

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : D : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.3986/Del/2016
Assessment Year: 2009-10

DCIT,
Circle-17(1),
New Delhi,.

Vs Kamakhya Cosmetics and
Pharmaceuticals Pvt. Ltd.,
Bamunimaindam,
Industrial Area,
Guwahati.

PAN: AABCK5526F

(Appellant)

(Respondent)

Assessee by	:	None
Revenue by	:	Dr. Vijay Kumar Chadha, Sr. DR
Date of Hearing	:	12.09.2019
Date of Pronouncement	:	24.09.2019

ORDER

PER R.K. PANDA, AM:

The appeal filed by the Revenue is directed against the order dated 22nd April, 2016 of the CIT(A)-5, New Delhi, relating to assessment year 2009-10.

2. Deletion of penalty of Rs.1,26,80,000/- levied by the Assessing Officer u/s 271(1)(c) of the Act is the only issue raised by the Revenue in the grounds of appeal.

3. None appeared on behalf of the assessee despite service of notice, therefore, we proceeded to decide the appeal on the basis of the material available on record and after hearing the Id. DR.

4. Facts of the case, in brief, are that the assessee is a company engaged in the business of manufacturing and trading of cosmetics and toiletries preparations, fragrances and perfumery products. It filed its return of income on 22nd September, 2009 declaring total income of Rs.1,09,79,095/-. The Assessing Officer completed the assessment u/s 143(3) on 23rd December, 2011 determining the total income of the assessee at Rs.4,82,84,180/- wherein he made an addition of Rs.3,73,05,083/- on account of provision of Excise Duty of Rs.3,43,18,499/- and education cess of Rs.29,86,584/-.

5. In appeal, the Id.CIT(A) upheld both the additions made by the Assessing Officer and on further appeal filed by the assessee the Tribunal also confirmed both the additions. The Assessing Officer, thereafter, initiated penalty proceedings u/s 271(1)(c) of the Act. Rejecting various explanations given by the assessee and observing that the assessee has concealed the particulars of income and furnished inaccurate particulars, the Assessing Officer levied penalty of Rs.1,26,80,000/- which is 200% of the tax sought to be evaded.

6. In appeal, the Id.CIT(A) cancelled the penalty so levied by the Assessing Officer on the ground that the assessee has preferred appeal against the order of the Tribunal which has been admitted by the Hon'ble Delhi High Court for

determining the question of law. Therefore, following the decision of the Hon'ble Delhi High Court in the case of *Liquid Investment and Trading Co., vide ITA No.240/2009* wherein it has been held that penalty cannot be levied in a case where an appeal is admitted by a High Court for determining the question of law, she cancelled the penalty levied on account of the addition for provision of Excise Duty. So far as the penalty levied on addition of education cess is concerned, she noted that the refund of the same has not been granted by the Excise Department from the year 2004 on the basis of the fact that the education cess is not included in the list of duties mentioned in Notification No.32/1999. Although the assessee has lost before the Hon'ble High Court, however, its SLP has been admitted and tagged along with Civil Appeal No.6085 to 6092/2010 by the Hon'ble Supreme Court. This, according to her, shows that there is an arguable case that the assessee was under the *bona fide* belief that it is entitled to the refund of education cess. The Id.CIT(A) also relied on the decision of the Hon'ble Supreme Court in the case of *Reliance Petroproducts Pvt. Ltd.* and various other decisions to support the plea of the assessee that the findings of the assessment proceedings cannot automatically justify the imposition of penalty and just because the contention of the assessee is not accepted or the claim made by the assessee is not accepted by the Assessing Officer, it cannot be a conclusive ground to levy penalty.

7. Aggrieved with such order of the CIT(A), the Revenue is in appeal before the Tribunal.

8. We have heard the Id. DR and perused the orders of the Assessing Officer and CIT(A). We find the Assessing Officer, in the instant case, levied penalty of Rs.1,26,80,000/- u/s 271(1)(c) of the Act being 200% of the tax sought to be evaded on account of two additions, namely, provision for Excise Duty of Rs.3,43,18,499/- and education cess of Rs.29,86,584/-. Both totaling to Rs.3,73,05,083/-. We find the Id.CIT(A) canceled the penalty so levied by the Assessing Officer on the ground that the appeal filed by the assessee on the issue of provision for Excise Duty has been admitted by the Hon'ble Guwahati High Court and, therefore, in view of the decision of the Hon'ble Delhi High Court in the case of *Liquid Investment and Trading Co. (supra)*, penalty cannot be levied in a case where an appeal is admitted by the High Court for determining the question of law. So far as the penalty levied on account of addition of Rs.29,86,584/- on account of education cess is concerned, she noted that the refund of education cess has not been granted by the Excise Department from the year 2004 on the basis of the fact that the education cess is not included in the list of duties mentioned in Notification No.32/1999. Although the assessee has lost its case before the Hon'ble High Court, however, the SLP filed by the assessee has been admitted by the Hon'ble Supreme Court which is pending. Therefore, the assessee was under a *bona fide* belief that it is entitled to the refund of the education cess.

9. We do not find any infirmity in the order of the CIT(A) cancelling the penalty so levied by the Assessing Officer u/s 271(1)(c) of the Act. As mentioned

earlier, the Id.CIT(A) while deleting the penalty levied on account of addition on account of provision for Excise Duty, has followed the decision of Hon'ble Delhi High Court in the case of Liquid Investment and Trading Co. (supra) that when the question of law has been admitted by the Hon'ble High Court, penalty cannot be levied.

10. The Id. DR could not controvert the factual finding given by the Id.CIT(A) that the Hon'ble Guwahati High Court has admitted the assessee's appeal vide its order dated 13th June, 2014 on the substantial question of law as to whether the Tribunal was justified in not permitting the assessee to claim deduction of Rs.3,43,18,499/- towards the Central Excise refund during the assessment year in question. In absence of any distinguishable feature brought to our notice by the Id. DR against the decision of the Hon'ble Delhi High Court which has been followed by the Id.CIT(A), we do not find any infirmity in the order of the CIT(A) cancelling the penalty so levied by the Assessing Officer on account of provision for Excise Duty of Rs.3,43,18,499/-.

11. So far as the penalty levied on account of provision for education cess is concerned, we find the Id.CIT(A) has given a categorical finding that the refund of the same has not been granted by the Excise Department from the year 2004 on the basis that the education cess is not included in the list of duties mentioned in Notification No.32/1999. She has also given a factual finding that the SLP filed by the assessee against the Hon'ble High Court order is tagged along with the Civil

Appeal No.6085 to 6092/2010 by the Hon'ble Supreme Court. The Id.CIT(A), further, followed the decision of the Hon'ble Supreme Court in the case of *Reliance Petroproducts Pvt. Ltd.* and the decisions of the Hon'ble Delhi High Court in the case of *IFCI Ltd. and Bacardi Martini India Ltd.* to the proposition that the findings of the assessment proceedings cannot automatically justify the imposition of penalty and just because the contention of the assessee is not accepted or the claim made is not accepted by the Assessing Officer, it cannot be a conclusive ground to levy penalty. We do not find any infirmity in the order of the CIT(A) cancelling the penalty on account of addition of education cess. The decision of Hon'ble Supreme Court in the case of *Reliance Petroproducts Pvt. Ltd.* is squarely applicable to the facts of the present case. We, therefore, do not find any infirmity in the order of the CIT(A) cancelling the penalty so levied by the Assessing Officer. Accordingly, the order of the CIT(A) is upheld and the grounds raised by the Revenue are dismissed.

12. In the result, the appeal filed by the Revenue is dismissed.

The decision was pronounced in the open court on 24.09.2019.

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated:24th September, 2019

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Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi