

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2", NEW DELHI**

**BEFORE
SH. INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.7895-96/Del/2017
(Assessment Year: 2005-06, 2006-07)**

LG Electronics India (P) Ltd. A-Wing (3 rd Floor), D-3, District Centre Saket, New Delhi-110017	Vs.	Commissioner of Income Tax (Appeals), Noida
Appellant		Respondent

Assessee by : Sh. Ajay Vohra, Sr. Adv., Aditya Vohra, Adv.
Revenue by : Sh. H.K. Choudhary, CIT-DR

Date of hearing : 05.09.2018
Date of pronouncement : 07.09.2018

ORDER

PER BENCH :

ITA no. 7895/Del/2017 is assessee's appeal preferred against order passed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter called to as the 'Act') for assessment year 2005-06 wherein the penalty has been imposed by the Ld. CIT (A), Noida after enhancing the assessed income to Rs. 7,10,87,13,603/- as against the

assessed income of Rs. 3,34,18,55,880/-. The impugned penalty amounts to Rs. 1,36,34,75,765/-. Similarly, ITA no. 7896/Del/2017 is the assessee's appeal challenging imposition of penalty u/s 271(1)(c) of the Act for assessment year 2006-07. This penalty was also imposed by the Ld. CIT (A), Noida after enhancing the assessed income from Rs. 4,97,93,69,060/- to Rs. 8,74,91,98,537/-. The impugned penalty for this year is Rs. 1,23,47,00,375/-. Since both these appeals involved identical issues, they were heard together and are being disposed of by this common order. The grounds raised by the assessee in both the appeals are as under:-

ITA no. 7895/Del/2017

“ 1. That the Commissioner of Income Tax Appeals [“CIT(A)”] erred on facts and in law in levying penalty under section 271(l)(c) of the Income tax Act, 1961 (“the Act”) for alleged concealment and furnishing of inaccurate particulars of income in respect of enhancement made by the CIT(A) in order dated 31.03.2017 passed under section 250/143(3) of the Act, on account of (i) non-deduction of tax at source on payments made to vendors for purchase of finished goods, and (ii) ad-hoc disallowance of Rs. 131,07,31,300 being 50% of the Advertisement, Marketing and Promotion Expenses.

2. That the CIT(A) erred on facts and in law in passing the impugned penalty order in undue haste, without affording adequate opportunity of being heard to the Appellant.

3. That the CIT(A) erred on facts and in law in not appreciating that satisfaction for initiating penalty was not recorded in order passed by the CIT(A) in quantum proceedings, which is sine qua non for assumption of jurisdiction to impose penalty.

4. That the CIT(A) erred on facts and in law in levying penalty under section 271 (1)(c) of the Act without specifying the exact charge for initiating penalty proceedings in notice dated 31.03.2017 issued under section 274 read with section 271(1)(c) of the Act, as also in the impugned order dated 30.09.2017.

5. That the CIT(A) erred on facts and in law in levying penalty qua enhancement made by the CIT(A) in quantum proceedings without appreciating that (a) all material facts were duly disclosed by the Appellant; (b) claims made were justified in law and explanation furnished was bona fide, and in any case, (c) no penalty is leviable qua additions/ disallowances related to issues which are debatable.

6.1 That the CIT(A) erred on facts and in law in levying penalty qua disallowance made under section 40(a)(ia) of the Act without appreciating that the stand taken by the Appellant to not withhold tax on payments made to vendors was in consonance with the decision of the Supreme Court in the Appellant's own case for earlier assessment years.

6.2 That the CIT(A) erred on facts and in law in proceeding on the fallacious and erroneous presumption that during the quantum proceedings, the Appellant had admitted its liability to deduct tax at source under section 194C while making payment to vendors, while levying penalty qua disallowance made under section 40(a)(ia) of the Act.

7. That the order passed by the CIT(A) levying penalty under section 271 (1)(c), being beyond limitation prescribed under section 275 of the Act, is bad in law and void ab initio.”

ITA no. 7896/Del/2017

1.That the Commissioner of Income Tax Appeals [“CIT(A)”] erred on facts and in law in levying penalty under section 271(l)(c) of the Income tax Act, 1961 (“the Act”) for alleged concealment and furnishing of inaccurate particulars of income in respect of enhancement made by the CIT(A) in order dated 31.03.2017 passed under section 250/143(3) of the Act, on account of (i) non-deduction of tax at source on payments made to vendors for purchase of finished goods, and (ii) ad-hoc disallowance of Rs.156,58,71,670 being 50% of the Advertisement, Marketing and Promotion Expenses.

2. That the CIT(A) erred on facts and in law in passing the impugned penalty order in undue haste, without affording adequate opportunity of being heard to the Appellant.

3. That the CIT(A) erred on facts and in law in not appreciating

that satisfaction for initiating penalty was not recorded in order passed by the CIT(A) in quantum proceedings, which is sine qua non for assumption of jurisdiction to impose penalty.

4. That the CIT(A) erred on facts and in law in levying penalty under section 271(l)(c) of the Act without specifying the exact charge for initiating penalty proceedings in notice dated 31.03.2017 issued under section 274 read with section 271(1)(c) of the Act, as also in the impugned order dated 30.09.2017.

5. That the CIT(A) erred on facts and in law in levying penalty qua enhancement made by the C1T(A) in quantum proceedings without appreciating that (a) all material facts were duly disclosed by the Appellant; (b) claims made were justified in law and explanation furnished was bona fide, and in any case, (c) no penalty is leviable qua additions/ disallowances related to issues which are debatable.

6.1 That the CIT (A) erred on facts and in law in levying penalty qua disallowance made under section 40(a)(ia) of the Act without appreciating that the stand taken by the Appellant to not withhold tax on payments made to vendors was in consonance with the decision of the Supreme Court in the Appellant's own case for earlier assessment years.

6.2 That the CIT(A) erred on facts and in law in proceeding on the fallacious and erroneous presumption that during the quantum proceedings, the Appellant had admitted its liability to deduct tax at source under section 194C while making payment

to vendors, while levying penalty qua disallowance made under section 40(a)(ia) of the Act.

7. That the order passed by the CIT(A) levying penalty under section 271(1) (c), being beyond limitation prescribed under section 275 of the Act, is bad in law and void ab initio.

2. The Ld. Authorised Representative appearing on behalf of the assessee submitted that the impugned penalties had been imposed on identical enhancements by the Ld. CIT (A). It was submitted that the penalties have been imposed for non-deduction of tax at source on payments made to the vendors for purchase of finished goods and also on account of *ad hoc* disallowance out of Advertising, Marketing and Promotion (AMP) expenses. The Ld. Authorised Representative submitted that in assessment year 2005-06, the Ld. CIT(A) made an enhancement of Rs. 3,76,68,57,723/- by making a disallowance u/s 40(a)(ia) of the Act as well as by disallowing 50% of the expenses on Advertising, Marketing and Promotion. Similarly, in assessment year 2006-07, the assessed income was enhanced by the Ld. CIT(A) by an amount of 3,76,98,29,477/- on account of disallowance u/s 40(a)(ia) of the Act and *ad hoc* disallowance out of Advertising, Marketing and Promotion expenses. The Ld. Authorised

Representative further submitted that the assessee's quantum appeals for these two years have been decided by the ITAT in favour of the assessee in ITA Nos. 3612 and 3613/Del/2017 vide consolidated order dated 18.7.2018 wherein the enhancement made by the Ld. CIT (A) u/s 40(a)(ia) was held to be vide *ab initio* as the enhancement was made by the Ld. CIT(A) by introducing/ discovering a new source of income. He drew our attention to the relevant paragraphs of the order of the ITAT, as contained in pages 13 to 16 of the ITAT's order, and submitted that since the quantum enhancement u/s 40(a)(ia) has been deleted by the ITAT in both the assessment years, the penalties imposed thereon would not survive.

2.1 With respect to the enhancement made on account of Advertising, Marketing and Promotion expenses, the Ld. Authorised Representative drew our attention to pages 25 to 28 of the order of the ITAT for the years under consideration and submitted that this issue had been restored to the file of the AO/TPO for fresh adjudication in light of the decision of the Tribunal in assessee's own case for assessment year 2007-08 which was decided by the Special Bench. It was submitted that for both the assessment years,

2005-06 and 2006-07, the quantum with respect to the enhancement relating to Advertising, Marketing and Promotion expenses had been restored to the file of the AO/TPO and, therefore, the penalty as imposed u/s 271(1)(c) on this enhancement would also not survive. The Ld. Authorised Representative also placed reliance on number of judicial precedents while contending that the penalties imposed with respect to enhancement pertaining to Advertising, Marketing and Promotion expenses need not be set aside to the file of the AO/TPO but should be directed to be deleted totally as the very basis for the quantum addition has been modified by the ITAT to keep in line with the order of ITAT Special Bench in assessee's own case for assessment year 2007-08.

3. In response, the Ld. CIT-DR placed reliance on the order of the Ld. CIT (A) but he could not negate the fact that the disallowance/enhancement made by the Ld. CIT (A) u/s 40(a)(ia) has been deleted by the Tribunal by holding the same as void *ab initio*. However, in respect of the other addition on which the penalties have been imposed i.e. enhancement in respect of Advertising, Marketing and Promotion expenditure, the Ld. CIT-DR submitted that the issue

should also be restored to the file of the AO/TPO rather than deleting the penalties.

4. We have heard the rival submissions and have also perused the material on record. It is undisputed that in both the years under consideration the quantum addition on account of enhancement by the Ld. CIT (A) with respect to disallowance u/s 40(a)(ia) of the Act has been deleted by the Tribunal in ITA nos. 3612 and 3613/Del/2017 and, therefore, since the impugned quantum additions have been deleted by the ITAT, the penalties u/s 271(1)(c) imposed on such enhancements also do not survive. Accordingly, the penalties with respect to enhancement u/s 40(a)(ia) in both the years under consideration stand deleted and the grounds raised by the assessee in this regard stand allowed.

4.1 As far as the other issue on which the penalties have been imposed is concerned, i.e. enhancement on account of Advertisement, Marketing and Promotion expenses, it is seen that the ITAT Delhi Bench has restored this issue to the file of the AO/TPO for both the years under consideration for the purpose of re-adjudicating the issue in light of the order of the Special Bench of the Tribunal in assessee's own case for assessment year 2007-08.

Although, the Ld. Authorised Representative has argued vehemently for deleting the penalties on the ground that the very basis of levy of penalties has been modified by the order of the ITAT in ITA Nos. 3612 & 3613/Del/2017, we are of the considered opinion that interest of justice would be served if the penalties for both the years on the quantum enhancement pertaining to Advertising, Marketing and Promotion expenses is also restored to the file of the AO/TPO. It is directed accordingly. Thus, the grounds raised in this regard are allowed for statistical purposes.

5. In the final result, both the appeals of the assessee stand allowed in terms of our observations as contained in the preceding paragraphs.

Order pronounced in the open court on 07th September, 2018.

Sd/-

(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Date: 07th September, 2018

Binita

Copy of order to: -

- 1) The Appellant;
- 2) The Respondent;
- 3) The CIT;
- 4) The CIT(A)-, New Delhi;

5) The DR, I.T.A.T., New Delhi;
True Copy

By Order
ITAT, New Delhi

Date of dictation	05 .09.2018
Date on which the typed draft is placed before the dictating Member	06 .09.2018
Date on which the typed draft is placed before the Other Member	06 .09.2018
Date on which the approved draft comes to the Sr. PS/PS	07 .09.2018
Date on which the fair order is placed before the Dictating Member for pronouncement	07.09.2018
Date on which the fair order comes back to the Sr. PS/PS	07.09.2018
Date on which the final order is uploaded on the website of ITAT	.09.2018
Date on which the file goes to the Bench Clerk	.09.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	