

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI

BEFORE SHRI ABY T. VARKEY (JUDICIAL MEMBER)
AND
SHRI GAGAN GOYAL (ACCOUNTANT MEMBER)

I.T.A No.2332/Mum/2021
(Assessment year : 2010-11)

Deputy Commissioner of Income-tax, Central Circle-8(1), Mumbai 656, 6 th Floor, Aayakar Bhavan M.K. Road, Mumbai-400 020	vs	M/s Karamtara Engineering Pvt Ltd 705, Morya Landmark II, New Link Road, Andheri West, Mumbai-400 053 PAN : AABCK1921E
APPELLANT		RESPONDENT

Assessee represented by	Shri Prakash Chougule
Department represented by	Shri Dharm Veer Singh, (CIT – DR)

Date of hearing	04/05/2022
Date of pronouncement	13/05/2022

O R D E R

Per: Aby T. Varkey (JM):

This is an appeal preferred by the Revenue, against the order of Ld.CIT(A)-50, Mumbai dated 27/09/2021 for assessment year 2010-11 against the deletion of the penalty levied by the Assessing Officer under section 271(1)(c) of the Income-tax Act, 1961 (hereinafter the Act).

2. Brief facts of the case as noted by the Ld.CIT(A) is that the Assessing Officer had made the 100 % addition (quantum) on account of bogus purchases at Rs.1,19,76,329/-. According to the Assessing Officer, the assessee could not prove the purchases from few parties named therein the assessment order. In the quantum appeal, the Ld.CIT(A) confirmed the addition at Rs.55,79,053/- as well as enhanced the addition on the element of commission supposed to have been paid by the assessee at 1% [for obtaining the bogus bills] at Rs. 11,976/-. On further appeal, this Tribunal vide order dated 10/03/2017 (ITA No.3519/Mum/2015 & 3645/Mum/2015) deleted the addition as such, however, confirmed the GP addition on such bogus purchases [as per the impugned order of Ld. CIT(A) @18.08% i.e. 4% over and above the declared GP by the assessee @14.08%]. In the impugned order, the Ld.CIT(A) has re-produced the ground (2)(a) raised by the assessee before the Tribunal in the quantum appeal order which was as under:-

The Ld. AO had made the addition on account of bogus purchases at Rs, 1,19,76,329/-, being 100% of such bogus purchases. The facts of the case suggest that the Ld. AO had made said addition on the ground that the appellant could not prove the purchases under consideration from the parties concerned. The Ld. CIT(A) had confirmed the disallowances/addition on this account at Rs.55,79,053/- and also enhanced the addition on account of probable commission paid @ 1% on obtaining such bogus bills at Rs.11,976/-. Hence, it is evident that the Ld. CIT(A) has confirmed/enhanced income on estimated/ad-hoc basis. Further the Hon'ble Tribunal vide its order dated 10.03.2017 in ITA Nos.3519/Mum/2015 and 3645/Mum/2015 has upheld the GP on such bogus purchases @ 18.08%, i.e. 4% over and above the declared GP by the appellant @14.08%. Before the Hon'ble ITAT, the appellant has raised the Ground No.2(a) as under.

"(2)(a) The Ld. Commissioner of Income Tax (Appeal) has erred in rejecting the books of accounts and increasing the gross profit in respect of the alleged bogus purchases at 18.08% comprising of 14.08% the gross profit ratio of the appellant company for the year and 4% of the vat claimed on such purchases. The same needs to be deleted."

The Hon'ble Tribunal has held as under.

"16. On the anvil of aforesaid case laws we find that when sales have not been doubted, hence the purchases cannot be held to be bogus. Hence, the disallowance of purchases is not sustainable. Hence, on the same reasoning as in Poona Galavniser (Supra) we hold that the peak addition on account of bogus purchases as also not sustainable. We further note that in similar case of Poona Galavniser (Supra) ITAT has upheld the rejection of books and upheld the estimated gross profit. Hence, following the same, we uphold the Ld. CIT(A) order of estimate of gross profit as contested by the assessee in ground no. 2(a) of assessee's appeal. All other addition made by Ld. CIT(A) on the basis of peak credit and commission charges for obtaining accommodation bills are also based on hypothetical consideration without cogent material brought on record, and are liable to be deleted on the basis of ratio emanating from the above case laws.

17. In the background of aforesaid decision and precedent we hold that since the sales have been accepted in the entirety no disallowance on account of bogus purchases etc. is sustainable. Accordingly, we delete the addition, in this regard. The fact that assessee has not been granted in opportunity cross examined the said suppliers whose statement has been the basis of AO's addition is also supporting the case of the assessee that addition in this regard are not sustainable in as much, as there is violation of principal of natural justice in this regard. Following the decision of Poona Galavniser (supra) only the addition with regard to gross profit as contested by the assessee in ground no.2(a) above is upheld."

3. Thereafter, in the impugned order, the Ld.CIT(A) has noted that while granting partial relief to the assessee, the Tribunal has confirmed only the addition on estimated / adhoc basis. Thereafter, the Ld.CIT(A) referred the decision of this Tribunal in M/s Earth Moving Equipment Services Corporation in

ITA No.6617/Mum/2014 order dated 02/05/2017 wherein the Tribunal was pleased to delete the penalty levied under section 271(1)(c) of the Act wherein similar additions were made under section 69C of the Act on account of bogus purchases; and the decision of this Tribunal in the case of Ajay Loknath Lohia in ITA No.2998/Mum/2017 vide order dated 05/10/2018 wherein also the Tribunal has deleted the penalty levied under section 271(1)(c) of the Act on the addition made @25% on alleged bogus purchases made from hawala dealers, based on the information received from the Sales-tax department. Taking note of the aforesaid decisions and considering the fact that the Tribunal in quantum appeal has only sustained the G.P. addition on the issue of bogus purchases, the Ld.CIT(A) has deleted the addition. Aggrieved by the impugned decision of the Ld.CIT(A), the Revenue is before us.

3. We have heard both the parties and perused the records. We note that in the quantum assessment, which is the foundation of the penalty order, the Assessing Officer has accepted the entire sales shown by the assessee, but has made the addition in respect of certain purchases from certain parties named in the quantum assessment order on the plea that it was bogus purchases. It is elementary that without purchases there cannot be any sales. So, when the entire sales shown by the assessee has been accepted by the Assessing Officer, the entire addition of Rs.1,19,76,329 (100% bogus purchases from hawala dealers) could not have been made by the Assessing Officer. Therefore, the Tribunal in assessee's own case (quantum appeal) has deleted the addition by

observing that *"Since the sales have been accepted on the entirety, no addition on account of bogus purchase is sustainable. Accordingly, we delete the addition in this regard."* Thereafter, the Tribunal was pleased to sustain only the gross profit (profit element embedded in such sales). In such a scenario, when the addition sustained was based on estimation (G.P. %) cannot be a ground for levy of penalty under section 271(1)(c) of the Act. Further, we note that in assessee's own case for assessment year 2011-12, similar penalty levied by the Assessing Officer was deleted by the Ld.CIT(A), which action has been confirmed by this Tribunal in ITA No.1795/Mum/2020 vide order dated 30/11/2021 wherein this Tribunal has held *"in our considered view, the penalty cannot be levied on the income which, itself is based on estimation"*. In the light of the aforesaid discussion, we do not find any infirmity in the order of Ld.CIT(A) and confirm the impugned action of the Ld.CIT(A) and dismiss this Revenue's appeal.

4. In the result, appeal is dismissed.

Order pronounced in the open court on 13th May, 2022.

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER
Mumbai, Dt: 13th May, 2022
Pavanan

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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(Dy./Asstt. Registrar)

ITAT, Mumbai