

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI
BEFORE SHRI AMARJIT SINGH, AM AND MS. KAVITHA RAJAGOPAL, JM

ITA No.3565/Mum/2023
(Assessment Year: 2011-12)

K P Sanghvi & Sons LLP 12A-03, Crescenzo, C-38/39, G – Block, Bandra Kurla Complex, Bandra East, Mumbai-400 051	Vs.	Asst. CIT-19(2) Mumbai
PAN/GIR No. AA AFK 8390 F		
(Assessee)	:	(Respondent)
Assessee by	:	Shri Ashish Gogri
Respondent by	:	Shri P. D. Chougule
Date of Hearing	:	15.02.2024
Date of Pronouncement	:	29.02 .2024

ORDER

Per Kavitha Rajagopal, J M:

This appeal has 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) passed u/s.250 of the Income Tax Act, 1961 (‘the Act’), pertaining to the Assessment Year (‘A.Y.’ for short) 2011-12.

2. The solitary issue involved in this appeal is the penalty levied u/s. 271(1)(c) of the Act amounting to Rs.4,20,540/-.
3. The appeal is filed with a delay of 20 days where the assessee has sought for condoning the said delay and on perusal of the Affidavit filed by the assessee, we deem it fit to condone the delay in filing the present appeal. Delay condoned.
4. The brief facts are that the assessee is engaged in the business of manufacturing and wholesale trading of cut and polished diamonds and had filed its return of income

dated 28.09.2011 declaring total income at Rs.41,43,49,462/- during the year under consideration. The assessee's case was selected for scrutiny and the assessment order dated 27.03.2015 was passed by the Id. Assessing Officer ('A.O.' for short) u/s. 143(3) of the Act where the Id. A.O. made an addition of Rs.2,47,45,023/- towards bogus purchases and Rs.1,24,13,323/- on the additional depreciation claimed by the assessee and determined the total income at Rs.45,15,07,810/-. The Id. A.O. also initiated the penalty proceedings u/s. 271(1)(c) of the Act for furnishing inaccurate particulars and for concealment of income. The Id. CIT(A) in the quantum appeal had initiated the addition to 5% instead of 100% on the bogus purchase. The Id. A.O. then passed the impugned penalty order u/s. 271(1)(c) of the Act dated 28.03.2018 thereby levying a penalty of Rs.4,20,540/- being 100% of the amount of tax sought to be evaded on the quantum upheld by the Id. CIT(A).

5. The assessee was in appeal before the Id. CIT(A) who upheld the impugned penalty levied on the alleged bogus purchases made by the assessee from various hawala parties.

6. The assessee is in appeal before us, challenging the order of the Id. CIT(A).

7. The learned Authorised Representative ('Id. AR' for short) for the assessee contended that it is a settled proposition of law that when addition has been made on estimate basis, no penalty can be levied u/s. 271(1)(c) of the Act. The Id. AR relied on the decision of the co-ordinate bench in the case of *Mun Gems vs. Asst. CIT* [2023] 108 ITR(T) 276 (Mum-Trib), *M/s. V. K. Ispat & Alloys* (in ITA No. 2326 & 2325/Mum/2022

vide order dated 24.01.2023 and *Shri Poonam K. Prajapati vs. ITO* (in ITA No. 1953/Mum/2022 vide order dated 30.11.2022).

8. The learned Departmental Representative ('ld.DR' for short), on the other hand, controverted the said fact and relied on the orders of the lower authorities.

9. We have heard the rival submissions and perused the materials available on record. It is observed that the assessee is alleged to have purchased cut and polished diamonds from (1) M/s. Aadi Impex (2) M/s. Kalash Enterprises and (3) M/s. Daksh Diamonds which aggregates to Rs.2,47,45,023/-. The ld. A.O. held the same to be bogus purchase on the premise that the assessee has received accommodation entries from the above mentioned entities which are sought to be managed and controlled by Bhanwarlal Jain & Famil and Rajendra Jain Group concerns. The assessee contended that the purchases and sales are duly recorded in purchase and sales register that form part of the books of accounts of the assessee and the quantitative details of the cut and polished diamonds are reflected in the tax audit report which the assessee is bound to u/s.44AB of the Act. The assessee further stated that it is said to have filed the relevant documents such as copy of invoices, ledger extracts, payment documents, bank account statement, PAN/VAT registration details of above parties, etc. for the purpose of substantiating its claim. The submission of the assessee was found to be not tenable to the ld. A.O., thereby holding the same to be bogus purchases. The ld. A.O. added 100% of the alleged purchase made from the above party.

10. The first appellate authority, on the other hand, in a appeal prayed by the assessee, restricted the addition to 5% of the alleged bogus purchase and made an addition of

Rs.12,37,251/- as against the addition made by the ld. A.O. amounting to Rs.2,47,45,023/-. The impugned penalty of Rs.4,20,570/- was levied on the quantum of addition confirmed by the ld. CIT(A).

11. In the above factual matrix, the ld. AR had relied on the following decisions where the co-ordinate benches have held that the penalty u/s. 271(1)(c) of the Act cannot be levied, where addition has been made on estimate basis on alleged bogus purchases. The ld. AR brought our attention to the operative part of the order of the co-ordinate bench in the case of *M/s. V. K. Ispat & Alloys* (supra) which we have extracted hereunder for ease of reference:

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 ld. 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 ld. CIT(A).*

12. As the facts of this appeal are identical to the above said decision, we hereby hold that the penalty u/s. 271(1)(c) of the Act cannot be levied where the addition has been

made on estimate basis on the gross profit on alleged bogus purchase. We, therefore, direct the ld. A.O. to delete the impugned penalty levied u/s. 271(1)(c) of the Act.

13. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 29.02.2024

Sd/-

Sd/-

(Amarjit Singh)
Accountant Member

(Kavitha Rajagopal)
Judicial Member

Mumbai; Dated : 29.02.2024

Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai