

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

**BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SH. SUDHIR KUMAR, JUDICIAL MEMBER**

ITA No. 2191/Del/2015
(Assessment Year : 2002-03)

DCIT Circle – 10(1) New Delhi	Vs.	Gemalto Digital Security Pvt. Ltd., 4 th Floor, A Wing Berjaya House, Community Centre, New Friends Colony, New Delhi-110 065
(APPELLANT)		PAN No. AABCS 5455 P (RESPONDENT)

Assessee by	Ms. Shashi M. Kapila, Adv. S/Shri Sushil Kumar and Shri Pravesh Sharma, Adv.
Revenue by	Shri Amit Kumar Jain, Sr. D.R.

Date of hearing:	22.04.2024
Date of Pronouncement:	01.05.2024

ORDER

PER SUDHIR KUMAR, JUDICIAL MEMBER :

This appeal by the Revenue is directed against the order dated 05.01.2015 of the Commissioner of Income Tax (Appeals)-44, New Delhi in Appeal No. 85/2014-15/CIT(A)-44 relating to the Assessment Year 2002-03 and arises out of the penalty order passed by the A.O under section 271(1)(c) of the I.T. Act, 1961 .

2. Revenue filed the following ground of appeal:

- “i. Whether on facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty of Rs.67,09,240/- u/s 271(1)(c) ignoring the fact that the Ld. CIT(A) has confirmed the addition on account of transfer pricing adjustment to the extent of Rs.1,87,93,367/-.*
- ii. The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing.”*

3. The brief facts of the case are that Gemalto Digital Security Private Limited (formerly known as Schlumberger Measurement and Systems India Limited and Axalto Cards & Terminals India Ltd.) was a wholly owned subsidiary of Gemalto NV, Netherlands supplying smart cards in India. The product range included smart cards, terminals and payphones, which were imported from various Associated Enterprises ('AEs') of GDSPL and subsequently resold in the Indian Market. The assessee filed its return of income on 31.10.2002 declaring loss of Rs.10,86,15,300/-. Assessment u/s 143(3) was completed on 31.12.2004. AO by vide order dated 31.12.2004 made transfer pricing adjustment to determine the Arm's length price of Rs.13,21,88,434/-.

4. Aggrieved by the order of the AO, assessee filed appeal before the CIT(A) and CIT(A) confirmed the addition of Rs.1,87,93,367/- and deleted the foreign exchange fluctuation loss. After the order passed by learned CIT(A), a fresh show-cause

notice for the penalty u/s 271(1)(c) was issued to the assessee on 08.03.2013. The assessee had filed a written reply. After considering the reply of the assessee, the AO has imposed the penalty of Rs.67,09,240/- with the observation that the assessee has filed the inaccurate particular of its income with intention of suppressing the taxable income. Assessee again filed the appeal against the AO before the CIT(A) and CIT(A) by the order dated 05.01.2015 allowed the appeal and case was not found fit for penalty and directed the AO to cancel the penalty of Rs.67,09,240/- against which this has been preferred.

5. Learned CIT(A) by the order dated 05.01.2015 has stated that 271(1)(c) provided that;

“Explanation 7- Where in the case of an assessee who has entered into an international transaction 64for specified domestic transaction) defined in section 92B, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) 65/or the Commissioner that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good faith and with due diligence.)”

“The appellant has also relied on the decision of the Hon’ble Supreme Court in the case of CIT vs. Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158 (SC) wherein it has been held that “merely because the assessee had claimed the expenditure, which claim

was not accepted or was not acceptable to the revenue, that by itself would not, in our opinion, attract the penalty u/s 271(1)(c)."

6. We have heard learned DR and perused the material on record. Learned DR stated that the order passed by the AO was correct. Learned CIT(A) ignore the fact that the learned CIT(A) has confirmed the addition on account of transfer pricing adjustment to the extent of Rs.1,87,93,367/-.

7. Learned Counsel for the assessee submitted that the order passed by the CIT(A) as per law and assessee provided the accurate details of losses on the basis of the record. The assessee furnished the accurate particulars, so the penalty cannot be imposed on the assessee. It is also submitted that Revenue had appealed against the CIT(A)'order dated 22.09.2011 in quantum appeal, which was allowed by learned ITAT by order dated 11.05.2023 against which, assessee had filed appeal before the Hon'ble Delhi High Court. Hon'ble High Court vide order dated 05.01.2024 had admitted the appeal and framed the substantial question of law. The issue is debatable and in such case penalty cannot be imposed.

8. Learned Counsel for the assessee has also relied upon the order of the Hon'ble Delhi High Court in the case of Pr. Commissioner of Income Tax (International Tax)-1 vs. Godaddy.com LLC learned CIT(A) (2020) 135 taxamann.com 130

(Delhi). He also relied on the following Tribunal orders which are as under:

- (i) Pr. CIT vs. Giesecks & Devrient (India) (P) (Ltd.) [2022] 135 taxmann.com 130 (Del)(HC)
- (ii) ACIT vs. AON Services India (P.) Ltd. 150 Taxmann.com 344 (Del) (Trib)
- (iii) Chegg India (P) Ltd. vs. ACIT 126 taxmann.com 272 (Del-Trib)
- (iv) Johnson Matthey India (P) vs. DCIT 111 taxmann.com 77 (Del-Trib)

9. Hon'ble Delhi High Court in the case of Pr. CIT vs. Giesecks & Devrient (India) (P) (Ltd) [2022] 135 taxmann.com 130 (Del)(HC) held that;

“13. We do not find any infirmity in the above observation of the learned ITAT. As held by the Supreme Court in CIT vs. Reliance Petroproducts (P.) Ltd. [2010] 189 Taxman 322/322 ITR 158 for the purpose of invoking section 271(1)(c) of the Act, there has to be a concealment of particulars in the income of the assessee and the assessee much have furnished inaccurate particulars of his income. Making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars under section 271(1)(c) of the Act. Mere making of a claim which is not sustainable in law, by itself, will not tantamount to furnishing inaccurate particulars regarding income of the assessee. Merely because, the assessee had claimed an expenditure, which claim was not accepted or was not acceptable to the revenue, that by itself would not attract the penalty under section 271(1)(c) of the Act.”

10. Hon'ble Delhi Tribunal in the following cases held as under:

- (i) Johnson Matthey India (P.) Ltd. vs. DCIT [2019] 111 taxmann.com 77 (Delhi Trib.)

“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.”

- (ii) ACIT vs. AON Services India (P.) Ltd. 150 Taxmann.com 344 (Del) (Trib)

“Learned Commissioner (Appeals) was justified in deleting the penalty imposed in respect of addition made on account of TP adjustment.”

11. Similar view has been taken by the ITAT in the case of Chegg India (P) Ltd. vs. ACIT 126 taxmann.com 272 (Del-Trib) wherein the Tribunal has held that if AO did not apply his mind to satisfy as to which limb of section 271(1)(c) of the Act, penalty was being initiated then penalty levied by AO and confirmed by CIT(A) is not sustainable in eye of law and should be deleted.

12. Undisputedly, addition made by AO in the account of transfer pricing adjustment. The assessee has filed the appeal against the order and in appeal No.131/06-07/CIT(A)-XX has confirmed the addition on account of Arm's Length price to the extent of Rs.1,87,93,367/- and has deleted disallowances on account of foreign exchange fluctuation loss. Revenue has filed the appeal before ITAT against the order of CIT(A) and learned ITAT allowed the appeal against which assessee has filed an appeal before the Hon'ble Delhi High Court, in which substantial question of law has been framed.

13. In the present case, substantial question of law has been framed by the Hon'ble Court in the appeal filed by the assessee challenging the addition confirmed by the Tribunal. The issue become debatable, no penalty in such consideration can be levied against the assessee.

14. Upon the aforesaid discussions, appeal is dismissed.

Order pronounced in the open court on 01.05.2024

**Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

**Sd/-
(SUDHIR KUMAR)
JUDICIAL MEMBER**

Date:- 01.05.2024

Priti Yadav, Sr. Ps*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI