

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER

ITA No. 467/Mum/2024
(Assessment Year 2009-10)

Alpa Rajesh Desai 15/32, Navjivan Society, Lamington Road, Mumbai-400 008 PAN : AELPD3053K	vs	ITO 19(1)(1), Mumbai Piramal Chambers, Mumbai-400020
APPELLANT		RESPONDENT

Assessee by : Ms. Mona Solanki
Respondent by : Shri Manoj Kumar Sinha(SR.DR.)

Date of hearing : 11/07/2024
Date of pronouncement : 22/ 07/2024

ORDER

PER ANIKESH BANERJEE, J.M:

Instant appeal of the assessee is preferred against the order of the Learned National Faceless Appeal Centre, Delhi [for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), for Assessment Year 2009-10, date of order 23.01.2024. The impugned order was emanated from the order of the Ld. Income-tax Officer, Ward 19(1)(1), Mumbai (in short, 'the

A.O.) passed under section 271(1)(c) r.w.s. 274 of the Act date of order 29/02/2019.

2. The assessee has taken the following grounds:-

"1. On the facts and in the circumstances of the case and in law, the CIT(A), hereinafter referred to as the Ld.CIT(A) has levied Penalty u/s. 271(1)(c) of Rs.26,076/-. The penalty may please be deleted.

2. The Assessee craves leave to add, alter, amend or drop any Grounds of Appeal at the time of the Appeal Proceedings."

3. Brief facts of the case are that the assessment was framed under section 143(3) / 147 date of order 16/03/2015 with an addition @ 12.5% on purchase value of Rs.18,75,349/- as the said purchases is taken as bogus purchase and the profit is estimated amount to Rs.2,34,419/-. The assessee filed an appeal before the Id. CIT(A) and Id. CIT(A) passed an order U/s 250 of the Act and reduced the gross profit @4.50% on bogus purchase as the assessee already declared the gross profit. So, the addition is restricted to Rs. 84,390/- which is @4.50% on bogus purchase amount to Rs. 18,75,349/-. The Ld.AO initiated the penalty proceeding U/s 271(1)(c) r.w.s. 274 of the Act and the penalty is levied amount to Rs.26,076/-i.e.,@100% of tax sought to be evaded. The aggrieved assessee filed an appeal before the Id. CIT(A). The Id. CIT(A) upheld the penalty order and confirmed the penalty. Being aggrieved on appeal order the assessee filed an appeal before us.

4. The Ld.AR argued that the addition was made on the basis of estimation and the Ld. CIT(A) also reduced the percentage of profit for addition of income on the unexplained purchase.

5. The Ld. DR fully relied on the order of the revenue authorities.

6. We heard the rival submission and considered the documents available in the record. The entire addition was made on the basis of the gross profit percentage on bogus purchases. The Id. CIT(A) reduced the percentage of addition of gross profit from @12.5% to @4.5% & restricted the addition amount to Rs.84,390/- and further, the penalty is levied @100% on tax sought to be evaded i.e. amount to Rs.26,076/- U/s 271(1)(c) of the Act. The Ld.AR relied on the order of the co-ordinate bench of Mumbai **Fancy Diamonds India Pvt. Ltd vs. DCIT 5(1)(1), Mumbai in ITA Nos961 to 963/Mum/2023**, date of pronouncement **20/06/2023** The relevant part of the order is reproduced as below: -

“6. We heard the rival contentions and perused the record. We noticed earlier that the Assessing Officer has estimated profit on alleged bogus purchases @ 12.5%, which was reduced to 6% by Ld. CIT(A). Admittedly, addition has been made on an estimated basis in all the three years under consideration. The question is whether penalty under Section 271(1)(c) of the Act could be levied on addition made on estimated basis. This question was examined by the co-ordinate bench in assessee’s own case and it was held that penalty under Section 271(1)(c) of the Act is not leviable on addition made on estimated basis. For the sake of convenience, we extract below the operative portion of the order passed by the co-ordinate bench in Assessment Year 2013-14 :-

“9. We have heard the submissions made by rival sides and have examined the orders of the authorities below. Undisputedly, the additions made on account of bogus purchases were partially confirmed by the Tribunal. The assessee failed to discharge its onus in proving genuineness of the purchases and dealers. During assessment proceedings, the addition was made on estimation @ 12.5%. In the first appeal, the addition was restricted to 3% and on further appeal to the Tribunal by the Revenue, the addition was enhanced to 6%. The entire addition right from assessment stage to the Tribunal was merely on estimations. There is no definite finding on the quantum of concealment

of income. It is an accepted legal position that penalty under section 271(1)(c) of the Act levied on additions made merely on estimations is unsustainable.

10. 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(1)(c) of the Act is leviable. A similar view has been expressed by 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(1)(c) of the Act is not leviable. 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(1)(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(1)(c) of the Act on estimated addition has been held to be unsustainable.

11. In the result, the impugned order is upheld and the appeal of Revenue is dismissed."

7. Since the facts of the issue under consideration are identical with the facts of the appeal pertaining to Assessment Year 2013-14 decided by the coordinate bench, following the said decision, we hold that the penalty levied under Section 271(1)(c) of the Act is liable to be cancelled in the instant cases since the additions have been made on estimated basis. Accordingly, we set-aside the orders passed by the Ld. CIT(A) in all the three years under consideration and direct the Assessing Officer to delete the penalty levied under Section 271(1)(c) of the Act in all the three years under consideration.

8. In the result, all the three appeals filed by the assessee are allowed."

7. In our considered view the penalty on the basis of the estimated addition cannot be sustained. We respectfully relied on the order of the co-ordinate bench in case of **Fancy Diamonds India Pvt. Ltd.(supra)**. We set aside the

impugned appeal order and direct to delete the penalty levied U/s 271(1)(c) of the Act amount to Rs. 26.076/-.

8. In the result, appeal of the assessee **ITA No. 467/Mum/2024** is allowed.

Order pronounced in the open court on 22nd day of July, 2024.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 22/07/2024

Pavanan

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
5. गार्डफाइल/Guard file.

sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

BY ORDER,

(Asstt. Registrar), ITAT, Mumbai