

THE INCOME TAX APPELLATE TRIBUNAL
 “J” Bench, Mumbai
 Before Shri Shamim Yahya (AM) & Shri Pawan Singh (JM)

I.T.A. No. 7444/Mum/2014 (Assessment Year 2007-08)

Tricom India Ltd. Gandhi Estate A.K. Road, Safed Pool Sakinaka Andheri Kurla Road Mumbai-400 072.	Vs.	ITO-8(3)(3) 202, 2 nd Floor Aayakar Bhavan M.K. Road Mumbai-400 020.
PAN : AAAC2807R		
(Appellant)		(Respondent)

Assessee by	None
Department by	Shri Uodal Raj Singh
Date of Hearing	20.01.2020
Date of Pronouncement	18.03.2020

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned CIT(A) dated 15.9.2014 and pertains to A.Y. 2007-08. The issue raised is that learned CIT(A) erred in sustaining penalty levied u/s. 271(1)(c) of the I.T.Act amounting to Rs. 101,44,741/-.

2. Brief facts of the case are that penalty levied u/s. 271(1)(c) of the Act in the present case was levied with reference to following additions :-

Sr.No.	Issue	Additions/disallowances as per order u/s. 143(3)	Additions/disallowances as per order of CIT(A)
1	Transfer pricing adjustment	26,61,237	12,09,653
2	Exclusion of other income from deduction claimed u/s. 10B	2,89,29,208	2,89,29,208
	Total	3,15,90,445	3,01,38,861

As regards addition on account of transfer pricing adjustment is concerned, the same was with respect to charging of interest on money advanced by the assessee to its associated enterprises based in USA. The assessee in this case has charged interest @ of 7.5% which was approximately US Libor+200 basis points. However, the Transfer pricing officer has charged interest @ 16.5%.

3. Upon assessee's appeal learned CIT(A) restricted the same to interest at Libor + 350 basis points. Finally the addition sustained on this account is Rs. 12,09,653/-. Penalty has been levied by the Assessing Officer with respect to this addition. While rejecting to the assessee's submission the authorities below placed reliance upon the decision of Hon'ble Supreme Court in the case of Dharmendra Textile Processors and others (295 ITR 244). Assessee's reliance upon Hon'ble Supreme Court decision in the case of Reliance Petroproducts Pvt. Ltd. (322 ITR 158) was also distinguished by referring to Hon'ble Supreme Court decision in the case of CIT Vs. Zoom Communication Pvt. Ltd. (327 ITR 510).

4. We find that in the present issue in dispute was charging of interest on sums advanced to the associated enterprises. The assessee has charged interest @ 7.5% which translated to US LIBOR + 200 basis points. The Transfer pricing officer replaced the same with interest rate at 16.5%. Learned CIT(A) has restricted the same to Libor + 350 basis points. In this regard upon careful consideration and hearing learned Departmental Representative, we note that in catena of cases Hon'ble Jurisdictional High Court has upheld interest rate to be charged on advance to overseas associated enterprises @ of Libor + 200 basis points. In this view of the matter, in our considered opinion the assessee's conduct cannot be said to be contumacious warranting levy of penalty. Moreover, the assessee has furnished all necessary particulars. There is no concealment in this regard. Addition made by the transfer pricing officer is ex facie unsustainable and has been so held by learned CIT(A) who has reduced the same to Libor + 350 basis points. In these circumstances, in our considered opinion Hon'ble Supreme Court decision in the case of Reliance

Petroproducts Pvt. Ltd. (supra) duly comes into play. In the said decision Hon'ble Supreme Court has held that if a claim of the assessee is rejected the same would not automatically lead to the assessee being visited with penalty u/s. 271(1)(c) of the Act. In our considered opinion this case law is fully applicable on the facts of the present case. Learned CIT(A) has completely erred in stating that the above said Supreme Court decision stands distinguished by Hon'ble Delhi High Court in the case of Zoom Communication Pvt. Ltd. (supra). By no stretch of imagination it can be said that Hon'ble Delhi High Court decision is having an overriding impact on the Supreme Court decision. In this view of the matter, in our considered opinion on the facts and circumstances of the case no penalty u/s. 271(1)(c) of the Act is livable on the transfer pricing adjustment of interest on advances to associated enterprise.

5. The other addition on which penalty has been levied is exclusion of other income being interest from deduction claimed u/s. 10B amounting to Rs. 289,29,208/-. Penalty has also been levied on this addition by placing reliance upon Hon'ble Supreme Court decision in Dharmendra Textiles Pvt. Ltd. (supra). Learned CIT(A) while confirming the penalty has also referred to the decision of Hon'ble Supreme Court in the case of Liberty India (317 ITR 218), wherein he has held that in the said decision it has been held that receipts beyond the first degree cannot be considered. That the interest income cannot be said to be derived from the business of providing ITES and it is not of first degree. Learned CIT(A) himself accepts that this decision is not available when assessee filed its return but learned CIT(A) states that after the issue of notice u/s. 142(1) on 18.8.2008, and passing of assessment order on 17.1.2011, the assessee could have abided by the decision of Hon'ble Apex Court if its intention was bonafide. From the above it is abundantly clear that learned CIT(A) has himself found that till the issue was finally decided by Hon'ble Supreme Court in the case of Liberty India (supra) this issue was debatable. Debate was fully settled by the decision of Hon'ble Supreme Court in the case of Liberty India (supra) as above. It is admitted fact that this decision was not

available when assessee filed its return. By no stretch of imagination it can be argued that assessee should have abided by Hon'ble Supreme Court decision, which is not in existence at that time. It is settled law that nobody can be asked to do the impossible. Hon'ble Supreme Court in the case of Mepco Industries Ltd. Vs. CIT (319 ITR 208) has referred with approval the Hon'ble Calcutta High Court in the case of Jiyajeerao Cotton Mills Ltd. (130 ITR 710) that subsequent decision of Hon'ble Supreme Court did not obliterate the conflict of opinion prior to it. In this view of the matter in our considered opinion the issue was debatable when the assessee filed its return of income. There is no concealment or furnishing of inaccurate particulars of income. Hence, in these facts the decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt. Ltd. (supra) as discussed above is applicable fully on the facts of the present case. Furthermore, the assessee's conduct cannot be said to be contumacious to warrant levy of penalty u/s. 271(1)(c) of the Act. This proposition is duly supported by the decision of the Larger Bench of Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa (83 ITR 26).

6. Accordingly, in the background of the aforesaid discussion and precedents, in our considered opinion the penalty levied in this regard is not sustainable. Accordingly we set aside the orders of the authorities below and delete the penalty.

7. In the result, appeal filed by the assessee stands allowed.

Order has been pronounced in the Court on 18.3.2020.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 18/03/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT

5. DR, ITAT, Mumbai
6. Guard File.

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BY ORDER,

(Assistant Registrar)
ITAT, Mumbai