

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, MUMBAI
BEFORE SHRI BASKARAN BR, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 1953/Mum/2022
(A.Y: 2009-10)

Shri Poonam K.Prajapati 81/83, Room No. 14, 4 Kumbharwada, Prabhu Shri Rammandir Marg, Mumbai – 400004.	Vs.	ITO – 19(2)(5) Matrumandir, Room No. 210, Tardeo, Mumbai – 400007.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AGMPP5641C		
Appellant	..	Respondent

Appellant by :	Mr. P.M Gang.AR
Respondent by :	Mr. B. Bagchi.DR

Date of Hearing	29.11.2022
Date of Pronouncement	30.11.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order passed by the Commissioner of Income Tax (Appeal) – 29, Mumbai passed u/s 250 of the Act.

At the time of hearing, the Ld.Counsel for the assessee submitted that there is a delay in filing the appeal before the Hon’ble Tribunal and filed an

affidavit for condonation of delay and relied on the decision of Hon'ble Supreme Court. We found the facts mentioned in the affidavit are reasonable and the Ld. DR has no specific objections. Accordingly, we condone the delay and admit the appeal.

The assessee has raised the following grounds of appeal:

- 1. On the facts and circumstances of the case and in law, the learned CIT erred in confirming the order of the assessing officer that penalty levied on our appellant is in order.*
- 2. On the facts and circumstances of the case and in law, the learned CIT failed to appreciate that there is neither concealment of particulars of income not furnishing of inaccurate particulars of income.*
- 3. On the facts and circumstances of the case and in law, the learned CIT erred in ignoring the facts that addition is made only on estimated basis on account of difference in gross margins earned from sale against purchase from party alleged to be non-genuine. An addition which is made purely on an estimate basis, it cannot be said there is concealment of income.*
- 4. On the facts and circumstances of the case and in law, the assessee is in appeal before the ITAT for the quantum and with prejudice to the above, penalty cannot be decided before the quantum. 5. The appellant craves leave to add, alter, amend, delete or*

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modify any or all of the above referred grounds of appeal.

2. The brief facts of the case are that the assessee is engaged in the business of trading in ferrous and non ferrous metal. The assessee has filed the return of income for the A.Y 2009-10 on 28.08.2009 disclosing a total income of Rs.1,99,830/- and the return of income was processed u/s 143(1) of the Act. Subsequently, the Assessing Officer (AO) has received the information from DGIT(Inv) that the assessee has obtained accommodation entries/bogus purchases bills from the six parties as per the information from Sales Tax Department. The AO has reason to believe that there is income escaping the Assessement and the assessee is one of the beneficiary and issued notice u/s 148 of the Act. The AO found that the assessee has obtained accommodation entries/ bogus purchase bills from six parties aggregating to Rs.63,52,693/- and therefore to test check the genuineness of the transactions, the AO has issued notices and called for the information but there was no compliance, further the AO has issued notice u/s 133(6) of the Act on the six none genuine parties and

the said notices were returned un served by the postal authorities. The assessee was called to produce the books of accounts, ledger and the other documentary evidence to substantiate the genuineness of the transactions. Since the assessee has failed to produce the details, the A.O. has dealt on facts and available material and applied Best Judgement Assessement and alleged that the purchases are not genuine and made addition of Rs. 63,52,693/- and assessed the total income of Rs. 65,52,520/- and passed the order u/s 144 r.w.s 147 of the Act on 12.03.2015.

3. Subsequently, the AO has issued notice for levy of penalty but there was no compliance to notice by the assessee in penalty proceedings u/s 271(1)(c) of the Act. The A.O. found that the assessee has entered into bogus purchase transactions and relied on the findings in the assessment as the assessee has not filed the reply/explanations in the penalty proceedings. Finally, the A.O has levied penalty based on the additions of bogus purchases which worked out to Rs.21,13,920/- and passed the order u/s 271(1)(c) of the Act.

4. Aggrieved by the penalty order, the assessee has filed an appeal with the CIT(A). The CIT(A) considered the grounds of appeal and provisions of the Act and confirmed the action of the A.O in levy of penalty and dismissed the appeal. Aggrieved by the order of CIT(A), the assessee has filed an appeal with the Hon'ble Tribunal.

5. At the time of hearing the Ld. AR submitted that against the quantum addition made by the AO the assessee has filed an appeal before the CIT(A) and the CIT(A) has restricted the addition considering the profit element @ 25%. Further the assessee has filed an appeal before the Honble Tribunal and addition was restricted to the extent of 9%. The Ld. AR also submitted that the penalty order cannot be sustained were the income is estimated and prayed for allowing the appeal. Per Contra, the Ld. DR supported the order of the CIT(A).

6. We heard the rival submissions and perused the material on record. The sole crux of the disputed issue is with respect to levy of penalty u/s 271(1)(c) of the

Act by the A.O based on the assessment order under section 144 r.w.s 147 of the Act . We find the A.O has made adhoc disallowance of bogus purchases and has accepted the sales in the books of accounts. On appeal, the CIT(A) has restricted the addition considering the profit element @ 25% and on further appeal the Honble Tribunal has restricted the addition to the extent of 9%. We are of the opinion, that where the addition is sustained on the estimated basis no penalty u/s 271(1)(c) of the Act can be levied. The disallowance of purchases on ad-hoc/estimated basis does not tantamount to furnishing inaccurate particulars of income under the provisions of Section 271(1) (c) of the Act. The A.O. has not doubted the sales and made disallowance of bogus purchases and we rely on the ratio of the Honorable Jurisdictional High Court in the case of M/s Nikunj Eximp Enterprises Vs Cit (W.P.No 2860 dated 18-06-2014). Further the assessing officer made an addition based on the information received from Sales tax department Maharashtra. Further we are of the opinion that once the revenue accepts that penalty is levied on the basis of information from the outside

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agency/ department, the penalty is not sustained. Accordingly, we considering the facts, circumstances and judicial decisions set aside the order of the CIT(A) and direct the assessing officer to delete the penalty and allow the grounds of appeal in favour of the assessee.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 30.11.2022.

Sd/-

(BASKARAN BR)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 30.11.2022

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai

ITA No. 1953/Mum/2022
Poonam K. Prajapati., Mumbai.