

IN THE INCOME TAX APPELLATE TRIBUNAL ‘F’ BENCH, MUMBAI

**BEFORE SHRI PRASHANT MAHARISHI, AM
AND MS. KAVITHA RAJAGOPAL, JM**

ITA No. 2304/Mum/2022
(Assessment Year: 2007-08)

United Gems GE-9010, G Block, Bharat Diamond Bourse, Bandra Kurla Complex, Bandra (E), Mumbai-400 050	Vs.	NFAC, DCIT-19(3), Mumbai
PAN/GIR No. AAAFU 4527 G		
(Appellant)	:	(Respondent)
Assessee by	:	Shri Himanshu Gandhi
Revenue by	:	Shri Vranda U. Matkari
Date of Hearing	:	01.11.2022
Date of Pronouncement	:	25.01.2023

ORDER

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) (‘Id.CIT(A) for short), National Faceless Appeal Centre (‘NFAC’ for short) passed u/s.250 of the Income Tax Act, 1961 (‘the Act’), pertaining to the Assessment Year (‘A.Y.’ for short) 2007-08.

2. The solitary issue involved in this appeal is that the assessee has challenged the penalty levied u/s. 271(1)(c) by the Assessing Officer (A.O. for short) and confirmed by the Id. CIT(A) amounting to Rs.44,045/-.

3. The brief facts are that the assessee firm is engaged in the business of trading and resale of industrial diamonds after assortment and mixing. The assessee filed its return of income for the impugned year dated 24.10.2007, declaring total income of Rs.15,64,807/- and processed u/s. 143(1) of the Act. Subsequently, the assessee’s case was reopened and

notice u/s. 147 was issued for the reason that there was information that the assessee has availed accommodation entries from two hawala parties, aggregating to Rs.43,19,568/-. The assessment order dated 31.12.2021 was passed where the A.O. made an addition, amounting to Rs.3,45,565/- @ 8% of the impugned purchase, aggregating to Rs.43,19,568/-.

4. The assessee was in appeal before the Id. CIT(A), challenging the assessment order and the Id. CIT(A) restricted the addition on suspicious purchases to the extent of 3% of purchase value and determined the addition at Rs.1,29,586/-. The assessee chose not to appeal further against the impugned addition for the reason of incurring the cost of litigation. The assessee has submitted that A.O. has initiated penalty proceeding u/s. 271(1)(c), thereby levying a penalty of Rs.44,045/-. The assessee challenged the said penalty before the Id. CIT(A) on the ground that the assessee has not concealed the income by filing inaccurate particulars. The Id. CIT(A) confirmed the penalty imposed by the A.O. on the ground that the assessee's transaction with hawala parties have been proved and that the addition made in the case of the assessee was not on estimated basis, but was on concealment of profit which arose out of the impugned transaction.

5. The assessee is in appeal before us, challenging the order of the Id. CIT(A).

6. The learned Authorized Representative (Id. AR for short) for the assessee contended that the addition in assessee's case was made on estimated basis on gross profits for which penalty cannot be levied. The Id. AR relied on various decisions in support of this proposition. The Id. AR further stated that the purchase and the sale have

not been disputed by the lower authorities and that the assessee has furnished the quantitative details before the lower authorities.

7. The learned Departmental Representative (Id. DR for short), on the other hand, contended that the addition was made in assessee's case not on estimated basis but for concealment of profit for the impugned transactions made with the hawala parties. The Id. DR controverted the contentions of the Id. AR and relied on the decisions of the lower authorities.

8. We have heard the rival submissions and perused the materials on record. It is evident that the assessee's case was reopened based on the information from the Investigation Wing that two parties with whom the assessee has dealt with was hawala parties issuing bogus bills to various parties without actual sales. It is contended that the assessee was one of the beneficiary of such accommodation entry operators. It is also observed that in the appeal before the Id. CIT(A) on quantum addition, the Id. CIT(A) has restricted the addition to 3% of the purchases on estimated basis. It is also pertinent to point out that the lower authorities have not disputed the purchase and sales made by the assessee firm and the dispute was only with regard to the impugned purchases made from 2 parties who were identified as entry operators by the Investigation Wing. The assessee has submitted that the addition made in the case of the assessee pertains to quantum addition and as such there was no concealment of particulars in the present case. The Id. AR relied on the decision of the co-ordinate bench in ITA No.5384/Mum/2019 in the case of *ACIT vs. M/s. Fancy Diamonds India Pvt. Ltd.* vide order dated 17.06.2022, which has held that in case where the addition is made on estimated basis, the penalty u/s.

271(1)(c) of the Act is not leviable. The Tribunal has relied on the decision of the Hon'ble Rajasthan High Court in the case of *CIT vs. Krishi Tyre Retreading and Rubber Industries* reported as 360 ITR 580, the decision of the Hon'ble Punjab & Haryana High Court in the case of *CIT vs. Sangrur Vanaspati Mills Ltd.* reported as 303 ITR 53 and Hon'ble Gujarat High Court in the case of *CIT vs. Subhash Trading Co. Ltd.* reported as 221 ITR 110. It is observed that all the above mentioned decisions have reiterated the proposition that the penalty u/s. 271(1)(c) of the Act cannot be levied in case where the addition is made on estimated basis. It is evident that there are plethora of other decisions by the Hon'ble High Court's and various benches of the tribunal which had held the said proposition. In the present case in hand, it is evident that the A.O. has made addition @ 8%, which was restricted by the Id. CIT(A) to 3% of gross profit on the bogus purchases made by the assessee with the hawala parties. This clearly indicates that the addition in assessee's case was made on estimated basis.

9. Having concluded that, we are of the considered opinion that the penalty u/s. 271(1)(c) cannot be levied where the addition is made on estimated basis. From the above observation and by respectfully following the above decisions, we hereby delete the penalty levied by the A.O. and find no justification in the order of the Id. CIT(A).

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

Order pronounced in the open court on 25.01.2023

Sd/-

(Prashant Maharishi)
Accountant Member

Mumbai; Dated : 25.01.2023
Roshani, Sr. PS

Sd/-

(Kavitha Rajagopal)
Judicial Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai