$~1

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 10.12.2021

\+ **ITA 141/2020 & CMs 7352-53-54/2020**

PR. COMMISSIONER OF INCOME TAX-4 ..... Appellant

Through Mr.Zoheb Hossain, Sr. SC with Mr.Vipul Agrawal, Mr.Parth Semwal, Jr.SC.

versus

M/S GIESECKS & DEVRIENT (INDIA) PVT. LTD. ..... Respondent

Through Mr.Harpreet Singh Ajmani, Mr.Rohan Khare, Advs.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This appeal has been filed by the appellant challenging the order dated 28.01.2019 passed by the Income Tax Appellant Tribunal, Delhi of 'I-2' Bench, New Delhi (hereinafter referred to as the 'ITAT') in ITA No.3864/Del/2015.

2. By the impugned order, the learned ITAT has allowed the appeal of the respondent and set aside the demand of penalty levied by the Assessing Officer vide order dated 26.11.2013 as subsequently upheld by the learned Commissioner of Income Tax (Appeal) (hereinafter referred to as 'CIT(A)') vide order dated 13.03.2015.

3. It is the case of the appellant that the respondent is a wholly-owned subsidiary of Giesecke & Devrient Gmbh (hereinafter referred to as 'G&D GmbH'). During the Assessment Year 2007-08 (hereinafter referred to as 'relevant AY') , the appellant was engaged in the business of wholesale trading of currency verification and processing systems ('CVPS'), their maintenance and providing SIM card systems to telecommunication operators. The respondent also renders software development agreements, wherein it develops software applications software(s) for G & D GmbH. As a part of this, the respondent is also engaged in the business development of smartcard-related applications.

4. The respondent filed its return of income for the relevant AY. Pursuant to the order of the Transfer Pricing Officer and subsequently the Dispute Resolution Panel, the Assessing Officer made an addition of Rs.25,31,59,381/- (Rupees Twenty Five Crores Thirty One Lakhs Fifty Nine Thousand Three Hundred Eight One) to the returned income, making the following adjustments:

i) Provision for software development services	-	Rs. 2,68,68,098/-
ii) Purchase of raw material for SIM Card assemble	-	Rs.1,90,83,391/-
iii) Payment of consultancy fees	-	Rs.2,11,25,492/-
iv) Purchase of finished goods	-	Rs. 18,60,82,400/-

5. Aggrieved by the assessment order dated 24.10.2011, the respondent filed an appeal being ITA No.5735/Del/2011 before the learned ITAT. The said appeal was partly allowed by the learned

ITAT vide its order dated 15.03.2013, upholding the adjustments at serial numbers (i) and (ii) above while deleting the remaining adjustments.

6. The Assessing Officer thereafter issued a show-cause notice dated 06.11.2013 under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') and passed the order dated 26.11.2013, levying a penalty of Rs.1,54,67,271/- (Rupees One Crore Fifty Four Lakhs Sixty Seven Thousand Two Hundred Seventy One) on the respondent. The respondent filed an appeal challenging the above order, which was dismissed by the learned CIT(A) vide order dated 13.03.2015.

7. The respondent challenged the said order before the learned ITAT, which appeal now stands allowed by the impugned order.

8. The learned counsel for the appellant submits that in terms of Rule 10B(4) of the Income Tax Rules, 1962 (hereinafter referred to as the 'Rules'), no contrary view on the issue of use of single-year data was available to the respondent. This itself shows lack of *bona fide* on part of the respondent, making it liable to levy of penalty.

9. The learned counsel for the appellant further submits that the TP documentation of the respondent for provision of software development services segment and purchase of raw material for SIM card assembly segment are faulty, misleading and prepared without proper care, which also clearly proves that there was lack of good faith and diligence on part of the respondent, making it liable to levy of penalty.

10. We have considered the submissions made by the learned counsel for the appellant, however, find no force in the same.

11. The learned ITAT in its impugned order has recorded that prior to 2007, there was a legal debate as to whether multiple-year data can be used or only current-year data is to be used under Rule 10B(4) of the Rules. In fact, this Court in its judgment dated 06.08.2019 passed in ITA No.335 of 2019, in the case of the respondent itself for the AY 2005-06, has upheld a similar view of the learned ITAT, observing as under:

> *"7. The Court notes that after the words "data relating to the financial year" occurring in Rule 10B(4) of the Rules, there is an insertion made in the Rules with effect from 19th October, 2015, which reads "hereafter in this Rule and in Rule 10(C)(a) referred to as the 'current year'.*
>
> *8. While it could be argued that this was a clarificatory amendment, the fact remains that the legislature thought it necessary to clarify that the data that was required to be used had to necessarily relate to the financial year in question and not to multiple year data.*
>
> *9. The view taken by the ITAT that during the AY in question, the issue was debatable cannot, in the circumstances, said to be an implausible view."*

12. The learned ITAT in its impugned order further records that the other reason for making the adjustments in the relevant AY was the denial of the capacity utilization claimed by the respondent. It has held that difference in the level of capacity utilization is an accepted principle, though denied in the relevant AY to the respondent. The same cannot, however, tantamount to filing without good faith and due diligence.

13. We do not find any infirmity in the above observation of the learned ITAT. As held by the Supreme Court in ***Commissioner of Income Tax, Ahmedabad vs. Reliance Petroproducts Pvt. Ltd.,*** (2010) 11 SCC 762, for the purpose of invoking Section 271(1)(c) of the Act, there has to be a concealment of particulars in the income of the assessee and the assessee must have furnished inaccurate particulars of his income. Making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars under Section 271(1)(c) of the Act. Mere making of a claim which is not sustainable in law, by itself, will not tantamount to furnishing inaccurate particulars regarding income of the assessee. Merely because, the assessee had claimed an expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not attract the penalty under Section 271(1)(c) of the Act.

14. Applying the above standard to the facts of the present case, we find no infirmity in the impugned order passed by the learned ITAT.

15. Accordingly, no substantial question of law arises for consideration in the present appeal. The appeal and the pending applications are dismissed.

NAVIN CHAWLA, J

MANMOHAN, J

DECEMBER 10, 2021
RN/AB