

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 1760/DEL/2017
[A.Y 2008-09]

M/s Metenere Ltd
138-19, Main Road
Ghazipur, Delhi

Vs.

The A.C.I.T
Central Circle - 18,
New Delhi

PAN No: AAACM 8484 F

[Appellant]

[Respondent]

Date of Hearing : 03.07.2019
Date of Pronouncement : 04.07.2019

Assessee by : None
Revenue by : Ms. Rinku Singh, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:

This appeal by the assessee is preferred against the order of the
ld. CIT(A) - 27, New Delhi dated 30.01.2017 pertaining to A.Y 2008-09 .

2. The sum and substance of the grievance of the assessee is that the ld. CIT(A) erred in sustaining the penalty of Rs. 1,39,15,733/- levied u/s 271(1)(c) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short].

3. We find that the first appellate authority has dismissed the appeal in limine which means that the facts of the case have not been properly appreciated by the ld. CIT(A).

4. The facts on record show that the assessment was framed u/s 143(3) of the Act vide order dated 13.12.2010. Income of the assessee was computed as under:

Income under the head "Business & Profession"			
Net Profit as per profit and loss account			1152349276
Add: (added by assessee himself)			
	Provision for leave encashment	500182	
	Prior period expenses	218273	
	ROC Fees	1002000	
	Intt. On TDS	4201	
	Depreciation as per Co. Act	188367698	190092354
			1342441630

Add:	Disallowance u/s 14A (as discussed above)	10607464	
	Disallowance u/s. 2(24)(x)	595170	
	Claim of depreciation on fixed assets	28005497	
	Excess claim of deduction of u/s. 80 IB	1939572	
	Claim of donation	153703	
	Claim of bad debts written off	234432	
			41535838
			1383977688
Less:	Depreciation as per Income Tax Act	12522.5239	
	Share in profit of firm	2112864	127338103
			1256639365
Less:	Deduction u/s 80 IB Rs. 1299341344		1256639365
.	Total income		0

Computation of income u/s. 115JB of the Act

	Net profit as per profit & loss account		1193133338
Add:	Provision for leave encashment	500182	
	Prior period expense	218273	718455
			1193851793
Less:	Deferred tax assets	41654336	
	Income from partnership firm	2112364	43767200
			1150084590
Add:	Disallowance u/s 14A (as discussed above)		10607464
	Total book profit		11606,9205
	Rounded off		1160 [®] 2G50

After discussion the total income of the assessee is computed at ? Nil u/s. 143(3) of the I T Act, 1961, however, the tax liability is computed at Rs. 116,06,92,050/- u/s. 115JB of I T Act. issue, necessary forms after allowing credit for prepaid taxes if any. Charge interest u/s 234A, 234B. 234C & 234D as per law. - Penalty proceedings u/s 271(l){c) have been initiated separately."

5. Penalty proceedings u/s 271(1)(c) of the Act were initiated on the additions made while computing the income under normal provisions of the Act. It can be seen from the computation of income, as per the assessment order exhibited above, that the tax liability of the assessee is computed u/s 115JB of the Act.

6. Against the quantum addition, the assessee preferred an appeal before the Id. CIT(A) who gave part relief to the assessee and penalty has been levied on the addition sustained by the Id. CIT(A).

7. We are of the considered view that in such a case, no penalty is leviable when income is assessed under the provisions of section 115JB of the Act and penalty is levied on the additions made under normal provisions of the Act. The Assessing Officer has made certain additions while computing the book profit u/s 115JB of the Act. Thus, it can be seen that the assessment is ultimately framed u/s 115JB of the Act whereas the penalty has been levied on the additions made for computing the income u/s 143(3) of the Act. This issue is now well settled in favour of the assessee and against the revenue by the decision of the Hon'ble High Court of Delhi in the case of Nalwa Sons Investment Ltd 327 ITR 543.

8. The facts of the case in hand are also clearly covered in favour of the assessee and against the Revenue by the following Circular of the CBDT:

"CIRCULAR NO. 25/2015
F.No.279/Misc./140/2015/ITJ
Government of India
Ministry of Finance Central Board of Direct Taxes
New Delhi,

31st December, 2015

Subject: Penalty u/s 271(i)(c) wherein additions/disallowances made under normal provisions of the Income Tax Act, 1961 but tax levied under MAT provisions u/s 115JB/115JC, for cases prior to A.Y. 2016-17- reg.-

Section 115JB of the Act is a special provision for levy of Minimum Alternate Tax on Companies, inserted by Finance Act 2000 with effect from 1-4-2001.

2. Under clause (iii) of sub-section (1) of section 271 of the Act, penalty for concealment of income or furnishing inaccurate particulars of income is determined based on the "amount of tax sought to be evaded" which has been defined inter-alia, as the difference between the tax due on the income assessed and the tax which would have been chargeable had such total income been

reduced by the amount of concealed income or income in respect of which inaccurate particulars had been filed.

3. In this context, Hon'ble Delhi High Court in its judgment dated 26.8.2010 in ITA No.1420 of 2009 in the case of Nalwa Sons Investment Ltd. (available in NJRS as 2010- LL-0826-2), held that when the tax payable on income computed under normal procedure is less than the tax payable under the deeming provisions of Section 115JB of the Act, then penalty under section 271(i)(c) of the Act could not be imposed with reference to additions /disallowances made under normal provisions. The judgment has attained finality.

4. Subsequently, the provisions of Explanation 4 to sub-section (1) of section 271 of the Act have been substituted by Finance Act, 2015, which provide for the method of calculating the amount of tax sought to be evaded for situations even where the income determined under the general provisions is less than the income declared for the purpose of MAT u/s 115JB of the Act. The substituted Explanation 4 is applicable prospectively w.e.f. 01.04.2016.

5. Accordingly, in view of the Delhi High Court judgment and substitution of Explanation 4 of section 271 of the Act with prospective effect, it is now a settled position that prior to

1/4/2016, where the income tax payable on the total income as computed under the normal provisions of the Act is less than the tax payable on the book profits u/s 115JB of the Act, then penalty under 27i(i)(c) of the Act, is not attracted with reference to additions /disallowances made under normal provisions. It is further clarified that in cases prior to 1.4.2016, if any adjustment is made in the income computed for the purpose of MAT, then the levy of penalty u/s 27i(i)(c) of the Act, will depend on the nature of adjustment.

6. The above settled position is to be followed in respect of section 115JC of the Act also.

7. Accordingly, the Board hereby directs that no appeals may henceforth be filed on this ground and appeals already filed, if any, on this issue before various Courts/Tribunals may be withdrawn/not pressed upon. This may be brought to the notice of all concerned.

(Ramanjit Kaur Sethi)
DCIT(OSD) (ITJ), CBDT, New Delhi"

9. In the light of the aforementioned Circular of the Board and the decision of the Hon'ble High Court of Delhi in the case of Nalwa Sons Investment Ltd [supra], the AO is directed to delete the penalty of Rs. 1,39,15,733/-. The grounds raised by the assessee are allowed.

10. In the result, the appeal of the assessee in ITA No. 1760/DEL/20176 is allowed.

The order is pronounced in the open court on 04.07.2019.

Sd/-

[SUCHITRA KAMBLE]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 04th July, 2019

VL/

Copy forwarded to:

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

Asst. Registrar
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
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	