

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

Before Shri Joginder Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.2998 /Mum/2017
(Assessment year: 2009-10)

Shri Ajay Loknath Lohia 62, Shangrila, Samarth Ramdevi Marg, Juhu Scheme, Vile Parle (W) Mumbai 400 049 PAN: AAAPL6294M	vs	ITO 25(2)(1), Mumbai
APPELLANT		RESPONDENT

Appellant by	Shri Ajay R Singh
Respondent by	Shri Himanshu Sharma

Date of hearing	26-09-2018
Date of pronouncement	05-10-2018

ORDER

Per G Manjunatha, AM :

This appeal filed by the assessee is directed against order of the CIT(A)-37, Mumbai dated 03-02-2017 and it pertains to AY 2009-10.

The assessee has raised the following grounds of appeal:-

“ASSESSMENT YEAR 2009-10

On the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals) - 37, Mumbai

General:

1. erred in confirming the order of the Assessing Officer that penalty levied on your appellant is in order.

Penalty U/s 271(l)(c) of Rs.3.40.980A

2. failed to appreciate that there is neither concealment of particulars of income nor furnishing of inaccurate particulars of income. Therefore penalty imposed under section 271(l)(c) is bad in law.

3. erred in ignoring the facts that addition is made only on estimated basis on account of difference in gross margins earned from sale against purchase from party alleged to be non-genuine. An addition which is made purely on an estimate basis, it cannot be said there is concealment of income.

4. The Id CIT(A) erred in confirming the order of Assessing Officer imposing penalty under section 271(l)(c) without appreciating that the penalty notice issued by the assessing officer dated 08/03/2015 is defective.

Without prejudice to above

5. erred in ignoring the fact that the assessee has suffered loss in the relevant year and even after the addition the income assessed was loss Rs.28,49,154/-. As such there was no loss to revenue, therefore no penalty ought to have been levied.”

2. The brief facts of the case are that the assessee is engaged in the business of trading in chemicals and also dealing in shares & securities, filed his return of income for AY 2009-10 on 30-09-2009 declaring total income of Rs.15,90,000. The case was selected for scrutiny and the assessment was completed u/s 143(3) r.w.s. 147 of the Income-tax Act, 1961 determining the total income at Rs.15,90,000 by making addition towards 25% gross profit on alleged bogus purchase made from hawala dealers. Thereafter, the AO initiated penalty proceedings u/s 271(1)(c) for furnishing inaccurate particulars of income and after considering relevant submissions of the assessee levied penalty of Rs.3,40,980 which is 100% tax sought to be evaded on the ground that the assessee has failed to offer any explanation with regard to the alleged bogus purchases made from hawala dealers. The relevant observations of the AO is extracted below:-

“5. The submissions made by the assessee are considered carefully. However, the same is not acceptable. As per the provisions of IT. Act, 1961 the onus of proving the genuineness and reasonableness of the transaction carried out by the assessee lies on the assessee itself. Therefore, during the scrutiny proceedings, assessee was also asked to substantiate the

genuineness of the transaction so claimed. To know the genuineness of the transactions made by the assessee, notice u/s 133(6) of the I.T. Act, 1961 were issued to Hawala Parties calling for certain information. However, the notice were returned back unserved which made it evident that the parties is not existence in the present address. The AR could not give the latest address/whereabouts of purchase parties, the bank statement of the Hawala Parties. Also, the assessee could not produce the so called suppliers before the assessing officer for verification. Moreover, the Hawala parties had admitted in front of the sales tax department that they have not made any sales or purchase transactions. Thus undisputed fact was that purchases claimed to have been made from above parties remained unverified. The assessee suppressed income, inspite of knowing very well that the same are duly required to be offered for taxation. Hence, it cannot be said that the assessee has not furnished inaccurate particulars in this regard. In order to prove the genuineness of the same, the assessee could have brought on record any evidence or reconciliation duly authenticated from such parties to verify the amounts as per its books as correct and genuine. The details supplied in the return of income are thus proved to be are not accurate, not exact or correct, not according to truth or erroneous. The wrongful claims in respect of the above items have been detected and added in the total income only after receipt of information. Had the information not been received and the necessary investigations/enquiries were not done by the Assessing Officer, the wrongful claim by the assessee in respect of the above bogus purchases would have gone undetected and the assessee would have succeeded in concealing his income to the extent of Rs.10,03,180/-. Thus, the assessee has not only furnished inaccurate particulars of income thereby concealing the particulars of its income but also failed to furnish explanation in support of its claim of Hawala Purchases.

6. Section 271(1)(c) of the Act provides for the levy of penalty in cases where the AO is satisfied that any person had concealed particulars of his income or had furnished inaccurate particulars of such income. Also, Explanation I to Section 271(1) provides that where in respect of any facts material to the computation of the total income of any person, such person fails to offer an explanation or offers an explanation which is found to be false or he offers an explanation which he is not able to substantiate and fails to prove that such explanation is bonafide and that all the facts relating to the same and are material to the computation of the total income of the person, have been disclosed by him, then the amount added or disallowed in computing total income of such person, as a result thereof, shall for the purpose of clause (c) be deemed to represent the income in respect of which particulars have been concealed. Thus, in case of failure of the assessee to offer any explanation or explanation furnished by him being found false, penalty can be imposed. Therefore, the penalty is warranted in the circumstances. Therefore, the assessee has to be deemed to have concealed its income by filing inaccurate particulars of its income, for the purpose of Section 271(1)(c).

7. In view of the above discussion, I, therefore, hold that the assessee has furnished the inaccurate particulars of its income as envisaged by section 271(1)(c) of the Income-tax Act 1961, in respect of amount of Rs. 10,03,180/-.

8. The total amount for which the assessee is deemed to have furnished inaccurate particulars of income worked out to Rs 10,03,180/-. Tax payable on this amount works out to Rs 3,40,980/- (including cess). The minimum penalty leviable under section 271(1)(c) is 100% of the 'tax sought to be evaded' and maximum penalty leviable is 300% of the 'tax sought to be evaded'. Considering the facts of the case, I propose to levy minimum penalty being 100% of 'tax sought to be evaded' which works out to Rs.3,40,980/-. Demand notice is issued."

3. Aggrieved by the penalty order the assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has filed elaborate written submissions which has been reproduced at para 4 on pages 3-10

of CIT(A)'s order. The sum and substance of arguments of the assessee before the Ld.CIT(A) are that mere disallowance of gross profit embedded in alleged bogus purchases does not amount to furnishing of inaccurate particulars of income which warrants levy of penalty u/s 271(1)(c) of the Act. The assessee further submitted that although he has not filed appeal against addition made by the AO before CIT(A), but fact remains that such addition has been made on estimate basis ignoring all evidences filed by the assessee to prove purchases from above parties as genuine. The Ld.CIT(A), after considering relevant submissions of the assessee and also by relying upon certain judicial precedents, including the decision of Hon'ble Delhi High Court in the case of CIT vs Zoom Communications Pvt Ltd reported in 327 ITR 510 (Del) held that the assessee has failed to offer any explanations in respect of addition made by the AO towards alleged bogus purchases from hawala operators. Therefore, he opined that the AO was right in levying penalty u/s 271(1)(c) for furnishing inaccurate particulars of income. The relevant observations are as under:-

"5.9 The AO completed the assessment for the relevant AY and initiated penalty proceedings u/s 271(l)(c) of the Act for furnishing inaccurate particulars of income, ""the AO had received information from the Sales Tax Department through C3IT(Inv), Mumbai that the appellant had obtained bogus purchase bills of Rs. 38,92,720/- from various hawala dealers during the relevant AY. The AO has therefore made additions of Rs. 10,03,150/- to the total income of the appellant being bogus purchases. The AO has stated that the appellant could not substantiate the genuineness of the purchase transactions and could not produce the suppliers before the assessing officer for verification. Moreover, the hawala parties had admitted in front of the Sales Tax Department that they have not made any sales or purchase transactions. The AO has thus concluded that the appellant had furnished inaccurate particulars of his income and has levied penalty of Rs. 3,40,980/- u/s 271(l)(c) of the Act. It can safely be held that where in respect of any facts material to the computation of the total

income of any person under the Act, such person fails to offer an explanation or offers an explanation which is found by the officers of the income-tax to be false, or such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount disallowed in computing the total income of such person as a result thereof shall, for the purposes of section, be deemed to represent the income in respect of which particulars have been concealed.

6. Therefore after considering the facts of the case, submissions made by the appellant and the judicial decisions cited above, I find that the penalty levied is in order and the same is upheld. Accordingly the grounds raised by the appellant are **rejected.**”

4. The Ld.AR for the assessee submitted that the Ld.CIT(A) was erred in confirming penalty levied by the AO without appreciating the fact that the addition made by the AO is only on estimate basis; hence, it cannot be considered as deliberate attempt to evade tax. The Ld.AR further submitted that the assessee has furnished all evidences and no information given in the return was found to be incorrect. Therefore, the assessee cannot be held to be guilty of concealing of particulars of income or furnishing of inaccurate particulars of income. The assessee has filed various details to justify purchases from above parties, but the AO has ignored all evidences only on the basis of report received from Sales-tax department. Though the assessee has not filed any appeal against addition made by the AO, but such addition is on the basis of estimation of gross profit. Mere fact that the assessee has not preferred appeal may not be a ground to hold the assessee guilty of furnishing inaccurate particulars of income.

5. The Ld.DR, on the other hand, strongly supported the order of Ld.CIT(A).

6. We have heard both the parties and perused the material available on record. The AO has levied penalty u/s 271(1)(c) on the ground that the assessee failed to offer any explanation to the satisfaction of the AO in respect of estimation of gross profit on alleged bogus purchases in the light of facts gathered during the course of assessment proceedings coupled with report of sales-tax department. According to the AO, the purchases from certain parties were not genuine which is evident from the fact that the assessee failed to furnish complete details of purchases from the above parties. The assessee also failed to produce the parties in person before the AO. Therefore, he opined that it is a clear case of furnishing of inaccurate particulars of income which warrants levy of penalty u/s 271(1)(c) and accordingly levied penalty under Explanation 1 to section 271(1)(c).

7. The assessee has not challenged addition made by the AO towards estimation of gross profit on alleged bogus purchases. The assessee claims that it has accepted addition made by the AO considering the fact that even after disallowance of gross profit on alleged bogus purchases, income from business in the year continued to be net loss, therefore, he was under the bona fide belief that penalty provisions for concealment of particulars of income u/s 271(1)(c) will not attract. The assessee further contended that when he has agreed for estimation of gross profit on

alleged bogus purchases, it was only for the purpose of avoiding litigation at the stage of assessment proceedings itself, but fact remains that he has furnished complete evidences to prove such purchases and also filed quantitative details of purchase and sales alongwith comparable gross profit ratio. The AO has not disputed all these facts. Therefore, he was under the bona fide belief that there would not be any penalty and accordingly not preferred an appeal before the Ld.CIT(A). He further submitted that merely for the reason that there was no appeal filed challenging the addition made by the AO, the same cannot be considered as furnishing of inaccurate particulars of income.

8. Having heard both the sides, we find merit in the arguments of the assessee for the reason that although the AO has estimated 25% gross profit on alleged bogus purchases, never made any observations with regard to the incorrectness in details filed by the assessee to prove such purchases. The AO never disbelieved information filed by the assessee, but he proceeded on the basis of information received from sales-tax department to make additions. The AO has made such addition on adhoc basis by estimating gross profit on alleged bogus purchases. From these facts, it is very clear that the AO failed to make a case of deliberate attempt by the assessee to furnish inaccurate particulars of income. Therefore, we are of the considered view that mere

disallowance of purchases on adhoc basis does not tantamount to willful furnishing inaccurate particulars of income within the meaning of section 271(1)(c) of the Income-tax Act, 1961. Hence, we are of the considered view that the AO was erred in levying penalty u/s 271(1)(c) of the Act. Accordingly we direct the AO to delete penalty levied u/s 271(1)(c) of the Act.

9. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 05th October, 2018.

Sd/-

sd/-

(Joginder Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 05th October, 2018

Pk/-

Copy to :

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

/True copy/

By order

Sr.PS, ITAT, Mumbai