

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "E" MUMBAI**

**BEFORE SHRI SHAMIM YAHYA ACCOUNTANTMEMBER AND  
SHRI PAVAN KUMAR GADALE JUDICIAL MEMBER**

**ITA No. 7746/MUM/2019  
Assessment Year: 2007-08**

M/s Sunmoon Enterprises,  
FC-8160A, FC-8161, FC-8162, Bharat  
Diamond Bourse, Bandra Kurla  
Complex, Bandra East,  
Mumbai-400051.

**PAN No. AACFS 2954 D**

**Appellant**

Assistant Commissioner of  
Income Tax-19(3),  
**Vs.** Matru Mandir Bldg.  
Mumbai-400007.

**Respondent**

Assessee by : Mr. Ketan Vajani, AR  
Revenue by : Mr. Vijay Kumar Menon, DR

Date of Hearing : 15/07/2021  
Date of pronouncement : 26/07/2021

**ORDER**

**PER PAVAN KUMAR GADALE, J.M.**

The assessee has filed an appeal against the order of Commissioner of Income Tax (Appeals)-3 passed u/s 271(1)(c) and 250 of the Income Tax Act, 1961. The assessee has raised following grounds of appeal:

- 1 The Ld. CIT(A) failed to appreciate that the Assessing Officer did not specify that under which limb the notice under section 274 read with section 271 was issued to the Appellant i.e. whether the notice was issued for non-filing of return under section 139(2)/148 or for failing to comply with notices u/s 142(1)/ 143(2) or for concealment of particulars of income or for furnishing of inaccurate particulars of income and as such the AO was not clear about*

*the charge at the time of issuing the notice nor the Appellant made was made aware about the charge.*

- 2 The Ld. CIT (A) failed to appreciate that the AO firstly had erred in reopening assessment under section 147 on the basis of information / material which is vague, general, non-specific and distant; having no direct link or direct nexus between the material and the reasons recorded more so when the Appellants matter was already finalized under scrutiny assessment. The AO also did not independently apply his mind to the information received from the DGIT (Inv.) and also did not make any independent enquiry lo arrive at a belief whether or not any income had escaped assessment.*
- 3 The Ld. CIT(A) failed to appreciate that the AO has neither given an opportunity of being heard nor did the AO give the Appellant the opportunity of cross-examination of the parties on whose reliance there was a re-opening of assessment.*
- 4 The Ld. CIT (A) failed to appreciate that the AO also erred in not informing hisproposed action to make an ad-hoc addition without pin-pointing the defects in the books of accounts/rejecting the books of accounts, which were already accepted by the AO at the time of earlier scrutiny assessment and thus not according any opportunity to the appellant to put its case and make submissions,*
- 5 The Ld. CIT (A) failed to appreciate that the addition was made due to certain information from some person. The Appellant in the course of proceedings had given complete and accurate details, which constituted the genuineness of thepurchases. No penalty can be levied on the assessee under section 271(1)(c) unless the Assessee's is dishonest, mala fide and amounts to concealment of facts.*
- 6 The Ld. CIT-A erred in appreciating that the AO had made the addition only on an estimate basis, which cannot be considered as a deliberate attempt to evade tax.*
- 7 The Ld. Assessing Officer has passed an erroneous Order which is clearly evident from the Order itself as the PAN No. and Address mentioned on the Order is not that of the Appellant and as such it is not a valid Order been*

*passed within the statutory time limit by the AO and the said order is void ab initio and liable to be set aside.*

2. The brief facts of the case are that, the assessee is a partnership firm and is engaged in the business of trading of diamonds. The assessee has filed the return of income for the assessment year 2007-08 on 15.11.2007 with the total income of Rs.28,82,303/-. The return of income was processed u/s 143(1) of the Act. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act were issued and accepted the return of income and the A.O. has passed the order u/s 143(3) of the Act dated 15.11.2007. Subsequently, the DGIT(Inv) Mumbai in respect of search and survey conducted in the case of Bhanwarlal Jain & Ors. Mumbai found that the assessee had transactions with the related group concerns. Therefore, the Assessing Officer has reason to believe that the income has been escaped as the assessee has ventured into obtaining accommodation entries in respect of purchases as per the data of DGIT (Inv) from Little Diam of Rs.96,06,064/-. The Assessing Officer has issued notice u/s 148 of the Act. The assessee was provided the reasons recorded and the assessee has filed objections. Whereas, the assessing Officer required assessee to prove the genuineness of purchases transactions and issued the notice u/s 142(1) of the Act and the assessee has submitted the details. The Assessing Officer was not satisfied with the details and the information of transactions. Therefore, the Assessing Officer has estimated income @ 8% of the non-genuine purchases which worked to Rs.7,68,485/- and added to the total income and passed the order u/s 143(3) r.w.s. 147 dated 28.09.2015.

3. Subsequently, Assessing Officer has initiated penalty proceedings and issued notice to the assessee. The assessee has filed the submissions on

15.07.2015, but the assessing Officer was not satisfied with the submissions and is of the opinion the assessee has furnished inaccurate particulars of income and levied penalty of Rs.2,40,000/- u/s 271(1)(c) of the Act and passed order on 28.09.2015.

4. Aggrieved by the penalty order, the assessee has filed an appeal before the Ld. CIT(A). Whereas, the Ld. CIT(A) has confirmed the action of the Assessing Officer in levying the penalty and dismissed the assessee's appeal. Aggrieved by the order the CIT(A), the assessee has filed an appeal before the Honble Tribunal.

5 At the time of hearing, the Ld. AR submitted that the Assessing Officer erred in levying the penalty on estimated income and supported the arguments with submissions and paper book. Contra, the Ld. DR supported the order of Assessing Officer.

6. We have heard the rival submissions and perused the materials on record. The sole crux of the disputed issued is in respect of levy of penalty u/s 271(1)(c) of the Act by based on the assessment order passed u/s 143(3) r.w.s. 147 of the Act. We find that Assessing Officer has made disallowance of bogus purchases by estimation of gross profit @ 8% and has accepted sales in the books of account. We rely on the ratio of decision of Hon'ble Jurisdictional High Court in the case of CIT v. Nikunj Eximp (216 Taxman.com 171) and Honble Tribunal. We are of the opinion that when the income/ profit element is sustained on estimated basis, the penalty

levied u/s 271(1)(c) of the Act is not sustainable. Accordingly, we set aside the order of CIT(A) and direct the Assessing Officer to delete the penalty and allow the grounds of appeal of the assessee.

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

Order pronounced in the open Court on 26/07/2021.

Sd/-

Sd/-

(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

(PAVAN KUMAR GADALE)  
JUDICIAL MEMBER

Mumbai;

Dated: 26/07/2021.

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai