IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

I.T.A. No.7789/DEL/2018
Assessment Year 2007-08

Dion Global Solutions Limited (Successor in interest Religare Tehnova Global Solutions Ltd.) Ground Floor, Prius Platinum, D3 District Centre, Saket New Delhi.	Vs.	**ACIT, Circle-7(2)** New Delhi
TAN/PAN: AAACF1917E		
(Appellant)		(Respondent)

Appellant by:	None		
Respondent by:	Shri Vivek Kumar Upadhyay, Sr.DR		
Date of hearing:	20	03	2024
Date of pronouncement:	22	03	2024

O R D E R

PER PRADIP KUMAR KEDIA-AM:

The captioned appeal is directed against the first appellate order of the Commissioner of Income Tax (Appeals)-III, Delhi ('CIT(A)' in short) dated 11.09.2018 arising from the penalty order dated 27.09.2017 passed under Section 271(1)(c) of the Income Tax Act, 1961 (the Act) concerning AY 2007-08.

2. As per the grounds of appeal, the assessee seeks to challenge the penalty imposed on disallowance of the expense amounting to Rs.32,95,228/- and additions on account of unearned income of Rs.102,33,994/-. The AO has imposed penalty of Rs.45,98,566/- on such additions.

3. When the matter was called for hearing, none appeared for the assessee. It is seen from the record that several opportunities have been given to the assessee in the past without any compliance. We are thus constraint to proceed *ex-parte*.

4. The ld. counsel for the Revenue placed the appellate order passed in the quantum proceedings by the ITAT in ITA No.245/Mum/2012 order dated 09.12.2016 to submit that the impugned additions in the quantum proceedings

have been confirmed by the Co-ordinate Bench.

5. The ld. DR for the Revenue accordingly submitted that no interference with the first appellate order of the CIT(A) in the matter of penalty proceedings is called for.

6. We have perused the material placed before the Tribunal and the relevant orders passed by the AO and CIT(A) in quantum proceedings and the penalty proceedings as placed before us.

7. As regards imposition of penalty on disallowance of ESOP expenses, the assessee before the AO contended that ESOP expenses are part of overall compensation cost and has been incurred by the company in relation to its employees during the assessment year under consideration. The ESOP were granted to its employees for the first time under the ESOP plan. The expenses have been incurred for maintaining good relations with the employees and for the retention of employees. The expenditure is in the nature of business expenditure.

7.1 We observe that while the additions have been confirmed in the quantum proceedings, such disallowance *ipso facto* does not lead to a conclusion that the issue is not arguable. The AO has also alleged that the claim is wrong in distinction to any falsity in claim.

7.2 Coupled with this, we note that the AO in the assessment order has merely observed that *penalty proceedings under Section 271(1)(c) are initiated separately*. No allegation towards the nature of default has been specified. No satisfaction contemplated under Section 271(1B) has been found towards the nature of default *qua* the disallowance. In the absence of any firm satisfaction towards alleged default, the AO is not entitled to invoke Section 271(1)(c) of the Act.

7.3 The penalty imposed on this ground is thus reversed and cancelled.

8. We now turn to the other additions towards unearned revenue which invited the penalty under Section 271(1)(c) of the Act. The assessee in the course of assessment proceedings pointed out that the assessee has received annual maintenance and subscription charges aggregating to Rs.102,33,944/-

which has been kept under current liability in the balance-sheet on the ground that the services qua such advances received, have not been rendered and therefore, the revenue cannot be said to have been accrued to the assessee. The assessee referred to the disclosures made in the audited financial statement in this regard and also referred to the accounting policies adopted before the lower authorities. The assessee also contended before the AO that in view of the mercantile method of accounting adopted by the assessee, such receipts remains unearned revenue and the income has been accounted for in the subsequent assessment year, i.e., AY 2008-09 where the services have been rendered. The AO has alleged furnishing inaccurate particulars of income while assessing such revenue received in advance.

9. In this backdrop, we are of the view that while the additions made on this count has been sustained in quantum proceedings, the explanation offered by the assessee is somewhat plausible when tested on the touchstone of Section 271(1)(c) of the Act. The assessee has made proper disclosure of the relevant facts in this regard and therefore, particulars, in itself, placed before the Assessing Officer cannot be said to be inaccurate *per se*. Merely because the advances received has been treated as income accrued to the assessee in the year of its receipt, the probative value of the explanation offered in this regard cannot be outrightly rejected. It is a case of mere preponement of year of taxation and is broadly tax neutral.

10. It is trite that burden of proof in the penalty proceedings varies from that in an assessment proceedings. Mere disallowance of expenditure or enhancement of returned income does not *ipso facto* call for imposition of penalty under Section 271(1)(c) of the Act. The assessee has offered an explanation in respect of treatment of such receipts as current liability instead of revenue income which may not have been accepted for the purposes of quantum proceedings but such option in quantum proceedings.

11 In the circumstances existing in the present case, we are inclined to agree with the contention on behalf of the assessee that discretion vested with the AO under Section 271(1)(c) ought to have been exercised in favour of the assessee and imposition of penalty is not justified. It is trite that imposition of penalty under Section 271(1)(c) is not automatic and should not be imposed merely because it is lawful to do so. Some degree of plausibility can be

assigned to the plea raised on behalf of the assessee. In the light of the mitigating circumstances, penalty imposed towards unearned revenue income is not justified.

12. Consequently, the first appellate order is set aside and the AO is directed to reverse and delete the penalty imposed in question.

13. In the result, the appeal of the assessee is allowed.

. **Order pronounced in the open Court on 22/03/2024**

Sd/- **Sd/-**

[KUL BHARAT] **[PRADIP KUMAR KEDIA]**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

DATED: **/03/2024**

Prabhat