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

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH.KULDIP SINGH, JUDICIAL MEMBER
(THROUGH VIDEO CONFERENCING)

ITA No.3937/Del/2017
Assessment Year: 2006-07

M/s. Yum Restaurant Marketing Private Limited 12th, Tower D, Global Business Park, MG Road, Gurgaon-122002 PAN No. AAACY1884D	**Vs**	**ITO Ward – 27 (4) New Delhi**
(APPELLANT)		**(RESPONDENT)**

Appellant by	Shri S. Krishnan, Advocate
Respondent by	Shri Prakash Dubey, Sr. DR

Date of hearing:	23/06/2021
Date of Pronouncement:	23/06/2021

ORDER

PER N. K. BILLAIYA, AM:

This appeal by the assessee is preferred against the order of the CIT(A)-15, Delhi dated 29.03.2017 pertaining to A.Y. 2006-07.

2. The solitary grievance of the assessee is that the CIT(A) erred in upholding the orders of the AO confirming the penalty levied u/s. 271 (1) (c) of the Act amounting to Rs.10386434/-.

3. Briefly stated that the facts of the case are that the assessee is a wholly owned subsidiary of Yum Restaurants India Private Limited (YRIPL). YRIPL is interalia engaged in the business of franchising of 'Pizza Hut', 'KFC' and 'Taco Bell' restaurants in India. The assessee was established with the sole objective of undertaking advertising, media and promotional activities exclusively for YRIPL and its franchisees/ associates at regional and national level.

4. By virtue of the foreign shareholding in YRIPL, requisite approvals were required to be taken from the Secretariat of Industrial Assistance, Ministry of Finance, Government of India.

5. The Secretariat of Industrial Assistance granted approval to YRIPL on the condition that the activities of assessee would be carried out on a 'non-profit' basis and on the principles of mutuality.

6. For this purpose the assessee entered into a triparte operating agreement with YRIPL and each of the respective franchisees of YRIPL under which it was to undertake AMP activities on behalf of YRIPL and its franchisees.

7. The agreement further provided that out of the total contributions received by the assessee during an accounting year, in the event of any surplus left over the AMP expenditure incurred from that period, the same shall either be retained by the assessee to be expended in the future periods or refunded to the franchisees/ YRIPL proportionately.

8. The assessee's claim of functioning as a mutual concern was rejected by the AO while framing the assessment for A.Y.2001-02 and the excess contributions that were received by the assessee were taxed in his hands.

9. The action of the AO was confirmed by the CIT(A). The Order of the CIT(A) was upheld by the Tribunal in ITA No.3235/Del/2005.

10. Following the order passed for A.Y.2001-02, the stand of the assessee was rejected in subsequent assessment years.

11. Facts which prompted the AO to initiate the penalty proceedings and subsequently levy penalty u/s. 271 (1) (c) of the Act is that the assessee in its return of income declared nil income and claimed credit of taxes deducted at source.

12. The return was selected for scrutiny assessment and subsequently an assessment order was framed u/s. 143(3) of the Act order dated 11.02.2008.

13. The AO followed the past years orders and held that appellant was not functioning as mutual concern. The AO made the addition of Rs. 3.05 crores on account of excess expenditure incurred over contributions received as income of the current year and further added Rs.258288/- being addition on account of provision for doubtful debts credited during the year.

14. The assessment was assailed before the CIT(A) who dismissed the appeal following the appellate orders of earlier assessment years..

15. Penalty proceedings were initiated and subsequently penalty was levied by the AO it was confirmed by the CIT(A).

16. We have carefully perused the orders of the authorities below and have gone through the past history of the assessee. At the very outset, we have to state that the assessee filed its return of income for the year under consideration on 30.11.2006 whereas the order of the Tribunal which dismissed the appeal for the base A.Y. 2001-02 was passed subsequently on 31.01.2008.

17. After going through the paper book we find that the assessee has made each and every disclosure in his financial statements. The assessee has also explained its revenue recognition in the notes to account. We are of the considered view that there is not even a single information/ detail which was not furnished by the assessee in its accounts/ submissions/ explanatory notes to the accounts. Therefore, in our considered opinion the assessee has neither concealed any particulars of income nor filed inaccurate particulars of income. Observations of the AO that the assessee has not only filed inaccurate particulars of its income but has also concealed true particulars of income is not correct considering the facts mentioned here in above.

18. Interestingly the entire additions which are coming from earlier assessment years have started from base year 2001-02. In A.Y. 2001-02 also penalty was levied u/s. 271 (1) (c) of the Act and Coordinate Bench in ITA No.319 and 320/Del/2011 vide order dated 28.03.2019 for A.Y. 2001-02, 2002-03 has deleted. The relevant findings of the coordinate bench read as under :-

> *11. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly on the first issue of taxability of excess contribution received by the assessee of Rs. 4444002/- whether same is not taxable as income of the assessee on the principles of mutuality has reached up to the level of honourable Supreme Court where special leave petition of the assessee has been admitted. However this is a fact that all*

the concurrent authorities starting from CIT - A to the honourable High Court has decided this issue against the assessee holding that principle of mutuality does not apply on the facts of the case. However, regarding complete disclosure by assessee, it has completely disclosed the facts in the computation of income that the income of the assessee is covered by the principle of mutuality. At para number, III of page number 2 of the assessment order the assessee has specifically given three notes in the computation of total income. The note number 1 says that the company operates as a mutual concern on No profit basis. The note number 2 says that that excess of contribution received is being disclosed as a current liability as it would be either to be distributed to the individual contributors or to be used for further expenditure based on confirmations to that extent from the contributors. Note number 3 says that based on the judicial precedents, excess receipt of the company does not fall within the ambit of taxable income u/s 4 of the income tax act. Assessee relied upon two decisions of the honourable Supreme Court. During the course of assessment, proceedings also vide letter dated 8/9/2003 the assessee made the complete disclosure explaining that why the above amount assessee claims to be tainted with mutuality and therefore is not chargeable to tax u/s 4 of the income tax act. Evidences and arguments placed before us shows that assessee has made a claim disclosing the complete facts about the same in its return of income putting notes in the computation of total income, corroborating it with its balance sheet, supporting it with judicial precedents of the honourable Supreme Courts. This show that assessee has completely disclosed the facts about its claim alongwith all the arguments. It is also the fate of the claim of the assessee that it has been concurrently rejected by all the appellate forums. However, mere

rejection of the claim of the assessee cannot be invited with the penalty. Further more on this issue of the excess contribution received the learned AO has recorded his satisfaction that assessee has furnished inaccurate particulars of income in the assessment order. However, at the time of levy of the penalty as per para number 1 at page number 2 of the penalty order he levied penalty for concealment of income. This fact itself renders the penalty on this issue not sustainable. The learned DR has raised an impressive argument stating that mere technicalities cannot rob the substance of the order and hence, cannot vitiate the penalty order. As there cannot be any 2 views on the above proposition, but when the assessee is asked to justify his stand with respect to levy of the penalty, it is certain that the learned assessing officer must put a specific charge making it clear that on what fault of the assessee the penalty is being levied. Unless the assessee is made aware of the specific charge, charging him for one offence and punishing him by levy of penalty on altogether another offence cannot be sustained. In view of this Assessee, on the addition of Rs. 4444002/- of the excess contribution received by the assessee claimed to be not taxable under the income tax act on principle of mutuality, though the arguments of the assessee have failed, but the complete disclosure has been made by the assessee, cannot be penalized u/s 271 (1) (C) of the act holding assessee to have committed the default of concealment but in the show cause notice and satisfaction is recorded for furnishing of inaccurate particulars, cannot be saddled with the penalty. Accordingly, we delete the penalty on this addition.

12. The second issue of the penalty related to the disallowance of claim of the assessee u/s 35D of the income tax act. The fact itself shows that the assessee has claimed expenses of INR 454992/- under section 35D as preliminary expenses however

the capital employed of the assessee is only INR 10200/- and the claim is required to be restricted only to the extent of 5% of the capital employed for amortization. Therefore the AO disallowed a sum of INR 454482/- AO initiated penalty for furnishing of inaccurate particulars of income. The assessee explained as per letter dated 8/9/2003 before the AO that the total preliminary expenses are INR 568740/- out of which INR 113748/- being 1/5 of the total expenses were charged to the income and expenditure account for the year ended on 31st of March 2000. Thereafter the balance amount of INR 454992/- has been charged to the income and expenditure account for the year ended 31st of March 2001 it was stated that as assessee has claimed that it is a mutual concern operating on a no profit basis the above preliminary expenses are merely form part of the expenses charged to the income and expenditure account incurred by the assessee in the ordinary course of business for carrying out the activities of the assessee and therefore such preliminary expenses have been rightly claimed in the impugned assessment year. The claim of the assessee was rejected for the reason that the assessee is not a mutual concern. Therefore for the reasons given by us in cancelling- the penalty levied on addition of Rs. 4444002/- of the excess contribution received claimed as a mutual concern, we also cancel the penalty on the disallowance of INR 454482/-.

13. *Accordingly penalty levied of INR 1937351 by the assessing officer under section 271 (1) (C) of the act is cancelled and the orders of the lower authorities are reversed. Accordingly, appeal of the assessee is allowed.*
14. *Now we come to the appeal of the assessee for assessment year 2002 - 03 wherein the learned CIT - A has confirmed the levy of penalty u/s 271 (1) (C) of INR 1216703/- on the addition of INR 3408129/- being the excess contribution received claimed by the*

assessee is not chargeable to tax on the principles of the mutuality but not accepted by the learned assessing officer and higher judicial forum.

15. Both the parties confirmed before us that the facts of the present case are identical to the facts of the case of the assessee for assessment year 2001 - 02 wherein penalty u/s 271 (1) (C) was levied. Both the parties also confirmed that their arguments also remained the same.

16. We have carefully considered the rival contentions and perused the orders of the lower authorities. On examination of the facts it was found that the facts of the present case are identical to the facts of the case of the assessee for assessment year 2001 -02 wherein on identical facts and circumstances penalty was levied u/s 271 (1) (C) of the income tax act. As per this order, we have cancelled the above penalty for assessment year 2001 - 02 on the similar addition. Therefore, for the similar reasons as given therein, we also cancel the penalty of INR 1 216703/- levied by the learned assessing officer u/s 271 (1) (C) of the act and reverse the orders of the lower, authorities.

17. Accordingly, appeal of the assessee for assessment year 2002-03 is allowed.

19. Considering the facts that the assessee has made proper disclosure and there is no concealment of income nor filing any inaccurate particulars drawing support from the decision of Hon'ble Supreme Court in Reliance Petro Products 322 ITR 158 and respectfully following the decision of the coordinate Bench (supra) we direct the AO to delete the penalty levied u/s. 271 (1) (c) of the Act. The appeal filed by the assessee is accordingly allowed.

20. In the result, the appeal filed by the assessee is allowed.

21. Decision announced in the open court in the presence of both the representatives on 23.06.2021.

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

NEHA
Date:- 23.06.2021
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	23.06.2021
Date on which the typed draft is placed before the dictating Member	23.06.2021
Date on which the typed draft is placed before the Other member	23.06.2021
Date on which the approved draft comes to the Sr.PS/PS	23.06.2021
Date on which the fair order is placed before the Dictating Member for Pronouncement	23.06.2021
Date on which the fair order comes back to the Sr. PS/ PS	23.06.2021
Date on which the final order is uploaded on the website of ITAT	23.06.2021
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant	

Registrar for signature on the order	
Date of dispatch of the Order	