

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'E', NEW DELHI**

**BEFORE SHRI P.K. BANSAL, VICE PRESIDENT
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER**

ITA No. 5757/Del/2014
AY: 1984-85

The ITO Ward 5(4) New Delhi	vs.	Modipon Ltd. Hapur Road Opp. Nagar Palika Modinagar 201 204 Uttar Pradesh PAN: AAACM 2069 E
(Appellant)		(Respondent)

Appellant by	Sh. P.Damkanunjna, Sr.D.R.
Respondent by	Sh. Santosh Aggarwal, Adv.
Date of Hearing	11.12.2017
Date of Pronouncement	13.12.2017

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

The present penalty appeal has been filed by Revenue against order dated 27/08/14 passed by Ld.CIT(A)-8, New Delhi for assessment year 1984-85 on the following grounds of appeal:

“1. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the penalty of Rs.20,72,130/- imposed by the AO on account of addition made u/s 37(4) and 40A(5) of the Income Tax Act, 1961 (the Act)?

2. *Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in ignoring that the addition on which penalty was imposed was duly confirmed by Hon'ble Delhi High Court and accepted by the assessee company?*
3. *Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred to state that the penalty was time barred as the same was imposed after the final order of Hon'ble ITAT?*
4. *That the order of Ld.CIT(A) is erroneous and is not tenable on facts and in law.*
5. *That the grounds of appeal are without prejudice to each other.*
6. *That the appellant craves leave to add, alter, amend or forego any grounds of appeal raised above at the time of hearing."*

2. Brief facts of the case are as under:

Assessee filed its return of income on 30/06/84 declaring total income of Rs.48,65,320/-. Assessment was made under section 143 (3) of the Act on 27/03/87, by making various additions and disallowances. Aggrieved by assessment order, assessee preferred appeal before Ld.CIT(A). Ld.CIT(A) vide order dated 28/12/87, deleted various disallowances. Being aggrieved by the order of Ld.CIT(A) assessee as well as revenue preferred appeal before this Tribunal, being ITA No.1134/1988 and 1231/1988 respectively. Both the appeals were disposed of by way of common order dated 30/06/94 granting part relief to assessee. A reference was made to Hon'ble High Court in RA No. 1003/Del/94 wherein following 4

questions of law were referred for esteemed opinion of Hon'ble High Court under section 256(1) of the Act.

“1. Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the Excise Duty on unsold items is to be excluded while determining the value of the closing stock as adopted by the assessee.

2. Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the expenditure on account of repairs, taxes which are specifically allowable u/s 30 to 36 are not covered u/s 37(2A) of the Act?

3. Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in directing to allow expenses amounting to Rs.58,341/- on rent/repairs and depreciation of guest house u/s 30 to 46 of the Act?

4. Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in allowing relief of custom duty paid included in closing stock as allowable u/s 43-B following the order of the Tribunal (S.B.)?”

2.1. Hon'ble High Court vide order dated 10/08/07 in ITA No. 40 of 1996 answered question No. 2 and 3 in negative in favour of revenue in view of the decision passed by *Hon'ble Supreme Court* in the case of *Britannia Industries Ltd vs. CIT and Anr.*, reported in (2005) 278 ITR 546.

2.2. Subsequent to passing of the order by Hon'ble High Court, this Tribunal vide order dated 10/08/13 modified its order dated 30/06/94.

2.3. Against order dated 10/08/13, Department initiated penalty proceedings. The penalty order was passed on 27.05.2014, levying penalty of Rs.20,72,130/-which is 200% of the tax sought to be evaded was levied.

2.4. Against the order of Ld. AO, assessee preferred appeal before Ld. CIT(A) who deleted the penalty by observing as under:

"I have perused the assessment order, penalty order, written submissions and discussed the matter with AR very carefully. The AR produced various case laws where the Hon'ble High Courts have deleted the penalty.

Appellant has produced the chart of additions made by the AO in the assessment order and in penalty order as well. The chart shows that the additions made on both Staff Transit Houses were mostly deleted by the Hon'ble Tribunal in its order dated 30.06.1994 vide ITA Nos.1134 & 1231 of 1988 in the assessee's own case. It is evident from the order dated 16.08.1994 passed by the Assessing Officer in pursuance to give effect to the aforesaid ITAT order dated in ITA No.1134 (pp 216-219).Further it is seen that the Question under section 256(1) of the Act raised on this issue by the department was rejected by ITAT vide its order dated 28.09.1995 in RA No.1003 of 1994 and no further question on this issue under section 256(2) of the Act was raised by the department (pp 233,235 & 248). Moreover there is force in the arguments of the Appellant that the aforesaid

issue was not the subject matter in the consequential order dated 10.08.2013 passed by the ITAT in pursuance to the Hon'ble Delhi High Court's order dated 10.08.2007 in ITR 40 of 1996 passed under section 256(2) of the Act. There are 4 questions referred by ITAT to Hon'ble Delhi High Court as stated above. Question no.1 and 4 were allowed in favour of the assessee and question no. 2 and 3 are allowed in favour of department. The AO should have imposed penalty on income arising out of these two questions no. 2 and 3.

The amount of income involved in question no. 2 and 3 are Rs. 2,44,747/- and 59,341/- only but since the penalty imposed is delayed and AR claimed the penalty proceedings as time barred. I find force in the arguments of the AR of the appellant that the penalty proceedings imposed by AO u/s 271(1)(c) is time barred u/s 275(1) of the IT Act, as the commissioner of had received the order of ITAT in the year 1995. The AO should have imposed penalty u/s 271(1)(c) while giving effect to the order of the Tribunal in 1994. The other section 275(1a) came into effect from 13.07.2006.

Therefore considering the facts and circumstances of the case and case law of various High courts including the jurisdictional High Court in the identical matter, I deem it fit not to impose the penalty under section 271(1)(c) of the Act, as the appellant had shown all the particulars of income & expenses in the return with Tax Audit Report and accompanying documents/letters. It is not a case to impose the penalty as the appellant's claim was bona fide and had not concealed any income which has been unearthed by the AO. In these circumstances, I quash the penalty order passed by the AO and

delete the penalty imposed under section 271(1)(c) of the Act of Rs. 20,72,130/-.”

2.5. Aggrieved by the order of Ld.CIT(A) revenue is in appeal before us now.

2.6. Ld. DR submitted that the penalty has been levied on the basis of the order passed by this Tribunal subsequent to the order of Hon'ble High Court.

Ld. DR placed reliance upon the order passed by Ld. AO.

2.7. Ld.AR in support of his argument submitted the following propositions:

- That the penalty proceedings initiated by Assessing Officer is time barred. He submitted that this Tribunal had decided appeal in ITA No.1134/del/98 vide order dated 30/06/94. The Subsequent order passed by this Tribunal on 10/08/13 was consequential to the order passed by Hon'ble High Court in ITA No. 40 of 1996. It has been submitted that, Ld.AO has passed penalty order beyond period of limitation within the purview of section 275 of the Act.
- That the expenses decided against assessee by Hon'ble High Court was in respect of expenses relating to guesthouse maintained by assessee's and certain expenses relating to disallowance under section 37 (2A), being entertainment expenses. It is further submitted that Ld.CIT(A) had allowed only 10% of the expenses towards the employees participation out of the total entertainment expenses debited which was further increased to 25% by this Tribunal while passing order

dated 30/06/94. It was submitted that Hon'ble Delhi High Court reversed the decision pursuant to the decision of *Hon'ble Supreme Court* passed in the case of *Britannia Industries Ltd vs. CIT and Ors. (supra)*. It has been submitted that therefore the issue is debatable. Ld.AR submitted that while the issue was pending before this Tribunal and the decision of Hon'ble Supreme Court was not available.

- Ld.AR submitted that in the assessment order the penalty has been initiated on account of issues discussed in para 1, 2 and 3. He submitted that there is nothing mentioned regarding any concealment or filing of inaccurate particulars in these paragraphs.

2.8. He accordingly submitted that penalty deserves to be deleted on the basis of the above contentions submitted by him.

3. We have perused the submissions advanced by both the sides in the light of the records placed before us. It is observed that the disallowance has been reaffirmed by Hon'ble Delhi High Court on the basis of a decision passed by *Hon'ble Supreme Court* in the case of *Britannia Industries Ltd. vs. CIT and Ors. (supra)*. It has thus been submitted that certain expenditure was disallowed merely because of a difference of opinion, without there being any allegation in respect of any concealment or filing of inaccurate particulars by assessee. Further from the submissions made by Ld.AR we observe that this Tribunal vide order dated 30/06/94 granted part relief in respect of additions, which have been reconsidered by Hon'ble High Court in view of the decision of

Hon'ble Supreme Court in the case of Britannia Industries Ltd vs.CIT and Ors. (supra).

3.1. At this juncture we refer to the decision of Hon'ble Supreme Court in the case of CIT versus Reliance Petro Products Private Limited reported in 322 ITR 158, wherein Hon'ble Court held as under:

“In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars”

‘A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars....

“We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that by itself would not, in our opinion, attract the penalty u/s 271(1)(c). If we accept the contention of Revenue then in case of every return where the claim made is not accepted by AO for any reason, the assessee will invite penalty u/s 271(1)(c). That is clearly not the intendment of the Legislature.”

3.2. In view of the above, we do not find any infirmity in the findings of Ld.CIT(A) and the same is upheld. Accordingly the grounds raised by revenue stand dismissed.

4. In the result appeal filed by the revenue stands dismissed.

Order pronounced in the Open Court on 13.12.2017.

Sd/-
(P.K.BANSAL)
VICE PRESIDENT

Sd/-
(BEENA A PILLAI)
JUDICIAL MEMBER

Dt. 13.12.2017

Copy forwarded to: -

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

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

ITA No.5757/Del/14, Assessment Year 1984-85
ITO vs. Modipon Ltd.

S.No.	Details	Date	Initials	Designation
1	Draft dictated on Dragon	11/12/17		Sr. PS/PS
2	Draft placed before author	12/12/17		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement			Sr. PS/PS
7	File sent to Bench Clerk	13.12.17		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			