



IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA no.5539/Mum./2014
(Assessment Year : 2008-09)

ITA no.3540/Mum./2014
(Assessment Year : 2009-10)

Income Tax Officer
Ward-22(2)(4), 4th Floor
Tower no.6, Vashi Railway Station
Complex, Vashi, Navi Mumbai

..... Appellant

v/s

Shri Ramesh L. Gajra
Flat no.1001, Tower no.9
Sea Breeze Society
Sector-16, Nerul
Navi Mumbai 400 706
PAN - ADVPG6169J

..... Respondent

Revenue by : Shri Purshottam Kumar
Assessee by : Shri Hitesh M. Shah

Date of Hearing - 14.12.2016

Date of Order - 21.12.2016

ORDER

PER SAKTIJIT DEY, J.M.

These appeals by the Department are directed against two separate orders, both dated 2nd June 2014, passed by the learned Commissioner (Appeals)-33, Mumbai, for the assessment year 2008-09 and 2009-10.

2. Brief facts are, a search and seizure operation under section 132 of the Act, was conducted in the case of M/s. Gagra Group and the assessee was also covered under the said search. During the search and seizure operation, statements were recorded under section 132(4) of the Act from various persons including the assessee and in total an amount of ₹ 15 crore was declared as additional income by the concerned persons. As stated by the Assessing Officer, additional income offered by the assessee for assessment year 2008-09 was ₹ 36,16,500, and for assessment year 2009-10 is ₹ 91,34,160. However, he found that in the return of income filed for the assessment year 2008-09 and 2009-10, assessee had shown income of ₹ 24,19,160 and ₹ 59,15,022, as against the income offered at the time of search. Being of the opinion that the assessee should have shown the income offered at the time of search and seizure operation in the return of income, the Assessing Officer added an amount of ₹ 11,96,816 in assessment year 2008-09 and an amount of ₹ 25 lakh in assessment year 2009-10. Further, the Assessing Officer also made addition of notional interest on interest free advance made. Admittedly, the assessment orders passed making the aforesaid additions were not challenged by the assessee before the first appellate authority. On the basis of additions made, the Assessing Officer initiated proceedings for imposition of penalty under section

271(1)(c). Though, the assessee objected for imposition of penalty by filing explanation before the Assessing Officer, the Assessing Officer ultimately passed orders imposing penalty under section 271(1)(c) for both the assessment years under appeal. Being aggrieved of the penalty orders, the assessee preferred appeal before the learned Commissioner (Appeals).

3. As far as imposition of penalty on account of notional interest on interest free advances, learned Commissioner (Appeals) deleted the penalty by observing that the assessee had not actually earned such income and failed to offer to tax. Therefore, there cannot be any concealment of income. Accordingly, he deleted the penalty. As far as imposition of penalty on the differential amount of income offered at the time of search and declared in return of income, the learned Commissioner (Appeals) accepting the contention of the assessee that the Assessing Officer has not brought on record any material to show that undisclosed income was unearthed on the basis of evidence found during the search, penalty cannot be imposed. Accordingly, he deleted the penalty imposed for both the assessment years.

4. Learned Departmental Representative relying upon the observations of the Assessing Officer submitted, in the course of search, when the assessee himself offered certain amount of income

voluntarily, the Assessing Officer cannot be expected to make further enquiry with regard to undisclosed income. He, therefore submitted, the decision of the learned Commissioner (Appeals) in deleting the penalty is improper. In support of such contention, he relied upon the decision of the Hon'ble Supreme Court in MAK Data Pvt. Ltd. v/s CIT, [2013] 353 ITR 593 (SC).

5. Learned Authorised Representative submitted, during the search and seizure operation no incriminating material was found by the Department to show undisclosed income of the assessee. He submitted, only on an estimate basis, some amount was offered as additional income in the statement recorded under section 132(4). However, subsequently, the assessee after having properly examined the facts found that there is no such income earned by the assessee. Accordingly, he filed returns of income offering the actual income earned by him. He submitted, as there is no material before the Department to show that the assessee had actually earned additional income, merely because assessee accepted such addition penalty under section 271(1)(c) cannot be imposed. As far as penalty on addition of notional interest is concerned, the learned Authorised Representative submitted, such addition being a notional one, penalty has been rightly deleted.

6. We have considered the submissions of the parties and perused the material available on record. As could be seen from the assessment order, the Assessing Officer himself while referring to income offered by the assessee at the time of search and seizure has observed that it was on the basis of estimation. In fact, a careful reading of the assessment order nowhere reveals that there is any incriminating material unearthed during search which could reveal earning of undisclosed income by the assessee. Therefore, merely because the assessee in the statement recorded under section 132(4), has offered certain amount as income on estimate basis, it can be assumed conclusively that the assessee actually has earned such income. It is another matter, assessee has accepted the addition made by the Assessing Officer in this regard. However, merely for that reason, it cannot be concluded that the assessee has furnished inaccurate particulars of income or has concealed particulars of income. That being the case, in our opinion, the learned Commissioner (Appeals) was justified in deleting the appeal.

7. As far as imposition of penalty on the addition made on account of interest disallowance, it is very much clear that such disallowance of interest was on a notional basis considering the fact that the assessee has made interest free advances. Therefore, it cannot be said the assessee has furnished inaccurate particulars of income or concealed

particulars of income. That being the case, imposition of penalty is not justified.

8. In view of the aforesaid, we do not find any infirmity in the order of the learned Commissioner (Appeals) in deleting the penalty for both the assessment years under consideration.

9. In the result, Department's appeals are dismissed.

Order pronounced in the open Court on 21.12.2016

Sd/-
N.K. PRADHAN
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 21.12.2016

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai