

आयकर अपीलीय अधिकरण
मुंबई पीठ "एफ", मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एस. रिफौर रहमान, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " F ", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
आअसं. 3885/मुं/2023 (नि. व. 2009-10)
ITA NO.3885/MUM/2023(A.Y.2009-10)

Jatin Enterprises,
31, Savita Sadan,
1st Parsiwada, V.P.Road,
C.P.Tank, Mumbai – 400 004.
PAN: AAAFJ-4667-N

..... अपीलार्थी/ Appellant

बनाम Vs.

ACIT-19(2), Mumbai,
Matru Mandir,
Income Tax Office, Tardeo,
Mumbai – 400 007.

.....प्रतिवादी/ Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Rajesh Bhende
प्रतिवादी द्वारा/ Respondent by : Ms. Rajeshwari Menon, Sr.A.R
सुनवाई की तिथि/ Date of hearing : 20/03/2024
घोषणा की तिथि/ Date of pronouncement : 21/03/2024

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [in short 'the CIT(A)'] dated 01/09/2023, for the Assessment Year 2009-10, confirming levy of penalty u/s. 271(1)(c) of the Income Tax Act, 1961 [in short 'the Act'].

2. Shri Rajesh Bhende appearing on behalf of the assessee submitted that the Assessing Officer vide assessment order dated 23/03/2015 passed u/s.

143(3) r.w. 147 of the Act made addition of Rs.1,00,15,634/- on account of bogus purchases. The Assessing Officer made addition of 100% of unproved purchases and initiated penalty proceedings u/s. 271(1)(c) of the Act on the said addition. The assessee carried the issue in appeal before the CIT(A). The CIT(A) on estimations restricted the addition to 12.5% of the alleged bogus purchases. The Assessing Officer vide order dated 31/03/2018 levied penalty u/s. 271(1)(c) of the Act in respect of the addition confirmed by the CIT(A). Against the order levying penalty, the assessee filed appeal before CIT(A). The CIT(A) without appreciating the facts and legal position confirmed the penalty.

2.1 The Id. Authorized Representative of the assessee submits that the Assessing Officer had made addition merely on estimations, which was reduced by the CIT(A). It is a settled legal principle that no penalty can be levied on addition based on estimations. To support his submissions, he placed reliance on the following decisions:

- (i) DCIT vs. Shyam Kundandas Gyanchandani, ITA No.2559/Mum/2022 For A.Y.2009-10,decided on 03/02/2023.
- (ii) Fancy Diamond India Pvt. Ltd. Vs. DCIT, ITA No.961 to 963/Mum/2023, For A.Y.2010-11 to A.Y.2012-13, decided on 20/06/2023.
- (iii) Sushila Goyal Vs. ITO, ITA No.3012/Del/2019 for A.Y. 2014-15,decided on 31/05/2023.

3. Per contra, Ms. Rajeshwari Menon representing the Department vehemently defended the impugned order. The Id. Departmental Representative submits that the assessee had indulged in bogus transactions. The assessee was not able to prove genuineness of the purchases hence, the Assessing Officer made addition of 100% of such purchases. The CIT(A) restricted the addition to 12.5%, the Assessing Officer levied penalty u/s.

271(1)(c) of the Act on the addition confirmed by the CIT(A). She prayed for upholding the impugned order and dismissing appeal of the assessee.

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.

7. Further, during the study of appeal file we find that the assessee has placed on record penalty notice u/s. 274 r.w.s 271 of the Act dated 25/03/2015. A perusal of the notice reveals that it is in a predrafted Performa and mentions both limbs of section 271(1)(c) of the Act as, “ **have Concealed the particulars of your income or Furnished inaccurate particulars of such income.*” The Assessing Officer has not struck off irrelevant clauses in the notice. The Hon’ble Jurisdictional High Court in the case of Mohd. Farhan A. Shaikh vs. DCIT, 125 taxmann.com 253 (Bombay) held that where Assessing Officer clearly records satisfaction for imposing penalty on one or other or both grounds mentioned in section 271(1)(c) of the Act, non-striking of irrelevant matter would render the notice defective and such defective notice vitiate the penalty proceedings. In the present case, we find that in assessment order the Assessing Officer had initiated penalty proceedings for furnishing inaccurate particulars of income only. Since, both limbs i.e. “*concealed particulars of income and furnished inaccurate particulars of income*” are recorded in the notice, the notice is defective. The penalty levied u/s. 271(1)(c) is liable to be deleted on the ground of defective notice as well.

8. In the result, impugned order is set aside and appeal of assessee is allowed.

Order pronounced in the open court on Thursday the 21st day of March, 2023.

Sd/-

(SHRI S.RIFAUR RAHMAN)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/ Dated 21/03/2023

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्तCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि. , मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt.Registrar) Mumbai