

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "B", MUMBAI**

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

**ITA Nos. 1766, 1783 & 1812/Mum/2024
Assessment Years: 2010-11, 2012-13 & 2014-15**

DCIT – 5(2)(1), Mumbai	Vs.	Nakodiam Diamonds Private Limited EC 1160, Bharat Diamond Bourse, Bandra Kurla Complex, Bandra East, Mumbai-400051. PAN: AABCC 5715 G
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Prateek Jain
Revenue by : Shri Ashok Kumar Ambastha, Sr. DR

Date of Hearing : 26.06.2024

Date of Pronouncement : 30.07.2024

ORDER

PER AMARJIT SINGH, ACCOUNTANT MEMBER:

All these three appeals filed by the revenue are directed against different orders of ld. CIT(A), NFAC, Delhi pertaining to A.Y. 2010-11, 2012-13 & 2014-15. All these appeals are adjudicated together by taking the ITA No. 1766/Mum/2024 as a lead case and its findings will be applied mutatis mutant to the other appeal wherever applicable.

2. Fact in brief is that return of income declaring total income at Rs. 92,46,304/- was filed on 20.04.2017. Subsequently the case was reopened by issuing of notice u/s 148 of the Act on the basis of information received from the Investigation Wing of the Department that the assessee had received accommodation entries

of bogus purchases from the party named Kangan controlled by Bhanwarlal Jain Group to the amount of Rs. 1,10,68,895/-The assessment u/s 147 of the Act was made on 29.06.2017 and the AO has estimated profit earned on such bogus suspicious transactions @ 12.5% at Rs. 9,38,373/- and added the same to the total income of the assessee. The AO has also initiated penalty proceedings for furnish inaccurate particulars of income by issuing of notice u/s 271(1)(c) r.w.s. 274 of the Act on 29.06.2017. In the appeal, the ld. CIT(A) has restricted the addition to the extent of 2% of the bogus purchases. The assessing officer has levied penalty of Rs. 68,405/- u/s 271(1)(c) of the Act vide order dated 04.02.2022.

3. The assessee filed appeal before the ld. CIT(A). The ld. CIT(A) has deleted the penalty levied an estimate basis following the decision of ITAT, Mumbai in the case of Sanjay Lalchand Bhatija vs ITO vide ITA No. 7141/M/2017.

4. Heard both the sides and perused the material on record. The case of the assessee was reopened on the basis of information received from Investigation Wing that assessee had obtained accommodation entries of bogus purchases from the entity that indulged in providing accommodation entries without actual delivery of goods. Therefore, the AO has estimated the profit element embedded in such purchases at 12.5% of the purchase amount of Rs. 92,46,304/- and made addition of Rs. 9,38,373/- to the total income of the assessee. During the course of assessment, the ld. CIT(A) has restricted the such addition to the extent of 2% of the purchase amount to Rs. 2,21,378/-. The AO has levied penalty of Rs. 68,405/- u/s 271(1)(c) of the Act on the such

disallowance. The ld. CIT(A) has deleted the penalty levied on estimate basis after following the decision of the ITAT, Mumbai as referred above in this order. The relevant extract of the decision of CIT(A) is reproduced as under:

“In this context, the jurisdictional ITAT in the case of Shri Sanjay Lalchand Bathija vs ITO bearing ITA No. 7141/Mum/2017 held as under:

“We have considered rival submissions and perused material on record. At the outset, we must observe that the penalty under section 271(1)(c) or the Act was imposed on the addition or 38,80,265/- representing the quantum of alleged non-genuine purchases. However, the Tribunal while deciding the quantum appeal of the assessee, in the order referred to above, has restricted the addition to 12.5% of the disputed purchases. Therefore, to that extent, the penalty imposed under section 271(1) (c) of the Act has to be revised. Be that as it may, undisputedly, on the basis of information received from the Sales Tax Department, Government of Maharashtra, that certain purchases made by the assessee are not genuine, the Assessing Officer has treated the said purchases to be bogus and added back to the income of the assessee.

The subject addition was also confirmed by learned Commissioner (Appeals). However, while considering assessee's appeal on the issue, the Tribunal having found that the Departmental Authorities have not disputed the sales effected by the assessee and further, the payment in respect of purchases effected were made through banking channel and also the purchases were entered in the stock register, had concluded that the assessee might have purchased the goods from grey market to save VAT and to regularize such purchases has obtained the possibility of accommodation bills. Accordingly, to take care of any of profit, the Tribunal, leakage of Revenue on account of Suppression has estimated the profit on bogus purchases @ 12.5% and restricted the addition to that extent. Thus, from the aforesaid facts, it is very much clear that what the assessee failed to prove is the source of purchase of goods. Otherwise, there is no dispute with regard to the fact that the assessee had purchased the goods, though, may not be from the declared source but from some other source. The failure on the part or the assessee to prove the source or purchases could be for various reasons, which in some cases may even turn out to be valid. Thus, in such circumstances, once the probable leakage of revenue has been taken care of by estimating its profit, there is no need to penalize the assessee any further by imposing penalty under section 271(1)(c) of the Act. More so, when the addition has

been finally made on estimate basis. In view of the aforesaid, we have no hesitation in deleting the penalty imposed under section 271(1)(c) of the Act. Grounds are allowed.

Respectfully following the jurisdictional ITAT, I direct the AO to delete the penalty imposed.”

5. The ld. DR has referred the decision of Hon'ble Allahabad High Court in the case of ITO vs R.K. Brothers (2003) 871 ITD 649 as mentioned by the revenue in ground no. 2 of the appeal. We consider that facts of that case are distinguishable from the case of the assessee. In the case referred there was specific discrepancy since the assessee had shown receipt of the amount of Rs. 19,41,233/- on which net profit of Rs. 99,960/- was shown, however, during the course of assessment on examination of the bank account of the assessee, the assessing officer found that assessee has received total amount of Rs. 23,82,732/- as against amount of receipt of Rs. 19,41,233/- shown by the assessee and the assessee could not explain the same. However, in the case of the assessee, there was no such specific discrepancy found by the assessing officer during the course of assessment and the addition was made only on estimate basis without disproving the corresponding sales against the purchase shown by the assessee as discussed supra in this order.

6. On the similar issue, ITAT Mumbai in the case of Bhuraram V. Choudhary vs ITO vide ITA No. 4402 to 4404/Mum/2023 dated 10.07.2024 held that penalty levied on estimated addition is not sustainable. The relevant extract of the decision is reproduced as under:

“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.”

7. Following the decision of ITAT, we don't find any infirmity in decision of Id. CIT(A) for deleting the penalty levied on the estimated addition made by the assessing officer as discussed supra in this order. Therefore, all the grounds of the appeal of the revenue are dismissed. Accordingly, the appeal of the revenue stand dismissed.

ITA 1783/Mum/2024

"1. Whether on the facts and in the circumstances of the case ad in law, the Ld. CIT (A) was justified in deleting the penalty levied u/s 271(1)(c) of the I.T. Act observing that the same was levied on addition made on estimate basis ignoring the fact that the addition on which the penalty was levied on the basis of information received from the Investigation Wing of the department of suspicious purchases made by the assessee?"

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in deleting the penalty levied u/s 271(1)(c) off the I.T. Act considering that the disallowance made in this case on percentage basis of bogus purchases at par with addition made on the estimated basis in the referred judgements ignoring the fact that the Hon'ble Allahabad High Court in the case of ITO Vs. RK Brothers (2003) 87 ITD 649(A1) wherein it was held that concealment of income apparent from records, penalty for concealment can be imposed even on the basis of estimation of income.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in deleting the penalty levied u/s 271(1)(c) of the I.T. Act observing that the same was levied on addition made on estimate basis ignoring the fact that the evidence uncovered during search or survey proceedings has evidentiary value and is considered true as per the provisions of section 292C of the Act."

4. The appellant prays that the order of the CIT(A) on the grounds be set aside and confirm the order of the AO.

5. The appellant craves leave to add, amend or alter all or any of the grounds of appeal."

8. Since similar issue on identical fact, we have adjudicated in the case of the assessee itself vide ITA 1766/Mum/2024 as

discussed supra in this order where similar penalty levied on addition made on estimate basis was deleted following the finding of the ITAT as discussed. Applying the finding of the ITA 1766/Mum/2024 mutatis mutandis all the grounds of appeal of revenue are dismissed. Therefore, appeal of the revenue is dismissed.

ITA 1812/Mum/2024

9. Fact in brief is that assessee filed return of income on 29.09.2012 declaring total income at Rs. 2,13,25,320/-. Subsequently on the basis of information received from DCIT, Central Circle Surat that assessee has entered into fictitious transaction with entities controlled and managed by Shri Rajendra Jain, Shri Sanjay Choudhary & Shri Dharmichand Jain group in whose cases a search and seizure operation was carried out. 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 29.03.2019.

During the course of assessment, the assessing officer held that assessee has entered into accommodation transactions of bogus purchases to the tune of Rs. 1,40,90,804/- through above mentioned group of concerns and thereby made addition @ 12.5% (profit element involved in the transaction) amounting to Rs. 17,61,351/-.

10. The assessee filed appeal before the ld. CIT(A). The ld. CIT(A) has restricted the addition to the extent of 2% of the bogus purchases after following the decision of ITAT in the case of assessee itself dated 30.10.2017.

11. Heard both the sides and perused the material on record. The case of the assessee was reopened u/s 147 of the Act on the basis of information received that assessee had entered into accommodation transactions of bogus purchases with the entity of the above referred group of Shri Rajendra Jain, Shri Sanjay Choudhary & Shri Dharmichand Jain. The assessing officer has made estimated addition @ 12.5% of bogus purchases to the tune of Rs. 1,40,90,804/- made from the alleged parties being profit element embedded in the aforesaid transaction amounting to Rs. 17,61,351/-. The ld. CIT(A) has restricted the addition to the extent of 2% of the alleged bogus purchases after following the decision of ITAT. The relevant extract of the decision of ld. CIT(A) is reproduced as under:

“10. As could be seen from the above that the Coordinate Bench while sustaining the order of the Ld. CITA) also considered the report of Task Group for Diamond Sector submitted to Department of Commerce, wherein it was submitted that net profit in diamond manufacturing is in the range of 1.5 to 4.5 and in trading it is in the range of 1 to 3. The assessee before us submitted that he is into 100 exports of trading of cut and polish diamonds. The Task Group for Diamond Sector submitted to Department of Commerce also suggests that the profit margin in trading of goods is in the range of 1% to 3%. In the circumstance we direct the Assessing Officer to estimate the profit element from the purchases treated as non-genuine at the rate of 2% uniformly for ail the Assessment Years 2007-08, 2008-09, 2010-11, 2011-12 and 2013-14.....

12. Following the decision of the ITAT as referred in the finding of ld. CIT(A), we do not find any reason to interfere in the decision of ld. CIT(A) in restricting the estimated addition to the extent of 2% of the alleged bogus purchases as discussed supra in this order. Therefore, all the grounds of appeal of the revenue are dismissed. Accordingly, this appeal of the revenue is dismissed.

13. In the result, all the appeals of the revenue are dismissed.

Order pronounced in the open court on 30.07.2024.

Sd/-
(RAJ KUMAR CHAUHAN)
JUDICIAL MEMBER

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Mumbai, Dated: 30.07.2024
Biswajit, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:
3. The CIT,
4. The CIT (A)
5. The DR

//True Copy//

By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai