INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI
BEFORE SHRI R.P.TOLANI, HON'BLE VICE PRESIDENT
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3337/Del/2014
(Assessment Year: 2008-09)

ITO, Ward-5(4), New Delhi	Vs.	Modipon Ltd, Hapur Road, Modi Nagar, Ghaziabad PAN:AAACM2069E
(Appellant)		**(Respondent)**

Revenue by :	Sh. Rajesh Kumar, Sr. DR
Assessee by:	Sh. Santosh Aggarwal, Adv
Date of Hearing	07/06/2017
Date of pronouncement	09/06/2017

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is preferred by the Revenue against the order of the ld CIT(A)-VIII, New Delhi dated 20.03.2014 for the Assessment Year 2008-09 wherein, penalty levied of Rs. 18810897/- u/s 271(1)(c) of the Income Tax Act was deleted.

2. The revenue has raised the following grounds of appeal:-

"*1. Whether in the facts and circumstances of the case, the ld CIT(A) has erred in deleting the penalty of Rs. 18810897/- imposed by AO on account of addition made u/s 35DDA of the Act, 1961.*

2. Whether on the facts and circumstances of the case, the ld CIT(A) has erred in ignoring that the addition on which penalty was imposed was duly confirmed and accepted by the assessee company.

3. That the order of the ld CIT(A) is erroneous and is not tenable on facts and in law.

4. That the grounds of the ld CIT(A) is erroneous and is not tenable on facts and in law."

3. The brief facts of the case is that the appellant is a public limited company filed its return of income on 01.10.2008 at Nil income and subsequently revised for Rs. 54622868/-. Assessment u/s 143(3) of the Act was made on 24.12.2010 u/s 143(3) of the Act at Nil income, however, one of the addition which is subject to the penalty was with respect to the expenditure claimed by the assessee on voluntary retirement scheme expenditure claimed by the assessee of Rs. 60874376/-.

4. During the year assessee has claimed the whole of the expenditure amounting to Rs. 76092970/- claimed on account of VRS expenditure whereas, the ld Assessing Officer disallowed 80% of such expenditure and held that u/s 35DDA, 20% of such expenses are allowable in the year in which the expenses are incurred and balance shall be allowed in for equal installments in the immediately succeeding previous years. The assessee aggrieved with the order of AO preferred appeal before the ld CIT(A) who denied the deduction of Rs. 60874376/-. Therefore, assessee approached the coordinate bench who vide order dated 02.12.2015 in ITA No. 4155 and 4178/Del/2011 confirmed the disallowance. Meanwhile, the ld Assessing Officer initiated the penalty proceedings and issued show-cause notice on 20.02.2013 which was not replied and therefore, ld Assessing Officer held that assessee has furnished inaccurate particulars of income and levied a penalty of Rs. 18810897/- vide order dated 30.03.2013. The assessee challenged the same before the ld CIT(A), who deleted the above penalty vide order dated 20.03.2014 and therefore, Revenue is in appeal.

5. The ld DR vehemently submitted that the assessee has falsely claimed the deduction u/s 37(1) with respect to VRS expenditure fully. He submitted that the assessee was only entitled to deduction in five equal installments over five years. He therefore, submitted that claim of the assessee was false and accordingly, the ld Assessing Officer has correctly levied the penalty u/s 271(1)(c) of the Act.

6. The ld AR submitted that claim of the assessee was supported by various decisions and the coordinate bench has after distinguishing various decisions has upheld the disallowance. He further submitted that the issue is squarely covered by the decision of the Hon'ble Delhi High Court in ITA No. 3292/Del/2006 dated 21.07.2009. He therefore, submitted that though claim of the assessee is not accepted but it is not incorrect or wrong claim.

7. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The coordinate bench has upheld the disallowance in ITA No. 4155 and 4178/Del/2011 dated 02.12.2015 vide para no. 7 to para No. 16 as under:-

> *"7. Third ground of appeal is against the disallowance of Rs 6,08,74,376/- being payments made under Voluntary retirement scheme. During the year appellant has claimed the deduction of Rs 7,60,92,970/- on account of payment made under voluntary retirement scheme. However AO disallowed that sum and allowed only 20 % of the total claim made by the assessee u/s 35DDA of The Income Tax Act, resultantly he disallowed Rs 6,08,74,376/- out of the total claim of Rs 7,60,92,970/-. Ld AO was of the view that as the claim of the assessee for allowance of VRS payments , same is covered by provisions of section 35DDA of The Income Tax Act and hence, not allowable u/s 37(1) of the Act. Assessee agitated the issue before CIT (A) who also*

confirmed the order of AO on same reasoning and therefore assessee is in appeal before us on this ground.

8. Before us Ld. AR of the assessee said that the claim is allowable u/s 37(1) of the Income Tax Act and he relied up on following decision of various courts.

a. CIT V KJS India Private Limited 340 ITR 380 (Delhi)

b. CIT V Bhor Industries Limited 264 ITR 180 (Bom)

c. CIT V orient papers and Industries Limited 372 ITR 680 (cal)

d. CIT V Simpson & co Limited 230 ITR 703

e. CIT V Swan Mills Limited 39 Taxmann.com 112 (Bom)

9. Ld DR relied on the order of AO as well as CIT (A) and submitted that claim is not allowable u/s 37(1) of the Act as it is specifically allowable u/s 35DDA of the Income Tax Act.

10. We have carefully considered the rival submission of the parties and also perused the orders of lower authorities. We have also perused the decisions relied up on by the Ld AR of the assessee. In fact it is not disputed by the assessee that the claim of the assessee is not governed by the provision of section 35DDA. However the stand of the assessee is that though the claim of the assessee satisfies all the conditions of the provision of section 35DDA but claim of VRS payments should not be allowed spread over five years as provided u/s 35DDA but whole expenditure u/s 37(1) in this year in which it is incurred.

11. The provision of section 35DDA was inserted in to the Income tax Act vide Finance Act 2001 with effect from AY 2002-03 which is as under.

MORTISATION OF EXPENDITURE INCURRED UNDER VOLUNTARY RETIREMENT SCHEME *(1) Where an assessee incurs any expenditure in any previous year by way of payment of any sum to an employee in connection with retirement, in accordance with any scheme or schemes of voluntary retirement, one-fifth of the amount so paid shall be deducted in computing the profits and gains of the business for that previous year, and the balance shall be deducted in equal installments for each of the four immediately succeeding previous years. (2) Where the assessee, being an Indian company, is entitled to the deduction under sub-section (1) and the undertaking of such Indian company entitled to the deduction under sub-section (1) is transferred, before the expiry of the period specified in that sub-section, to another Indian company in a scheme of amalgamation, the provisions of this section shall, as far as may be, apply to the amalgamated company as they would have applied to the amalgamating company if the amalgamation had not taken place. (3) Where the undertaking of an Indian company entitled to the deduction under sub-section (1) is transferred, before the expiry of the period specified in that sub-section, to another company in a scheme of demerger, the provisions of this section shall, as far as may be, apply to the resulting company, as they would have applied to the demerged company, if the demerger had not taken place. (4) Where there has been reorganization of business, whereby a firm is succeeded by a company fulfilling the conditions laid down in clause (xiii) of section 47 or a proprietary concern is succeeded by a company fulfilling the conditions laid down in clause (xiv) of section 47, the provisions of this section shall, as far as may*

be, apply to the successor company, as they would have applied to the firm or the proprietary concern, if reorganization of business had not taken place.
(5) No deduction shall be allowed in respect of the expenditure mentioned in sub-section (1) in the case of the amalgamating company referred to in sub-section (2), in the case of demerged company referred to in sub-section (3) and in the case of a firm or proprietary concern referred to in sub-section (4) of this section, for the previous year in which amalgamation, demerger or succession, as the case may be, takes place. (6) No deduction shall be allowed in respect of the expenditure mentioned in sub-section (1) under any other provision of this Act. According to this section the dispute has come to end that whether the VRS expenditure is capital or revenue in nature. With effect from AY 2001-02 , any expenditure incurred by assessee on Voluntary retirement scheme shall be allowed in five years i.e @ 20 % for each of the year. Further any expenditure which is in nature of expenditure of Voluntary retirement scheme shall not be allowed as deduction under any other section of the Income Tax Act. Analyzing the claim of the assessee it is apparent that claim of the assessee is allowable u/s 35DDA of the act in 5 years @ 20 % in each of the years. However assessee claims that same is fully allowable u/s 37(1) in this year .i.e. in the year in which it is incurred.

12. Provisions of section 37 (1) deals with the deductibility of expenses which are not covered u/s 30 to 36 of the Income Tax Act. Section 37 of the IT Act, 1961, enjoins that any expenditure, ***not being expenditure of the nature described in section 30 to section 36****, laid out or expended wholly and exclusively for the purpose of the business or profession should be allowed in computing the income chargeable under the head 'Profits and gains of business or profession'. In other words, section 37(1) being a residual provision, the aid of that section cannot be resorted to unless and until it is established that none of the provisions of section 30 to section 36 are applicable to a given case. Where, for instance, it is found as a fact that section 35DDA of the Act applies, the assessee cannot be allowed to make use of the provision contained in section 37(1) of the Act. Where a case specifically falls under any one of the specific provisions of Section 30 to 36, although it was not specifically pleaded by the assessee, the assessing authority has a statutory duty and obligation to consider the claim of the assessee pertaining to a particular item under that section. Honourable Guj High court has held in Khimji Vishram & sons V CIT 209 ITR 993 as under :-*

> *"As against this, under section 37, deduction of any expenditure could be allowed in computing the income chargeable under the head "Profits and gains of business or profession", if it is found that :*
>
> *(i) it is not an expenditure of the nature described in sections 30 to 36 ; (ii) it is not in the nature of capital expenditure or personal expenses of the assessee ; (iii) it must have been laid out or expended wholly and exclusively for the purposes of the business or profession ; and (iv) there is no specific prohibition for its allowance such as section 37(2B), (3) and (4) or as provided in other sections. From the aforesaid two sections, it is apparent that, under section 37, only revenue expenditure, which is expended wholly and exclusively for the purpose of business or profession, can be allowed to be deducted in computing the income while under sections 30 to 36, it could be either revenue expenditure or capital expenditure. Further, section 37 as such is a general provision which provides for deduction of expenditure while*

computing the income chargeable under the head "Profits and gains of business or profession" of the assessee, if the expenditure is of revenue nature and not personal expenses of the assessee and if the said expenditure is laid out or expended wholly and exclusively for the purpose of business or profession. Hence, if the expenses are not covered by the specific provisions of sections 30 to 36 and yet the said expenses are laid out or expended wholly and exclusively for the purposes of the business or profession and they are not in the nature of capital expenditure or personal expenses of the assessee, then deduction is required to be given for the said expenses. It is quite possible that with regard to some expenses there may be overlapping between sections 30 to 36 and section 37. In that set of circumstances, if the expenses are deductible under sections 30 to 36, then section 37 is not to be resorted to. But if the said expenses are not deductible under sections 30 to 36 and the conditions prescribed under section 37 are satisfied, then the said expenses are required to be deducted while computing the income unless there is a specific prohibition."

13. Therefore in our view the claim of the assessee is allowable u/s 35DDA of the act and no deduction u/s 37(1) is permitted for expenditure on voluntary retirement scheme.

14. We also deal with the decision relied up on by the assessee:-

a. CIT V KJS India Private Limited 340 ITR 380 (Delhi) the issue before Honourable high courts was whether the severance cost to the employees on suspension of one of the manufacturing activities is revenue expenditure or capital expenditure. It was held that it is revenue expenditure in nature and therefore allowable to the assessee for AY 2003-04. However provision of section 35DDA was not brought to the notice of the court.

b. CIT V Bhor Industries Limited 264 ITR 180 (Bom) the issue before Hon high court was whether the amount of expenses on voluntary retirement scheme for AY 1996-97 would be allowable to the assessee in the year in which it is incurred or it is allowable over the period as written off in the books of accounts. Honourable court held that enduring benefit test does not apply on these expenditure and same shall be allowable in the year in which it is incurred.

c. CIT V orient papers and Industries Limited 372 ITR 680 (cal) the issue before high court was whether the VRS expenditure is capital expenditure in nature or not. Honourable High court held that it is allowable as deduction as expenditure on grounds of commercial expediency.

d. In the decision of CIT V orient papers & Industries Limited Hon Delhi High court has followed the decision of CIT V Simpson and Co Limited 230 ITR 703 which is also on the issue of whether the VRS expenditure is capital or revenue expenditure.

e. CIT V Swan Mills Limited 39 Taxmann.com 112 (Bom) the issue before high court for AY 2000-01 was whether VRS payments are allowable on closure of business as revenue expenditure and court held that same is allowable as revenue expenditure.

15. In none of the decision cited before us, Honourable courts were concerned about the allowability of claim of VRS expenditure u/s 35DDA of the act as well as u/s 37(1) of the act. Further all the cases cited above pertains to AY prior to introduction of section 35DDA of the act except in case

of CIT V KJS India Private Limited 340 ITR 380 (Delhi), however provision of section 35DDA was not brought to the notice of the court. Therefore these decisions render no help to the cause of the assessee.

16. In view of above facts we confirm the order of CIT (A) disallowing the claim of the assessee of Rs 6,08,74,376/- u/s 37(1) of the act on account of payment made under voluntary retirement scheme. Therefore ground no 3 of the appeal is dismissed. "

8. On perusal of the order of the coordinate bench it is apparent that the claim of the assessee was based on several decisions including the decision of Hon'ble Delhi High Court in CIT Vs. KJS India Pvt. Ltd 340 ITR 380 (Del) and coordinate bench has also discussed the claim of the assessee thoroughly. Merely because the claim of the assessee was not accepted by the concurrent authority despite there being plausible judicial precedents in favour of the assessee, the claim of the assessee cannot be said to be false. It is also an established principle that penalty u/s 271(1)(c) of the Act cannot be levied on debatable issues. Hon'ble Supreme Court in case of CIT Vs. Reliance Petro Products Pvt. Ltd 322 ITR 158 has held that merely on the ground that the claim of the assessee is incorrect cannot tantamount to furnishing of incorrect claims. Further, Hon'ble Delhi High Court on identical facts and circumstances in the case of CIT Vs. Dalmia Pvt Ltd 186 Taxmann 155 (Del) has held as under:-

"4. We may note at this stage that the assessee had accepted the assessment orders whereby deduction of aforesaid amount paid by the assessee to its workers was allowed under section 35DDA of the Act. However, the assessee challenged the penalty order on the ground that the requirements of section 271(1)(c) of the Act were not fulfilled and the penalty proceedings were illegally initiated by the Assessing Officer and consequently the penalty order passed also was not valid. In this behalf, submissions of the assessee was that the claim made by the assessee, treating the aforesaid payment as revenue expenses under section 37(1) of the Income-tax Act, was a bona fide move. Two opinions were possible and in case it was held by the Assessing Officer that the claim is allowable under section 35DDA and not under section 37, that would mean that the Assessing Officer was not right in initiating penalty proceedings. Contention of the assessee found favour with the Commissioner of Income-tax (Appeals) who vide his order dated 8-10-2004 set aside the penalty levied against the assessee.

5. The revenue challenged this order before the ITAT but without any success inasmuch as by reason of impugned order dated 30-8-2005, the Tribunal has dismissed the appeal of the revenue. In the process, the ITAT has observed as under :

"We have considered the rival contentions and the material on record. Firstly, we do agree with the observations of the CIT(Appeals) that all material facts were disclosed by the assessee and that there was no intention to conceal any particulars. The modus of claiming deduction was merely a matter of opinion and hence on that ground itself, no penalty is leviable. Secondly, nowhere in the assessment order we find any satisfaction recorded by the Assessing Officer as to concealment by the assessee. This is a prerequisite

before Commercial Enterprises in 246 ITR 568 and a host of other judgments which followed thereafter. Therefore, on any count, the penalty is not sustainable and hence we uphold the order of the CIT (Appeals) cancelling the same."

6. Reason given by the ITAT that in the assessment order, no satisfaction is recorded by the Assessing Officer as to concealment by the assessee and setting aside the order on that ground, relying upon the judgment in the case of CIT v. Ram Commercial Enterprises Ltd. [2000] 246 ITR 5681 (Delhi), no more remains valid in view of legislative amendment in section 271 by the Finance Act, 2008. By this amendment, sub-section (1B) is inserted to section 271 of the Income-tax Act retrospectively with effect from 1-4-1989 as per which it is not necessary for the Assessing Officer to record such a satisfaction. It is for this reason that on 18-7-2008, this Court taking note of the aforesaid amendment observed that the matter is to be now examined on merits.

7. For this reason, we heard the counsel for the parties on merits. Section 35DDA inter alia states that where an assessee incurs any expenditure in any previous year by way of payment of any sum to an employee in connection with his voluntary retirement, in accordance with any scheme or schemes of voluntary retirement, one-fifth of the amount so paid shall be deducted in computing the profits and gains of the business for that previous year, and the balance shall be deducted in equal instalments for each of the remaining succeeding previous years. Thus, this provision is applicable when Voluntary Retirement Scheme is introduced by the assessee and under this scheme, payments are made by the assessee to his employees on their voluntary retirement. It is well known that many times various companies come out with such Voluntary Retirement Schemes to ease out unwanted/surplus employees. The purpose is to give honourable exit with "golden hand shake". Indubitably there exist specific provisions in the Industrial Disputes Act to retrench surplus employees which can also be resorted to by the employer. However, invocation of those provisions normally leads to litigation between the retrenched workmen and employer. Furthermore, the provisions of retrenchment etc. which are contained in Industrial Disputes Act would cover only those employees who are 'workmen' within the meaning of section 2(s) of the Industrial Disputes Act, and it would not include non-workmen/other employees. Guided by these considerations, Voluntary Retirement Scheme is normally introduced with benevolent objective to give extra benefits to the employees who come forward and opt for such a scheme by taking much more benefits which otherwise may not be available to such employees under the law. Section 35DDA of the Act covers such a situation.

In the present case, what we find from the orders of the Assessing Officer as well as CIT (Appeals) that assessee is engaged in the business of manufacturing of cement pipes and fittings, agricultural activities and investment in shares. It had closed its Rockfort unit at Dalmia Puram. Because of its closure, closure notice was issued to its employees whose services were no longer required as a result of the aforesaid closure. It appears that this led to a dispute between the employees and the employer which resulted into settlement under section 18(1) of the Industrial Disputes Act. It was because of this reason that the assessee believed that the payment made in a settlement arrived at under section 18(1) of the Industrial Disputes Act, would qualify as revenue expenditure and it could claim the entire deduction under section 37 of the Income-tax Act.

8. Interestingly, even the Assessing Officer in the assessment order took note of the judgment of the Supreme Court in the case of Employers in relation to

the Management of the Indian Cable Co. Ltd. v. Its Workmen AIR 1972 SC 2195. In this case, the Apex Court held that when payment is made to workmen, who retire prematurely, it is treated as expenditure incurred on the ground of commercial expediency and thus expenditure so incurred would be allowable as an expenditure under section 37(1) of the Income-tax Act. This also demonstrates that in the income-tax return filed by the assessee when the assessee is claiming expenditure because of payment made under section 18(1) of the Industrial Disputes Act and not under the Voluntary Retirement Scheme, it was a bona fide move on the part of the assessee and two views in the matter were possible, namely, whether the claim was to be allowed under section 37(1) of the Act or it was allowable under section 35DDA of the Act. In such circumstances, even if the Assessing Officer ultimately held that claim could be allowed only under section 35DDA, we are of the view that it was not a case where the assessee had concealed the income or had furnished inaccurate particulars. In fact as observed by the CIT(Appeals) and as well as by ITAT complete disclosure was made by the assessee in this behalf.

9. We are, therefore, of the opinion that ingredients of section 271(1)(c) of the Act are not satisfied in the present case and the findings arrived at by the two authorities below, which are concurrent, are findings of facts on this aspect. No substantial question of law arises for determination and this appeal is accordingly dismissed."

9. In view of the decision of Hon'ble Delhi High Court and Hon'ble Supreme Court we find no infirmity in the order of the ld CIT(A) in deleting penalty u/s 271(1)(c) of Rs. 18810897/-. In the result appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 09/06/2017.

-Sd/-	**-Sd/-**
(R.P.TOLANI)	**(PRASHANT MAHARISHI)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated: 09/06/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi