

IN THE INCOME TAX APPELLATE TRIBUNAL  
"B" Bench, Mumbai  
Before Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. Nos. 1213 & 1214/Mum/2021  
(Assessment Years : 2009-10 & 2010-11)

DCIT, Circle-1, Thane Room No.22, B-Wing, 6 <sup>th</sup> Floor Ashar IT Park Wagle Industrial Estate, Thane(W)-400 604	Vs.	Bhawani Engineering Works Unit No.2, Block No.2 Rajshree Industrial Complex Chitalsar, Manpada Thane(W)-400 610  PAN : AAEFB1471C
(Appellant)		(Respondent)

Assessee by	None
Department by	Shri C.T.Mathews, Sr.AR
Date of Hearing	07.02.2022
Date of Pronouncement	08 .02.2022

O R D E R

Per Shri Shamim Yahya(A.M) :-

These are Revenue's appeals directed against respective orders of learned CIT(A) for the concerned assessment years, wherein following penalty levied under section 271(1)(c) of the Act has been deleted:-

A.Y.	Amount (Rs.) of Penalty
2009-10	Rs. 73,675/-
2010-11	Rs.1,31,610/-

2. Since the issues are common and connected and the appeals were heard together, these have been consolidated and disposed off together for the sake of convenience.

3. Brief facts of the case leading to the levy of penalty are that the AO in these cases made disallowance of 20% on account of bogus purchases. Assessee has supplied the

purchase vouchers and the payment, where shown to have been made by banking channel. The AO also noted that assessee has shown 28% G.P. However, drawing the adverse inference by observing that assessee representative agreed the AO made disallowance of 20%. However, the AO did not doubt the sales. Penalty was also levied on this addition. Ld.CIT(A) deleted the penalty by holding as under:-

"I have carefully considered the facts of the case, findings of the AO and statement of facts. It is observed that there is a normal tendency to subject an assessee to penalty u/s 271(1)(c) in all cases where the assessee refrains to file an appeal pursuant to an assessment order, by accepting the general additions in assessment order. Penalty is straightaway levied merely because no appeal has been filed against the quantum order. The Hon'ble Supreme Court in the case of Sir Shadilal Sugar Mills (168 ITR 7051) held that there may be a hundred and one reasons for not protesting and agreeing to an addition but that does not follow to the conclusion that the amount agreed to be added was concealed income. The Hon'ble Karnataka High Court in case of CIT v. Manjunatha Cotton & Ginning Factory (2013 35 taxmann.com 250) categorically held that:-

"....The very fact that the assessee agreed to pay tax and did not challenge the assessment order cannot be construed as mala fide,"

The Supreme Court has recently reiterated the law in case of Dilip N. Shroff v. Jt. CIT [2007J 291 ITR 519 by holding in para 62 that finding in assessment proceedings cannot automatically adopted in penalty proceedings and the authorities have to consider the matter afresh from different angle. Moreover, in the case of Ajay Loknath Lohia, order dated 5.10.2018, Mumbai ITAT has addressed that when AO had estimated cost GP on alleged purchases, such disallowance does not tantamount to willful furnishing of inaccurate particulars of income within the meaning of section 271(1)(c) of the Income Tax Act, 1961. This was also echoed in the case of ETCO Profiles Pvt. Ltd. vs. ACIT, by Mumbai ITAT.

In the case of CIT v. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158 (SC) it was held as under;-

"We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under section 271(1)(c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the

assessee will invite penalty under section 271(1)(c), That is clearly not the intendment of the Legislature ".

The levy of penalty is merely on disallowance of a percentage of purchases and not finding of concealment of any particular or mala-fide intention to reduce taxable income. Addition made on account of disallowance of purchases as bogus automatically cannot justify the penalty levied u/s 271(1)(c) of the Act. Accordingly, the penalty of Rs, 73,675/-, imposed u/s 271(1)(c) of the I.T. Act, by the AO, is hereby deleted and the all the above grounds of raised as above, is allowed.”

4. Against the above order revenue is in appeal before us.
  
5. We have heard the Ld. DR and perused the record. 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 AO. 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 u.s 271(1)(c). As a matter of fact, on many occasions, on similar circumstances in quantum proceedings, the disallowance itself has been deleted. It is seen that AO has disallowance 20% on agreed basis even after noting that assessee has already shown 28% G.P. 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 Hon'ble Supreme Court in the case of the State of Orissa 82 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.CIT(A) and delete the levy of penalty.

8. In the result, these revenue's appeals are dismissed.

Pronounced in the open court on 08.02.2022

Sd/-  
(PAVAN KUMAR GADALE)  
JUDICIAL MEMBER

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 08 /02/2022

Thirumalesh, Sr.PS

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//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai