

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"E" BENCH, MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA.NO. 172/MUM/2021 (A.Y: 2010-11)

DCIT – Circle – 3 Room No. 02, 6 th Floor, B-wing Wagle Industrial Estate Thane (W)-400604	v.	Shri Shibshankar Ghosh 101, Vardhaman Indl. Complex LBS Marg, Gokul Nagar Thane (W) - 400601 PAN: AEDPG7709K
(Appellant)		(Respondent)

Assessee by	:	Shri Subodh Ratnaparkhi
Department by	:	Shri B.K. Bagchi
Date of Hearing	:	18.11.2021
Date of Pronouncement	:	04.01.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the revenue against order of the Learned Commissioner of Income-tax (Appeals)-2, Thane [hereinafter for short "Ld. CIT(A)] dated 09.09.2020 for the A.Y. 2010-11 in partly deleting the penalty levied u/s. 271(1)(c) of the Act made by the Assessing Officer.

2. Briefly stated the facts are that, assessee an individual, proprietor of M/s. Siddharth Trading Company engaged in the business of distributor and dealer in Engineering goods, filed return of income on 03.08.2011 declaring income of ₹.73,30,653/- for the A.Y.2010-11. The case was selected for scrutiny by issuing notice u/s. 148 of the Act and assessment was completed on 17.03.2015 u/s. 143(3) r.w.s 147 of the Act determining the income at ₹.95,33,714/-. While completing the reassessment the Assessing Officer treated purchases of ₹.22,03,061/- made from various dealers as non-genuine on the basis of the information received from Sales Tax Department, Mumbai that assessee has received accommodation entries from various dealers without making any purchases but made purchases only in gray market. The Assessing Officer treated such purchases as non-genuine as the assessee could not produce any delivery challans, goods receipt note, transportation bills to prove that the delivery of goods has been actually received by the assessee from the alleged suppliers. Therefore, Assessing Officer completed the assessment assessing total income at ₹.95,33,710/- by making addition of ₹.22,03,061/-. On appeal before Ld.CIT(A), the Ld.CIT(A) restricted the addition to the extent of ₹.9,87,002/- by estimating Gross Profit @24%. On further appeal before ITAT, Mumbai the Tribunal in ITA.No.

6487/Mum/2016 dated 18.01.2019 on considering facts/submissions restricted the addition to 5% of the alleged bogus purchases.

3. Subsequently, Assessing Officer considering the amount of ₹.9,87,002/- being 24% of the Gross Profit estimated by the Ld.CIT(A), initiated penalty proceedings and levied penalty of ₹.3,04,844/- u/s.271(1)(c) of the Act for the A.Y.2010-11, stating that the assessee has furnished inaccurate particulars of its income and concealed its income within the meaning of section 271(1)(c) r.w. Explanation 1 of the Act. On appeal the Ld.CIT(A) directed the Assessing Officer to give effect to the order of ITAT in assessee's own case in ITA.No. 6487 & 6488/Mum/2016 for the Assessment Year 2010-11 and 2011-12 dated 18.01.2019 and levy the penalty on the resulting suppressed income. Against this order of the Ld.CIT(A), revenue is in appeal before us.

4. Ld. Counsel for the assessee reiterated the submissions made before the Ld.CIT(A). Ld. Counsel for the assessee further submitted that the penalty cannot be imposed when the estimation is made on adhoc basis and requested to delete the penalty levied by the Assessing Officer.

5. Ld. DR vehemently argued and supported the orders of the Assessing Officer.

6. Considered the rival submissions and material placed on record. It is a settled position of law that penalty cannot be levied when an adhoc estimation is made. In the instant case the Assessing Officer treated entire alleged bogus purchases as non-genuine which was partly confirmed by the Ld.CIT(A). On further appeal the ITAT estimated the profit element at 5% in such purchases. Adhoc estimation of 5% is directed to be made.

7. On identical situations the Coordinate Bench in the case of Shri Deepak Gogri *v.* Income Tax Officer in ITA.No. 1396/MUM/2017 dated 23.11.2017 held that no penalty is leviable observing as under: -

"6. We have heard the rival submissions, perused the orders of the authorities below. In so far as the penalty levied on estimation of profit element on purchases is concerned, we are of the view that Assessing Officer had made only adhoc estimation of profit on certain purchases treated as unexplained expenditure. Assessing Officer did not doubt the sales made by the assessee from out of such purchases. Assessing Officer based on the decision of the Hon'ble Gujarat High Court in the case of CIT v. Simit P. Seth [356 ITR 451] estimated the profit element in such purchases at 12.5% and by reducing the Gross Profit already declared by the assessee. In the circumstances, we hold that there is no concealment of income or furnishing of inaccurate particulars as the profit element was determined by way of adhoc estimation. Coming to the interest, the assessee furnished complete details in the return of income and made a claim and simply because the claim is denied and cannot lead to furnishing of inaccurate particulars or concealment of income. No allegation by Assessing Officer that the assessee failed to disclose the particulars relating to its claim in the return of income. Thus we

hold that there is no concealment of income or furnishing of inaccurate particulars of income. Thus we direct the Assessing Officer to delete the penalty levied u/s. 271(1)(c) of the Act."

8. Further, the Hon'ble Punjab & Haryana High Court in the case of Harigopal Singh v. CIT [258 ITR 85] held as under: -

"3. On further appeal, the Tribunal reduced the addition to Rs.1,50,000. Hence, the income was finally assessed at Rs.1,50,000 against the declared income of Rs. 52,000. The Assessing Officer initiated penalty proceedings against the assessee by invoking Section 271(1)(c) along with the Explanation 1(B) of the Act on the plea that he had concealed the particulars of his income. A show-cause notice was issued to him under Section 274 read with Section 271(1)(c) of the Act. In reply thereto, the assessee pleaded that since no positive concealment had been detected by the Department and the addition was made in his income only on estimate basis, no penalty under Section 271(1)(c) of the Act could be imposed because the assessee's income on estimate basis keeping in view his household expenses as well as the statement of accretion to his assets during the year under consideration, was bona fide. The Assessing Officer did not accept the reply and found that since the assessee had not filed any fresh evidence in penalty proceedings to prove that there was no attempt on his part to conceal his income, he, by his order dated March 10, 1992, imposed a penalty of Rs. 50,000. Feeling aggrieved by this order, the assessee filed an appeal before the Commissioner of Income-tax (Appeals), Patiala, who allowed the same holding that there was indeed no positive evidence whatever to show that the appellant's income during the year in question was, in fact, more than the income returned by him and that estimated additions in the returned income do not attract penalty under Section 271(1)(c) of the Act. The Revenue went up in appeal before the Income-tax Appellate Tribunal which was allowed by order dated May 30, 2001. It is against this order that the present appeal has been filed which raises the aforesaid question of law.

4. In order to attract Clause (c) of Section 271(1) of the Act, 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 the 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 adopted 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) of the Act. There is not even an iota of evidence on the record to show that the income of the assessee during the year under appeal was more than the income returned by him. Additions in his income were made, as already observed, on estimate basis and that by itself does not lead to the conclusion that the assessee either concealed the particulars of his income or furnished inaccurate particulars of such income. There has to be a positive act of concealment on his part and the onus to prove this is on the Department. We are also of the considered view that the Tribunal grossly erred in law in relying on Explanation 1(B) to Section 271(1)(c) of the Act to raise a presumption against the assessee. The assessee had justified his estimate of income on the basis of household expenditure and other investments made during the relevant period. It is not the case of the Revenue that he had, in fact, incurred expenditure in excess of what he had stated. In this view of the matter, it cannot be said that the explanation furnished by the assessee had not been substantiated or that he had failed to prove that such explanation was not bona fide.

5. In the result, the appeal is allowed and the question posed in the earlier part of the order is answered in the negative holding that the provisions of Section 271(1)(c) of the Act are not attracted to cases where the income of an assessee is assessed on estimate basis and additions are made therein on that basis."

9. Similar view has been taken by the Hon'ble Delhi High Court in the case of CIT v. Aero Traders Pvt. Ltd., [322 ITR 316] wherein the Hon'ble High Court affirmed the order of the Tribunal in holding that estimated rate of profit applied on the turnover of the assessee does not amount to concealment or furnishing inaccurate particulars.

10. Respectfully following the above decisions and in the given case also, the income of the assessee is estimated on the value of alleged bogus purchases. Therefore, we direct the Assessing Officer to delete the penalty levied u/s. 271(1)(c) of the Act.

11. In the result, appeal of the revenue is dismissed.

Order pronounced on 04.01.2022 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER
Mumbai / Dated 04/01/2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum