

IN THE INCOME TAX APPELLATE TRIBUNAL

"H" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1913/Mum./2021
(Assessment Year : 2010-11)

Shobha Chidambaram
Shop no.4, Tej Manjul
Tejpal Road, Vile Parle
Mumbai 400 057 PAN – AAAPC4727A

..... Appellant

v/s

Income Tax Officer
Ward-21(2)4, Mumbai

..... Respondent

Assessee by : Shri Mehul Shah
Revenue by : Shri Dinesh Chaurasia

Date of Hearing – 21/04/2022

Date of Order – 21/06/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 06/09/2021 passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax, National Faceless Appeal Centre (*"learned CIT(A)"*), for the assessment year 2010-11.

2. In this appeal, assessee has raised following grounds:

"Being aggrieved by the order of the Assessing Officer 17(3)(2), Mumbai, and learned Commissioner of Income Tax(Appeals) - 28 this appeal petition is filed on the following amongst other grounds of appeal, which it is prayed may be considered without prejudice to one another.

1. On the facts, and in circumstances of the case, and in law, learned Commissioner of Income-tax (Appeal) erred in partly upholding action of the Assessing Officer in levying penalty under section 271 (1) (c) of the Income-tax Act 1961 amounting to RS. 28,476 and directing him to rework penalty on the basis of sustained addition of RS. 92,153 being 10% of alleged bogus purchases of RS. 921,532 without appreciating that the addition of alleged non-genuine purchases was made on an estimated basis and on a difference of opinion; and there was neither concealment of income nor filing of inaccurate of income, as the Appellant had furnished all material particulars in support of its claim of purchases further supported by the order of MAVT Department accepting the same purchases which the Assessing Officer treated as non genuine.

2. On the facts, and in circumstances of the case, and in law, notice issued by the Assessing officer initiating penalty under section 274 read with section 271 (1) (c) was bad in law as the Assessing Officer did not cancel the irrelevant portion in the notice as to whether the Assessee has concealed the income or filed inaccurate particulars of income, and thereby no specific charge was created against the Assessee.

3. Your Appellant craves leave to add to, amend, alter, modify, and I or delete any of the above grounds of appeal at or before final disposal of appeal."

3. The only grievance of the assessee in the present appeal is against penalty of Rs. 28,476 under section 271(1)(c) of the Act, which was upheld by the learned CIT(A).

4. The brief facts of the case, as emanating from record are: The assessee is a proprietorship entity and principally engaged in business as dealer/contractor in numerous PVC items on wholesale as well as retail basis. For the year under consideration, assessee filed its return of income of Rs. 9,46,240. During the assessment proceedings, the

Assessing Officer observed that most of the purchases made by the assessee were not from genuine parties and were bogus as per the information received from Sales Tax Department. Accordingly, Assessing Officer vide assessment order passed under section 143(3) of the Act made an addition of Rs. 9,21,532 under section 69C of the Act. In further appeal, the learned CIT(A) vide order dated 07/08/2014 dismissed the appeal filed by the assessee against the aforesaid order passed under section 143(3) of the Act. In quantum appeal against the aforesaid order passed by the learned CIT(A), Co-ordinate Bench of the Tribunal vide order dated 23/06/2017 passed in ITA No. 6429/Mum/2014 granted partial relief to the assessee and restricted the disallowance at 10% of impugned purchases.

5. Meanwhile, the penalty order dated 31/03/2016 was passed by the Assessing Officer under section 271(1)(c) of the Act, wherein penalty of Rs. 2,84,756 was levied on the basis that assessee has furnished inaccurate particulars of income. In further appeal, learned CIT(A) vide impugned order dated 06/09/2021 confirmed the levy of penalty, however, granted partial relief to the assessee by restricting the penalty to 10%, on the basis of order passed by the Co-ordinate Bench of Tribunal in quantum appeal. Accordingly, penalty of Rs. 2,84,756 was reduced to Rs. 28,476. Being aggrieved, assessee is in appeal before us.

6. During the course of hearing, learned Authorised Representative submitted that penalty in the present case has been levied on estimated addition, which was made relying on the report of Sales Tax Department, Government of Maharashtra, and thus, prayed for deletion of same.

7. On the other hand, learned Departmental Representative vehemently relied upon the orders passed by the lower authorities.

8. We have considered the rival submissions and perused the material available on record. From the documents available on record, it is evident that the impugned penalty, in the present case, was levied by the Assessing Officer on the basis of addition on account of alleged bogus purchases made by the assessee. The addition so made was restricted by the Co-ordinate Bench of Tribunal, in quantum appeal, at 10% of the impugned purchases. The Co-ordinate Bench of Tribunal further noted that the Assessing Officer has not made any independent enquiry nor any incriminating material was brought on record, except relying on the report of Sales Tax Department, Government of Maharashtra. Thus, it is evident that the entire addition has been made by the Assessing Officer only on the basis of estimation i.e. on the basis of difference of opinion and on an *ad hoc* basis. It is further pertinent to note that such addition was ultimately restricted to 10%.

9. We find that in respect of similar issue, the Co-ordinate Bench of Tribunal in Reliable Metal Industries vs ACIT, in ITA No.1261/Mum./ 2017, vide order dated 30/08/2017, observed as under:

"5. We have heard the rival submissions and have perused the material available on record. We find that the assessment was reopened on the basis of the information received from the DGIT (Investigation) that during the impugned assessment year, the assessee made purchases from the dealers, who were shown as hawala dealers in the website of the Sales tax Department of State of Maharashtra. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has made purchases amounting to Rs. 23,19,151/- from four parties viz. Nisha Enterprise, Dhanera Metal Corporation, Manish Industrial Corporation and Shidhsila Tradelinks Private Ltd. The Assessing Officer, on the basis of the gross profit percentage, disallowed 12.5% out of the total purchases made from the four such hawala dealers. Admittedly, the addition was made on estimation basis. The Co-ordinate Bench of the Ahmedabad Tribunal in the case of Ruchi Developers vs. ITO (supra), and the Mumbai Bench in the case of Earthmoving Equipment Service Corporation (supra), has taken a view that when a assessee made a bona fide claim coupled with documentary evidence but the same remained inconclusive for want of confirmation from the suppliers and the Assessing Officer has not made further inquiry to verify the correctness of the confirmation, the imposition of penalty is not justifiable. Thus, respectfully following the decisions of the co-ordinate Benches of this Tribunal, we find that the penalty made on estimated disallowance is not sustainable. As a result, the penalty levied is set aside and the appeal of the assessee is allowed."

10. In another decision, the Co-ordinate Bench of Tribunal in Kamlesh Manohar Kanungo vs. DCIT, in ITA No. 139/Mum/2021, vide order dated 03/11/2021, after following various judicial precedents, decided similar issue, observing as under:

"13. In the case on hand the learned AO and learned CIT(A) as well has 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. Thus, respectfully following the above decisions, we direct the AO to delete the penalty

levied under s. 271(1)(c) of the Act for the assessment year under consideration."

11. As, in the present case, the explanation of the assessee has not been accepted by the Revenue and no contradictory evidence to disprove the explanation so offered has been brought on record by the Assessing Officer, we are of the considered view that penalty levied merely on estimated addition cannot be sustained in the absence of anything to prove that there was any concealment of income or furnishing of inaccurate particulars of income by the assessee. Accordingly, the grounds raised in present appeal are allowed and the Assessing Officer is directed to delete the penalty, as affirmed by the learned CIT(A).

12. In the result, appeal by the assessee is allowed.

Order pronounced in the open court on 21/06/2022

Sd/-
PRAMOD KUMAR
VICE PRESIDENT

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 21/06/2022

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai