

**In the Income-Tax Appellate Tribunal,
Delhi Bench ' E', New Delhi**

**Before : Shri Amit Shukla, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No. 6514/Del/2014
Assessment Year: 2009-10**

MakeMy Trip (India) Pvt. Ltd., 243, Ground Floor, Tower A, S.P. Infocity, Udyog Vihar, Phase-1, Gurgaon. PAN- AADCMS 5146R (Appellant)	vs.	DCIT, Circle 6(1), New Delhi. (Respondent)
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Appellant by	Sh. Tarandeep Singh, Advocate
Respondent by	Sh. Sridhar Dora, Sr. DR

Date of Hearing	28.11.2018
Date of Pronouncement	16.01.2019

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the assessee against the order of ld. CIT(A)-XX, New Delhi dated 15.09.2014 for the assessment year 2009-10 on the following grounds :

1. *That on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in upholding the penalty order under section 271(1)(c) of the Act of Rs. 3,08,52,975/- in respect of following controversial/disputed disallowance made in the assessment order:*

i) *Payment Gateway Charges disallowed u/s 40(a)(ia) alleging TDS should have been deducted u/s 194H of the Act wherein penalty of Rs 2,85,12,768 has been upheld.*

ii) *Difference in rate of depreciation on Computer Peripherals wherein penalty of Rs 55,491 has been upheld.*

iii) *Difference in amount of depreciation on 'Website Development Cost' arising due to past Appellate order, wherein penalty of Rs 22,84,716 has been upheld.*

2. *That on the facts and the circumstances of the case and in law, Ld. CIT(A) has failed to appreciate that the provisions of section 271(l)(c) of the Act are not applicable in this case as the Appellant had furnished all the material facts and made all true and full disclosures in the return of income and the explanations offered by it are bonafide and the additions/disallowances made in the Assessment order are merely due to difference of opinion and controversial in nature.*

3. *The Ld. CIT(A) on the facts and circumstances of the case and in law has erred in stating in the order that the Appellant could not furnish any satisfactory explanation as to why penalty should not be levied, ignoring the detailed written submissions filed with both the Ld. AO as well as the Ld. CIT(A), as well as the submissions made during the hearing, explaining the facts and that provisions of section 271(1)(c) of the Act are not applicable in this case, relying on various judicial precedents.*

4. *That on the facts and in the circumstances of the case and in law the Ld. CIT (A) has erred in upholding the penalty order based on the premise that the disallowance/additions have been upheld, without appreciating that this itself cannot lead to levy of penalty.*

5. *That on the facts and in the circumstances of the case and in law, the order passed by the Ld. CIT(A) is mechanical and without application of mind, based on mere conjectures and surmises, without appreciating the facts, controversial additions/disallowances made in the assessment order. The legal submissions/explanations offered by the Appellant have been disregarded without giving cogent reasons as to how the requirements of Section 271(1)(c) are met in this case and hence the impugned order is perverse, vitiated in law and deserves to be quashed on this ground alone.*

Penalty in respect of Payment Gateway Charges disallowed under section 40(a)(ia)

6. *The Ld. CIT(A) on the facts and circumstances of the case and in law has erred in upholding penalty of Rs 2,85,12,768 under Section 271(1)(c) of the Act on disallowance of the payment gateway charges retained/paid to Indian banks, without appreciating the fact that:*

i) The issue whether TDS is required to be deducted on payment gateway charges retained/paid to banks is controversial, debatable and litigative and various decisions of Hon'ble ITAT have held that on similar payments there is no requirement of TDS.

ii) The provisions of Section 194H are not applicable to the amount paid/retained to/by the banks for providing Payment Gateway facilities and hence there was no requirement of TDS under section 194H of the Act.

iii) Since inception no TDS was being deducted by the Appellant on the payment gateway/authentication charges retained by the banks under a bonafide belief that such payments are not subject to TDS under any provisions of the Act. Further, this position was never disputed by the tax authorities prior to AY 2008-09.

Penalty on Disallowance on account of rate of depreciation on certain computer peripherals

7. That on the facts and the circumstances of the case and in law, Ld. CIT(A) has erred in upholding penalty of Rs 55,491 under Section 271(1)(c) of the Act in respect of difference in amount of deprecation on certain computer peripherals due to rate of difference without appreciating that, this issue is not only controversial, debatable and litigative but favourably covered by various judicial rulings.

Penalty in respect of rate of depreciation on 'Website Development Costs'

8. That on the facts and the circumstances of the case and in law, Ld. CIT(A) has erred in upholding penalty of Rs 22,84,716 under Section 271(1)(c) of the Act on difference in amount of depreciation on Website Development Cost, due to difference in rate of depreciation arising out of past litigation.

9. That on the facts and the circumstances of the case and in law, Ld.CIT(A) has failed to appreciate that this issue has been under litigation and the Hon'ble Income Tax Appellate Tribunal in Appellant's own case for AY 2004-05 vide order dated March 9, 2012 has allowed depreciation @ 25%, whereas return of income for AY 2009-10 was filed on September 26,2009

The above grounds of appeal are without prejudice to and independent of one another.

2. The brief facts of the case are that the assessment of assessee for the year under consideration was completed u/s. 143(3)/144C(3) of the IT Act on 01.05.2013 at an income of Rs.55,13,70,655/- against the loss of

Rs.41,69,31,088/- declared by assessee vide its revised return filed. The Assessing Officer while completing the assessment made various additions under different heads, as mentioned at page 1 of the assessment order and accordingly levied penalty u/s. 271(1)(c) of the IT Act based on such additions. In the quantum appeals, the assessee was given relief with respect to some of the additions and some of them were sustained by the Id. CIT(A) and the Tribunal. The assessee challenged the penalty order in appeal before the Id. CIT(A), who after considering the results of quantum appeals, i.e., the additions sustained/deleted, confirmed the penalty imposed on the basis of additions which were sustained under the following heads :

- (i). Payment Gateway charges disallowed
- (ii). Excess Depreciation on website Development cost.
- (iii). Excess depreciation on computer peripherals

Aggrieved by the impugned order sustaining penalty imposed on the additions made in the above heads, the assessee is in appeal before the Tribunal.

3. We have heard the submissions of both the parties and have gone through the entire material available on record.

4. A perusal of the assessment order reveals that the Assessing Officer had disallowed the entire payment gateway charges of Rs.12,52,49,946/- on the premise that the said payment was made without deducting tax at source u/s.

194H of the Act like commission and brokerage, liable to be disallowed u/s. 40(a)(ia) of the Act. The contention of the assessee has been that in the quantum appeal, this issue has been decided by ITAT in assessee's own case by the Tribunal for the year under consideration vide order dated 26.09.2017 (ITA No. 4721/Del/2014). The relevant observations of ITAT read as under :

On consideration of the rival submissions in the light of the earlier order of the Tribunal dated 30th January, 2017. (supra) we find that this issue is already decided in favour of the assessee by the Tribunal following the decision of the Hon 'ble Delhi High Court in the case of CIT Vs. JDS Apparels (P.) Ltd. (2015) 370 ITR 454 (Del.) in which it was held "that commission to bank on payments received from customers who had made purchase through credit cards is not liable to TDS under section 194H of the I. T. Act." The issue is covered in favour of the assessee by order of ITAT, Delhi Bench in the case of same assessee vide order dated 30th January, 2017. Therefore, there is no justification for the authorities below to sustain addition on this issue.

Learned counsel for the assessee further submitted that assessee also moved before the Addl. Commissioner of Income Tax for direction under section 144 A of the Income Tax Act for assessment year 2011-12 on the identical issue in which the learned Addl. Commissioner issued the directions vide order dated 20th March, 2015 directing the Assessing Officer to follow decision of the Hon'ble jurisdictional High Court in the case of JDS Apparels (P.) Ltd. (supra). It, therefore, stands concluded that assessee is not liable to make TDS on payments gateway charges. Therefore, provisions of section 194H of the Income Tax Act would not apply to the facts and circumstances of the case.

We accordingly set aside the orders of the authorities below and delete the entire addition.'

The Id. DR could not object to the above contentions of the assessee. Accordingly, we are of the opinion that once the very basis of imposing penalty on this addition stood collapsed, there remaining no justification to sustain penalty on this count. For this view, we stand fortified by the decision of Hon'ble Apex Court in the case of K.C. Builder v. Asstt. CIT [2004] 265 ITR 562/135 Taxman 461 wherein it has been laid down that where the additions made in the assessment order on the basis of which penalty for concealment was levied has been deleted, there remains no basis at all for levying concealment penalty and therefore, in such a case no such penalty can survive. Accordingly, the penalty based on this addition, sustained by Id. CIT(A) deserves to be cancelled.

5. As far as the penalty based on addition made on account of excess depreciation claimed on website development cost is concerned, the assessee claimed depreciation of Rs.3,02,03,098/- @ 60% on the website development cost. The Assessing Officer allowed depreciation @ 25% after following order of CIT(A) for earlier A.Y. 2007-08 and of Tribunal for A.Y. 2004-05 and accordingly made disallowance of depreciation of Rs.1,76,18,474/-. The contention of the Id. AR is that this is a debatable issue. While the Tribunal allowed depreciation @ 25% in 2004-05 but in appeal for A.Yrs.2005-06 and 2006-07 in case of assessee itself, the issue has been decided in favour of the assessee after following the decision of Special Bench of Tribunal in the case

of Amway India Enterprise, 114 TTJ 476 (SB) which has been upheld by Hon'ble Delhi High Court. Therefore, the penalty imposed only on the basis of rate difference of depreciation, cannot be sustained as held in various decisions. The ld. DR supported the observations of the ld. authorities below on this count. We, however, observe that there being difference in opinions of various authorities on the rate of depreciation on website development cost as narrated above, it cannot be made to be the sole basis for imposition of penalty for furnishing inaccurate particulars of income. The revenue could not make out any case that the assessee did not furnish all material facts before the ld. authorities below pertaining to website development cost and depreciation claimed thereon. The issue of depreciation being debatable in nature, therefore, does not warrant to observe that the assessee had furnished inaccurate particulars of income entailing penalty u/s. 271(1)(c) of the Act. Accordingly the penalty imposed on this addition too cannot be sustained.

6. As regards the penalty based on addition on account of difference in rate of depreciation on computer peripherals, the Assessing Officer has observed that the assessee made a wrong claim of depreciation @ 60% on printers, UPS, computer stationery, routers and scanners by clubbing them with the computers. As per Assessing Officer these items fall in the category of office equipments for which depreciation is available @ 15%. It was also observed that assessee had clubbed the license fees paid for the software with the computer and the software were not purchased with their source codes and such software were eligible for depreciation @ 25%. Thus, the Assessing

Officer worked out excess depreciation of Rs.73,48,472/- and added the same to the income of assessee. Based on this addition penalty u/s. 271(1)(c) was imposed. The contention of the assessee has been that similar claim of the assessee stood accepted in earlier years. Moreover, in quantum appeal of assessee for the year under consideration, the Tribunal has upheld the decision of Id. CIT(A) that all these items are subject to depreciation @ 60% barring the items like digital call logger board & software protection, Nortel equipment, headsets and time attendance system, which do not satisfy the criterion of being computer peripherals and are subject to depreciation as plant and Machinery. The Id. CIT(A) has thus given substantial relief to the assessee restricting the disallowance to only Rs.1,63,257/-. It was therefore, submitted that there being difference in the opinion of the Assessing Officer and that of various other authorities on this issue, it cannot be said that the assessee has furnished any inaccurate particulars of income. The Id. DR opposing the contentions of the assessee supported the orders of the authorities below on this score. We find substantial weight in the contention of the assessee. It is notable that complete details/facts relating to the assets on which depreciation was claimed were furnished before the Assessing Officer and as such it can hardly be said that the assessee has furnished inaccurate particulars of income merely because the claim of assessee was not, in the opinion of Assessing Officer, sustainable in law. For this view, we stand fortified by the decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt. Ltd., 322 ITR 158 (SC). No contrary material is placed on record on behalf of the Revenue to support the penalty imposed on

the basis of difference in the rate of depreciation. Accordingly, the penalty based on this addition deserves to be cancelled.

7. In view of what has been discussed above, the appeal of the assessee deserves to be allowed.

Order pronounced in the open court on 16.01.2019.

Sd/-

(Amit Shukla)
Judicial member

Sd/-

(L.P. Sahu)
Accountant Member

Dated: 16.01.2019

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Copy of order forwarded to:

<i>(1) The appellant</i>	<i>(2) The respondent</i>
<i>(3) Commissioner</i>	<i>(4) CIT(A)</i>
<i>(5) Departmental Representative</i>	<i>(6) Guard File</i>

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi