

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

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER  
and  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.4509/Del./2016  
(ASSESSMENT YEAR : 2007-08)**

**ITA No.4510/Del./2016  
(ASSESSMENT YEAR : 2008-09)**

M/s. Johnson Matthey India Pvt.Ltd., vs. DCIT, Circle 13 (2),  
C/o Luthra & Luthra, New Delhi.  
Law Offices,  
103, Ashoka Estate,  
Barakhamba Road,  
New Delhi – 110 001.

**(PAN : AAACJ2919A)**

**(APPELLANT)**

**(RESPONDENT)**

**ASSESSEE BY : Shri Sumit Mangal, Advocate  
Shri Saksham Singhal, CA  
REVENUE BY : Smt. Nidhi Srivastava, CIT DR**

Date of Hearing : 24.09.2019  
Date of Order : 01.10.2019

**ORDER**

**PER KULDIP SINGH, JUDICIAL MEMBER :**

Since common questions of facts and law have been raised in the aforesaid appeals, the same are being disposed off by way of consolidated order to avoid repetition of discussion.

2. Appellant, M/s. Johnson Matthey India Pvt. Ltd. (hereinafter referred to as the 'assessee') by filing the present appeals sought to set aside the impugned orders both dated 30.06.2016 passed by the Commissioner of Income - tax (Appeals)-37, New Delhi affirming the penalty orders both dated 19.12.2014 passed u/s 271(1)(c) of the Income-tax Act, 1961 (for short 'the Act'), qua the assessment years 2007-08 & 2008-09 on the identical grounds inter alia that :-

*"1. The order passed by the Learned Commissioner of Income Tax (Appeals) - 37 ("Ld. (A)") under Section 250 of the Act is bad in law and on the facts and circumstances of the case.*

*2. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case by not appreciating that the appellant had computed the price of international transactions in accordance with law in good faith and with due diligence.*

*3. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case in holding that the appellant has concealed the particulars of its income / furnished inaccurate particulars of income as the appellant had made full and complete disclosure.*

*4. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case by not appreciating that where two views are possible, no penalty is leviable under section 271(1)(c) of the Act.*

*5. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case by not appreciating that the transfer pricing additions, made by the Learned Transfer Pricing Officer ("Ld. TPO") /Learned Assessing Officer ("AO") and sustained by the Ld. CIT(A), were made on account of difference of opinion between the appellant and the Ld. TPO.*

*6. The Ld. CIT(A) has erred in not considering the difference between assessment proceedings and penalty proceedings; and thereby applying a different burden of proof on the appellant (that of proving the case on merits) as opposed to the burden of proving disclosure made bone fide, in good faith and with due diligence, which the appellant has satisfied."*

3. Briefly stated the facts necessary for adjudication of the issue at hand are : Assessee is into the business of manufacture of auto exhaust catalyst and on the basis of assessment framed under section 143 (3) read with section 144C of the Act for Assessment Years 2007-08 & 2008-09 vide which addition of Rs.4,54,54,937 & Rs.2,41,93,000/- on account of TP adjustment and sales-tax subsidy respectively for AY 2007-08 and addition of Rs.3,18,10,000/- in TP adjustment on account of royalty and Rs.2,10,11,348/- in respect of TP adjustment on account of cost recharge to Associated Enterprises (AE), penalty proceedings u/s 271(1)(c) of the Act have been initiated for furnishing inaccurate particulars of income. Declining the contentions raised by the assessee, Assessing Officer (AO) levied the penalty of Rs.1,51,77,400/- & Rs.71,41,757/-for AYs 2007-08 & 2008-09 respectively @ 100% of the tax sought to be evaded.

4. Assessee carried the matter by way of appeals before the Id. CIT (A) who has confirmed the penalties by dismissing the appeals. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeals.

5. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

6. Undisputedly, in AY 2007-08, Id. CIT (A) vide impugned order confirmed the penalty levied by the AO on the income of Rs.2,08,97,308/- qua cost recharges to AEs and confirmed the penalty levied by the AO qua transfer pricing adjustment pertaining to addition of Rs.1,94,52,958/- on account of cost recharges to AEs for AY 2008-09. It is also not in dispute that for AY 2007-08, the Tribunal in quantum appeal has deleted the addition on account of SAP maintenance charges and cost sharing charges and for AY 2008-09, the Tribunal deleted the addition on account of server charges and cost sharing charges. It is also not in dispute that so far as addition made on TP adjustment on account of sales commission is concerned, Hon'ble Delhi High Court has admitted the appeal of the assessee and has framed substantial question of law.

7. In the backdrop of the aforesaid undisputed facts & circumstances of the case, order passed by the lower revenue authorities and arguments addressed by the Ld. Authorized Representatives of the parties to the appeal, the sole question arises for determination in this case is:-

***“As to whether the assessee has concealed particulars of income or has furnished inaccurate particulars of such income during assessment proceedings?”***

8. Ld. AR for the assessee challenging the impugned order passed by the Id. CIT (A) contended inter alia that the penalty levied by the AO

and sustained by the Id. CIT (A) is not sustainable because addition has been made just on the mere difference of opinion as to use of method of Transactional Net Margin Method (TNMM) and Comparable Uncontrolled Price (CUP) for making adjustment on account of transfer pricing; that the TPO has merely changed the method for TP adjustment, made addition on sales commission which is not covered for levying the penalty u/s 271(1)(c) of the Act; that the issue on which penalty has been levied/upheld by AO/CIT(A) has since become debatable as Hon'ble High Court has admitted the appeal by framing substantial question of law and relied upon the decision rendered by *Hon'ble Delhi High Court in CIT vs. Liquid Investment & Trading Co. in ITA 240/2009 order dated 05.10.2010, Hon'ble Bombay High Court in CIT vs. Nayan Builders & Developers (2015) 56 taxmann.com 335 (Bombay) and coordinate Bench of the Tribunal in Mitsui Prime Advanced Composites India (P.) Ltd. vs. DCIT (2016) 178 TTJ 490 (Delhi-Trib.)*.

9. When undisputedly addition has been made by the TPO on account of transfer pricing adjustment qua the international transactions by using a particular method, TNMM in this case, with best of its wisdom as per provisions contained u/s 92C, any further addition by changing the Most Appropriate Method (MAM) from TNMM to CUP by the TPO is not sufficient to attract provisions contained u/s 271(1)(c) of the Act as it is a mere change of opinion. Identical issue has been

decided by the coordinate Bench of the Tribunal in case of *Mitsui Prime Advanced Composites India (P.) Ltd.* (supra) by returning following findings :-

***“19. Coming back to the Explanation 7 to section 271 (1), we find that no doubt the addition of Rs. 3.31 crore has been made on account of transfer pricing adjustment in respect of these three international transactions, but, the same cannot be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished because the assessee has proved that the price paid by it under such transactions was computed in accordance with the provisions of section 92C and in the manner prescribed under the TNMM in good faith and with due diligence. Further the action of the TPO in changing the most appropriate method from TNMM to CUP without bringing on record any comparable instance, is itself faulty. In any case, it was the AO who was to determine whether or not such expenses were deductible in terms of section 37(1) and not the TPO, as has been done. We have noticed above that the exercise done by the TPO in determining Nil ALP on the premise that either no services were availed by the assessee or in any case it was a case of duplication of services, is not only unsubstantiated but contrary to the material on record. The mere fact that the TPO determined Nil ALP of the international transactions cannot be a reason to impose penalty u/s 271(l)(c) of the Act. “***

10. Undisputedly, assessee has challenged the addition on the basis of which penalty has been levied u/s 271(1)(c) of the Act before the Hon’ble Delhi High Court vide ITA 732/2018 & Ors. and Hon’ble High Court vide order dated 12.11.2018 framed the following substantial question of law :-

***“Whether Income Tax Appellate Tribunal was right in holding that Royalty and Sales Commission paid were separate and independent international transactions which were required to be benchmarked separately by applying the Comparable Uncontrolled Price Method?”***

11. It is settled principle of law that when substantial question of law has been framed by the Hon’ble High Court in the appeal filed by the

assessee challenging the addition confirmed by the Tribunal, the issue become debatable and no penalty in such circumstances can be levied. Hon'ble Delhi High Court in case of *CIT vs. Liquid Investment & Trading Co.* (supra) confirmed the order passed by the Tribunal setting aside the penalty confirmed by the Id. CIT (A) u/s 271(1)(c) on the ground that the issue has become debatable by returning following findings :-

*“Both the CIT(A) as well as the ITAT have set aside the penalty imposed by the Assessing Officer under Section 271(1)(c) of the Income Tax Act, 1961 on the ground that the issue of deduction under Section 14A of the Act was a debatable issue. We may also note that against the quantum assessment where under deduction under Section 14A of the Act was prescribed to the assessee, the assessee has preferred an appeal in this Court under Section 260A of the Act which has also been admitted and substantial question of law framed. This itself shows that the issue is debatable. For these reasons, we are of the opinion that no question of law arises in the present case. This appeal is accordingly dismissed.”*

12. In view of what has been discussed above, we are of the considered view that the penalty levied by the AO and confirmed by the Id. CIT (A) for AYs 2007-08 & 2008-09 is not sustainable in the eyes of law, hence ordered to be deleted. Consequently, appeals filed by the assessee are allowed.

**Order pronounced in open court on this 1<sup>st</sup> day of October, 2019.**

**Sd/-  
(N.K. BILLAIYA)  
ACCOUNTANT MEMBER**

**sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

**Dated the 1<sup>st</sup> day of October, 2019  
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-37, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT  
NEW DELHI.