

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

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

ITA Nos. 2326 & 2325/Mum/2022
(Assessment Years: 2010-11 & 2011-12)

M/s. V. K. Ispat & Alloys 316, Giriraj, S. T. Road, Mumbai-400 009	Vs.	ITO-17(3)(5), Mumbai
PAN/GIR No. AAHFM 8770 A		
(Appellant)	:	(Respondent)
Assessee by	:	None
Revenue by	:	Shri Vranda U. Matkarni
Date of Hearing	:	01.11.2022
Date of Pronouncement	:	24.01.2023

ORDER

Per Bench :

These appeals have 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) u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Years ('A.Y.' for short) 2010-11 and 2011-12, respectively.

2. The solitary issue involved in these two appeals is that the assessee has challenged the penalty levied by the Assessing Officer (A.O. for short) and confirmed by the Id. CIT(A) u/s. 271(1)(c) of the Act, amounting to Rs.1,10,781/- and Rs.46,116/- respectively. As both these appeals are identical on facts, we hereby pass a consolidate order by taking ITA No. 2326/Mum/2022 as the lead case.

ITA No. 2326/Mum/2022

3. It is observed that as there was no representation on behalf of the assessee, we hereby proceed to decide this appeal by hearing the learned Departmental Representative (Id. DR for short) and on perusal of the available material on record.

4. The brief facts are that the assessee firm is a reseller engaged in the business of trading in stationery, general items and derives income from business and profession. The assessee filed its return of income on 19.09.2010 declaring the total income at Rs.3,69,640/- for the A.Y. 2010-11 and processed u/s. 143(1). The assessee's case was reopened based on the investigation made by the Sales Tax Department, wherein it was found that the assessee was a beneficiary of bogus purchases from various hawala parties. During the impugned year, the assessee is said to have total purchase of Rs.1,38,95,843/- from certain parties which were stated to be entry providers as per the investigation made by the Sales Tax Department. It is stated that the assessee was one of the beneficiaries of receiving bogus purchase bills without actual delivery of goods or services.

5. During the assessment proceeding, it is stated that the assessee has failed to produce the suppliers, brokers or transporters before the A.O. and has also failed to prove the genuineness of the impugned purchases. The A.O. made an addition of Rs.7,75,388/- being 2.58% gross profit ratio + 3% addition made as VAT.

6. In an appeal before the Id. CIT(A) against the assessment order passed u/s. 143(3) r.w.s. 147 of the Act, the Id. CIT(A) restricted the gross profit @ 2.58% on account of bogus purchases. It is observed that the penalty proceeding u/s. 271(1)(c) of the Act was

initiated against the assessee for concealment of particulars of income and the A.O. thereby levied penalty, amounting to Rs.1,10,781/- and the same stands confirmed by the Id. CIT(A).

7. The assessee has challenged the order of the Id. CIT(A), confirming the penalty levied by the A.O. before us on the grounds of non striking of irrelevant limb u/s. 271(1)(c) and on the ground that penalty cannot be levied on estimated gross profit basis. Ground no. 1 is general in nature and ground nos. 2 & 3 pertains to non striking of the irrelevant limb, i.e., inaccurate particulars of facts and concealment of income. From the penalty order and the assessment order dated 20.03.2019, it is observed that the A.O. has levied the impugned penalty for both furnishing of inaccurate particulars and for concealment of income. Since the lower authorities have levied the penalty on both the limbs, we are not inclined to decide ground nos. 2 & 3. Ground no. 4 relates to levying the penalty u/s. 271(1)(c) on additions made on estimated basis. It is observed that the assessee's case was reopened based on the investigation by the Sales Tax Department that the assessee has obtained bills from M/s. Diamond Traders, Merchant Enterprises, Navjyot Metal Industries, Rohit Enterprises, Hitech Impact and Om Sai Enterprises, which are alleged to be hawala parties. Based on the said information, the A.O. has made the impugned addition on account of bogus purchases @ 2.58% gross profit ratio + 3% VAT and the Id. CIT(A) further restricted the gross profit addition @ 2.58% and deducted 3% addition made as VAT.

8. From the above facts, it is evident that the said addition made in the case of the assessee pertains to the addition made on bogus purchase on estimated basis. It is also pertinent to point out that the A.O. has arrived at the percentage of the gross profit based on the average gross profit earned by the assessee for A.Ys. 2008-09, 2009-10 and 2010-11. We would like to place our reliance in 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 observed that the A.O. has made addition @ 2.58% + 3% on VAT which was restricted by the Id. CIT(A) to 2.58% 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. We are of view that the penalty u/s. 271(1)(c) of the Act 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.

ITA No. 2325/Mum/2022

11. The appeal filed by the assessee for A.Y. 2011-12 is on identical facts with the appeal for A.Y. 2010-11 and the observation made above in ITA No. 2326/Mum/2022 applies *mutual mutandis* to this appeal also, except for the quantum and the percentage of the gross profit. Hence, the appeal for A.Y. 2011-12 is allowed as indicated above.

12. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the open court on 24.01.2023

Sd/-

(Prashant Maharishi)
Accountant Member

Mumbai; Dated : 24.01.2023
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