - 2021

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER True Copy
Ahmedabad: Dated 10/11/2021

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad