

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

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA No.5063/Del/2019
Assessment Year: 2006-07

DCIT, Circle -1(1)(2), International Taxation, New Delhi	Vs.	M/s. Bently Nevada LLC (earlier known as Bentley Nevada Inc.), 6 th Floor, Building 7A, Standard Chartered Building, DLF Cyber City, Phase-III, Gurgaon
PAN :AADCB8118J		
(Appellant)		(Respondent)

Appellant by	S/sh. Sachit Jolly, Rohit Garg & Sohum Dua, Advocates
Respondent by	Sh. Munish Kumar Gupta, CIT (DR)

Date of hearing	31.01.2023
Date of pronouncement	17.02.2023

ORDER

PER SAKTIJIT DEY, JM:

This is an appeal by the Revenue challenging the order dated 30.03.2019 passed by learned Commissioner of Income-tax (Appeals)-42, New Delhi, deleting the penalty imposed under section 271(1)(c) of the Income-tax Act, 1961 (for short 'the Act') for the assessment years 2006-07.

2. Briefly the facts are, the assessee is a non-resident entity incorporated in United States of America (USA) and tax resident of USA. Basically, the assessee is engaged in the business of off-shore supply/sale of equipments to Indian customers. In course of assessment proceeding, the assessee submitted that sales/supplies of equipments to Indian customers having been made outside the territory of India, the income generated from such sale/supply is not taxable in India. The Assessing Officer, however, did not accept the aforesaid claim of the assessee. The Assessing Officer held that the assessee had fixed place Permanent Establishment (PE) as well as agency PE in India and off-shore supply/sale of equipments are related to such PE. Accordingly, he attributed 2.62% of the sales towards profit of the PE. While deciding the objections raised by the assessee, the learned DRP upheld the decision of the Assessing Officer. Against the final assessment order passed, the assessee filed appeal before the Tribunal. While deciding the appeal, the Tribunal upheld existence of PE in India. However, insofar as attribution of profit to the PE, the Tribunal restricted it to 2.6% on sale. Against the decision of the Tribunal, the assessee went in further appeal before the Hon'ble Jurisdictional High Court.

3. Be that as it may, based on the additions made on account of attribution of profit to the PE, the Assessing Officer initiated proceeding for imposition of penalty under section 271(1)(c) of the Act alleging concealment of income or furnishing of inaccurate particulars of income. Ultimately, the Assessing Officer passed an order imposing penalty of Rs.52,43,531/- under section 271(1)(c) of the Act. Challenging the penalty imposed, the assessee filed an appeal before learned Commissioner (Appeals). Penalty imposed was deleted by learned Commissioner (Appeals) basically on the ground that the issue, whether the assessee had a PE in India or not, is a debatable issue and under identical circumstances the Tribunal has deleted penalty imposed under section 271(1)(c) of the Act in case of a group entity by relying upon a decision of Hon'ble Jurisdictional High Court. The relevant observation of learned Commissioner (Appeals) in this regard are under:

“5.33 However, the Appellant has brought my attention to the recent decision of Hon'ble ITAT in the case of GE Energy Parts INC (ITA 6403/del/2018) & GE Transportation Parts LLC (ITA 696/697/del/2019) wherein the penalty has been deleted by Hon'ble ITAT considering that whether the assessee is having PE in India or not is debatable issue and in such circumstances, penalty cannot be levied. Further, Hon'ble ITAT also relied on the decision of Hon'ble Delhi High Court in the case of Liquid Investment & Trading Co. to hold that issue is debatable if the appeal is filed before Hon'ble High Court and the substantial question of law has been admitted in the case. The relevant extracts of the order of Hon'ble

ITAT (ITA 6403/de1/2018) & (ITA 696/697/de1/2019) are reproduced as under:

"8. Undisputedly, assessment orders framed by the AO have been upheld by the Id. CIT (A) as well as by the Tribunal, who have held that GE Overseas entities have PEs in various forms and these are fixed place PE, Office PE, construction PE and agency

PE and in case of oil and gas business, involves in installation and commissioning would also constitute construction PE and since the commissioning would also constitute construction PE and since the assessee has earned global profit of 10% on the sales made to the customer in India, the income chargeable to tax as attributable to the PE was computed at 3.5% of the sales made. It is also not in dispute that the findings returned by the Tribunal have been challenged before the Hon'ble Delhi High Court in a batch of petitions bearing No./TA 660/2017 & Ors. and vide order dated

15.01.2018, questions of law have been framed which are extracted

for ready perusal as under "(1) Did ITAT fell into error in its findings with respect to existence of a fixed place Permanent Establishment (PE) of the assessee in India;

(2) Did ITAT fell into error in concluding that assessee/appellant's separately independent agent PE, was located in India; and,

(3) Whether on the facts and the circumstances of the case and the law, the ITAT was justified in attributing as high as 35% of the profits to the alleged marketing activities and thereafter, attributing 75% of such 35% profits to the alleged PE of the Appellant in India?

9. From the order passed by Hon'ble High Court (supra), it has become clear that the question as to whether the assessee is having fixed place PE in India is "debatable one" and in these circumstances, penalty levied by the AO is not sustainable in the

Eyes of law.

In view of what has been discussed above, since substantial question of law has been framed by Hon'ble High Court on the issue if the assessee is having fixed place PE in India, which is the basis of levying/confirming the penalty u/s 271(1)(c) of the Act, the issue becomes debatable, hence penalty u/s 271(1)(c) is not leviable.

Reliance in this regard is placed on the decision by Hon'ble Delhi High Court in ITA 240/2009 in CIT-H vs. Liquid Investment and Trading Co. order dated 05.10.2010 whereby identical issue is decided as under:

"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 hereunder 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 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."

11. Consequently, penalty levied by the AO and confirmed by Ld. CIT (A) of Rs.24,93,590/-, Rs.20,85,545/, Rs.20,20,281/- & Rs.59,52,684/- in AYs 2001-02, 2006-07, 2007-08 & 2008-09 respectively is ordered to be deleted and all the appeals filed by the assessee are allowed".

5.34 It is important to mention that the quantum order forming the basis of the penalty order in the present case flows from the consolidated order of Hon'ble ITAT in 26 cases of GE group which included the case of the appellant as well as of GE Energy Parts INC & GE Transportation Parts LLC. Further, as noted above, the penalty order in the case of GE Energy Parts INC & GE Transportation Parts LLC on the similar set of facts stands deleted by the decision of Hon'ble ITAT in the case of GE Energy Parts INC (ITA 6403/del/2018) & GE Transportation Parts LLC (ITA 696/697/del/2019). It is reiterated that in the above referred decision of Hon'ble ITAT deleting the penalty, there is no comment on the observation made by CIT(A) in his order in the respective case while upholding the penalty order that "this case is on different footing and is distinguishable on facts on account of survey proceedings. There are clear cut observations of Hon'ble ITAT that the facts were concealed by the appellant (refer para 5.7, 5.8 & 5.17 of the order)." It is reiterated that Para 5.7, 5.8 & 5.17 of this order does contain the clear cut observations of Hon'ble ITAT that the facts were concealed by the appellant.

5.35 However, respectfully following the aforesaid order of Hon'ble ITAT deleting the penalty order in the case of GE Energy Parts INC (ITA 6403/del/2018) & GE Transportation Parts LLC (ITA 696/697/del/2019),

the penalty levied by the Ld. AO is deleted in Appellant's case on account of the following observations;

- *Whether the assessee is having PE in India or not is debatable issue and in such circumstances, penalty cannot be levied.*
- *Hon'ble ITAT relied on the decision of Hon'ble Delhi High Court in the case of Liquid Investment & Trading Co. to hold that issue is debatable if the appeal is filed before Hon'ble High Court and the substantial question of law has been admitted in the case."*

4. We have considered rival submissions and perused the materials on record. As could be seen from the facts and materials available on record, the addition which led to imposition of penalty under section 271(1)(c) of the Act was on account of profit/income generated from off-shore sale/supply of equipments to Indian customers. Though, it was the case of the assessee that off-shore supply/sale of equipments was concluded outside Indian and payments were received outside India, hence, no taxable event arises in India, however, the Assessing Officer did not accept the claim on the ground that the assessee had both fixed place PE and agency PE in Indian and part of off-shore sale and supply are related to the PE in India. Accordingly, the Assessing Officer made the addition by attributing profit to Indian PE as a percentage of sales. The aforesaid view of the Assessing Officer has been accepted up to the level of Tribunal, though, the quantum has been partly reduced.

5. It is the specific contention of learned counsel appearing for the assessee before us that in the appeal filed by the assessee challenging the decision of the Tribunal the Hon'ble Jurisdictional High Court has framed substantial question of law on the issue of existence or otherwise

of PE. He submitted, in such a scenario, the issue being a highly debatable one, no penalty under section 271(1)(c) of the Act can be imposed. Further, he submitted, under identical facts and circumstances, the Tribunal had deleted penalty imposed under section 271(1)(c) of the Act in respect of other group entities and the Revenue did not prefer any further appeal.

6. In support of his contention, learned counsel has relied upon a decision of Hon'ble Jurisdictional High Court in case of PCIT Vs. Harsh International Pvt. Ltd. [2021] 431 ITR 118, wherein, following observations have been made:

“10. Having heard the learned counsel for the appellant and having perused the impugned order, this Court is of the view that the ITAT was right in deleting the penalty levied under [Section 271\(1\)\(c\)](#) of the Act. It has to be noted that penalty proceedings are an outcome of assessment and if the assessment itself is debatable, the penalty proceedings cannot survive.

11. This court is also of the opinion that levy of penalty cannot be a matter of course, as sought to be contended by the Revenue. It can only be levied in cases where the concealment of income has been proven. If the quantum order itself has been challenged and this Court has framed substantial questions of law in the appeal preferred by the respondent- assessee, it shows that the alleged concealment is not final and the issue is disputable. Consequently, the penalty levied by the assessing officer cannot survive in such a case.

12. It is pertinent to note that this Court in similar cases [CIT Vs. Liquid Investment Ltd, ITA 240/2009, CIT Vs H B Leasing & Finance Co. Ltd. I.T.A. No. 1612/2010 and CIT Vs. Thomson Press India Ltd, ITA 426,440/2013] has upheld the deletion of the penalty on the same ground i.e. the fact that appeals were admitted proved that the issue was debatable. The relevant portion of the orders in CIT Vs. Liquid Investment Ltd (supra) and CIT Vs. Thomson Press India Ltd(supra) is reproduced hereinbelow:-

A) Order dated 5th October, 2010 passed by this Court in CIT Vs. Liquid Investment Ltd (supra) :-

" 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."

B) Order dated 3rd March, 2014 passed by this Court in CIT Vs. Thomson Press India Ltd(supra) :-

" This Court is of the opinion that where the question of law as raised by the assessee has been framed and admitted in the circumstances of this case, imposition of penalty cannot be justified. The appeals being bereft of substantial question of law are dismissed."

13. Keeping in view the aforesaid, this Court finds that no question of law arises in the present appeals for consideration of this Court."

7. The ratio laid down by the Hon'ble Jurisdictional High Court, as aforesaid, squarely applies to the facts of the present appeal. In view of the aforesaid, we do not find any reason to interfere with the decision of learned Commissioner (Appeals). Grounds are dismissed.

8. In the result, the appeal is dismissed.

Order pronounced in the open court on 17th February, 2023

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 17th February, 2023.

RK/-

Copy forwarded to:

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

5. DR

Asst. Registrar, ITAT, New Delhi