

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: H: NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No. 1814/Del/2020
ITA Nos.423 & 424/Del/2021
Assessment Years: 2009-10, 2013-14 & 2014-15

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| M/s. G.D Foods and Manufacturing (India) Pvt. Ltd., Plot No. 14, Block-B, Community Centre, Janakpuri, New Delhi 110058 PAN AAACG 9952 A | vs. | The ACIT, Centre Circle 26, New Delhi 110055 |
| (Appellant) | | (Respondent) |

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| For Revenue : | Shri Ajay Wadwa, Adv. Ms. Bharti Sharma, CA |
| For Assessee : | Shri Amit Katoch, Sr. DR |

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| Date of Final Hearing : | 17.07.2023 |
| Date of Pronouncement : | 10.08.2023 |

ORDER

PER CHANDRA MOHAN GARG, J.M.

These appeals have been filed against the order of CIT(A)-29 New Delhi dated 31.08.2020 for AY 2009-10 & dated 18.02.2021 for AYs 2013-14 & 2014-15.

ITA No. 1814/Del/2020 for AY 2009-10

2. The Id. counsel drawing our attention towards copy of the notice dated 30.12.2016 u/s. 274 r.w.s 271 of the I.T Act 1961 (for short the 'Act') submitted that when the penalty proceedings have been initiated by the AO without specifying the allegation as to whether the assessee has conceal particulars of income or has furnished inaccurate particulars of income then the penalty cannot be held as valid and sustainable. The Id. counsel placed reliance on the judgment of Hon'ble Karnataka High Court in the case of S.S.A Emerald Meadows (2016) 73 taxmann.com 241 (Kar.) and judgment of Hon'ble jurisdictional High Court dated 02.08.2019 in ITA No. 475/2019 PCIT vs. M/s Sahara India Life Insurance Company Ltd. & Other connected appeals.

3. Replying to the above the Id. Senior DR supported the orders of the authorities below and submitted that the AO has rightly levied penalty u/s. 271(1)(c) of the Act by concluded that the assessee had conceal particulars of its income.

4. Copy of notice dated 30.12.2016 for AY 2009-10 issued by the AO clearly reveals that the AO has not specify as to whether the assessee has conceal particulars of income or has furnished inaccurate particulars of income therefore the issue is squarely covered in favour of the assessee by the judgments of Hon'ble High Court of Karnataka in the cases of CIT vs. Manjunatha Cotton & gunning Factory 359 ITR 565 (Kar.) and in the case of CIT vs. S.S.A Emerald Meadows (supra). SLP of Department in the case of SSA Emerald Meadows (supra) has been dismissed by Hon'ble Supreme Court. Accordingly, AO is directed to delete the penalty. Sole grievance of assessee is allowed.

ITA Nos. 423 & 424/Del/2021

5. The Id. counsel submitted that the penalty is not sustainable on following grounds:-

i. The Hon'ble High Court of Delhi in ITA No. 502/2019 dated 24.09.2019 has admitted substantial questions of law on addition therefore the issue has become debatable hence in view of various judgment including recent judgment in the case of PCIT vs. Harsh International Pvt. Ltd. 431 ITR 118 (del) the penalty levied by the AO u/s. 271(1)(c) of the Act does not survive.

ii. Drawing our attention towards quantum order dated 06.09.2018 passed by coordinate bench of ITAT Delhi for seven assessment years including AY 2013-14 and 2014-15 the Id. counsel submitted that at page 43 the Tribunal held that for obtaining invoices for purchase of goods without receiving material, cash back from the supplier, deploying the same cash for the purpose of incurring various expenses, the activity of not booking the expenditure in its books of accounts are the activities noted by the AO. But Tribunal has also held that neither the assessee nor the AO has shown what kind of expenditure is involved and in the seized document also neither of the parties could show the element of such expenditure. The Id. counsel submitted that with these observations the Tribunal deleted the addition on bogus purchases and change the character of addition by observing that it will meet the ends of justice if unaccounted expenditure incurred in the whole activity a charge to tax @8% of the total bogus purchases and scrap sales found in the seized material. Therefore in view of order of Hon'ble jurisdictional High Court of Delhi in the case of PCIT vs. Fortune Technocomps Pvt. Ltd. dated 13.05.2016 in ITA 313/2016 the penalty cannot be held as sustainable.

iii. No penalty u/s. 271(1)(c) of the Act can be levied for concealment of income if addition are made on estimation basis as per judgment of Hon'ble jurisdictional High Court of Delhi in the case ACIT vs. Aero Traders Pvt. Ltd. 322 ITR 316 (Del.).

Therefore the Id. counsel submitted that the penalty levied by the AO and upheld by the Id. CIT(A) for both the years having identical facts and circumstances is not sustainable and valid.

6. Replying to the above the Id. Senior DR supported the orders of the authorities below and submitted that the penalty has rightly being imposed and upheld by the Id. CIT(A) as the Tribunal restricted and estimated the addition @8% of total bogus purchases. However, he did not controvert that the Hon'ble High Court of Delhi in the appeal filed by the assessee against the order of the Tribunal dated 06.09.2018 (supra) has admitted substantial questions of law to adjudicate as to whether the Tribunal was right in estimating incurring the expenditure by the assessee @8% of total bogus purchases.

7. On careful consideration of above, we note that the AO in the quantum order dated 30.12.2016 made addition on account of bogus purchases but the Tribunal by order dated 06.09.2018 (supra) deleted the addition and made estimation of expenditure for obtaining bogus purchase bill @8% of total purchases. Therefore character of addition has changed and this conclusion of Tribunal has been challenged by the assessee wherein the Hon'ble High Court has framed substantial question of law to evaluate said findings of the Tribunal. Hence we safely presume that the issue has become debatable and the quantum addition has been converted into estimated addition.

8. In view of various judgments including judgment of Hon'ble jurisdictional High Court of Delhi in the case PCIT vs. Harsh International P. Ltd. (supra) when the High Court has admitted substantial question of law on the addition then the issue becomes debatable and in such circumstances penalty u/s. 271(1)(c) cannot be levied. In the present case also substantial question of law has been framed therefore penalty has become unsustainable.

9. Further as per judgment of Hon'ble jurisdictional High Court of Delhi no penalty for concealment of income can be levied if the addition made are on estimation basis. In the present case also the Tribunal has converted quantum addition into estimated addition on account of expenditure incurred for obtaining bogus bills which is also under challenge before Hon'ble High Court wherein substantial question of law has been

framed thus penalty does not survive. Furthermore as per judgment of Hon'ble jurisdictional High Court of Delhi in the case of PCIT vs. Fortune Technocomps Pvt. Ltd. (supra) once assessment order in the quantum proceedings has been significantly modified or altered by the appellate authority then the very basis of initiation of penalty proceedings has to be rendered as nonexistent. As we have noted above the Tribunal has altered and changed the basic character of addition therefore penalty on the changed or alter addition cannot be held as sustainable and valid. Accordingly, sole grievance of assessee is allowed and AO is directed to delete the penalty for both the assessment years having identical facts and circumstances.

10. In the result, all three appeals of the assessee are allowed and AO is directed to delete the penalty in toto.

Order pronounced in the open court on 10.08.2023.

Sd/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

Sd/-
(CHANDRA MOHAN GARG)
JUDICIAL MEMBER

Dated:10th August, 2023.

NV/-

Copy forwarded to :

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

// By Order //

Asstt. Registrar, ITAT, New Delhi