

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “C”, MUMBAI**

**BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1779/M/2021
Assessment Year: 2011-12**

Mr. Omprakash G. Agarwal, Room No.71, 12/2, K.D. Road, Mumbai – 400 002 PAN: ADXPA4476G	Vs.	ITO, Ward-18(2)(4), Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : None
Revenue by : Shri C.T. Mathews, Sr. A.R.

Date of Hearing : 07 . 04 . 2022
Date of Pronouncement : 29 . 04 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, Mr. Omprakash G. Agarwal (hereinafter referred to as ‘the assessee’) by filing the present appeal, sought to set aside the impugned order dated 13.09.2021 passed by National Faceless Appeal Centre (NFAC), Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] confirming the penalty levied by the AO qua the assessment year 2011-12 on the grounds inter alia that :-

“1.1 The Commissioner of Income Tax (Appeals) National Faceless Appeal Centre [‘the CIT (A)’] erred in confirming the penalty of Rs. 4,62,4877- levied by the Assessing Officer (‘the A.O.’) under section 271 (1) (c) of the Income tax Act, 1961.

1.2 While doing so, the CIT (A) failed to appreciate that:

a. the penalty in the Appellant's case was levied merely on the addition of Rs. 14,01,476/- being 12.5 % of the purchases of Rs. 1,12,11,810/- made from M/s. Sai International Impex;

b. penalty was levied by the A.O. on estimated addition confirmed by the appellate authority;

c. the penalty was levied by the A.O. on the additions confirmed by the appellate authority of gross profit rate at 12.5% purely on estimation basis after rejections of books result and there was no clinching evidence in possession of the A.O. of concealment of income;

d. in the notice issued under section 274 read with section 271(1)(c) of the Act as well as penalty order, the charge for which penalty under section 271(1) (c) of the Act has been levied, is not specific and both the limbs of charge are mentioned there that is, 'concealment of income' and furnishing of inaccurate particulars of income'.

1.3 The Appellant submits that in the facts and circumstances of the case and in law no such penalty is livable.

1.4 The Appellant prays that penalty of Rs. 4, 62,487/- levied under section 271 (1) (c) of the Act be canceled.

2 The Appellant craves leave to add, alter, delete or modify all or any the above ground at the time of hearing.”

2. Briefly stated facts necessary for adjudication of the controversy at hand are : on the basis of assessment framed under section 143(3) read with section 147 of the Income Tax Act, 1961 (for short 'the Act') making addition of Rs.14,01,476/- by estimating the gross profit on unproved/non genuine purchases at

the rate of 12.5% of the total amount of Rs.1,12,11,810/-, penalty proceedings have been initiated under section 271(1)(c) of the Act for concealing particulars of income and furnishing inaccurate particulars of income by the assessee.

3. Declining the contentions raised by the assessee, the AO proceeded to levy penalty to the tune of Rs.14,01,476/- @ 100% of the tax sought to be evaded.

4. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the penalty by dismissing the same. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing the present appeal.

5. Despite issuance of the notice to the assessee none has preferred to put in appearance to contest the present appeal. So the Bench proceeded to decide this appeal on the basis of material available on record with the assistance of the Ld. D.R. for the Revenue.

6. We have heard the Ld. Departmental Representative for the Revenue, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and case law relied upon.

7. Undisputedly Assessing Officer (AO) has made the addition of Rs.14,01,476/- in this case by estimating the gross profit @ 12% of the total amount of unproved/non genuine purchases made by the assessee during the year under consideration. It is also not in

dispute that in the quantum proceedings first appellate authority namely CIT(A) has also decided the issue on estimation basis.

8. In the backdrop of the aforesaid undisputed facts it has become clear on the file that the entire addition has been made in this case on the basis of estimation and no independent enquiry has been made by the AO nor he has rejected the books of accounts prepared by the assessee. Rather basis of the entire addition and consequent levy of penalty is on the basis of information received from Sales Tax Department and no independent enquiry has been made by the AO.

9. Co-ordinate Bench of the Tribunal while deciding identical issue deleted the penalty in identical facts and circumstances in a case cited as DCIT vs. M/s. Toshvin Analytical Pvt. Ltd. in ITA No.7505/M/2019 order dated 10.06.2021.

10. In the backdrop of the aforesaid undisputed facts we are of the considered view that when the entire addition has been made on the basis of estimation penalty levied by the AO and sustained by the Ld. CIT(A) is not sustainable. Moreover, penalty in this case has been levied on the basis of information received from the Sales Tax Department and no independent enquiry has been made by the AO, hence, the penalty is not sustainable. Co-ordinate Bench of the Tribunal has also deleted the penalty levied in the identical facts and circumstances of the case in DCIT vs. M/s. Toshvin Analytical Pvt. Ltd. in ITA No.7505/M/2019 order dated 10.06.2021.

11. Furthermore, when the basis for initiation of penalty proceedings have been altered or modified by the appellate

authority the AO cannot proceed with the penalty proceedings as has been held by Hon'ble Delhi High Court in case of Pr. CIT vs. Fortune Technocomps (P) Ltd. (ITA No.313/2016) (Delhi HC) on the line of decision rendered by the Hon'ble Kolkata High Court in case of CIT vs. Ananda Bazar Patrika Pvt. Ltd. (1979) 116 ITR 416 (Cal HC) by returning the following findings:

"Wherein the Hon'ble Calcutta HC affirmed the view of the ITAT that "once the basis for initiation of penalty proceedings was altered or modified by the first appellate authority, the then Learned Assessing Officer has no jurisdiction thereafter to proceed on the basis of the findings of the first appellate authority."

12. So we are of the considered view that when entire addition in this case is on estimation basis and at no point of time Revenue Authorities have reached the specific conclusion that the assessee has concealed the particulars of income or has furnished inaccurate particulars of income rather made the addition and levied consequent penalty on the basis of information received from Sales Tax Department as to the alleged bogus purchases, the penalty levied by the AO and confirmed by the Ld. CIT(A) is not sustainable in the eyes of law. Consequently, penalty levied by the AO and sustained by the Ld. CIT(A) is hereby deleted by allowing the appeal filed by the assessee.

Order pronounced in the open court on 29th April 2022.

**Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 29.04.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.