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

Before Justice (Retd.) C.V. Bhadang, President and
Shri B.R. Baskaran, Accountant Member

ITA NO. 2734/MUM/2023 : **A.Y : 2011-12**

Dombivali Paper Mfg. Co. Pvt. Ltd., B-42, Phase-I, MIDC, Golavali Village, Dombivali (E), Dist Thane 421 203 **PAN : AAACD5897M** (Appellant)	Vs.	Asstt. Commissioner of Income Tax, Circle-1, Kalyan (Respondent)

Appellant by : Shri Subodh Ratnaparkhi
Respondent by : Shri Sunil Mathews

Date of Hearing : 05/12/2023
Date of Pronouncement : 06/12/2023

O R D E R

Per Justice (Retd.) C.V. Bhadang, President :

The present appeal by the assessee is directed against the imposition of penalty of Rs.2,38,176/- under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act'), which order has been confirmed by the learned Commissioner of Income Tax (Appeals) (in short 'CIT(A)').

2. The brief facts are that the appellant-assessee is a company engaged in the manufacture of craft paper. The assessee filed its return of income for Assessment Year 2011-12 declaring total income of Rs.1,34,48,577/-. It appears that the case was reopened on the basis of information received from the Sales Tax Department, Mumbai alleging bogus purchases. It was found

that the assessee was one of the beneficiaries and had availed accommodation entries during the financial year 2010-11 (Assessment Year 2011-12) for Rs. 7,17,020/-. The Assessing Officer completed the assessment under Section 143(3) read with section 147 of the Act on 26.02.2015 assessing the total income at Rs.1,41,65,597/- thereby making an addition of Rs.7,17,020/-. The assessee carried the matter in appeal. The learned CIT(A) confirmed the addition by order dated 14.11.2017, which was challenged by the assessee before this Tribunal in ITA No. 1035/Mum/2018. This Tribunal by an order dated 25.03.2019 has partly allowed the appeal thereby restricting the impugned addition to 12.5% of the alleged bogus purchases of Rs.7,17,020/-, which comes to Rs.89,628/-. Consequently, the balance addition was deleted.

3. In the meantime, the Assessing Officer issued a communication dated 15.03.2018 in pursuance of which the assessee submitted its submissions on 23.03.2018 furnishing all the supporting documents and proof of payment thereby claiming that there was no concealment of any facts with regard to the purchases from these parties. However, the Assessing Officer did not concur with the view of the assessee and levied penalty of Rs.2,38,176/- by order dated 29.03.2018. That order was challenged by the appellant-assessee in appeal, which appeal has been dismissed on 09.06.2023, which order is subject matter of challenge in this appeal before us.

4. Heard learned counsel for the parties. Perused record.

5. The learned counsel for the appellant has submitted that the addition as originally made has been restricted to 12.5% of the alleged bogus purchases

which translates into Rs.89,628/-. He submitted that once this Tribunal in the earlier round of litigation had restricted the addition on the basis of an estimate, the Assessing Officer was not justified in imposing penalty under Section 271(1)(c) of the Act. Reliance in this regard is placed on the decision of Hon'ble Rajasthan High Court in *CIT vs Krishi Tyre Retreading & Rubber Industries, 360 ITR 580 (Rajasthan)* and Hon'ble Gujarat High Court in *CIT vs Whitelene Chemicals, 360 ITR 385 (Gujarat)*.

6. It is submitted that before the Assessing Officer, appellant had produced material to show that the impugned purchases were genuine and thus, even on facts, no addition could have been made. It is alternatively submitted that, in any event, the addition was restricted to Rs.89,628/- and thus, the penalty as originally imposed on the basis of 100% addition of the alleged bogus purchases cannot be sustained. It is lastly submitted that the order of learned CIT(A) is an *ex parte* order without affording sufficient opportunity to the appellant and thus cannot be sustained and deserves to be set aside.

7. The learned DR referring to the order of learned CIT(A) has submitted that the appellant had not responded to the various notices/intimations and failed to produce the necessary documents to show that the purchases were genuine. He, therefore, submitted that no case for interference is made out.

8. We have considered the rival submissions made. Normally, when the order of the First Appellate court is an *ex parte* order, wherein the assessee is not found to be at fault, we would be inclined to remand the matter back to the First Appellate court. However, when the necessary facts and circumstances and material on the basis of which, the issue in the appeal has

to be decided, are already on record, this Tribunal would be slow in directing such remand which may ultimately lead to multiplicity of proceedings. In the present case, we find that the circumstances which are relevant for the purpose of deciding the issue involved are matters of record and, therefore, we have heard the parties on merits and the appeal is being disposed of accordingly.

9. It is a matter of record that initially an addition of 100% of alleged bogus purchases was made, which was restricted by this Tribunal to 12.5% by order dated 25.03.2019. Thus, the addition as restricted by this Tribunal works out to Rs.89,628/-, which was essentially on the basis of estimate of gross profit. The issue about, justification of imposition of penalty, where the addition is made on the basis of an estimate is no longer *res integra* and is covered by certain decisions of this Tribunal as also various High Courts. A useful reference in this regard can be made to the decision of Hon'ble Rajasthan High Court in the case of *CIT vs Krishi Tyre Retreading & Rubber Industries (supra)* and Hon'ble Gujarat High Court in the case of *CIT vs Whitelene Chemicals (supra)*. In Whitelene Chemicals *(supra)* one of the reason for imposition of penalty was that there were additions made in the income after rejection of book results on the basis of fair gross profit ratio. The Tribunal in that case found that no penalty can be imposed when the profit was estimated on the basis of fair gross profit ratio, which order came to be confirmed by the Hon'ble High Court. It can thus be seen that when the addition is made on the basis of an estimate, no penalty could have been levied.

10. A perusal of the order passed by the First Appellate court in this case would indicate that this aspect about the original addition being restricted to

12.5% on the basis of an estimate as to gross profit and the consequent effect on the levy of penalty has not been considered by the learned CIT(A). This aspect being clearly borne out of record, could have been considered by the learned CIT(A), notwithstanding that, the assessee had, allegedly not responded to the various notices/communications.

11. In that view of the matter, we find that the appeal has to succeed. Consequently, the appeal is allowed and the impugned order of imposition of penalty is hereby set aside.

Order pronounced in the open court on 06/12/2023.

Sd/-	Sd/-
(B.R. Baskaran)	(Justice (Retd.) C.V. Bhadang)
ACCOUNTANT MEMBER	PRESIDENT

Mumbai; Dated : 06/12/2023

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Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai