

IN THE INCOME TAX APPELLATE TRIBUNAL  
[ DELHI BENCH: "E" NEW DELHI ]

BEFORE SHRI I. C. SUDHIR, JUDICIAL MEMBER  
AND SHRI B. P. JAIN, ACCOUNTANT MEMBER

I.T.A. No. 1393/Del./2011  
Assessment Year : 1997-98

Dy. Director of Income Tax,  
Circle : 3 (2),  
International Taxation,  
New Delhi.

M/s. Metapath Software International Ltd.  
Vs. [Now M P Software International Ltd.]  
C/o. S. R. Batliboi & Co.,  
Golf View Corporate Tower - B,  
Sector : 42, Sector Road, Gurgaon-122002.

PAN : AAFCM 0788 D

(Appellant)

(Respondent)

Assessee by : Shri Sanat Kapoor, Adv.; &  
Ms. Ananya Kapoor, Adv.;

Department by : Shri Rajesh Kumar, Sr. D.R.

Date of Hearing : 11.04.2017.

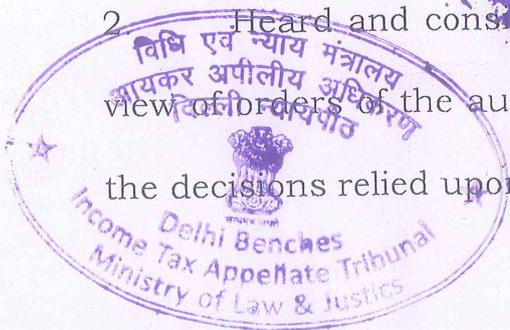
Date of Pronouncement : 28 .04.2017.

**ORDER**

**PER I. C. SUDHIR, J. M. :**

The Revenue has impugned action of the Id. CIT (Appeals) in deleting the penalty of Rs.18,02,291/- levied under section 271(1)(c) of the Act.

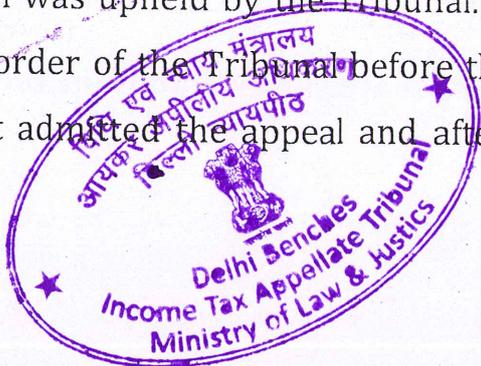
2. Heard and considered the arguments advanced by the parties in view of orders of the authorities below, material available on record and the decisions relied upon.



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3. Being a tax resident of UK, the assessee opted to be taxed in India under the provisions of the India UK Double Taxation Avoidance Agreement for the previous year relevant to the assessment year under consideration. As per the assessee under the provisions of the Tax Treaty, income derived by him from supply of network equipment (hardware and software) to Indian customers qualified as "business profits" and, therefore, not liable to taxation in India under the provisions of Article 7(1) of the Tax Treaty in the absence of a "permanent establishment" (PE) of assessee in India. Accordingly, assessee did not offer the Revenue from supply of network equipment to tax in India.

3.1 In response to notice under section 142(2) requiring the assessee to file its return of income, it filed a letter submitting that it did not constitute a PE in India under the terms of the Tax Treaty and is not taxable in India. In compliance of further notice issued under section 142(1) it, however, filed its return of income declaring 'NIL' income. It was selected for scrutiny and in the assessment framed under section 143(3), income earned from some sources was taxed. The entire revenue from supply of hardware was held to be taxable in India and profit margins at the rate of 40% were attributed to the Indian activities. Income from supply of software was taxed as "royalty" at the rate of 30% on a gross basis on the ground that software has been licensed by the assessee and not sold. The Id. CIT (Appeals) gave part relief, which was upheld by the Tribunal. The Revenue went in appeal against the said order of the Tribunal before the Hon'ble High Court. The Hon'ble High Court admitted the appeal and after passing a detailed order dismissed the



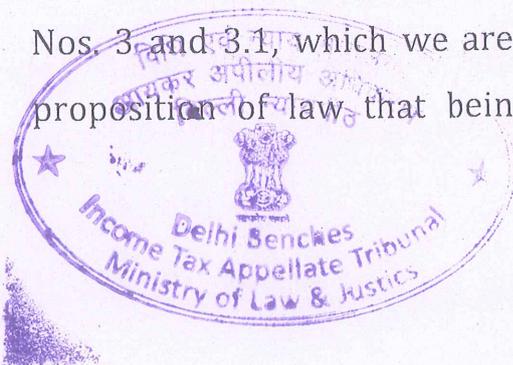
appeal on 23.12.2011 after answering the questions of law against the Revenue. In the meanwhile, vide order dated 27.04.2007 Assessing Officer levied penalty under section 271(1)(c) of the Act at Rs.18,02,291/- @ 100% on the tax of Rs.18,02,291/- sought to be evaded.

The Id. CIT (Appeals) has deleted the penalty, which has been questioned by the Revenue before us.

4. In support of the ground, the Id. Sr. DR, Shri Rajesh Kumar has placed reliance on the penalty order with this submission that the assessee tried to evade payment of tax by not filing its return of income. It had filed its return of income only in compliance of notices issued under section 142(1) of the Act. The Assessing Officer was thus justified in initiating and imposing the penalty as the assessee has furnished inaccurate particulars of its income by claiming that income derived by it from supply of network equipments to Indian customers qualifies as "business profits" and, therefore, not liable to taxation in India under the provisions of Article 7(1) of the Tax Treaty in the absence of a 'permanent establishment' of the assessee in India.

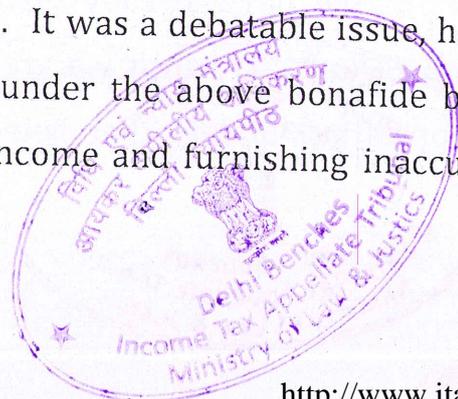
5. The Id. AR, Shri Sanat Kapoor, Advocate, with Ms. Ananya Kapoor, Advocate, has on the other hand, reiterated submission made before the authorities below and placed reliance on the decisions cited before them.

6. We have already discussed facts of the case hereinabove in para Nos. 3 and 3.1, which we are not repeating here. It is an well established proposition of law that being penal in nature, the provisions of section



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271(1)(c) of the Act are invoked only when there is evidence beyond doubt that there was concealment of particulars of income or furnishing inaccurate particulars thereof on the part of the assessee towards the tax alleged to be evaded. That is the reason behind that assessment proceedings and penalty proceedings are independent proceedings. In other words, making and sustaining an addition against the assessee will not be always resulted into levy of penalty. When we examine the facts of the present case, keeping in mind the above position of law, we find that the Id. CIT (Appeals) has deleted the penalty mainly on the basis that the explanation furnished by the assessee regarding non-filing of its return of income was bonafide. Where an explanation is furnished which the assessee is unable to substantiate, but the assessee establishes that the explanation furnished was bonafide and all the facts relating to the same and material to the computation of its total income has been disclosed by it, in our view, Explanation (1)(B) to section 271(1)(c) of the Act will not be applicable. In the present case before us the explanation of the assessee was that being a tax resident of UK it had opted to be taxed in India under the provisions of the India - UK Double Taxation Avoidance Agreement (Tax Treaty) for the previous year relevant to the assessment year under consideration. It was explained that under the provisions of the Tax Treaty, income derived by it from supply of network equipments to Indian customers qualify as "business profits" and, therefore, not liable to taxation in India under the provisions of Article 7(1) of the Tax Treaty in absence of a PE of the assessee in India. Thus, the assessee did not offer the Revenue from supply of network equipment to tax in India. It was a debatable issue, hence failure to voluntarily file return of income under the above bonafide belief cannot be construed to be concealment of income and furnishing inaccurate



particulars of income by the tax-payer. Also because the Id. CIT (Appeals) and Tribunal upheld the taxability of assessee in India partially cannot lead to an inference that assessee had furnished inaccurate particulars of income. It is not the case of the Revenue that the assessee had not disclosed all the material facts, but it is a case where the Revenue did not agree with the assessee that it was not liable to taxation in India. Penalty can be levied on account of failure on the part of the assessee to offer explanations with regard to facts material to the computation of total income and where no explanations have been offered by the assessee or were found by the Revenue authorities to be false. There is no such case before us. Under these facts and circumstances considered in its totality, we are of the view that the Id. CIT (Appeals) was justified in deleting the penalty in question. The same is upheld. The ground is accordingly rejected.

7. In result, appeal is dismissed.

8. The order is pronounced in the open court on : 28.04.2017.

( B. P. JAİN )  
ACCOUNTANT MEMEBR

*I. C. Sudhir*  
( I. C. SUDHIR )  
JUDICIAL MEMBER

*k*

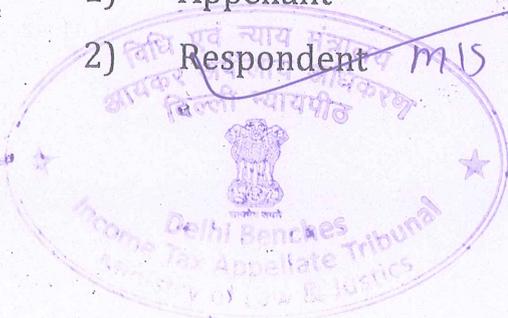
Dated the : 28th April, 2017.

\*MEHTA\*

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1) Appellant

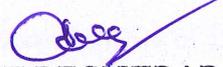
2) Respondent



- 3) CIT
- 4) CIT (Appeals)
- 5) DR: ITAT



BY ORDER

  
ASSISTANT REGISTRAR

सहायक पंजीकार  
Assistant Registrar  
आयकर अपीलीय अधिकरण  
Income Tax Appellate Tribunal  
नई दिल्ली / New Delhi