

IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH 'G', MUMBAI

**BEFORE SHRI AMARJIT SINGH, HON'BLE ACCOUNTANT MEMBER
AND MS. KAVITHA RAJAGOPAL, HON'BLE JUDICIAL MEMBER**

ITA No. 2742/Mum/2023 (A.Y. 2011-12)

ITA No. 2745/Mum/2023 (A.Y. 2010-11)

Gautam Tajraj Shah Neo Ornate Towers, Flat No 1301, 13 th Floor, 75/83, Nanubhai Desai Road, Mumbai-400004. PAN: ABIPS 9227 Q	vs	ITO, Ward-19(1)(1), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Sanjiv M. Shah, Advocate
Revenue by : Shri Akshay Tapdiya, Sr. DR

Date of Hearing : 22.11.2024

Date of Pronouncement : 09.01.2025

ORDER

PER AMARJIT SINGH, AM:

Both the appeals filed by the assessee are directed against the different order for sustaining the penalties levied by the assessing officer on estimated addition made in the assessment order passed u/s 143(3) r.w.s. 147 of the Act for the A.Y. 2010-11 & 2011-12. Since both these appeals are based on similar issue on identical fact, therefore, for the sake of convenience both these appeals are adjudicated together by taking the ITA 2742/M/2023 for A.Y. 2011-12 as lead and its finding will be applied to the other appeal mutatis mutandis.

ITA No. 2742/M/2023 (A.Y. 2011-12)

“On the facts and circumstances of the case and in law, the ld. CIT(A) erred in confirming levy of penalty of Rs. 5,55,197/- u/s 271(1)(c) of the

Act being alleged tax sought to be evaded solely on the basis of order passed u/s 143 r.w.s. 147 of the Act without proving furnishing of inaccurate particulars of income.

On the facts and circumstances of the case and in law the ld. CIT(A) erred in confirming levy of penalty even though the notices issued by the AO u/s 271(1)(c) of the Act is/are vague and hence the penalty order is unsustainable.

On the facts and circumstances of the case and in law the ld. CIT(A) erred in confirming levy of penalty on additions made on estimation basis.”

2 There was a delay of 374 days in filing this appeal by the assessee. Before us, the assessee filed affidavit dated 04.07.2024 for condoning the impugned delay in filing the appeal. In the affidavit, it is reported that assessee has given his g-mail address as ritusteel@gmail.com in the income tax portal along with his PAN Number as login id. The assessee, Shri Gautam Tejraj Shah further reported that e-mail id and password was accessible to the assessee only, however, his e-mail remains inactive since assessee was suffered from corona virus and heart ailment and subsequently undergone heart surgery in November, 2020. Therefore, the assessee missed out the mail containing order of ld. CIT(A) dated 27.05.2022 against which the appeal was to be filed before the ITAT. The assessee came to know about the penalty sustained by the ld. CIT(A) after receiving the tax demand for A.Y. 2009-10 to 2010-11 on 30.06.2023. The ld. Counsel contended that there is a bona fide reason for delay in filing the appeal by 374 days therefore, requested for condoning the delay and deciding the appeal on merit. The Hon'ble Supreme Court in the case of Collector Land Acquisition vs Mst, Katiji & Ors. Civil Appeal No. 460 of 1987 dated 19.12.1987 held that sufficient

cause for the purpose of condonation of delay should be interpreted with a view to do even handed justice on merit in preference to the approach which scuttles a decision on merit. In the light of the above facts and findings, we consider there appear to be bonafide cause for delay in filing the appeal, therefore, we condone the delay of 304 days in filing this appeal in order to decide the appeal on merit.

3. Fact in brief is that the case of the assessee was reopened u/s 147 of the Act on the basis of information received from the Sales Tax Department through DGIT(Inv.) that assessee has obtained accommodation entries of bogus purchases from 8 parties to the amount of Rs. 1,93,55,303/-. During the course of assessment, the AO stated that assessee could not fully explained the genuineness of the purchases made from the 8 parties therefore profit element embedded in such purchases to the amount of Rs. 24,19,413/- being 12.5% of the impugned purchases of Rs. 1,93,55,303/- was added to the total income of the assessee as profit earned from such purchases.

4. The assessee filed appeal before the ld. CIT(A). The ld. CIT(A) has partly allowed the appeal of the assessee by directing the assessing officer to reduce the profit from the impugned addition of 12.5% of the purchases which had already been declared by the assessee on this purchases. Thereafter, the assessing officer has levied penalty u/s 271(1)(c) of Rs. 5,55,197/- being hundred percent of the disallowed amount of purchases holding that assessee has filed inaccurate particulars of income.

5. During the course of appellate proceeding before us, the Id. Counsel filed paper book comprising copies of various documents and detail made before the lower authorities on the submission of the assessee that no penalty should be levied on the basis of addition made on the estimated basis. The assessee has also filed copy of notice issued u/s 271(1)(c) of the Act stating that assessing officer has not strike off the non-applicable limb from the notice. In support of his contention that no penalty can be levied on estimated addition the assessee has also filed various judicial pronouncements.

6. On the other hand, the Id. DR supported the order of lower authorities.

7. Heard both the sides and perused the material on record. Without reiterating the fact as discussed above, the assessing officer has levied penalty of Rs. 5,55,197/- being hundred percent of the tax determined on addition of Rs. 24,19,413/- made on the basis of profit estimated @ 12.5% of the impugned bogus purchases. In the case of the assessee, it is clear from the copy of the notice issued u/s 274 of the Act filed in the paper book that assessing officer has not striked off non-applicable portion in the printed show cause notice to indicate the limb of section 271(1)(c) of the Act for which the penalty proposed to be imposed. The Hon'ble Bombay High Court in the case of Md. Farhan A. Shaikh vs DCIT 434 ITR 1 held that non-striking off irrelevant material from the notice issued would vitiate penalty proceedings. Further, the ITAT Mumbai in various decision held that the penalty u/s 271(1)(c) of the Act cannot be levied where the addition is made

on estimated basis. In the light of these findings in the case of the assessee the sales were not disputed and only the profit element embedded in the transactions was estimated. Before us, the Id. Counsel has also referred the decision of the ITAT in the case of ITO vs Sunil Bhagwandas Vorani (HUF) wherein held that penalty u/s 271(1)(c) is not attracted where addition is made on estimated basis. In the light of the above facts and findings, we consider that in the case of the assessee, the addition was made only on the estimated basis of profit element involved in the purchase transactions without disproving the corresponding sales shown by the assessee, therefore the penalty levied on the basis of addition made on estimated basis is not sustainable. Therefore, we set aside the order of the Id. CIT(A) and the appeal of the assessee is allowed.

ITA No. 2745/M/2023 (A.Y. 2010-11)

8. Since the similar issue on identical fact, we have decided vide ITA No. 2742/M/2023 as (supra) wherein the appeal of the assessee was allowed, therefore, applying the finding of the same mutatis mutandis, this appeal of the assessee is also allowed.

9. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 09.01.2025

Sd/-

(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER

Mumbai: 09.01.2025
Biswajit, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:
3. The CIT,
4. The DR .

//True Copy//

By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai