

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No. 155/Del /2014
Assessment Year: 2005-06**

Pheonix Lamps Ltd., (Formerly Halonix Ltd.,) 59Am NSEZ, Phase-II, Noida. (PAN: AABCP7718G)	vs	Joint Commissioner of Income Tax, Noida, Range-1, Noida.
(Appellant)		(Respondent)

Appellant by: Shri Shashwat Bajpai, Adv. & Shri Sharad Agarwal
Respondent by: Smt. Paramita Tripathy, CIT DR

**Date of Hearing : 26.07.2017
Date of Pronouncement: 24.10.2017**

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.

This appeal has been preferred by the assessee against the order passed by the Ld. Commissioner of Income Tax (Appeals) – Noida for assessment year 2005-06 wherein he has confirmed the penalty of Rs. 18 lakh imposed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter called 'the Act').

2. The brief facts of the case are that the assessee company is into manufacturing halogen lamps and CFL lamps. It had two existing units at Noida and one new unit started in Uttarakhand in the previous year relevant to the assessment year under consideration. The assessee had claimed exemption u/s 80IC of the Income Tax Act, 1961 (hereinafter called 'the Act') about which there is no dispute. The return of income was filed showing a total income of Rs. 16,85,43,920/- which was subsequently revised by the assessee. The assessment was completed at a total income of Rs. 17,26,15,083/- after making the following additions – disallowances:-

- i) Rs. 19,37,758/- added u/s 50C of the Income Tax Act, 1961 (hereinafter called 'the Act') on the basis of circle rate in respect of property situated at Sector 80, Noida.
- ii) Disallowance of Rs. 37,31,300/- being amount disallowed by the Assessing Officer out of Director's remuneration.

Subsequently, penalty of Rs. 18 lakh was imposed u/s 271(1)(c) of the Act on these two additions/disallowances which on appeal was also confirmed by the ld. CIT(A). Now, the assessee has

approached the ITAT and has challenged the confirmation of penalty.

3. At the outset, ld. AR submitted that the assessee was seeking deletion of penalty only on the disallowance of Rs. 37,31,300/- which had been disallowed out of Director's remuneration.

3.1 On the second issue on which the penalty had been confirmed i.e. reallocation out of managerial remuneration to the Dehradun unit, the ld. AR submitted that the assessee company in the Uttarakhand unit had claimed payment of Director's remuneration (including sitting fees etc.) at Rs. 14,95,700/- and had debited the remaining amount of Rs. 1.52 crores in the Noida unit. The total managerial remuneration claimed during the year and debited in the account was Rs. 1.6703 crore. It was submitted that the Assessing Officer was of the opinion that since the company had three units, it would have divided the Director's remuneration between three units equally or on the basis of turnover effected by these three units. It was further submitted that the Assessing Officer proceeded to reallocate the managerial remuneration between the three units, thereby disallowing Rs. 37,31,300/- as a deductible expense on which penalty u/s

271(1)(c) was imposed. Ld. AR submitted that full particulars with regard to payment on account of commission, salary, allowances and perquisites paid to the Director had been duly furnished before the Assessing Officer and, therefore, it was not the case of the department that there was any concealment of income or any furnishing of inaccurate particulars of income thereof. It was also submitted that this was the initial year of the Uttarakhand unit in which the plant was set up for the first time and the assessee was fully justified in making the claim on the basis of capital outlay i.e. the fixed assets because during the initial years, it is the management of the capital outlay and its deployment which is the main function and responsibility of the management. It was also submitted that any comparison between the net profit of the old and established units at Noida and newly set up unit at Dehradun was unjust and unfair and devoid of real business consideration which the Assessing Officer had done. It was also submitted that there was no justification in apportioning the salary and wages equally between the units in Noida and Uttarakhand because Noida establishment had two units and Uttarakhand had only one unit. It was also emphasised that Noida establishment employed 1030 employees

whereas Uttarakhand unit had only 660 employees during the year under consideration. It was also submitted that the Noida unit had a turnover of five times than that of the Uttarakhand unit and also had exports whereas Uttarakhand unit did not have any export. It was submitted that this undisputed fact demanded much higher attention and time of the Directors at Noida than the Uttarakhand unit in the field of man management and driving and motivating the employees to increase the exports.

3.2 It was further submitted by the ld. AR that the assessee had apportioned the managerial remuneration on the basis of capital outlay whereas the Assessing Officer had apportioned the same on the basis of net profit and salary which was only a difference of opinion and accordingly no penalty was leviable on such a change of opinion. It was also submitted that the ld. Commissioner of Income Tax(A) had confirmed the penalty on the ground that the assessee's apportionment did not appear prudent or logical whereas penalty is leviable only when there is concealment of income or furnishing of inaccurate particulars and not on the basis of change of opinion.

3.3 The ld. AR placed reliance on the judgment of Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs

Dharampal Premchand Ltd. reported in 329 ITR 572 (Del) wherein similar penalty deleted by the Tribunal was upheld by the Hon'ble Delhi High Court by placing reliance on the apex court judgment in Commissioner of Income Tax vs Reliance Petroproducts Pvt. Ltd. 322 ITR 158 (SC). Reliance was also placed on a judgment of the Hon'ble Bombay High Court in the case of Commissioner of Income Tax vs Mirc Electronics Ltd. reported in (2017) 77 taxmann.com 67 (Bombay). Ld. AR submitted that the penalty as upheld by the ld. Commissioner of Income Tax(A) may kindly be deleted.

4. In response, the ld. C.I.T. DR read out from the order of the Assessing Officer as well as the ld. Commissioner of Income Tax(A) and submitted that as pointed out by the Assessing Officer as well as the ld. Commissioner of Income Tax(A), this was just a ploy by the assessee to avoid payment of tax and there was no justifiable reason for the assessee to have apportioned the remuneration on the basis of capital outlay. She also pointed out that the quantum has been confirmed by the ITAT which was all the more reason for confirming the levy of penalty. It was prayed that the order of the ld. Commissioner of Income Tax(A) be upheld.

5. We have heard the rival submissions and perused the material available on record. As it has been submitted by the ld. AR that he is not challenging the imposition of penalty on addition of Rs. 19.37,758/- added u/s 50C of the Income Tax Act, the assessee's appeal on this issue is dismissed as not pressed.

5.1 As far as the second issue on which the penalty has been confirmed by the ld. Commissioner of Income Tax(A) i.e. the re-allocation out of managerial remuneration, it is seen that the assessee's case is covered by the judgment of the Hon'ble Bombay High Court in the case of Commissioner of Income Tax vs Mirc Electronics Ltd. (supra) wherein the Hon'ble High Court had placed reliance on its earlier judgment in the case of Zandu Pharmaceuticals vs Commissioner of Income Tax reported in 350 ITR 366 (Bombay) and had arrived at a conclusion that the opinion of the respondent assessee in not allocating any personal expenses of the head office to the eligible units is a possible view and therefore it could not be said that there was any filing of inaccurate particulars and/or concealment of income on the part of the respondent assessee warranting imposition of penalty. The Hon'ble Delhi High Court in the case of Commissioner of Income

Tax vs Virgo Marketing (P) Ltd. (2008) 172 Taxman 83 held that if the Assessing Officer took a view contrary to that expressed by the assessee, it did not *per se* mean that the assessee had adopted an illegal device for reducing its tax liability. It is undisputed that there are no norms prescribed under the Income Tax Act for allocation of common expenses incurred by the assessee and the same has to be apportioned to various manufacturing units on the basis of an estimate only. The assessee company adopted the capital basis for apportionment whereas, as per the Assessing Officer, the same should be allocated on the basis of salary and wages. Thus, it was only a case of difference of opinion between the Assessing Officer and the assessee. It is not the department's case that relevant facts were not disclosed in the income tax return of the financial statement of the assessee. It is undisputed that the assessee had furnished all the details of expenditure as well as income and no such details were found to be inaccurate nor could be viewed as concealment of income on the part of the assessee. Therefore, at most, it was a case of the assessee making an incorrect claim in law which cannot tantamount to furnishing of inaccurate particulars of income. The Hon'ble Apex Court has held in

Commissioner of Income Tax vs Reliance Petroproducts (supra) that merely because the assessee had claimed a deduction which was not acceptable to the revenue, the same by itself would not attract the penalty u/s 271(1)(c) of the Income Tax Act. Accordingly, we are of the considered opinion that this was not a fit case for imposition of penalty u/s 271(1)(c) of the Act and we set aside the order of the Id. Commissioner of Income Tax(A) on the issue of levy of penalty on apportionment of managerial remuneration and direct the Assessing Officer to delete the penalty so imposed.

6. In the result, the appeal of the assessee stands partly allowed.

The order is pronounced in the open court on 24th October, 2017.

Sd/-
(PRASHANT MAHARASHI)
ACCOUNTANT MEMBER

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 24th October, 2017

‘GS’

Copy forwarded to:

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

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By Order

ASSISTANT REGISTRAR