

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
Dr ARJUN LAL SAINI, ACCOUNTANT MEMBER

आ.अ.सं./ITA No.459/SRT/2023 (AY 2007-08)

(Hearing in hybrid mode)

Yogendra Raj U Singhvi, CTS, 95/4/B-3-4/590, Village Dindoshi, Oberoi Garden City, Flat No. 3902, Floor C-Wing, Meter Exquisite, Mumbai. PAN : ANJPS 9745 G	Vs	Income Tax Officer-2(3)(8) Aaykar Bhavan, Majura Gate, Surat-395001
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से /Assessee by	Shri Prakash Jhunjunwala CA & Pawan Jagatia, CA
राजस्व की ओर से /Revenue by	Shri Vinod Kumar, Sr-DR
Date of filing appeal	07.07.2023
सुनवाई की तारीख/Date of hearing	19.10.2023
उद्घोषणा की तारीख/Date of pronouncement	19.10.2023

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee is directed against the order of learned Commissioner of Income tax (Appeals)-29, New Delhi [for short to as 'Ld. CIT(A)'] dated 06.06.2023, which in turn arises against the penalty levied by the Assessing Officer/ ITO 2(3)(8) Surat under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') dated 20.03.2018 for assessment year (AY) 2007-08.
2. Rival submissions of learned authorised representative (AR) for the assessee and the learned Senior departmental representative (Sr DR) for the revenue heard and record perused. The ld AR for the assessee submits that he has raised two fold grounds of appeal and accordingly

have two fold submissions. On primary and first of grounds of appeal the assessee has challenged the validity of notice which was issued by assessing officer in a mechanical manner, without recording the satisfaction, if the notice was for concealment of income or for furnishing inaccurate particulars of income. Thus, in absence of specific charge, the action of the assessing officer is vitiated and the order passed on the basis of such notice is *void ab initio*. To support his submission, the ld AR for the assessee filed copy of notice under section 274 rws 271(1)(c) dated 09.03.2015. The ld AR for assessee by refereeing the contents of such notice submits that the assessing officer has not strike off the inappropriate portion of the notice, in specifying the charges either 'for concealment of income' or for 'furnishing inaccurate particulars of such income'. The ld AR for the assessee submits that he has also filed copy of assessment order to substantiate that no specific charge was mentioned even in the assessment order.

3. On merit of the case the ld AR for the assessee submits that the assessing officer while passing the assessment order under section 143(3) rws 147 dated 09.03.2015 made addition of Rs. 7.15 Crore on account of bogus purchases, which was 100% of the disputed purchases. On appeal before ld CIT(A), the addition was restricted to 5% of entire turnover shown in the profit and loss account. However, on further appeal before, Tribunal the disallowances / additions were restricted to 5% of the disputed purchases, vide order dated 25.07.2019 in ITA No. 2926/Ahd/ 2016. The ld AR for the assessee submits that admittedly the addition was restricted to estimated

addition and no penalty is leviable on such *ad hoc*/ estimated additions. The support his various submissions, the ld AR for the assessee relied on the following decisions;

(A) On the validity of notice;

- Mohd. Farhan A Shaikh Vs DCIT 15 taxmann.com 253 (Bom HC),
- PCIT Vs Basanti Property (P) Ltd 114 taxmann.com 541 (SC),
- CIT Vs SSA's Emerald Meadow 73 taxman.com 248-SC,
- Paresh Surathiya Vs ITO ITA no. 342/Srt/ 2018.

(B) On the submissions of estimated additions;

- Manish Dhiraj Lal Munjal Vs ACIT in Tax Appeal No. 461 & 462 of 2000,
- ITO Vs Bomayawala Readymade Stores (55 taxmann.com 258 Bom),
- Nazar Inmex Pvt Limited Vs ITO In ITA No. 132 &133/SRt/ 2021 and
- ACIT Vs Shivam Project (97 taxmann.com 88 (Surat Trib).

4. On the other hand, the ld Sr DR for the revenue supported the order of lower authorities. The ld Sr DR for the revenue submits that while restricting the additions of bogus purchases, the Tribunal accepted the assessee was indulging in showing the bogus purchases. The finding of the Tribunal is not based on guess work rather it is a definite finding of facts. The finding of Tribunal cannot be said to be mere guess work, so the penalty on the additions restricted by Tribunal should be restricted.

5. We have considered the submissions of both the parties and also deliberated on the various case laws relied by the ld AR for the assessee. We find that the assessing officer while passing the assessment order under section 143(3) rws 147 dated 09.03.2015 made addition of Rs. 7.15 Crore on account of bogus purchases, which was 100% of the disputed purchases. On appeal before ld CIT(A), the

addition was restricted to 5% of entire turnover shown in the profit and loss account vide order dated 19.10.2016. On receipt of the order of CIT(A) dated 19.10.2016 in quantum assessment the assessing officer worked out the disallowance of the impugned purchases at Rs. 2,98,97,701/-. The assessing officer levied penalty under section 271(1)(c) at the rate of 100% of tax sought to be evaded and worked out the penalty of Rs. 1,00,69,015/- vide order dated 20.03.2018. While levying penalty the assessing officer recorded a show cause notice date 06.02.2018 was issued to the assessee and that no reply was filed by assessee. The order of assessing officer in levying the penalty was upheld by Id CIT(A), which is impugned before this Tribunal.

6. We find that on further appeal in quantum assessment before Tribunal the disallowances / additions of impugned purchase were restricted to 5% of the disputed purchases in ITA No. 2926/Ahd/ 2016, vide order dated 25.07.2019. Thus, we find that ultimately the addition was restricted to 5% being average profit ratio in the industry. Such disallowance was restricted by following decisions of various benches of Tribunal and by following some decisions of jurisdictional High Court. In our considered view the addition was ultimately restricted by Tribunal on *ad hoc* to the extent of average profit ratio.
7. We find this combination in Nazar Impex P Ltd (supra) while considering the similar contentions of the parties on levy of penalty on similar estimated additions of similar purchase, deleted the similar penalty under section 271(1)(c) by taking view that no penalty is leviable on estimated additions. While deleting the similar penalty, we

followed the decision of jurisdictional High Court in Vijay Proteins Limited Vs CIT (ITR No. 319 of 1996). In view of the binding decision of jurisdictional High Court, which otherwise have followed in many cases, therefore, respectfully following the same, we do not find any justification in levying the penalty by assessing officer on the additions of bogus purchase, which were ultimately restricted on estimation average of profit in the similar business. Thus, the assessee succeeds on his secondary submission. Considering the fact that assessee succeeds on his secondary submission, therefore adjudication on other submissions has become academic.

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

Order pronounced in the open court on 19/10/2023.

Sd/-
(Dr ARJUN LAL SAINI)
[लेखा सदस्य/ACCOUNTANT MEMBER]
MEMBER]

Surat, Dated: 19/10/2023

Self/ Author

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

// True Copy //

Sd/-
(PAWAN SINGH)
[न्यायिक सदस्य JUDICIAL

By order

Sr.P.S./Assistant Registrar, ITAT, Surat