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

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.1247/Del/2023
Assessment Year: 2010-11

Johnson Mattey India P. Ltd., C/o Luthra & Luthra, Law Offices India, 103, Ashoka Estate, Barakhamba Road, Delhi – 110 001. PAN: AAACJ2919A	Vs	Addl.CIT, Range-5, New Delhi.

ITA No.1310/Del/2023
Assessment Year: 2010-11

ACIT, Circle-13(1), New Delhi.	Vs.	Johnson Mattey India P. Ltd., C/o Luthra & Luthra, Law Offices India, 103, Ashoka Estate, Barakhamba Road, Delhi – 110 001. PAN: AAACJ2919A
(Appellant)		(Respondent)

Assessee by : Ms Radhika Sharma, Advocate &
Shri Sumit Mangal, Advocate
Revenue by : Ms Parul Singh, Sr. DR

Date of Hearing : 24.06.2024
Date of Pronouncement : 23.07.2024

ORDER

PER ANUBHAV SHARMA, JM:

The appeal preferred by the Assessee is against the order dated 03.03.2023 of the Commissioner of Income Tax (Appeals), Delhi-44

(hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in Appeal No.CIT(A), Delhi-36/10011/2018-19 arising out of the appeal before it against the order dated 23.03.2018 passed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred as 'the Act'), by the Addl. CIT, Special Range-5, New Delhi (hereinafter referred to as the Ld. AO) and the appeal preferred by the Revenue is against the order dated 11.01.2016 of the Commissioner of Income Tax (Appeals)-44, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in Appeal No.37/2014-15/CIT(A)-44 arising out of the appeal before it against the order dated 25.04.2014 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act'), by the DCIT, Circle-4(1), New Delhi (hereinafter referred to as the Ld. AO).

2. On hearing both the sides, it comes up that in regard to appeal in ITA No.1310/Del/2023, of Revenue, the CIT(A) has passed the impugned order of deleting the penalty on account of alleged furnishing of inaccurate particulars of income in respect of payment made under the cost sharing arrangements and on account of service charges, as the same stands deleted by the Tribunal in ITA no 3123/DEL/2016 and ITA no 3406/DEL/2016 vide order dated 30/10/2019.

2.1 The penalty on account of willingly furnishing inaccurate particulars of income on account of sales commission has been deleted by CIT(A) on the basis that though Tribunal has sustained the addition on merits, but Hon'ble High Court has admitted the appeal of assessee by framing substantial question of law

and that signifies, that the issue was debatable. Further in assessee's own case for AY 2007-08 and 2008-09, the penalty on same count were deleted by the Tribunal.

2.2 Ld. DR could not dispute these factual aspects thus issues being covered in favour of the assessee have been rightly taken note by CIT(A) to delete the penalty and same requires no interference. Appeal of the Revenue is dismissed.

3. As regards the appeal of the assessee, it comes up that the CIT(A) has sustained the penalty on the basis that he found that the assessee had concealed the income as held by the AO. In this context, if we go through the impugned penalty order, it comes up that assessee filed return declaring taxable income for A.Y.- 2010-11 of Rs. 20,77,35,912/- which was e-filed on 15/10/2010 & revised income of Rs. 21,45,81,319/- on 14.06.2011. Assessment u/s 143(3) of the I.T,Act,1961 was completed on 25.04.2014 at income of Rs. 29,92,79,900/- with the following additions as under: -

(i)	Addition on account of TPO adjustment	Rs. 7,39,83,986/-
(ii)	Disallowance on account of provision for sales tax concession	Rs. 1,04,39,001 /-
(iii)	Disallowance on account of excess depreciation claimed	Rs. 2,75,583/-

3.1 The CIT(A) has sustained the penalty on account of alleged willful furnishing of inaccurate particulars of sales tax concession. The claim of

assessee is that there was inadvertent mistake in suo moto disallowance. The AO has, however, held that:-

> *"4. Perusal of the details revealed that the assessee has shown provision for sales tax concession of Rs. 3,13,16,000/-. The assessee was asked to file details and further to explain as to how the same has been accounted for in the books of accounts. The assessee has submitted reply vide letter dated 21.10.2013 submitting therein as under:-*
>
> > *"The company was granted sales tax concession from the Haryana government which exempted the Company from payment of local sales tax up to 50% of the total sales tax payable.*
> >
> > *Subsequently, the Company had received a notice from the Director of Industries and Commerce stating that the Company had not satisfied certain specified conditions for availing the sales tax benefit and stated that the said concession is to be withdrawn. The Company filed an appeal against the order of the Director of Industries and Commerce in the Honorable Punjab and Haryana High Court and the case was decided in the favor of the Company.*
> >
> > *Subsequently, the authorities appealed to the Honorable Supreme Court against the above mentioned order. The Apex Court vide its order dated 16 April 2009, without expressing an opinion on the merits of the case and keeping all questions of law open, set aside the impugned judgment of the Honorable High Court and remitted the case back to the Honorable High Court fresh consideration in accordance with law.*
> >
> > *While the matter was sub judice and pending disposal by the honorable High Court, as the matter of prudence and caution, the company created a total provision of Rs.75,573 thousand represents provision created during F Y 2008- 09 in respect of the sales tax benefit availed (and the same was duly disallowed while preparing the income tax return of A Y 2009-10) and balance of Rs. 31,316 thousand represents created during FY 2009-10 for interest liability that the company may suffer, in case the High Court decides the matter against the Company."*
>
> *4.1 The reply of the assessee has been considered. The assessee has made a provision for sales tax concession of Rs. 3,13,16,000/-. As per the assessee's own submission the matter is sub judice and the liability has not crystallized as yet. As per the Act all the provisions are required to be added back while computing taxable income. However the assessee for reason best known to it has added back, amount of Rs. 2,08,76,999/- out of provision made of Rs.3,13,16,000/-. The assessee has not submitted any justification for the same. As the liability has not crystallized as yet, the difference of Rs.1,04,39,001/- (Rs.3,13,16,000/- -*

Rs.2,08,76,999/-) is added back to the income of the assessee as the same has not crystallized as such."

"12. The AO has also imposed penalty in respect of disallowance of provision for sale tax concession amounting to Rs.1,04,39,001/-as the appellant did not file appeal against the disallowance.

12.1 During appeal, the appellant claimed that not adding back provision for sale tax concession amounting to Rs. 1,04,39,001 /- was due to inadvertent mistake. It is observed that the appellant is a big corporate having professional assistance of high order. The appellant is subjected to tax audit. The AR could not explain as to how such a mistake could have occurred in this case.

12.2 It is pertinent to refer to the case of Zoom Communication, delivered by the Hon'ble Delhi High Court (327 ITR 510) wherein the Court has held that if the assessee makes a claim which is incorrect in law, Explanation 1 to section 271(1)(c) would come into play and assessee will be liable to penalty. It reasoned as under:

> *"20. The court cannot overlook the fact that only a small percentage of the Income-tax returns, are picked up for scrutiny. If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bona fide, it would be difficult to say that he would still not be liable to*
> *penalty under section 271(1)(c) of the Act. If we take the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the assessee would not be liable to imposition of penalty, even if he was not acting bona fide while making a claim of this nature, that would give a licence to unscrupulous assessees to make wholly untenable and unsustainable claims without there being any basis for making them, in the hope that their return would not be picked up for scrutiny and they would be assessed on the basis of self-assessment under section 143(1) of the Act and even if their case is selected for scrutiny, they can get away merely by paying the tax, which in any case, was payable by them. The consequence would be that the persons who make claims of this nature, actuated by a mala fide intention to evade tax otherwise payable by them would get away without paying the tax legally payable by them, if their cases are not picked up for scrutiny. This would take*

away the deterrent effect, which these penalty provisions in the Act have."

12.3 Further this case is directly covered by Hon'ble Supreme Court in MAK Data (P.) Ltd. Vs CIT 358 ITR 593 (SC)[2013] wherein the law has been laid that voluntary disclosure does not release assessee from mischief of penal proceedings under section 271(1)(c). In this case, the appellant never made the disallowance in the original return of income or revised return of income. It was the AO who discovered this issue during assessment and made addition in respect of the same. Therefore, in this case, there was not even a voluntary disclosure made by the appellant.

12.4 In this background, it is observed that the taxable income covered by this addition would have got unnoticed without the scrutiny assessment, therefore, the appellant's case is squarely covered by the decision of Hon'ble Supreme Court in the case in MAK Data (P.) Ltd.(supra) and Hon'ble Delhi High Court in the case of Zoom Communication (supra), and thus, this was a fit case for levy of penalty for furnishing inaccurate particulars of income u/s 271(1)(c) of the Act. The order of AO on this issue is confirmed.

4. After considering the submissions and the facts as corroborated from the paper book, we are of the considered view that there appears to have been no intent of the assessee to submit inaccurate particulars as alleged and the ld.CIT(A) has sustained the penalty only on presumption that since the assessee is a big organization, the mistake could not have crept. We are of the considered view humans in all organizations are fallible to mistake and only because assessee happens to be an organization, a malice cannot be attributed. In fact, assessee reported correct facts at two places in the return at one place it left unreported. Thus, the findings of the ld.CIT(A) to that extent deserves not to be sustained.

5. In the result, the appeal of the assessee is allowed and that of Revenue is dismissed..

Order pronounced in the open court on 23.07.2024.

Sd/-	Sd/-
(G.S. PANNU) VICE PRESIDENT	(ANUBHAV SHARMA) JUDICIAL MEMBER

Dated: 23rd July, 2024.

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Copy forwarded to:

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

Asstt. Registrar, ITAT, New Delhi