

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 324/Mum/2023 (A.Y.2011-12)

Nirman Electronics Pvt. Ltd.

4, Annapurna Sadan,
Behind Moonlight
Shopping Centre
Andheri(E)
Mumbai-400 069

PAN: AAACN8193L

..... Appellant

Vs.

CIT/NFAC

Delhi

..... Respondent

Appellant by : Shri Mahesh Saboo
Respondent by : Shri Chetan M. Kacha, Sr. AR

Date of hearing : 17/04/2023
Date of pronouncement : 12/06/2023

ORDER

PER GAGAN GOYAL, A.M:

This appeal by assessee is directed against the order of National Faceless Appeal Centre (for short "NFAC") dated 31.01.2023 u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2011-12. The assessee has raised the following grounds of appeal:-

1) On the facts and circumstances of the case and in law, the authorities below have erred in confirming the levy of penalty of Rs. 3, 28,367/- u/ s. 271(1)(c) of the Income Tax Act and the reasons/ justifications assigned for doing so were wholly wrong and are not in accordance with the facts of the case, and provisions of the Income Tax Act, 1961 and rules made there under.

2) The appellant craves leave to add, alter, modify and delete all or any of the aforesaid grounds of appeals on or before the date of hearing.

2. The brief facts of the case are that assessee filed its return of income on 25-09-2011 declaring total income at Rs 2,49,821/-. Revenue received information from the office of DGIT (Inv); Mumbai that assessee had dealt with certain hawala parties who have accepted that they are into business of giving bogus/ accommodation entries only. These hawala parties have admitted before the sales tax authorities that they are simply issuing bogus entries without physical delivery of goods to the beneficiary's parties. Based on this the Maharashtra VAT authorities had cancelled TIN NO. of these hawala parties. The case of the assessee was reopened u/s. 148 based on this information and assessment was completed u/s. 143(3) r.w.s 147 of the act on 14-03-2016 assessing the total income at 13,12,500/-. Thereby the purchases for an amount of Rs 10,62,678/- being 12.5% of Rs 85,01,430/- were disallowed on account of bogus purchases from various parties mentioned in the assessment order and a penalty proceeding u/s 271(1C) of the act was also initiated for furnishing of inaccurate particulars of income and concealment of income.

3. Assessee being aggrieved against the assessment order filed appeal before the Ld.CIT(A) Mumbai wherein the Ld.CIT(A) confirmed the addition amounting to Rs 10,62,678/- made by the AO on account of bogus purchases. Assessee being further aggrieved with the order of Ld.CIT (A) preferred further appeal before the co-ordinate bench. The co-ordinate bench confirmed the order of the Ld.CIT (A). Thereafter AO proceeded to levy penalty initiated (supra) and imposed a penalty of Rs 328,367/-. Assessee being aggrieved with this order of AO preferred further appeal to the Ld.CIT (A) who in turn confirmed the penalty order passed by AO.

4. Assessee being further aggrieved with the order of Ld.CIT (A) preferred this appeal before us. We have gone through the order of AO, order of Ld.CIT (A) and submissions of the assessee along with grounds of appeal taken by the assessee. It is observed that throughout the submissions assessee try to contest the merits of the assessment order. No doubt penalty proceedings fetch facts and evidence from the assessment order heavily. But in the eyes of law both the proceedings are quite separate despite the fact of interdependence. Assessment order is not before us on record but the order of co-ordinate bench on the same is there on record vide paper book dated 12-04-2023 filed by the assessee. Wherein co-ordinate bench vide ITA No. 1423/Mum/2017 dated 14-09-2017 dealt with assessment order and confirmed the view of AO and Ld.CIT (A). So, the facts of assessment proceedings get finalized as there is no further appeal by the assessee, but one fact is still unchallenged by the department also that they accepted the sales in the books of the assessee and in turn the purchases also. The only

issue in dispute was the element of profit declared by the assessee by virtue of bogus purchase bills.

5. In such type of cases now it's a consistent view of the ITAT and various honorable high courts also that assessee purchased the goods from grey market and to introduce these purchases into regular books of accounts they buy the bogus purchase bills from hawala dealers. In such types of cases the only action the department can take is to estimate the extra profits earned from this type of purchase from grey markets and then cover the same through bogus purchase bills. It is settled propositions that there is no hard and fast rule to quantify the extra profit earned by the assessee in this whole process. The only procedure being adopted is estimation of income i.e., usually the applicable rate of VAT. In such a situation this fact is unchallenged that whatever be the additions made are purely on estimate basis.

6. In case of estimation of income, no penalty can be levied despite explanation -1 to section 271(1) (c) is inserted. AO never challenged the genuineness of sales of the assessee along with other item of trading and profit & loss account. The only objection of AO was with respect to the parties from whom assessee purchased goods and they were on the radar of Maharashtra Sales Tax Department along with parallel enquiry from DGIT (inv.), Mumbai. In such circumstances, only an estimate can be made about extra savings being made by the assessee out of transactions with such party and no positive evidence can be adduced against the assessee, which is *sine qua non* for imposition of penalty.

7. In our considered opinion simply because assessee had not challenged the quantum appeal further, may be on cost-benefit analysis, no penalty in the present matter can be imposed as the department itself is not able to make any concrete case in favor of imposition of penalty. Estimating additional income out of alleged bogus purchase and its acceptance by the assessee is a material fact, but not that much strong a factor to justify imposition of penalty.

8. **In the result, appeal of the assessee is allowed.**

Order pronounced in the open court on 12th day of June, 2023.

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 12/06/2023

Sr. PS (Dhananjay)

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

BY ORDER,

//True Copy//

(Asstt. Registrar)
ITAT, Mumbai