

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

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KUL BHARAT, JUDICIAL MEMBER**

ITA No. 7503/DEL/2019 [A.Y 2013-14)
ITA No. 7504/DEL/2019 [A.Y 2014-15)

The A.C.I.T
Circle -16(2)
New Delhi

Vs. Max Bupa Health Insurance Company Ltd
1, MAX House, Dr. Jha Marg, Okhla
New Delhi

PAN: AAFCM 7916 H

(Applicant)

(Respondent)

Assessee By : Ms. Manisha Sharma, Adv
Department By : Ms. Rakhi Vimal, CIT - DR

Date of Hearing : 08.09.2022
Date of Pronouncement : 08.09.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above two captioned separate appeals by the Revenue are preferred against two separate orders of the Id. CIT(A) - 37, New Delhi dated 27.06.2019 pertaining to Assessment Years 2013-14 and 2014-15.

2. Since common grievance is involved in both the captioned appeals, they were heard together and are disposed of by this common order for the sake convenience and brevity.

3. The common grievance in both the appeals relate to the deletion of penalty levied by the Assessing Officer u/s 271(1)(c) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'], though the quantum of penalty may differ in each Assessment Year under consideration.

3. The common facts in both the Assessment Years relates to the claim of expenditure on account of advertisement and publicity. During the course of assessment proceedings, the assessee was asked to justify its claim for advertisement expenses and was asked as to why a disallowance be not made considering part of it to be capital in nature.

4. The assessee filed detailed reply which was partly accepted by the Assessing Officer.

5. The Assessing Officer concluded by holding that part of the expenditure i.e. 60% is disallowed as capital expenditure and 40% is allowed as Revenue expenditure. The amount disallowed as capital expenditure was treated as intangible asset and the Assessing Officer allowed depreciation as per provisions of section 32 of the Act.

6. The assessee did not prefer any appeal against this action of the Assessing Officer as tax effect was neutral.

7. The Assessing Officer initiated penalty proceedings u/s 271(1)(c) of the Act and accordingly, notice was issued and served upon the assessee.

8. During the penal proceedings, once again referring to the assessment proceedings, the Assessing Officer formed a belief that the assessee has furnished inaccurate particulars of income in its return of income deliberately and drawing support from the decision of the Hon'ble Jurisdictional High Court in the case of Zoom Communication Pvt Ltd 327 ITR 510 and NG Technology Ltd 370 ITR 7 and further referring to the decision of the Hon'ble Supreme Court in the case of Mak Data Pvt Ltd penalty was levied u/s 271(1)(c) of the Act amounting to Rs. 4,49,41,932/- in Assessment Year 2013-14 and Rs. 3,98,76,463/- in Assessment Year 2014-15.

9. The assessee challenged the levy of penalty before the Id. CIT(A) and vehemently contended that the Assessing Officer has levied penalty on wrong appreciation of facts. It was brought to the notice of the Id. CIT(A) that the Assessing Officer himself has estimated capital expenditure @ 60% of total expenditure and has allowed 40% as Revenue expenditure and levied penalty on the estimation.

10. After considering the facts and submissions and after referring to various judicial decisions, the Id. CIT(A) was convinced that the bifurcation of the expenditure into capital and Revenue is a debatable issue and, therefore, no penalty can be levied on a highly debatable issue. The Id. CIT(A) further found that disallowance made by the Assessing Officer was purely on estimation and, therefore, no penalty is leviable on adhoc disallowance. Penalty so levied was deleted.

11. Before us, the Id. DR strongly supported the findings of the Assessing Officer and once again relied upon the very same decisions which were referred to by the Assessing Officer while levying penalty u/s 271(1)(c) of the Act.

12. Per contra, the Id. counsel for the assessee reiterated what has been stated before the first appellate authority.

13. We have given thoughtful consideration to the orders of the authorities below. The undisputed fact is that the Assessing Officer allowed 40% of the total expenditure claimed by the assessee and treated 60% as capital expenditure. However, we do not find any basis for this estimation of the Assessing Officer.

14. A perusal of the order of the Id. CIT(A) shows that similar disallowance was made by the Assessing Officer in the preceding Assessment Years i.e. 2011-12 and 2012-13 and in Assessment Year 2011-12, the Assessing Officer considered 75% of the total expenditure as capital in nature and in Assessment Year 2012-13, 50% of the total expenditure was considered as capital in nature.

15. Past history, when considered with assessment of the years under consideration, it can be safely concluded that disallowance made by the Assessing Officer are consistently on estimation without any basis. Since the action of the Assessing Officer was tax neutral to the assessee, no appeal was preferred before the appellate authority. But this does not mean that the assessee has accepted the action of the Assessing Officer.

16. In our considered opinion, whether an expenditure is of capital in nature or Revenue in nature, or whether part of the expenditure is capital and part is Revenue, is a highly debatable issue and, therefore, in our humble opinion, no penalty is leviable u/s 271(1)(c) of the Act on such a debatable issue. At the same time, we cannot ignore the fact that disallowance is on adhoc basis and for that reason also, no penalty is leviable. Considering the facts of the case in totality, we do not find any reason to interfere with the findings of the ld. CIT(A).

17. In the result, both the appeals of the Revenue in ITA Nos. 7503/DEL/2019 and 7504/DEL/2019 are dismissed.

The order is pronounced in the open court on 08.09.2022.

Sd/-

**[KUL BHARAT]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 08th September, 2022.

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	
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Date on which the file goes to the Head Clerk	
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