

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : SMC-II : NEW DELHI

BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

ITA No.4066/Del/2015
Assessment Year : 2009-10

DCIT,
Circle-3(1)(2),
International Taxation,
New Delhi.

Vs. Sagem Defence Securite SA,
C/o BMR & Associates LLP,
22nd Floor,
Building No.5, Tower A, DLF
Cyber City, DLF Phase-III,
Gurgaon.

PAN: AAAJS2651K

(Appellant)

(Respondent)

Assessee By : None
Department By : Mrs. Rakhi Vimal, JCIT

Date of Hearing : 13.08.2015
Date of Pronouncement : 04.11.2015

ORDER

This appeal filed by the Revenue is directed against the order of the
CIT(A)-43, New Delhi, dated 28.4.2015 for assessment year 2009-10, on
the following grounds:-

“1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting penalty of Rs. 7,82,524/- u/s 271(1)(c) of the Income Tax Act, 1961 (the Act) imposed by the Assessing Officer.

l(a) Whether the Ld. CIT(A) has erred in deleting the penalty u/s 271(1)(c) as the addition has been made on a estimated basis, not appreciating the fact that there is no general proposition that penalty u/s 271(1)(c) cannot be imposed where an addition or disallowance is made on estimated basis. Reliance is placed on decision of in the case of CIT Vs ECS Ltd (2010-TIOL-287-HC-DEL-IT)

l(b) Whether the Ld CIT(A) has erred in deleting the penalty on the ground that in an earlier year, penalty u/s 271(1) was dropped by the AO, not appreciating the fact that in the said Assessment Year was the first year when the issue of LO ('Liaison Office') constituting PE was examined and therefore, the assessee had the benefit of a bona fide view regarding non-existence of the PE.

l(c) The Ld CIT(A) has erred in not appreciating the fact that the case of the assessee is squarely covered by Explanation 1 to section 271(1)(c) of the Act as the assessee has failed to establish the bona fides of explanation offered by it.

2. The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal.”

2. I have heard the rival contentions and perused the relevant material on record. At paras 4.2 to 4.7, the ld.CIT(A) has held as follows:-

4.2 It is pertinent to note that it is the assessment order dated 23.02.2012 which forms the basis of this penalty order. In the assessment order dated 23.02.2012, for AY 2009-10, the AO notes that the income for this assessment year is being arrived at on the basis similar to that of AY 2007-08. The AO notes in paras 9 and 10 of his order dated 23.02.2012 as follows:-

"Under these circumstances, I am left with no option but to assess the income of the assessee on the basis of the assessment done for the assessment year 2007-08. In the final assessment order passed for said assessment year pursuant to the RP directions, it was concluded that Mr. Bernard Lacoste, the representative of LO in India was engaged in negotiation of the sale of products of the assessee in India and that the LO of the assessee company was doing much more activities than for which it was authorized as per RBI Regulations. In fact, without the help of LO it is unthinkable to do any trade and business by the assessee company in India in the facts and circumstances of the case. It can be seen that the LO in India was undertaking more or less same or similar activities during AY 2009-10 as it was undertaking in AY 2007-08. In light of the discussion made in preceding paragraph, it is evident that the assessee is having a permanent establishment in the form of its LO in India. It is established that the place of business in India contribute to the productivity of the enterprise and the services it performs are very much connected with the actual realization of profits."

4.3 The AO for this penalty order intends to base himself upon the final assessment order for AY 2007-08 (past pursuant to order of DRP dtd. 29.09.2010). The date of final assessment order for AY 07-08 is 15.10.2010. In the final assessment order for AY 07-08 based on DRP's directions dated 29.09.2010, it was held that the assessee had a PE in India. The AO, as per directions of DRP, calculated the net profit margin on the basis of global profit margin of the assessee. The net profit margin was arrived at by applying this profit percentage on total turnover from trading in India. Thereafter 50 per cent of profits thereupon were attributed to Indian operations.

4.4 The assessment order for AY 07-08 dated 15.10.2010 consequent to directions of DRP, was challenged by the assessee in ITAT. The Honourable ITAT vide order dated 29.07.2011, In ITA No. 5914/D/2010 restored the matter to the file of the AO for de novo assessment, as per directions therein. Pursuant to these directions an assessment order was passed by the AO on 08.05.2013, wherein additions were made on a basis similar to the basis adopted by the AO, ab initio, in his assessment order dated 15.10.2010. It is to be noted that the order for AY 2007-08, based upon directions of Honourable ITAT was passed on 08.05.2013. The assessment order

for this subject year, AY 2009-10 was passed on 23.02.2012. As informed by the assessee, penalty proceedings under section 271(1)(c) were initiated by the AO vide his order dated 08.05.2013, for AY 2007-08. The assessee further informs that penalty proceedings under section 271 (1)(c) for AY 2007-08 were dropped by the AO.

4.5 In the subject year, i.e. AY 2009-10, though the AO notes that additions have been made on a basis similar to that of AY 2007-08, I find that the AO has gone on a different trajectory. In. this assessment year, additions have been made on an estimated basis, determining income at 10 per cent of the costs of the LO.

4.6 An examination of the above facts reveals that in an earlier year, on the same facts, penalty was initiated by the AO, only to be dropped later. In the subject year, addition has been made on an estimated basis of 10 per cent of costs. The AO however, has failed to provide the basis of holding the income of LO / PE at 10 per cent of the costs of LO/PE. This estimation therefore is without basis. Mere fact that the assessee did not go in appeal against the assessment order does not establish that the assessee has furnished inaccurate particulars of his income, or concealed his income. .

4.7 In view of the facts as obtained, after hearing the assessee's counsel at length it is held that penalty under section 271 (1)(c) of the IT Act is not leviable in the assessee's case. Since both the grounds taken by the assessee are connected, separate adjudication is not being made. The assessee succeeds.

3. I find no infirmity in the above findings of the first appellate authority. Therefore, I uphold the same.

4. In the result, the appeal of the Revenue is dismissed.

The order pronounced in the open court on 04.11.2015.

Sd/-

[J.SUDHAKAR REDDY]
ACCOUNTANT MEMBER

Dated, 04th November, 2015.

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Copy forwarded to:

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

AR, ITAT, NEW DELHI.