

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

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &
SHRI RAJ KUMAR CHAUHAN, JUDICIAL MEMBER,**

**ITA Nos.4402 to 4404/Mum/2023
(A.Ys. 2009-10 to 2011-12)**

Bhuraram V. Choudhary 126/8, Dr. M.G. Mahimtura Marg, 3 rd Kumbharwada, Mumbai - 400004	Vs.	Income Tax Officer, Ward 19(1)(2), Matrumandir Income Tax Office, Opp, Bhatia Hospital Tardeo, Mumbai - 400007
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: ADWPC8702A		
Appellant	..	Respondent

Appellant by :	Ravi Gupta
Respondent by :	Ashok Kumar Ambastha

Date of Hearing	20.06.2024
Date of Pronouncement	10.07.2024

आदेश / O R D E R

Per Amarjit Singh (AM):

All these 3 appeals filed by the assessee are directed against the different order of ld. CIT(A) NFAC of the Income Tax Act, 1961 for Assessment Year 2009-10 to 2011-12. Since similar issue on identical facts are involved in these cases, therefore for the sake of convenience all these appeals are adjudicated together by this common order by taking ITA No. 4402/Mum/2023 as a lead case and its finding will be applied mutatis mutandis to the other appeals wherever it is applicable.

ITA No. 4402/Mum/2023

1. *On the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals) NFAC erred in confirming the order passed under section 271(1)(c) by the Assessing Officer levying penalty of Rs.2,18,350.*
2. *On the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals) NFAC erred in ignoring the facts that the additions made on estimated basis on account of difference in gross profit margin from sales against purchases from the party alleged to be non-genuine on which the penalty u/s 271(1)(c) is levied.”*

2. The fact in brief is that return of income declaring total income of Rs.3,05,780/- was filed on 24.09.2009. The return of income was processed u/s 143(1) of the Act. Subsequently, information was received from the DGIT(Inv.) on the basis of communication received from the Sale Tax Department relating the parties indulged in providing and availing accommodation entries of non-genuine purchases. The assessee who was engaged in trading in ferrous/non-ferrous metals and his name was appeared in the list provided by the Maharashtra Sales Tax Department. The assessee had made purchases of Rs. 1,08,71,191/- without delivery of goods as reported in the list of Sales Tax Department from 10 different parties as mentioned at page no. 2 of the assessment order. Therefore, the case of the assessee was reopened u/s 147 of the Act by issuing of notice u/s 148 of the Act on 21.03.2014. On query the assessee has submitted purchase details along with comprising sales and bills along with stock details etc. However, the assessing officer has not agreed with the submission of the assessee and on the basis of facts as discussed above added 12.5% of the aforesaid purchases to the amount of Rs.13,58,899/- being profit element involved on account of non-genuine purchases. The ITAT vide order dated 06.08.2018 has restricted the disallowance to the extent of 6.5 of impugned purchases of Rs. 1,08,71,191/-.

3. The assessing officer has also initiated penalty proceedings u/s 271(1)(c) r.w.s 274 of the Act vide order u/s 271(1)(c) of the Act dated

29.03.2019, the AO has levied penalty of Rs. 2,18,350/- for furnishing inaccurate particulars of income.

4. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) upheld the penalty levied by the assessing officer.

5. During the course of appellate proceedings before us the ld. Counsel submitted that impugned penalty levied is bad in law without proving concealment of particulars of income and assessing officer also failed to disprove the claim of the assessee that he had actually made the purchases. The ld. Counsel also placed reliance on the decision of ITAT, Mumbai in the case of Jatin Enterprises Vs. ACIT 19(2), vide ITA No. 3885/Mum/2023 dated 21.03.2024.

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

6. Heard both the sides and perused the material on record. The case was reopened u/s 147 of the Act on the basis of information received from investigation wing regarding bogus purchases made by the assessee during the year under consideration as discussed supra in this order. The assessing officer stated that assessee failed to prove the genuineness of the purchases made from the parties listed in the list received from the Sales Tax Department, therefore estimated the profit element embedded in such purchases at 12.5% of the purchase amount of Rs. 108,71,191/- and made addition of Rs.13,58,899/- to the total income of the assessee. During the course of assessment, the assessee has furnished detail of purchases and other documentary evidences connected with the purchases made from the said dealers as referred at para 7 of the assessment order by the assessing officer reproduced as under:

“Similarly, details of corresponding sales of goods were also called for as per annexure-B and link the purchase with sales supported by bills and vouchers and reflection in the stock register of its entry and exit item by item. The assessee was also asked to produce books of accounts, bills and vouchers for verification but could not link the purchases with that

of corresponding sales. The assessee produced books of accounts for verification. However, the AR of the assessee vide his written submission dated 12.03.2015 sated that

The assessee has already submitted purchase details alongwith correspondence sales and bills along with stock details. The assessee firmly believes that there are valid reasons for not treating purchases as fictitious and also believes that no addition on account of disallowance of purchase should be made.

The assessee has request to consider the case amicably. Assessee plead for non-levy of penalty of prosecution as consent letter is given to buy peace of mind and avoid further litigation cost, since the assessee has submitted all the documentary evidences in connection with the purchases from the said dealers. Kindly consider the same.”

However, the assessing officer has not agreed with the submission of the assessee and estimated profit element embedded in impugned purchases at 12.5% of the purchase amount of Rs.108,71,191/-. However, the ITAT has restricted such amount of disallowance to the extent of 6.5% of such purchases. The Assessing Officer had only made estimation addition of profit element involved in such amount of purchases made from the dealers which were listed by the Sale Tax Department involved in providing accommodation bills without supplying the goods. We have also perused the decision of ITAT, Mumbai as referred by the ld. counsel in the case of Jatin Enterprises Vs. ACIT-19(2) dated 21.03.2024 where on identical fact also the CIT(A) has restricted the addition to the extent of 12.5% on estimation basis. The ITAT has deleted the penalty holding that penalty levied u/s 271(1)(c) of the Act on estimation addition is unsustainable. The relevant extract of the decision of the ITAT is reproduced as under:

“4. We have heard the submissions made by rival sides. It is an undisputed fact that the Assessing Officer has made addition in the case of assessee on account of alleged bogus purchases. The Assessing Officer made addition of 100% of unproved purchases, the CIT(A) restricted the addition to 12.5% of such

purchases. The addition made by the Assessing Officer and subsequently restricted by the CIT(A) to 12.5% is merely on estimations.

5. The Hon'ble Rajasthan High Court in the case of CIT vs. Krishi Tyre Retreading and Rubber Industries reported as 360 ITR 580 has held that where addition is made purely on estimate basis, no penalty u/s. 271(l)(c) of the Act is leviable. Similar view has been expressed by the Hon'ble Punjab & Haryana High Court in the case of CIT vs. Sangrur Vanaspati Mills Ltd. reported as 303 ITR 53. The Hon'ble High Court approving the order of Tribunal held that when the addition has been made on the basis of estimate and not on any concrete evidence of concealment, penalty u/s. 271(l)(c) of the Act is not livable. The Hon'ble Gujarat High Court in the case of CIT vs. Subhash Trading Co. Ltd. reported as 221 ITR 110 has taken a similar view in respect of penalty levied u/s. 271(l)(c) of the Act on estimated additions. There are catena of decisions by different High Courts and various Benches of the Tribunal wherein penalty levied u/s. 271(l)(c) of the Act on estimated additions has been held to be unsustainable.

6. Thus, in the facts of the instant case and the decisions referred above, we hold penalty levied u/s. 271(1)(c) of the Act unsustainable. Ergo, the Assessing Officer is directed to delete the penalty.”

In the case of the assessee the supporting material as referred at para 7 of the assessment order was furnished however the addition on estimation basis of 12.5% of the purchase amount was made on the ground of extra profit earned by the assessee on such purchases because the parties were involved in issuing accommodation bills of purchases as per the information supplied by the Sales Tax Department. It is clear that in the case of the assessee the addition was made on estimation basis therefore following the decision of ITAT as referred supra we consider that penalty levied in the case of the assessee on estimated addition is not sustainable. Therefore, the penalty levied is deleted. Accordingly, both the grounds of appeal of the assessee are allowed.

7. The appeal of the assessee is allowed.

ITA No. 4403/Mum/2023 (AY: 2010-11)

8. Since we have adjudicated the similar issue on identical facts vide ITA No.4402/Mum/2023 while adjudicating the appeal of the assessee

for A.Y. 2009-10 as supra in this order therefore applying the same finding as mutatis mutandis this ground of appeal of the assessee is also allowed.

ITA No. 4404/Mum/2023 (AY: 2011-12)

9. Since we have adjudicated the similar issue on identical facts vide ITA No.4402/Mum/2023 while adjudicating the appeal of the assessee for A.Y. 2009-10 as supra in this order therefore applying the same finding as mutatis mutandis this ground of appeal of the assessee is also allowed.

10. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open court on 10.07.2024

Sd/-
(Raj Kumar Chauhan)
Judicial Member

Sd/-
(Amarjit Singh)
Accountant Member

Place: Mumbai
Date 10.07.2024
Rohit: PS

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

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

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

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