

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D ": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.433/Del/2011
(Assessment Year: 2001-02)

Yum ! Restaurants (India) Pvt. Ltd, 2 nd Floor, Tower D, Global Business Park, MG Road, Gurgaon PAN: AAACY4188E (Appellant)	Vs.	ITO, Ward-18(4), New Delhi (Respondent)
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Assessee by :	Shri Salil Kapoor, Adv
Revenue by:	Smt Naina Soin Kapil, Sr. DR
Date of Hearing	03/04/2019
Date of pronouncement	25/06/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the assessee against the order of the ld CIT(A)-XXI, New Delhi dated 01.11.2010 for the Assessment Year 2001-02, wherein, the penalty levied u/s 271(1)(c) of the Income Tax Act, 1961 by the Income Tax Officer, Ward-18(4) of Rs. 2993984/- is confirmed. The assessee has raised the following grounds of appeal:-
 1. *That on the facts and circumstances of the case and in law, the Ld. Commissioner of Income tax (Appeals) ['CIT(A)'] erred in upholding the order passed by the Ld. Assessing Officer ['AO'] even though it was time barred under the provisions of Section 275 of the Income tax Act, 1961 ('the Act').*
 2. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the order of the Ld. AO stating that the appellant intended to defraud taxes while claiming the amount of Rs. 3,64,239 paid to Rites Equipment Limited as expenditure. The Ld. CIT(A) thereby erred in upholding penalty on the appellant under Section 271(l)(c) of the Act amounting to Rs. 1,44,057.*
 3. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the order of the Ld. AO stating that the appellant intended to defraud taxes while claiming the amount of Rs. 27,61,882 as expenditure being the accrued marketing expenditure*

under the development initiative scheme. The Ld. CIT(A) thereby erred in upholding penalty on the appellant under Section 271(1)(c) of the Act amounting to Rs. 10,92,324.

4. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the order of the Ld. AO stating that the appellant intended to defraud taxes while claiming the amount of Rs. 44,44,002 paid as advertising, marketing and promotions contributions to Yum! Restaurants Marketing Private Limited, i.e. appellant's wholly owned subsidiary company. The Ld. CIT(A) thereby erred in upholding penalty on the appellant under Section 271(1)(c) of the Act amounting to Rs. 17,57,603."*
2. During the course of hearing the assessee furnished an application for admission of additional grounds of appeals raising following grounds:-
 - "Ground 5: "That the notice issued under section 271(1)(c)/ 274 of the Act, and the order passed under section 271(l)(c) of the Act are illegal, bad in law and without jurisdiction. "*
 - Ground 6: "That no satisfaction has been recorded while completing the assessment proceedings, hence the notice issued under section 274 of the Act, and the order passed under section 271(1)(c) of the Act are illegal, bad in law and without jurisdiction. "*
 - Ground 7: "That the penalty has been initiated vide notice under section 271(l)(c)/ 274 of the Act without any specific charge, hence, the said notice and the order passed under section 271(1)(c) of the Act are illegal, bad in law and without jurisdiction. "*
 - Ground 8: "That the levy of penalty is illegal, unjust and not in accordance with law as the mandatory requirements of Section 271(1)(c) have not been met in the instant case. "*
 - Ground 9: "That the AO/CIT(A) erred in levying penalty on disallowance made on account of contributions made to YRMPL and on account of accrued marketing expenditure and erred in not appreciating that the claim of the assessee is a debatable issue and as such no penalty is leviable. "*
 - Ground 10: "That the said additions made by the AO are based on difference of opinion on account of allowability of the claim of the assessee, and as such no penalty can be levied in such cases. "*
3. Ld AR submitted that the above grounds are purely legal and does not require any fresh investigation of facts. It is further mentioned that they got to the root of the matter and therefore, same may be admitted.
4. The ld DR vehemently objected to the application for admission of additional grounds and submitted that they were not raised before the lower authorities. Hence, they should not be admitted.
5. We have carefully considered the rival contentions and found that additional grounds raised by the assessee are purely legal in nature and goes to the

root of the subject matter of the appeal. As the issues are raised with respect to the initiation of penalty proceedings on jurisdictional matters the additional grounds are therefore, admitted.

6. The brief facts of the case shows that the assessee is a company, filed its return of income on 31.10.2001 declaring income of Rs. 4723300/- under the head income from other sources. The income under the head “profits and gains” of business were computed at Rs. 9207745/- and were reduced to Nil after setting off brought forward losses. Assessment u/s 143(3) of the Act was completed on 31.03.2004 at Rs. 472330/- under the head from other sources. However, the business income was determined at Rs. 18106601/- by making an addition of Rs. 8898856/-. The disallowances were of sales tax, marketing expenses and contribution towards AMP activities.
7. The assessee preferred an appeal before the Id CIT(A) who deleted the disallowance to the extent of Rs. 12.50 lacs out of total addition of Rs. 8898856/-. The assessee has filed an appeal before ITAT which confirmed the addition of Rs. 2761882/- towards marketing expenses under Development Initiative Scheme and Rs. 4444002/- on account of contribution towards AMP activities to Yum Restaurants Marketing Private Limited (YRMPL).
8. Therefore, the penalty proceedings were initiated on these two issues. The Id AO issued show cause notice to the assessee which was replied by the assessee. However, the Id AO rejected the contention of the assessee and levied a penalty of Rs. 2993984/- stating that the assessee has filed inaccurate particulars of his income. In the assessment year the Id AO did not initiate any penalty proceedings with respect to accrued marketing expenditure of Rs. 2761882/-/- However, with respect to the contribution of AMP expenditure the AO initiated the penalty proceedings.
9. On appeal before the Id CIT(A) the penalty levied by the Id AO was upheld.
10. Adverting to the additional ground, the Id AR produced the notice dated 31.03.2004 issued u/s 274 read with section 271 of the Income Tax Act and submitted that none of the charges mentioned in the above notice has been struck off by the Id AO and therefore, the penalty itself becomes void *ab initio* and deserves to be quashed. It was further stated that on identical

facts and circumstances the additional ground raised by the assessee in the case of the assessee's sister concern in ITA No. 6598/Del/2015 for assessment year 2000-01, the penalty was deleted. He therefore, submitted that on this issue the matter is squarely covered in favour of the assessee. He also raised issues on the merits of the case.

11. The Id DR vehemently supported the order of the lower authorities.
12. We have carefully considered the rival contentions and found that the penalty notice have been issued without striking off one of the twin charges for levy of the penalty. As held by the Hon'ble Supreme Court in CIT Vs. SSA Emerald Meadows 242 Taxmann 180 (SC), wherein, it has been held that notice issued by the Id AO u/s 274 read with section 271(1)(c) is bad in law as it did not specified as to which limb of that section the penalty proceedings have been initiated. In view of this, and respectfully following the decisions of the coordinate bench in case of sister concern of the assessee, we cancel the penalty as none of the charges of the twin charges were struck off. Accordingly, additional grounds raised by the assessee are allowed and appeal of the assessee succeeds on this ground. Accordingly, additional ground Nos. 5 to 10 of the appeal are allowed. As we have quashed the penalty on the issue of validity of notice, other, issues in the appeal becomes academic. Accordingly, appeal of the assessee is allowed quashing penalty levied of Rs. 29,93,984/- u/s 271(1)(c) of the Act.
13. In the result appeal of the assessee is allowed.
Order pronounced in the open court on 25/06/2019.

-Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 25/06/2019
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi