

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM &
MS PADMAVATHY S, AM**

आयकरअपीलसं./ I.T.A. No.353 & 354/Mum/2023
(निर्धारणवर्ष / Assessment Year 2009-10 & 2010-11)

ITO, WARD-1(1). Room No. 23, B-Wing, 6 th Floor, Ashar IT Park, Wagle Industrial Estate, Thane- 400 604	बनाम/ Vs.	MOHD. UMAR TIMBER MART. Near Golden Dyes Co. Highway Service Road, Haridas Nagar, Thane(W)- 400 601
स्थायीलेखासं ./जीआइआरसं ./PAN No. AABFM8610M		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	None
प्रत्यर्थीकीओरसे/ Respondent by	:	Smt. Mahita Nair Sr. AR
सुनवाईकीतारीख/ Date of Hearing	:	11.05.2023
घोषणाकीतारीख / Date of Pronouncement	:	16.05.2023

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

The aforesaid appeals filed by the Revenue against impugned order of even date 22.01.2022, passed by NFAC Delhi, in relation to the penalty proceedings u/s 271(1)(c) for the A.Ys. 2009-10 & 2010-11.

2. In both the years, the common grounds raised by the Revenue reached as under:

1. On the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the assessee had consciously suppressed the particulars of purchases made in grey market and instead furnished inaccurate particulars of income by disclosing higher purchases from hawala entry providers.

2. It is respectfully submitted that the penalty was levied for the additions made on the basis of information received from Law enforcement agency of the State Government of Maharashtra i.e. Sale Tax Department.

3. It is humbly requested that present appeal is being filed in accordance with the CBDT's Instruction No. 3/2018 dated 11/07/2018 amended vide letter dated 20.08.2018 as per para 10(e) of the said circular. Therefore, the order of the CIT (A) may be vacated & that of the Assessing Officer may be restored.

3. The brief in facts are that, the assessee is dealer in timber and wooden items and it is not disputed that the entire purchase and sales have been recorded in the books of account. For the A.Y. 2009-10, Assessee has filed the return of income on 18.09.2010, for the A.Y. 2010-11 the same was duly processed u/s 143(1). Subsequently, based on certain information received from sales tax

department, Maharashtra, giving names and details of certain dealers, who were providing entries for bogus purchase bills, assessee's case was reopened u/s 147. The AO in the assessment order noted that, Assessee has also obtained purchases bills from some of the parties for sums aggregating to Rs. 23,97,933/- in A.Y. 2009-10 and Rs. 18,65,671/- in A.Y. 2010-2011. In both the years, the Ld. Assessing Officer held that GP rate of 12.5% should be estimated to factor the suppressed profit on bogus purchases made from such parties. Now, penalty u/s 271(1)(c) has been levied by the AO on such adhoc estimate on GP rate of 12.5% on some alleged bogus purchases.

4. Before the authorities below it has been stated by the assessee that, he has placed the oral order to the broker and broker had supplied the goods and the suppliers have received the materials and sold the same goods. The payments have been made through cheques and the brokers have collected 4% VAT and paid 2% to produce the bill and he earned 2% commission for giving these bills. The Assessee before the AO has given all the details of opening stock, purchase, sale and closing stock at the time of assessment.

The AO, however, on non-production of the said parties, made an estimated addition @ 12.5% of the amount of bogus purchases of Rs.23,97,933/-.

5. The Ld. CIT (A), has deleted the penalty after observing and holding as under:

3.2 I have considered the submission of the Assessee and perused the penalty order. The appellant during assessment proceedings had stated that he was a dealer in Timber and other wooden items. The Assessee submitted various documentary evidences at the time of assessment. No discrepancies in these evidences/documents filed by the appellant were pointed out by the AO.

3.3 The penalty proceedings are different from assessment proceedings. The penalty proceedings u/s 271(1)(c) being quasi criminal proceeding, the standard of evidence required is much higher than in assessment proceedings u/s 143(3). The Assessee during assessment proceedings u/s 143(3) could not produce the name of the supplier/parties, the genuineness of purchase and also failed to prove to the assessment authority. The AO has not refuted the submission made by the appellant with speaking order but nevertheless proceeded to impose penalty u/s 271(1)(c). Secondly, the addition has been made only on the basis of estimation @12.5% for purchase of bogus bills. It is settled legal

position that when income is estimated, then there can be no question of imposing penalty u/s 271(1)(c) of the Act. In this regard, a reference may be made to the decision of the Hon'ble Delhi High Court in CIT Vs. Aero Traders Pvt. Ltd. (2010) 322 ITR 316 (Del.) wherein it has held that no penalty u/s 271(1)(c) can be imposed when income is determined on estimate basis. The similar view has been taken by the Hon'ble Punjab and Haryana High Court in Harigopal Singh Vs. CIT (2002) 258 ITR 85 (P&H) and Hon'ble Gujarat High Court in CIT Vs. Subhash Trading Co. 221 ITR 110 (Guj.). Moreover, in the assessment order it is mentioned that the appellant has agreed to the addition in order to buy peace and avoid litigation. This is an additional reason which favour the case that penalty should not be imposed on the appellant.

3.4 In light of above, and after careful consideration of the submission of the appellant and the relevant records, penalty amounting to Rs.92,620/- imposed u/s 271(1)(c) is deleted. The appeal of the assessee, is therefore, allowed.

6. None appeared on behalf of the Assessee.

7. After hearing the Ld. DR and on perusal of the impugned order, we find that penalty u/s 271(1)(c) has been levied on estimation of the gross profit on adhoc basis, at the rate of 12% on alleged bogus purchases and assessee's explanation has not been rebutted by the AO either during the assessment proceedings or penalty

proceedings, that it has filed the entire details of purchases and sales, including purchase bills, sales bills and details of opening stock and closing stock and the manner in which assessee has made the purchases and sales through brokers. All the payments made have been through banking channels and there is no dispute regarding the quantitative statement of the purchases along with the bills and corresponding sales along with the copies of proceeding bills. None of these evidences or documents or the copies of sales bills or the quantitative details or the corresponding sales has been found to be incorrect or trading results have been disturbed. It is not a case that in the course of any enquiry conducted by the AO, parties have denied the transaction or it has been found that assessee has made these purchases outside the books. The sources of purchases are from the books and through banking channels and quantitative details of purchases have been accepted. Once the quantitative details of purchases and the corresponding quantitative sales have not been disturbed and has been accepted, then there cannot be any case for levy of penalty on account of alleged bogus purchases. Ultimately, the AO held that at the most there could be element of suppression of gross profit on

the purchases, but such estimated addition alone cannot be the basis for levy penalty u/s. 271(1)(c), The penalty proceedings being separate and distinct from the assessment proceedings and the assessee can explain on the basis of same material facts on record that he has not concealed any particulars of income or furnished any inaccurate particulars of income. The explanation of the Assessee and all the evidences filed before the authorities below have neither been rebutted nor has been found to be incorrect or assessee has failed to substantiate the explanation.

8. Accordingly, the order of the Ld. CIT(A) is deleting the appeal for both the years are confirmed grounds raised by Revenue are dismissed.

9. **In the result, appeal of the Revenue is dismissed.**

Orders pronounced in the open court on 16th May, 2023.

Sd/-

(Padmavathy S)
Accountant Member

मुंबई Mumbai;दिनांक Dated : 16.05.2023

Mrs.Urmila

Sd/-

(Amit Shukla)
Judicial Member

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

.उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai