

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, HON'BLE JUDICIAL MEMBER**

ITA.NO. 7579/MUM/2019 (A.Y: 2011-12)

Income Tax Officer – 32(2)(5) Room No. 719, 7 th Floor Kautilya Bhavan, C-41 to C-43 G-Block, Bandra Kurla Complex Bandra(E), Mumbai - 400051	v.	Shri Pritesh Mafatlal Shah M/s. Pankaj Enterprises 46A, 2nd Floor Ganjawala Apartment, Ganjawala Lane Borivali (E), Mumbai - 400092 PAN: AAAFP2176J
(Appellant)		(Respondent)

Assessee by	:	None
Department by	:	Shri R.A. Dhyani
Date of Hearing	:	23.02.2022
Date of Pronouncement	:	29.03.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the revenue against order of the Learned Commissioner of Income-tax (Appeals)-44, Mumbai [hereinafter for short "Ld. CIT(A)] dated 18.09.2019 for the A.Y. 2011-12 in deleting the penalty levied u/s. 271(1)(c) of the Act made by the Assessing Officer.

2. Briefly stated facts are that, assessee an individual, engaged in the business of building material supply, filed return of income on 28.09.2011 declaring income of ₹.3,50,910/- for the A.Y.2011-12. The return was processed u/s.143(1) of the Act. Subsequently, Assessing Officer received information from the Sales Tax Department and DGIT (Investigation), Mumbai about the accommodation entries provided by various dealers and assessee was also one of the beneficiary from those dealers. Accordingly, assessment was reopened u/s. 147 of the Act and completed the re-assessment on 14.01.2016 u/s. 143(3) r.w.s 147 of the Act determining the income at ₹.2,45,49,950/-. While completing the reassessment the Assessing Officer treated purchases of ₹.22,01,157/- made from R.K. Traders 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 to prove that goods have been actually received by the assessee from the alleged suppliers. On appeal before Ld.CIT(A), the Ld.CIT(A) estimated @27.38% of the said purchases as profit. On further appeal by the assessee the ITAT Mumbai restricted the addition to 5% of

the bogus purchases. Subsequently, Assessing Officer initiated penalty proceedings and levied penalty of ₹.4,82,306/- u/s. 271(1)(c) of the Act, 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) deleted the penalty made by the Assessing Officer. Against this order of the Ld.CIT(A), revenue is in appeal before us.

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

4. In spite of issue of notice none appeared on behalf of the assessee. The notice was sent through RPAD to the address given in Form No.36 by the assessee returned unserved with an endorsement "Not Known" by the postal authorities. Since the notice issued was returned unserved, we dispose off this appeal on merits on hearing the Ld.DR.

5. We have heard Ld.DR, perused the orders of the authorities below. It is a settled position of law that penalty cannot be levied when an adhoc estimation is made. In the instant case profit element on the alleged bogus purchases was estimated on adhoc basis at 27.38% by Ld.CIT(A).

The Coordinate Bench of the Tribunal on considering facts restricted the addition @5% of the total alleged bogus purchases.

6. 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."

7. 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.

8. In the case on hand the Ld. CIT(A) as well as Coordinate Bench in assessee's case, only estimated the Gross Profit on the alleged non-genuine purchases without there being any conclusive proof of concealment of income or furnishing inaccurate particulars of such income. We do not find any infirmity in the order passed by the Ld.CIT(A) in deleting the penalty levied u/s.271(1)(c) of the Act for the Assessment Year under consideration.

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

Order pronounced in the open court on 29.03.2022.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai / Dated 29/03/2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR 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