

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

ITA No. 2214/MUM/2015
(Assessment Year : 2009-10)

M/s. Babcock & Brown India Pvt. Ltd.
Room No.1/3, 1st Floor,
Jayanthi Apts., Above Hotel Atithi,
Mulund (W)
Mumbai.
PAN: AADCB 3091J
Vs.

... Appellant

The Dy. Commissioner of Income Tax (3)(1),
Aaykar Bhavan, MK Road,
Mumbai 400020

.... Respondent

Appellant by : S/Shri S.Hariharan/
R.Suryanarayanan
Respondent by : Shri Pankaj Kumar

Date of hearing : 17/11/2015
Date of pronouncement : 20/11/2015

ORDER

PER N.K.BILLAIYA,AM:

This appeal by the assessee is directed against the order of the CIT(A)-5, Mumbai dated 14/11/2014 pertaining to the assessment year 2009-10.

2. The appeal is barred by limitation by 42 days. The assessee has prayed for the condonation of the delay and the prayer is supported by an affidavit. We have considered the contents of the affidavit. In

our considered opinion the assessee was prevented by reasonable and sufficient cause for not filing the appeal on time. Therefore, the delay is condoned and the appeal is admitted.

2. The sole grievance of the assessee relates to the penalty levied under section 271(1)(c) of the Income Tax Act, 1961(in short 'the Act') on account of upward pricing adjustment made by the Assessing Officer.

3. The roots for the levy of penalty lie in the assessment order dated 1/3/2013 made under section 143(3) r.w.s. 144C(3) of the Act.

4. The assessee is engaged in the business of providing investment advisory services. For its international transactions, transfer pricing study report was filed alongwith the return of income. The matter was referred to the Transfer Pricing Officer (TPO) for the determination of arm's length price in respect of international transactions entered with the Associated Enterprises of the assessee.

5. After considering the facts and the submissions and the transfer pricing study report of the assessee, the TPO recommended an upward adjustment of Rs.4,03,58,886/-. Objections were raised before the DRP, which were dismissed. The assessment was completed by making upward adjustment of Rs.4,03,58,886/-. Simultaneously, penalty proceedings were initiated under section 271(1)(c) of the Act for filing inaccurate particulars of income.

6. During the course of penalty proceedings, the assessee was asked to explain why penalty should not be imposed for filing inaccurate particulars of income. The assessee filed a detailed reply vide letter dated 08/03/2013 stating that although it has accepted the variation proposed in the order, it was not in agreement with the same as the arm's length price taken by the TPO by taking final comparable companies were not in similar line as compared to the assessee's business. It was further contended that the only reason for accepting the order of the AO was to avoid protracted litigation. It was also pointed out that the company is under voluntary winding up and an Official Liquidator has been appointed. The contention of the assessee did not find any favour with the AO, who was of the firm belief that Explanation-1 to section 271(1)(c) of the Act squarely apply and, therefore, concluded by levying penalty under section 271(1)(c) of the Act for furnishing inaccurate particulars of income.

7. The assessee carried the matter before Ld. CIT(A) but without any success.

8. Before us, the Ld. Counsel for the assessee reiterated what has been stated before the lower authorities. It is the say of the Ld. Counsel for the assessee that assessee's transfer pricing study report was based on a study conducted by an independent expert and the expert justified the pricing as arm's length price using TNMM method. It is the say of the Ld. Counsel for the assessee that in so far as the transfer pricing additions are concerned, Explanation -7 is the relevant explanation to be considered alongwith section 271(1)(c) of the Act. Strong reliance

was placed on the decision of the Tribunal in the case of RBS Equity (India) Ltd., 13 Taxman.com 30 (Mum). Per contra, Ld. DR strongly supported the findings of the Revenue authorities.

9. We have given careful consideration to the orders of the authorities below. We have also considered carefully the decision of the Co-ordinate Bench relied upon by the Ld. Counsel for the assessee. The undisputed fact is that the assessee had adopted TNMM method as most appropriate method for determining the arm's length price with the comparables. It is also a fact that the TPO has also followed the TNMM method. Thus, there is no dispute in so far as adoption of most appropriate method is concerned. Admittedly, the upward adjustment have been made on account of different sets of comparables taken by the TPO. It is also an admitted fact that the assessee did not contest the assessment order because it was under liquidation and was going to wind-up its affairs.

10. In our considered opinion, the determination of reasonable arm's length price is a matter of estimate. Merely because it is possible to arrive at two different estimates of arm's length price, it cannot be held that the lower of the two estimates is based on inaccurate particulars, while higher one is accurate. We also find that with regards to penalty under section 271(1)(c) of the Act in respect of transfer pricing additions, only Explanation -7 to the section has to be considered. A perusal of the said Explanation shows that no penalty can be levied where the pricing is done in good faith and with due diligence. In the present case, the transfer pricing of the assessee is based on a study

conducted by an independent expert, M/s.Price Waterhouse Coopers, Chartered Accountants. The assessee has obtained a transfer pricing study from an outside expert, and this transfer pricing study, objectivity of which is neither called into question or seems to be, upon perusal of this transfer pricing study, questionable to us anyway, approves TNMM method for determination of arm's length price - a proposition which has not been specifically rejected by the Revenue authorities. On these facts, lack of due diligence in determining the arm's length price is neither indicted nor can be inferred. In such a situation, it cannot be said that the assessee has not determined the arm's length price in accordance with the scheme of section 92C in good faith and with due diligence. The conditions precedent for invoking Explanation-7 to section 271(1)(c) did not exist on the facts of this case.

11. We, therefore, set aside the order of Ld. CIT(A) and direct the AO to delete the impugned penalty.

12. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 20/11/2015.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER
Mumbai, Dated 20/11/2015

Sd/-
(N.K.BILLAIYA)
ACCOUNTANT MEMBER

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.

//True Copy//

Vm, Sr. PS

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai