

IN THE INCOME TAX APPELLATE TRIBUNAL
“H” BENCH, MUMBAI
BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER
ITA Nos. 1944 & 1945, 1934 & 1935/Mum/2022
(A.Ys.2011-12 & 2012-13)

Mr. Hajaram Purohit 33, Ganesh Bhuvan, 3 rd Khetwadi Lane, Mumbai – 400004	Vs.	DCIT (CC)-5(3) Room No. 11, Ground Floor, Aayakar Bhavan, Mumbai - 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AGUPP6813E		
Appellant	..	Respondent

Appellant by :	Dipen Tanna
Respondent by :	Nihar Ranjan Samal
Date of Hearing	07.02.2023
Date of Pronouncement	23.02.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

These 4 appeals filed by the assessee are directed against the different orders of CIT(A)-53, Mumbai. Since common issue on identical facts are involved in these appeals except variation in the amount, therefore, these appeals are adjudicated together by taking the ITA No. 1944/Mum/2022 as a lead case and its finding will be applied mutatis mutandis to the other appeal vide ITA No. 1945/Mum/2022. Similarly, the finding in respect of ITA No. 1934/Mum/2022 will be applied vide ITA No. 1935/Mum/2022 to mutatis mutandis.

ITA No. 1944/Mum/2022

Legal:

1. Reopening under section 147/148 is bad in law

The action of the Ld. A.O. in reopening the assessment of the Appellant by issuance of the notice under section 148 of the Act without recording valid and proper reasons to show that any income chargeable to tax has escaped

assessment is erroneous Hence, the notice under section 148 and subsequent assessment order passed under section 143 rws. 147 is bad in law and the same may be quashed and set aside.

2. Sanction not obtained as per section 151

The action of the Ld. A.O. in reopening the assessment without following proper sanctions as per section 151 is erroneous Hence, the notice under section 148 is bad in law and the same may be quashed and set aside as no there is no proper sanction as per section 151.

Merit

3. Treating the purchases made during the year as bogus

- i. The Ld. CIT(A) erred in confirming the action of Ld. A.O. in making addition of Rs.11,86,69,553/- being purchases made by treating the same as bogus without appreciating the facts and circumstances of the case.*
 - ii. The Ld. CIT(A) failed to appreciate that the material purchased during the year are duly accounted in the book of the Appellant and the same are supported by proper documentary evidences The said material was subsequently sold by the Appellant and the profit earned thereon is offered for tax. Hence, the addition of Rs.11,86,69,553/- by treating the purchases as bogus is unjustified and the same may be deleted.*
 - iii. The Ld. CIT(A), further, failed to the appreciate that the Ld. A.O. has neither rejected the books of accounts of the Appellant nor pointed any discrepancies in the same. The Ld. A.O. also accepted the sales made during the year. Hence, the addition of Rs.11,86,69,553/- is unjustified and the same may be deleted.*
 - iv. Without prejudice to the above the Ld. CIT (A) erred in upholding the action of Ld. A.O. by treating the purchases as bogus on the basis of the certain information received from Sales Tax Department without providing the Appellant an opportunity to cross examine the persons relying on whose statement an adverse inference has been drawn against the Appellant. Hence, the addition of Rs.11,86,69,553/- is unjustified and the same may be deleted.*
- 4. The Appellant craves leave to add, alter, rescind or amend any of the above grounds of appeal.”**

2. Fact in brief is that return of income declaring total income of Rs.11,68,560/- was filed on 29.09.2010. The assessee is a trader and stockiest of ferrous and non-ferrous metals and works under the name of M/s Rinku Steel Corporation. The case of the assessee was reopened u/s 147 of the Act by issuing of notice u/s 148 of the Act on 11.02.2014. Regarding reopening of the assessment the A.O stated that on the official website of the Sale Tax Department there was information of hawala dealers who have issued only bills to the various parties without

actual delivery of good. The detail of purchases made by the assessee from the such parties are as under:

Sr. No.	Name of the Hawala Party	Purchase Amount in Rs.
1.	Shradha Trading Co.	64,802/-
2.	Apex Ferromate P. Ltd.	3,26,30,998/-
3.	Akshay Metals	3,44,67,724/-
4.	Jindal Metal Corporation	8,17,037/-
5.	Konica Steel India	1,25,49,784/-
6.	Veer corporation	3,81,39,208/-
	Total	11,86,69,553/-

3. During the course of assessment the assessee was asked to explain why the purchases made from the aforesaid hawala parties should not be disallowed. However, no explanation was filed by the assessee, therefore, the A.O had added the 100% of such purchases to the amount of Rs.118,66,955/- to the total income of the assessee.

4. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee vide order dated 01.11.2017 holding that assessee has not furnished any evidence to show the genuineness of the purchases.

5. Thereafter, ITAT vide order dated 24.04.2019 restored the matter regarding addition of bogus purchases to the file of the ld. CIT(A) to decide the matter afresh on merit after giving the assessee proper opportunity of being heard.

6. During the course of appellate proceedings before the ld. CIT(A) the assessee submitted that he had made purchases of Rs.11,86,69,553/- from 6 parties and the purchases were recorded in the books of account and were supported by the invoices. The assessee also submitted that the A.O had not provided any opportunity for cross examination of those six parties. The assessee further submitted that the corresponding sales made was also supported with invoices. The payment were also made to these parties by account payee cheque. At

para 4.3 of the order Id. CIT(A) stated that the genuineness of the alleged 6 parties have been proved by producing copies of purchase invoices and payment made through bank account. The confirmation of these parties were also furnished. The assessee has also submitted the copy of balance sheet. However, the Id. CIT(A) has dismissed the appeal of the assessee stating that it was established by Sale Tax Department that these six parties were only providing accommodation entries without supplying of any goods and mere filing of purchase invoices and making payment through banking channel was not sufficient to prove the genuineness of the purchases. The Id. CIT(A) has also stated that assessee has not been able to produce these parties before the assessing officer as well as during the course of appellate proceedings.

7. During the course of appellate proceedings before us the Id. Counsel contended that Id. CIT(A) has completely unjustified in treating the 100% purchases as bogus without disproving the corresponding sales made by the assessee. No opportunity to cross examine the sale parties were given to the assessee. He also submitted that the supporting evidences i.e copies of purchase bill, copies of bank account and etc. were not disproved by the A.O and CIT(A). The Id. Counsel stated that merely on the basis of information available on the website of Sale Tax Department, the whole purchases without disturbing the sales cannot be disallowed.

8. On the other hand, the Id. D.R supported the order of lower authorities.

9. Heard both the sides and perused the material on record. During the course of assessment on the basis of information from Sale Tax Department that six parties were indulged in issuing of bogus bills without supporting of any material, the assessing officer treated the 100% purchases of Rs.11,86,69,553/- made by the assessee from such

six parties as bogus and added to the total income of the assessee. During the course of set aside proceedings before the Id. CIT(A) the assessee has submitted the copies of purchase invoices and detail of payment made for such purchases to the parties through bank account. The assessee has also furnished the confirmation of all these parties. The assessee also submitted the copies of balance sheet. However, the Id. CIT(A) had sustained the addition holding that mere filing of purchase invoices and the payment through banking channel were not sufficient to prove the genuineness of the purchases. In this regard, we find that except the information available on the website of the Sale Tax Department pertaining to issuing of bogus bills by the six parties no other materials were brought on record by the assessing officer. We observe that the assessee had shown corresponding sales against the said purchases debited and the genuineness of purchases of whole cannot be doubted and only the profit margin embedded in such transaction could be taxed. We observe that in such types of transactions, the assessee purchases the goods from the grey market by making gross payment in cash without bills. The bills are obtained from the third parties and after receipt of cheques such parties adjust the same by providing cash after deducting their commission. Taking all these facts the material purchase in the grey market are always cheaper than the material sourced from the genuine dealer. Before the Id. CIT(A) at para 4.4. of his order the assessee submitted that it had earned gross profit of 2.81% during the year. However, after taking into consideration that assessee has brought the material from the grey market at cheaper rate, therefore we consider that it is fair and reasonable to restrict the said disallowance at the 6% of the impugned purchases. Therefore, the A.O is directed to restrict the disallowance to the extent of 6% of the impugned purchases. Accordingly, the ground no. 3 of the assessee is partly allowed.

10. Ground no. 1 & 2 pertaining to reopening of assessment were not discussed, therefore, the same stand dismissed.

ITA No. 1945/Mum/2022

Ground No. 1 & 2:

11. As the facts and issues involved in these grounds of appeal are same as ITA No. 1944/Mum/2022 as supra, therefore, applying the same findings mutatis mutandis these grounds of appeal of the assessee are also dismissed.

Ground No. 3:

12. As the facts and issues involved in this ground of appeal is same as ITA No. 1944/Mum/2022 as supra, therefore, applying the same findings mutatis mutandis these grounds of appeal of the assessee is partly allowed.

ITA No. 1934/Mum/2022

13. Fact in brief is that the assessment u/s 143(3) r.w.s 147 was completed on 30.03.2015 by determining total income at Rs.11,98,38,110/- after making addition of Rs.11,86,69,553/- on account of bogus purchases made from six parties as discussed supra in this order. Thereafter vide order u/s 271(1)(c) of the Act dated 30.03.2019 the A.O has levied penalty of Rs.3,66,68,890/- for furnishing inaccurate particulars of income.

14. The assessee filed the appeal before the Id. CIT(A). However, the Id. CIT(A) has dismissed the appeal of the assessee.

15. During the course of appellate proceedings before us at the outset the Id. Counsel has vehemently contended that assessing officer has issued notice u/s 274 r.w.s 271(1)(c) dated 30.03.2015 without specifying whether the penalty is levied for concealment of income for

furnishing of inaccurate particular of income. The Id. Counsel has further contended that Hon'ble Jurisdictional High Court of Bombay in the case of Mohd Farhan A. Shaikh Vs. DCIT (2021) 434 ITR 1 (Bom) has held that if there is a defect in notice of not striking off irrelevant matter, the penalty cannot be levied.

On the other hand, the Id. DR has supported the order of lower authorities.

16. Heard both the sides and perused the material on record. The case of the assessee was reopened and assessment u/s 143(3) r.w.s 147 of the Act was completed on 30.03.2015 after making an addition of Rs.11,86,69,553/- on account of bogus purchases. Thereafter, the A.O has levied penalty u/s 271(1)(c) of the Act in respect of addition of bogus purchases.

17. With the assistance of Id. Representative we have gone through the notice u/s 274 r.w.s 271(1)(c) dated 30.03.2015. The relevant part of the notice reproduced as under:


NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF THE INCOME-TAX ACT, 1961
Penalty u/s. 271(1)(c)

PAN: AGUPP6813E

To
Shri HAJARAM P. PUROHIT
33, GANESH BHUVAN,
3RD, KHETWADI LANE,
MUMBAI-400080

Office of the
Dy. Commissioner of Income Tax
Central Circle-5(3), Room no-11
Gr.floor, Aayakar Bhavan,
Mumbai- 400 020
Date: - 30.03.2015.
pen/13/p-1/1475

Whereas in the course of proceeding before me for the assessment year 2011-12 it appears to me that you: -
have without reasonable cause failed to furnish the return of income which you were required to furnish by a notice given under section 22(1)/22(2) 34 of the Indian Income-tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under section 139(2)/148 of the Income Tax Act, 1961. No _____ dated _____ or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said section 139(1) or by such notice.
have without reasonable cause failed to comply with a notice under section 22(4)/23(2) of the Indian Income-tax Act, 1922 or under section 142(1)/145(2) of the Income Tax Act, 1961.
have concealed the particulars of your income or _____ furnished inaccurate particulars of such income.
You are hereby requested to appear before me at 21 /04/ 2015 at 12.30. am/pm and show cause why an order imposing a penalty on you should not be made under section 271 of the Income-tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271(1)(c).

Seal: 

Dy. Commissioner of Income Tax
Central Circle-5(3), Mumbai-5(3)
Dy. Commissioner of Income Tax, Central Circle-5(3)
1977/Mumbai

*Delete inappropriate words and paragraphs.

18. On the perusal of the notice it is clear that assessing officer has not specified whether the penalty is being levied on account of concealment of particulars of income or furnishing of inaccurate particulars of income. In this regard, we have gone through the case of jurisdictional High Court referred by ld. Counsel in the case of Mohd Farhan A. Shaikh Vs. DCIT (2021) 434 ITR 1 (Bom), the relevant part of head note is reproduced as under:

“Section 271(1)(c), read with section 274 of the Income-tax Act, 1961- Penalty - For concealment of income (Recording of satisfaction) -Whether where assessment order clearly records satisfaction for imposing penalty on one or other, or both grounds mentioned in section 271(1) (c), a mere defect in notice-not striking off irrelevant matter would vitiate penalty proceedings. Held, yes Whether since penalty proceedings culminate under a different statutory scheme that remains distinct from assessment proceedings, therefore, assessee must be informed of grounds of penalty proceedings only through statutory notice Held, yes Whether even if notice contains no caveat that inapplicable portion be deleted, it is in interest of fairness and justice that notice must be precise, it should give no room for ambiguity-Held, yes [Paras 181 and 188][In favour of assessee].”

Further we have also perused the decision of coordinate bench of ITAT, Mumbai in the case of M/s Bhavya Shashank Shabhag Vs. DCIT vide ITA No. 4630/Mum/2019 dated 09.07.2021 and the case of Ravi Gehi (HUF) Vs. ACIT vide ITA No. 7002/Mum/2019 wherein on identical issue and similar facts have deleted the penalty after following the decision of Hon’ble jurisdictional High Court in the case of Mohd Farhan A. Shaikh Vs. DCIT (2021) 434 ITR 1 (Bom).

19. In the light of the decision of Hon’ble jurisdictional High Court and the coordinate benches there is nothing before us on hand to differ from the issue raised in the cases cited supra so as to take a different view of this issue. Therefore, since the issue on hand being squarely covered therefore, following the principle of consistency, we find merit in the submission of the assessee and direct the assessing officer to delete the penalty since notice issued u/s 274 r.w.s 271(1)(c) dated 30.03.2015 was bad in law. Since we have deleted the penalty on account of invalid

notice issued u/s 274 r.w.s 271(1)(c) dated 30.03.2015, therefore the other ground on merit are not required to be adjudicated.

20. In the result, the appeal of the assessee is allowed.

ITA No. 1935/Mum/2022

21. As the facts and issues involved in these grounds of appeal are same as ITA No. 1934/Mum/2022 as supra, therefore, applying the same findings mutatis mutandis these grounds of appeal of the assessee is also allowed.

22. In the result, the appeals of the assessee are partly allowed.

Order pronounced in the open court on 23.02.2023

Sd/-

(Aby T Varkey)
Judicial Member

Sd/-

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 23.02.2023

Rohit: PS

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

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

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.