आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
'' B'' BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No. 161/AHD/2019**
निर्धारण वर्ष/Asstt. Year: 2011-12

M/s. Morakhia Copper and Alloys Pvt. Ltd., 12, 2nd Floor, B Wing, Mardia Plaza, C.G. Road, Ahmedabad-380006. **PAN: AAACM3439J**	Vs.	A.C.I.T., Tax, Circle-2(1)(2), Ahmedabad.
(Applicant)		**(Respondent)**

Assessee by	:	None
Revenue by	:	Shri R.R. Makwana, Sr.D.R

सुनवाई की तारीख/**Date of Hearing : 15/11/2021**
घोषणा की तारीख /**Date of Pronouncement: 20/12/2021**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax(Appeals)-2, Ahmedabad, dated 24/12/2018 arising in the matter of penalty order passed under s. 271(1)(c) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2011-12.

2. When the matter was called for hearing it was noticed that there was none appeared on behalf of the assessee despite the fact that case has been listed for hearing for more than 3 times. On the previous occasion the notice intimating the date of hearing was sent to the address of the assessee which was duly served. It is the trite law that assessee after filing the appeal should be vigilant enough to prosecute the same. But, we find that the assessee is not serious in pursuing the appeal filed by it. In the absence of any co-operation from the side of the assessee, we don't find any reason to keep the matter pending before us. Accordingly, we decide to proceed to adjudicate the appeal after hearing the learner DR appearing on behalf of the Revenue.

3. The assessee has raised the following grounds of appeal:

> *1. The learned CIT(A) has erred in law and on facts in confirming the action of AO in initiating and levying penalty under section 271(l)(c) of the Act without recording mandatory satisfaction as contemplated under the Act at the time of framing the assessment order.*
>
> *2. The learned CIT(A) has erred both in law and on the facts of the case in confirming the levy of penalty u/s.271(l)(c) of the Act on the amount of alleged bogus purchase of Rs. 15,29,625/-.*
> *3. In any case, the impugned penalty order is barred by limitation and thus without jurisdiction and illegal.*
>
> *4. In any case, quantification of the penalty is erroneous and excessive*
>
> *5. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.*
>
> *6. The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.*

4. The only issue raised by the assessee is that the learned CIT (A) erred in confirming the penalty in part under the provisions of section 271(1)(c) of the Act instead of deleting the same in entirety.

5. The facts in brief are that the assessee in the present case is a private limited company and engaged in the activity of manufacturing of Ferrous and Ferrous metal. The AO in the assessment framed under section 143(3) of the Act vide order dated 27th March 2014, inter-alia, made addition of ₹ 3,06,32,999/- on account of bogus purchases shown by the assessee. The assessee during the assessment proceedings initiated the penalty proceedings under section 271(1)(c) of the Act on account of furnishing inaccurate particulars of income. However, the assessee has not made any reply in response to the penalty notice issued upon the assessee. In the absence of any reply, the AO concluded that the assessee has furnished inaccurate particulars of income under explanation 1 to section 271(1)(c) of the Act and levied the penalty of ₹ 1,01,75,518/- being 100% of the amount of tax sought to be evaded.

6. Aggrieved assessee preferred an appeal to the learned CIT (A).

7. The assessee before the learned CIT (A) contended that the Tribunal has reduced the addition made by the AO to the extent of 5% of such bogus purchases. Thus, the Tribunal has deleted the addition to the tune of ₹ 2,91,03,374/- and confirmed the addition of ₹ 15,29,625/- on estimated basis on account of the profit embedded in such bogus purchases.

7.1 Thus, the assessee before the learned CIT (A) contended that there cannot be any penalty for the addition confirmed by the ITAT on estimated basis. The assessee in support of his contention relied on various case laws which were cited before the learned CIT (A).

7.2 The learned CIT (A) admitted the fact that ITAT has reduced amount of addition made by the authorities below from ₹ 3,06,32,999/- to ₹ 15,29,625/-. The addition was reduced on the reasoning that the amount of sale was not doubted by the AO which is not possible until and unless purchases are shown against such sales. However, the learned CIT (A) found that the ITAT has nowhere held that purchases shown by the assessee are genuine, rather the amount of purchases from the parties was held as bogus. Thus only the element of profit was brought to tax. Accordingly, there was no shifting in the basis of the addition made by the authorities below which was subsequently confirmed by the ITAT. Accordingly, the contention of the assessee that the basis of addition has been changed by the ITAT is not correct.

8. Likewise, the Hon'ble Gujarat High Court in the case of ACIT vs. Chandravilas Hotel reported in 29 Taxman 492 has confirmed the penalty based on estimated basis. Accordingly, the learned CIT (A) disregarded the contention of the assessee that there cannot be any penalty based on estimated addition. However, the learned CIT (A) directed the AO to levy the penalty under section 271(1)(c) of the Act for furnishing inaccurate particulars of income with respect to the addition of ₹ 15,29,625/- only which was confirmed by the ITAT. Hence the ground of appeal of the assessee was partly allowed.

9. Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us.

10. The assessee in the ground of appeal has challenged the penalty order on the ground that there was no specific charge levied by the AO in the assessment order whether it was for concealment of income or on account of furnishing inaccurate particulars of income. Accordingly, it was contended by the assessee in the ground of appeal that penalty order is not maintainable.

10.1 It was also submitted by the assessee in the ground of appeal that the penalty order is bad by limitation and therefore the same is without the jurisdiction.

10.2 The assessee also submitted that penalty has been levied without considering the documents available on record and various submissions made by it before the authorities below.

11. On the contrary the learned DR vehemently supported the order of the authorities below.

12. We have heard the learned DR and perused the materials available on record. The 1st issue arises whether the AO has levied the penalty under the specific charge as contemplated under the provisions of section 271(1)(c) of the Act. For this purpose, we refer the penalty order and find that the penalty has been levied on account of furnishing the inaccurate particulars of income which is the specific charge as provided under the provisions of section 271(1)(c) of the Act. Accordingly, we are not convinced with the ground of appeal raised by the assessee.

12.1 With respect to the 2nd issue, we find that there was nothing submitted by the assessee to justify that the penalty order has been passed beyond the time prescribed under the law. The time limit for passing the penalty order is provided under section 275 of the Act. In the given case, the learned CIT (A) confirmed the assessment order vide order dated 25 January 2016, thus the financial year end as on 31st March 2016. Hence time limit to frame penalty order expire as on 31st March 2017 whereas penalty order was passed as on 26th March 2017. Therefore the same is within time limit provided under the provision of law.

12.2 The penalty under the provisions of section 271(1)(c) of the Act can be levied either on account of concealment of income or furnishing inaccurate particulars of income. Under explanation 1 to section 271(1) of the Act, there are certain situations

provided therein wherein it is deemed that the assessee has concealed the particulars of income. We have to test the addition made by the authorities below which was subsequently confirmed by the ITAT in part whether the assessee's case falls within the parameters of the provisions of section 271(1)(c) of the Act. In this regard we note that the assessee has shown purchases from certain parties amounting to ₹ 3,06,32,999/- but failed to support the same based on the documentary evidence. Indeed the primary onus lies upon the assessee to justify the genuineness of the purchases. The assessee has only filed the copy of the ledger of the purchases from one-party. But the assessee failed to file the copies of the bill/invoices for the freight charges, octroi details of the vehicles used in the transportation of the goods. Thus it is clear that the assessee failed to discharge the onus cast upon it under the provisions of law. Admittedly, the assessee against the purchases has shown sales which were not doubted by the authorities below. Indeed, the sales are not possible without the corresponding purchases. Thus, the entire amount of purchases cannot be treated as income despite the fact that the assessee failed to discharge onus with respect to such purchases.

12.3 Generally, the assessee adopts the practice for taking the bogus bills from the market when it makes purchases of the goods from the grey market in cash and without the bills which cannot be accounted in the books of accounts. Accordingly the assessee to bring such purchase of goods in accounting form arranges the bogus bills from the market. Accordingly, the entire amount of bogus purchases shown by the assessee cannot be treated as income of the assessee. What should be brought to tax is the income earned by the assessee whether it was from legal or illegal source. Accordingly the ITAT estimated the amount of profit embedded in such purchases. But the estimation of profit does not lead to draw that the assessee cannot be held under the charge of furnishing the inaccurate particular of income. The percentage of profit is one of the method of determining the income in respect of which the inaccurate particulars of income was furnished. Accordingly we hold that, the assessee cannot discharge/ escape from the penalty levied under section

271(1)(c) of the Act. In holding so we draw support and guidance from the judgment of Hon'ble Jurisdiction High Court in case of ACIT vs. Chandravilas Hotel reported in 29 Taxman 492, the relevant protion of the judgment is extracted below:

> *"the assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income within the meaning of section 271(1)(*c*). In other words, the* Explanation *raises a legal fiction and the assessee is brought straightaway within the ambit of section 271(1)(*c*). It is then not necessary for the revenue to show affirmatively by producing material that the assessee has in fact concealed the particulars of his income or furnished inaccurate particulars of such income. This legal fiction or presumption, however, can be displaced if the assessee proves that the failure to return the correct income, that is, the total income assessed did not arise from any fraud or gross or wilful neglect on his part. The assessee may claim to have discharged the burden by relying on the material which is on record in the penalty proceedings, irrespective of whether it is produced by him or by the revenue. The mere fact that the assessee's income was estimated under section 144 read with section 145(2) would not absolve the assessee from discharging the burden of proving that failure to return correct income did not arise from fraud or gross or wilful neglect."*

12.4 In view of the above, we hold that the assessee cannot be escaped from the penalty provisions in a situation where the income was determined on estimated basis. In view of the above and after considering the facts in totality, we do not find any infirmity in the order of learned CIT (A). Hence the ground of the assessee is hereby dismissed

13. In the result, the appeal of the assessee is **dismissed.**

Order pronounced in the Court on 20/12/2021 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 20/12/2021

Manish