IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: C: NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA Nos.732 to 735/Del/2023
Assessment Years: 2009-10 & 2011-12 to 2013-14

| The ACIT, Circle 13(1), New Delhi | vs. | M/s. Johnson Matthey India Pvt. Ltd., 103, Ashok Estate Barkhamba Road, New Delhi 110001 **PAN AAACJ 2919 A** |
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| (Appellant) | | (Respondent) |

| For Assessee: | Ms. Anukrati Gupta, CA |
|---|---|
| For Revenue : | Mr. Waseem Arshad, CIT(DR) |

| Date of Hearing : | 17.08.2023 |
|---|---|
| Date of Pronouncement : | 30.08.2023 |

**ORDER**

**PER CHANDRA MOHAN GARG, J.M.**

These above appeals have been filed against the order of CIT(A), New Delhi dated 27.01.2023 for A.Ys. 2009-10 & 2011-12 to 2013-14. The ld. Representatives of both the sides agreed that the facts and circumstances of all four appeals are similar and identical therefore we taken appeal for AY 2011-12 ITA No. 733/Del/2023 as lead case for the sake of convenience and brevity. However, it is also pertinent to mention that in the appeals for AY 2011-12 & 2012-13 the penalty has been imposed on account of addition/disallowance on payment made under cost sharing arrangements, payment of sales commission and foreign travel expenses. In appeal for AY 2013-14 penalty has been imposed on addition/disallowance on account of payment made under cost sharing arrangements and sales commission and in AY 2009-10 penalty has been imposed only on account of disallowance of sales commission only but undisputedly, the facts and circumstances of said three issues are similar and identical.

2. The grounds raised by the revenue in ITA no. 733/Del/2023 are as under:-

*1. That whether on the facts and in law, the Ld. CIT(A) is erred in deleting the penalty order u/s. 271(1)(c) of the Act levying penalty of Rs. 5,16,62,058/- that the assessee has knowingly and willingly furnished inaccurate particulars of its income in*

*respect of addition of Rs. 4,42,76,395/- on account of payment made under cost sharing arrangements.*

*2. That whether, on the facts and in law, the Ld. CIT(A) is erred in deleting the penalty order u/s. 271(1)(c) of the Act levying penalty of Rs. 5,16,62,058/- that the assessee has knowingly and willingly furnished inaccurate particulars of its income in respect of addition of Rs. 10,60,97,836/- on account of payment of sales commission.*

*3. That whether on the facts and in law, the Ld. CIT(A) is erred in deleting the penalty order u/s. 271(1)(c) of the Act levying penalty of Rs. 5,16,62,058/- that the assessee has knowingly and willingly furnished inaccurate particulars of its income in respect of addition of Rs. 13,49,794/- on account of foreign travel expenses.*

3. The ld. CIT(DR) submitted that on the facts and in law, the Ld. CIT(A) is erred in deleting the penalty order u/s. 271(1)(c) of the Act levying penalty of Rs. 5,16,62,058/- that the assessee has knowingly and willingly furnished inaccurate particulars of its income in respect of addition of Rs. 4,42,76,395/- on account of payment made under cost sharing arrangements. He further submitted that the Ld. CIT(A) is erred in deleting the penalty order u/s. 271(1)(c) of the Act levying penalty of Rs. 5,16,62,058/- that the assessee has knowingly and willingly furnished inaccurate particulars of its income in respect of addition of Rs. 10,60,97,836/- on account of payment of sales commission. It has also been contended by the ld. CIT(DR) that on the facts and in law, the Ld. CIT(A) is erred in deleting the penalty order u/s. 271(1)(c) of the Act levying penalty of Rs. 5,16,62,058/- that the assessee has knowingly and willingly furnished inaccurate particulars of its income in respect of addition of Rs. 13,49,794/- on account of foreign travel expenses. Therefore the ld. CIT(DR) submitted that first appellate order may kindly set aside by restoring that of the Assessing Officer.

4. Replying to have above, the ld. Assessee Representative (AR) supported the first appellate order and submitted that since the ld. CIT(A) has taken note of the Tribunal order for AY 2007-08 & 2008-09 and also noted that the Hon'ble High Court of Delhi has admitted substantial questions of law on the issues of disallowance/addition on account of royalty and sales commission paid and foreign travel expenses in the appeal filed by the assessee against Tribunal order confirming the disallowance. Therefore the said issues became debatable and on debatable issue penalty u/s. 271(1)(c) of the Act cannot be imposed and sustained. She further submitted that the disallowance/addition on account of payment made under cost sharing arrangements has been deleted by the Tribunal therefore no penalty could have been imposed against the assessee on the basis of non-existing and deleted disallowance. The ld. AR thus submitted that the ld. CIT(A) was right in deleting the penalty.

5. On careful consideration of above from the relevant operative part of first appellate order, we note that the ld. CIT(A) deleted penalty on all three issues with following observations and findings:- para 7 to 12

*7. Through multiple grounds of appeal, the levy of penalty has been challenged.*

*8. It has been informed that after the order of Ld. CIT(A), the appellant and the department, both, went in appeal before the Hon'ble ITAT. The Hon'ble ITAT vide order dated 03.11.2021 in ITA no. 2025/DEL/2017 & ITA no. 2209/DEL/2017 deleted the addition on account of cost sharing arrangements (amounting to Rs. 4,42,76,395/-) confirmed by the Ld. CIT(A) but confirmed the additions on account of payment of sales commission (amounting to Rs. 10,60,97,836/-) and foreign travel expenses (amounting to Rs. 13,49,794/-). The Hon'ble ITAT remanded the issue of addition of interest of Rs. 2,67,911/- to the file of TPO.*

*9. As the transfer pricing addition of Rs. 4,42,76,395/- on account of payment made under cost sharing arrangements have been deleted by the Hon'ble ITAT, no penalty can be imposed in respect of this addition. The AO is directed to modify the penalty order accordingly.*

*10. It is observed that the addition on account of sales commission of Rs. 10,60,97,836/- and foreign travel expenses of Rs. 13,49,794/-have been confirmed by the Hon'ble ITAT. The appellant has informed that against the order of ITAT, the appeal filed by the appellant has been admitted by the Hon'ble Delhi High Court vide order dated 07.04.2022, a copy of which has been filed, by framing the following substantial question of law:-*

> *"I. 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 CUPM?*
>
> *II. Whether the Ld. ITAT erred in holding that foreign travel expenses on the visit of family members of the Directors have no nexus with the business contingencies and hence, such expenses cannot be considered having been incurred for business?"*

*10.1 It has been contended that the addition sustained by the Hon'ble ITAT are on account of issues which are covered within the aforesaid questions of law framed by the Hon'ble High Court of Delhi. It was submitted that it is trite law that where the issue in the Quantum appeal is susceptible to interpretation and debate, then penalty under section 271(1)(c) of the Act cannot be levied on the taxpayer. This position in law is based on the principle that where High Court admits appeal against the issue in quantum proceedings, it clearly indicates that the underlying issue is subject to judicial scrutiny and interpretation of law. It was argued that admission of appeal by the High Court establishes the fact that the issues involved in the quantum proceedings are debatable and are subject to interpretation. Therefore, it has been submitted that since, the quantum appeal of the appellant has been admitted by the Hon'ble Delhi High Court, penalty under section 271(1)(c) of the Act should be deleted.*

*10.2 The appellant invited attention to the judgement of Hon'ble ITAT in the appellant's*

*own case for the AY 2007-08 in ITA no. 2509/DEL/2016 and AY 2008-09 in ITA no.4510/DEL/2016, wherein the Hon'ble ITT vide order dated 01.10.2019 deleted the penalty levied in the case of the appellant, on this issue, by holding as follows:*

> *"10. Undisputedly, assessee has challenged the addition on the basis of which penalty has been levied us 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) uls 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."*

*10.3 The issue involved in the present year is identical as decided in appellant's favour by the Hon'ble ITAT in AY 2007-08 and 2008-09. Therefore, respectfully following the judgement of Hon'ble ITAT in the appellant's own case for the AY 2007-08 in ITA no. 2509/DEL/2016 and AY 2008-09 in ITA no. 4510/DEL/2016, wherein the Hon'ble ITAT vide order dated 01.10.2019 has deleted the penalty levied, in view of the fact that Hon'ble High Court has framed substantial question of law on these issues, the penalty is deleted in respect of addition on account of sales commission of Rs. 10,60,97,8361- and foreign travel expenses of Rs. 13,49, 794/-.*

*11. It is observed that the Hon'ble ITAT has remanded the issue of addition of undisclosed interest of Rs. 2,67,911/- to the file of AO. Therefore, penalty on this issue*

*is not adjudicated in this order. It is clarified that if the addition is made again by the AO in the set-aside proceedings, and if penalty is imposed; the same shall be subject matter of , separate appeal, in any filed by the appellant.*

*12. In the result, the appeal is allowed.*

6. In view of above noted rival submissions, basis taken by the Assessing Officer for imposing of penalty and the reasons and observations of the ld. CIT(A) for deleting the penalty we note that undisputedly the coordinate bench of the Tribunal in the order in assessee's own appeal for AY 2007-08 & 2008-09 has deleted the addition/disallowance on account of payment made under cost sharing arrangements therefore deletion of penalty by ld. CIT(A) cannot be challenged or disputed as per settled principles of tax jurisprudence as and when the basis of penalty is not survive then consequent penalty also loses its legal existence.

7. So far as deletion of penalty on other two issues are concerned although the Tribunal confirmed disallowance/addition on account sales commission payment and foreign travel expenses through order dated 03.11.2021 in ITA No. 2025/Del/2017 and ITA No. 2209/Del/2017 and the assessee carried matter before Hon'ble High Court of Delhi wherein the Hon'ble High Court order dated 07.04.2022 has framed substantial questions of law on both the issues then the ld. CIT(A) was right in holding that since the issue has become debatable after framing of substantial questions of law by Hon'ble High Court therefore penalty on debatable issue do not survive. Therefore we are unable to see any ambiguity perversity or any other valid reason to interfere with the findings of ld. CIT(A) and thus we uphold the same. Accordingly, grounds of revenue for AY 2011-12 are dismissed.

8. Since undisputedly the facts and circumstances on all three issues involved in the above captioned appeals are quite similar and identical, therefore our conclusion for AY 2011-12 would apply mutatis mutandis to AY 2012-13 for all three issues, to AY 2013-14 on both the issues and to AY 2009-10 on sole issue. We, thus, uphold the conclusion drawn by the ld. CIT(A) deleting the penalty on all three issues in the captioned appeals. Accordingly, grounds of revenue in other three appeals are also dismissed uphold the deletion of penalty.

9. In the result, the appeals of revenue are dismissed.

Order pronounced in the open court on 30.08.2023.

| Sd/- | Sd/- |
|---|---|
| (DR. B.R.R. KUMAR) | (CHANDRA MOHAN GARG) |
| ACCOUNTANT MEMBER | JUDICIAL MEMBER |

Dated: 30th August, 2023.

NV/-

Copy forwarded to :

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

// By Order //

Asstt. Registrar, ITAT, New Delhi