

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

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER

**ITA No.1527/M/2021
Assessment Year: 2010-11**

Shri Ramniklal Sivji Savla, 74 Muljibhai Building, Khetwadi Main Road, Behind Alankar Cinema, Mumbai – 400 004 PAN: AACPS7486C	Vs.	Income Tax Officer- 19(3)(1), Matru Mandir, Income Tax, Mumbai – 400 007
(Appellant)		(Respondent)

Present for:

Assessee by : None
Revenue by : Shri Rajendra Chandekar, D.R.

Date of Hearing : 02 . 11 . 2022
Date of Pronouncement : 30 . 11 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, Shri Ramniklal Sivji Savla (hereinafter referred to as ‘the assessee’) by filing the present appeal, sought to set aside the impugned order dated 19.08.2021 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)) qua the assessment year 2010-11 on the grounds inter-alia that :-

“1. The Ld. Commissioner of Income-tax (Appeals) [hereinafter referred to as "Ld. CIT(A)"] has erred in upholding the order of the Ld. Assessing Officer and has erred in levying penalty u/s 271 (1)(c) of the Income Tax Act, 1961 of Rs. 5,64,4647-.

2. The Appellant craves leave to add, alter, rescind or amend the above grounds of appeal.”

2. Briefly stated facts necessary for adjudication of the issue 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') determining the income of the assessee at Rs.32,80,200/- by making addition of Rs.29,23,726/- on account of unexplained expenditure i.e. bogus purchases @ 12.5% of the total bogus purchases made during the year under consideration to the tune of Rs.23389804/-, the Assessing Officer (AO) has initiated the penalty proceedings under section 271(1)(c) of the Act against the assessee for furnishing the inaccurate particulars of income. Declining the contentions raised by the assessee the AO proceeded to levy penalty of Rs.5,64,464/- under section 271(1)(c) of the Act @ 100% of the amount sought to be evaded by furnishing inaccurate particulars of income.

3. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the penalty levied by the AO by dismissing the appeal. Feeling aggrieved the assessee has come up before the Tribunal by way of filing present appeal.

4. This appeal was filed on 03.09.2021. Thereafter six notices were given to the assessee and on two occasions i.e. on 29.06.2022 and 05.09.2022 assessee appeared through his representative but thereafter again absented, nor filed any application for adjournment. It appears that the assessee is not interested in prosecuting the present appeal. So the Bench has decided to dispose of the same on the basis of material available on record with the assistance of the Ld. D.R. for the Revenue.

5. I 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.

6. Undisputedly entire addition in this case was made/confirmed by the AO as well as Ld. CIT(A) on the basis of estimation and guess work on the alleged bogus purchases made by the assessee during the year under consideration @ 12.5% of the total bogus purchases. It is also not in dispute that sale made by the assessee during the year under consideration has not been disputed by the Revenue nor the books of account of the assessee has been rejected under section 145 of the Act.

7. In the backdrop of the aforesaid facts and circumstances of the case, we are of the considered view that when the entire addition has been made on the basis of estimate penalty levied by the AO and sustained by the Ld. CIT(A) is not sustainable. Moreover, addition in this case has been made on the basis of information received from the Sales Tax Department without conducting any independent enquiry by the AO and on the basis of said information penalty has been made on the basis of guess work and estimation 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 in the identical facts and circumstances of the case by citing as DCIT vs. M/s. Toshvin Analytical Pvt. Ltd. in ITA No.7505/M/2019 order dated 10.06.2021.

8. 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) by following the 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.”

9. 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 on the basis of information received from Sales Tax Department without conducting any independent enquiry 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.

10. In view of what has been discussed above, I am of the considered view that penalty levied by the AO and confirmed by the Ld. CIT(A) is not sustainable in the eyes of law, hence ordered to be deleted.

11. Resultantly, appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on 30.11.2022.

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

Mumbai, Dated: 30.11.2022.

* 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.