

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH: 'G': NEW DELHI)**

**BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER  
AND  
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

**ITA Nos:- 3917, 3918 & 3919/Del/2015  
(Assessment Years: 2004-05, 2005-06 & 2009-10)**

ACIT Circle 2, Aayakar Bhawan, A-2D, Sector-24, Noida	<b>Vs.</b>	Noida Power Company Ltd. Commercial Complex, Block-H, Alpha-II, Greater Noida
<b>PAN No:</b> AAACN4984D		
<b>APPELLANT</b>		<b>RESPONDENT</b>

**Assessee by** : Sh. S.S. Rana, CIT(DR)  
**Revenue by** : Ms. Sushmita Basu, CA  
Date of Hearing : 12.02.2019  
Date of Pronouncement : 14.02.2019

**ORDER**

**PER BENCH:**

These three appeals have been filed by the Revenue by which the penalty imposed u/s 271(1)(c) by the Assessing Officer('AO' for short) has been quashed by the Commissioner of Income Tax (Appeals)['CIT(A)' for short], Noida vide his separate orders dated 12.03.2015 pertaining to 2004-05, 2005-06 and 2009-10 Assessment Years. It was a common stand of the parties that the issue raised in each of these appeals is identical, accordingly for the sake of convenience, a common order is being passed. Since the grounds raised in each of these appeals is identical for ready reference, the grounds from ITA No. 3917/Del/2015 is reproduced here:

- 1. That the CIT (Appeals-I) has erred in law and on facts by deleting the penalty levied u/s 271(1)(C) amounting to Rs. 46,00,00,000/- as the same was levied upon the assessee on the grounds that it was wrongly claimed as deduction from computation of Income without debiting from Profit & Loss Account.*
- 2. That the CIT (Appeals-I) has erred in law and on facts by ignoring the fact that the power purchase price was not taken by the assessee as its liability at any point of time.*
- 3. That the CIT(Appeals-I) has erred in law and on facts by ignoring the fact that*

*quantum of appeal in the case of assessee was decided in favour department by CIT(A) and ITAT for the A.Y. 1995-96 to 2003-04 & 2007-08.*

4. *That the appellant craves to leave, add, alter and amend any of the grounds of appeal on or before hearing.*
  5. *That the order of the CIT(Appeals-I) being erroneous in law and on facts deserves to be set aside/cancelled and order of the AO be restored.*
- 2.** In the facts of the present case the Assessee is a company engaged in the business of distribution of power in Greater Noida area. The short issue on the basis of which penalty has been levied in the years under consideration is the addition made by the AO in the respective years wherein deduction claimed by the Assessee under the head "Power purchase price" has been denied. The deduction was claimed only through the computation of income without debiting it to the Profit and Loss account. The claim was made on account of some additional power purchase by the Assessee due to increase in demand. The rate applied in the invoice was disputed by the Assessee by claiming that it was not a marginal cost as agreed upon but higher than the marginal cost. It was the differential amount in the respective years which was claimed a deduction and disallowed. The addition has been sustained right up to the Income Tax Appellate Tribunal ('ITAT' for short), in the quantum appeals which led to the levy of penalty. The penalty imposed by the AO was set aside by the CIT(A), Noida in the respective years following his own orders in 2007-08 and 2008-09 Assessment Years.
- 3.** Both the parties have been heard. On a perusal of the relevant material on record as is evident from the departmental grounds raised itself in the respective years it is seen that the factum that additions have been sustained in each of the years is a factor considered and followed by the AO and the CIT(A). No change in facts and circumstances was pointed out by the parties whereas Ld. CIT(DR) relied upon the penalty orders. The Ld. AR, apart from relying upon the order of the ITAT dated 05.09.2016 in 2007-08 Assessment Year (Copy available at pages 102-105 of the Paper Book) and order dated 28.03.2017 pertaining to 2008-09 Assessment Year in ITA No. 149/Del/2014 (Copy available at pages 106-108 of the Paper Book) also relied upon the departmental Circular No. 25 of 2015 dated 31.12.2015.

**4.** We have heard the submissions and perused the material available on record. It is seen that the Coordinate Bench in 2007-08 Assessment Year in ITA No. 1569/Del/2013 while adjudicating as an identical issue examining the correctness of the order dated 24.12.2012 of CIT(A), Noida considered the facts in the following manner:

*“3. Brief facts of case are that appellant is a company engaged in business of distribution of power in greater Noida Area. For above assessment year assessee filed its return of income declaring loss of Rs. 176961703/- and book profit u/s 115JB of Rs. 60065825/-. Subsequently, return was revised on 31.03.2009 declaring loss of Rs. 176581620/- and book profit of Rs. 60068535/-. In assessment proceedings an addition of Rs. 261406249/- was made on account of power purchase price, not debited to the profit and loss account, claimed by the assessee as an expenditure in return of income showing it in computation of total income. Ld Assessing Officer disallowed same holding that it is neither an ascertained liability nor provided for in books of account. After disallowance the assessed income in normal computation was Rs. 84824629/- and book profit remain unchanged. Against above addition assessee preferred an appeal before ld CIT(A) who confirmed action of Assessing Officer. Against order of the ld CIT(A) the assessee preferred appeal before ITAT. Vide order dated 19.01.2012 in ITA No. 999/Del/2011 the appeal of the assessee was dismissed. Against the order of the tribunal the assessee approached Hon’ble Allahabad High Court who while admitting appeal of the assessee passed an interim order on 19.07.2012 and 25/7/2012. The Hon’ble High Court admitted appeal of the assessee on the question of law that whether the liability claimed by the assessee towards purchased price to the extent of Rs. 261406249/- being the difference between the purchase price of electricity bill by UPPCL and the purchase price debited to the profit and loss account by the appellant at rates worked out by UPERC is allowable expenditure in AY 2007-08. Meanwhile, the ld Assessing Officer levied penalty on this amount vide order dated 29.03.2012 of Rs. 8.80 crores holding that the assessee has furnished inaccurate particulars of income to the extent of Rs. 261406289/- by making a false claim of deduction which was apparently, patently, and clearly not allowable. Aggrieved by this order the assessee preferred appeal before the ld CIT(A) who deleted the penalty relying on the decision of the Hon’ble Supreme Court in case of CIT Vs. Reliance Petro Products Ltd and further holding that the disallowance is a purely legal and debatable issue. He further held that in assessee’s own case for earlier years the claim of the deduction of the assessee is allowed by tribunal and in earlier years when the addition is upheld. AO himself have dropped the penalty u/s 271(1) (c) for Ay 2003-04. Therefore, by order of the ld CIT(A) revenue is aggrieved and has preferred the present appeal before us.”*

**4.1.** It is seen that before the Coordinate Bench the respective arguments advanced by the parties were as under:

*“4. The ld DR submitted that as the deduction has been concurrently upheld it is not debatable and therefore, penalty levied by the ld AO may be upheld. He relied vehemently on the order of the ld Assessing Officer.*

*5. The ld AR submitted a paper book wherein the orders of the authorities including the order of the Hon’ble High court dealing the issue are placed on record. He further submitted that the orders of the coordinate benches for the previous years in case of assessee wherein the claim of the deduction is allowed. He further submitted that identical issue in AY 2003-04, the ld Assessing Officer has dropped the penalty on the similar issue.”*

**4.2.** It is seen that considering the submissions and the record, the Coordinate Bench concluded the issue affirming the CIT(A)’s decision of quashing the penalty in the following manner:

*“6. We have carefully considered the rival contentions. The issue is regarding the disallowance of a sum of Rs. 261406249/- being power purchase price which was not debited by the assessee in its books of account as expenditure but claimed as deduction in the computation of the total income. The claim of the assessee for this year is concurrently rejected by all the appellate authorities up to the Tribunal. However, Hon’ble Allahabad High Court has admitted the appeal of the assessee vide order dated 25.07.2012 in ITA No. 68 of 2009 wherein following questions of law are admitted:-*

*1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in declining to allow deduction in respect of the differential rate of power purchase (i.e. difference between the rate at which the bills were raised by the UP State Electricity Board/ UP Power Corporation Ltd. and the rates as determined/recommended by the independent authority?.*

*2 Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in declining to consider the claim of the appellant (assessee) for exclusion of the amount re-payable to customers as per the minimum consumption guarantee scheme?.*

*7. Hon’ble Delhi High Court in case of Cit Vs. Liquid Investment and Trading Company in ITA No. 240 of 2009 wherein, it is held that the appeal is admitted and substantial question of law is framed by Hon’ble High Court u/s 260A of the Act it shows that the issue is debatable and no penalty u/s 271(1)(c) can be levied. Hon’ble Bombay High Court in CIT Vs. Nayan Builders and Developers 368 ITR 722 has also held that where High Court admitted substantial question of law in respect of which penalty was levied the impugned order of penalty was to be deleted. Therefore, respectfully following the decisions of Hon’ble High*

*Court we hold that when the issue is admitted by Hon'ble High Court as substantial question of law in the case of the assessee on disallowance of Rs. 261406249/- for power purchase price difference, no penalty u/s 271(1)(c) can be levied. Furthermore, in past years the Tribunal has decided this issue in favour of the assessee that itself makes the issue debatable. Further, in AY 2003-04 on identical issue the Assessing Officer has dropped the penalty proceedings u/s 271(1)(c) in view of the facts of the case, nature of addition and in view of the reply of the assessee. The copy of such order dated 12.03.2008 was placed on the record and same was not contraverted by revenue. We are of the view that consistent approach should have been taken by revenue in this case for this year too. Hon'ble Supreme Court in case of CIT Vs. Reliance Petro Products Ltd 322 ITR 158 has stated that a mere making of the claim which is not sustainable in law by itself does not amount to furnishing of inaccurate particulars regarding the income of the assessee and does not invite penalty u/s 271(1)(c) of the Act. In the present case also the assessee has disclosed full facts about the claim made in the computation of total income filed. Further, detailed explanation about the power purchase price was given in notes to accounts in Schedule 16 of its annual account. Therefore, it cannot be said that the assessee has furnished inaccurate particulars of its claim. It also cannot be said that the claim of the assessee is not a bona fied claim because of the past history of such claim being allowed to the assessee by the tribunal. In view of the above facts we do not find any infirmity in the order of the ld CIT(A) in deleting the penalty of Rs. 8.80 crores u/s 271(1)(c) of the Act."*

**4.3.** It is further seen that the said issue again came for consideration in 2008-09 Assessment Year in ITA No. 149/Del/2014 wherein considering the following facts and identical submissions, the CIT(A)'s order was upheld holding as under:

*"2. Briefly stated, the facts of the case are that the assessee claimed deduction of Rs.22.93 crore under the head 'Power purchase price.' This deduction was claimed only through the computation of income without debiting it to the Profit & Loss Account. Such deduction was made on account of some additional power purchased by the assessee due to increase in demand. The rate applied in the invoice was disputed by the assessee by claiming that it was not a marginal cost as agreed upon, but, higher than the marginal cost. The differential amount of Rs.22.93 crore was claimed as deduction. The Assessing Officer made addition for this sum and also imposed penalty. The ld. CIT(A) deleted the penalty.*

*3. After considering the rival submissions and perusing the relevant material on record, it is observed that the penalty under identical circumstances was also imposed on the assessee for the immediately preceding assessment year i.e., 2007-08. The Tribunal, vide its order dated 05.09.2016 (ITA No.1569/Del/2013), has deleted the penalty. A copy of such order has been placed on record. The ld.*

*DR could not point out any distinguishing feature for this year vis-à-vis the immediately preceding year which has been considered and decided by ITA No.149/Del/2014 3 the Tribunal. Respectfully following the precedent, we uphold the impugned order in deleting the penalty.”*

5. Accordingly, since the facts, circumstances and the position of law remains the same as considered by the Coordinate Benches in 2007-08 and 2008-09 Assessment Years, accordingly in the absence of any infirmity having been pointed out, the impugned orders are upheld and departmental appeals are dismissed. Said order was pronounced in the open court at the time of hearing itself.

6. In the result, appeals of the Revenue are dismissed.

Order pronounced in the open court on 14.02.2019.

Sd/-  
**(L.P. SAHU)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(DIVA SINGH)**  
**JUDICIAL MEMBER**

Dated: 14.02.2019

*Bidhan*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	12.02.19
Date on which the typed draft is placed before the dictating Member	12.02.19
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	