IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'E': NEW DELHI)

BEFORE SHRI GS PANNU, VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 83/Del/2024
Assessment Year: 2016-17

Niva Bupa Health Insurance Company Ltd., New Delhi.	Vs.	ACIT, Delhi.
PAN No: AAFCM7916H		
APPELLANT		**RESPONDENT**

Assessee by : Ms. Manisha Sharma, Adv. and
Shri Shubham Sharma, CA
Revenue by : Shri Subhra Jyoti Chakraborty, CIT(DR)

Date of Hearing **:** 29.04.2024
Date of Pronouncement **:** 21.05.2024

ORDER

PER ANUBHAV SHARMA, JM

This appeal is preferred by the assessee against the order of the Commissioner of Income Tax (Appeals), NFAC, (hereinafter referred to as Ld. First Appellate Authority or in short Ld. 'FAA') arising out of the appeal before it against the order dated 30.11.2023 passed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred as 'the Act'), by the NFAC, New Delhi (hereinafter referred to as the Ld. AO).

2. Heard and perused the record.

3. The issue involved in this appeal is the challenge of penalty order under section 271(1)(c) of Rs. 3,07,87,955/- levied by the AO vide order dated 28.06.2019 passed under section 271(1)(c) of the Act. The same has in its background net disallowance of Rs. 10,26,26,51/- made in the assessment order by making an ad-hoc disallowance of 50% of the total advertisement and publicity expenses as capital expenditure and allowing depreciation thereof. AO alleged that Appellant had deliberately furnished inaccurate particulars not the aforesaid claim. The claim of assessee is that the Ld. Tax authorities erred on facts and in law in upholding penalty without appreciating that treatment of advertisement expenditure as revenue expenditure by the appellant is (i) sustainable in law, and (ii) at worst, a debatable and revenue neutral issue, which does not attract levy of penalty under section 271(1)(c) of the Act. Further that the NFAC erred on facts and in law in upholding penalty without appreciating that the impugned disallowance was merely on account of re-characterization of advertisement expense based on bonafide difference of opinion and there was neither concealment nor furnishing of inaccurate particulars of income.

4. It came up during hearing that the aforesaid issue is squarely covered in favour of the appellant by common order dated 08.09.2022 passed by the Tribunal in appellant's own case for AYs 2013-14 and 2014-15. The copy of same is provided at pg. nos. 4 to 10 of the PB, with relevant finding @ pg. no. 8 (para 13)]. We consider it appropriate to reproduce the same hereinbelow:-

> *"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 ld. 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)."

5. Appreciating aforesaid, it is established Co-ordinate Bench has upheld the order passed by the CIT(A) deleting the penalty levied u/s 271(1)(c) of the Act holding that the issue whether advertisement expenditure is capital or revenue in nature is a highly debatable not warranting levy of penalty and (ii) disallowance made by the AO is on adhoc basis, on which no penalty can be levied. There is no reason to deviate from aforesaid findings, which are based on settled propostions of law.

6. Accordingly, appeal is allowed and the penalty levied by the AO stands deleted.

Order pronounced in the Open Court on 21.05.2024

Sd/-	**Sd/-**
(GS PANNU)	**(ANUBHAV SHARMA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 21/05/2024.

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Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI