



IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER

ITA no.4356/Mum./2014
(Assessment Year : 2006-07)

Dy. Commissioner of Income Tax
Circle-10(1), Aayakar Bhawan
101, M.K. Road, Mumbai 400 020

..... Appellant

v/s

Symantic Software Solution Pvt. Ltd.
(Formerly known as Veritas Software
Solutions Pvt. Ltd.), Unit no.430
C-Wing, 4th Floor, Fortune 2000
Bandra Kurla Complex
Bandra (E), Mumbai 400 051
PAN - AABCV2624B

..... Respondent

Revenue by : Shri N.K. Chand a/w
Shri Sambit Mishra
Assessee by : Shri A.V. Sonde

Date of Hearing - 17.03.2016

Date of Order - 31.03.2016

ORDER

PER SAKTIJIT DEY, J.M.

Instant appeal of the Department is directed against the order dated 30th March 2014 passed by the learned Commissioner (Appeals)-11, Mumbai, deleting the penalty imposed under section 271(1)(c) of the Income Tax Act, 1961 (for short "*the Act*") for the assessment year 2006-07.

2. Briefly stated the facts are, assessee an Indian Company is engaged in the business of providing marketing support service to its Associate Enterprise (A.E). For the relevant previous year, assessee entered into international transaction with its A.E. For bench marking, the price charged, assessee undertook a transfer pricing study through an external agency. Transaction Net Margin Method (TNMM) was adopted as most appropriate method with Operating Profit / Operating Cost (OP/OC) as Profit Level Indicator (PLI). A search process was undertaken in the data base and on the basis of financial data of the current year as well as previous two years selected 12 companies as comparables with average margin of 19.70% as against margin shown by the assessee at 0.87%. Since, the margin shown by assessee was found to be lesser than the margin of comparables, the assessee on its own made an adjustment to the arm's length price by an amount of ₹ 92,15,556. In the course of proceedings before the Transfer Pricing Officer, he called upon the assessee to compute the margin of the comparables on the financials of the current year only. On the basis of query raised by the Transfer Pricing Officer, assessee updated the margin of the comparable companies as per which the arithmetic mean of the comparable companies was 29.50%. The Transfer Pricing Officer after excluding one of the companies out of 12 selected in the transfer pricing study called upon the assessee to explain why arm's length

margin should not be taken at 29.50% for the transaction entered with the A.E. Though the assessee objected to the proposed adjustment, however, Transfer Pricing Officer passed an order by applying the margin of 29.50% as a result of which there was an upward transfer pricing adjustment of ₹ 2,54,27,043 on the arm's length price. On the basis of the order passed by the Transfer Pricing Officer, Assessing Officer passed a draft assessment order incorporating the transfer pricing adjustment recommended by the Transfer Pricing Officer. Further, Assessing Officer also disallowed the amount of ₹ 21,47,595 under section 40(a)(ia) of the Act. Against the draft assessment order, the assessee raised objections before the DRP. As it appears, assessee did not contest the disallowance under section 40(a)(ia). The DRP having confirmed transfer pricing adjustment, the Assessing Officer passed the final assessment order. Though, assessee preferred appeal before the Tribunal against the final assessment order, however, as it appears, as far as the transfer pricing adjustment is concerned, the Tribunal confirmed the addition. On the basis of aforesaid two additions sustained in appeal, the Assessing Officer initiated proceedings under section 271(1)(c) by issuing a show cause notice to the assessee. Though, the assessee objected to initiation of penalty proceedings, but the Assessing Officer rejecting the explanation of the assessee ultimately passed an order imposing penalty of ₹ 31,91,220.

Being aggrieved of the penalty order, assessee preferred appeal before the learned Commissioner (Appeals).

3. The learned Commissioner (Appeals), after considering the submissions of the assessee in the light of the facts and materials on record, noticed that as far as the transfer pricing adjustment is concerned, the assessee had bench marked the transaction with A.E. using TNMM as most appropriate method and had selected certain comparables for comparability analysis. He observed, the Transfer Pricing Officer not only accepted the method selected by the assessee along with the PLI but comparables selected were also accepted. He noticed, only difference between the computation of arm's length price by the assessee and Transfer Pricing Officer was on account of margin earned by the comparable companies. While the assessee has taken the margin of the comparables on the basis of three years data, the Transfer Pricing Officer computed the margin of the comparables only on the basis of current year data. He further found that the assessee itself has made a transfer pricing adjustment of ₹ 92,15,556. Referring to Explanation 7 to section 271(1)(c), he observed, only if the computation of arm's length price by assessee was not in good faith or without due diligence, penalty can be imposed. He was of the opinion that the difference in arm's length price as per assessee's computation

and that of the Transfer Pricing Officer is only as a result of average of multiple year data used by the assessee in respect of comparable as against single year data used by the Transfer Pricing Officer. He observed, as at the time of preparing the transfer pricing study the current year data in respect of all the comparable companies was not available in public domain the assessee could not have incorporated such data for computing the margin of the comparables. He observed, computation of margin of comparable companies by the assessee was as per the data available in the public domain on the due date of filing of return of income. Therefore, he ultimately held that as the Transfer Pricing Officer has accepted the method of bench marking the international transaction selected by the assessee and all other facts except the margin computed on the basis of multiple year data, it cannot be said that the assessee has not carried out the exercise of determining arm's length price in good faith or due diligence. Accordingly, he held that in terms of Explanation-7 to section 271(1)(c), no penalty is imposable. As far as, imposition of penalty on the disallowance made under section 40(a)(ia), learned Commissioner (Appeals) held as the Assessing Officer in the draft assessment order has not initiated proceedings for imposition of penalty under section 271(1)(c) in respect of the disallowance made under section 40(a)(ia),

he cannot impose penalty on such addition after directions of the DRP on the draft assessment order.

4. Learned Departmental Representative submitted, the very fact that the assessee itself made transfer pricing adjustment of ₹ 92 lakh to the arm's length price proves that the price charged was not at arm's length. Referring to Explanation-7 to section 271(1)(c), learned Departmental Representative submitted, burden is on the assessee to prove that the price charged or paid in respect of an international transaction was computed in good faith and due diligence in accordance with the provisions contained in section 92C and in the manner prescribed therein. He submitted, as per rule 10B(4), computation of margin of comparables will have to be made on the basis of current year data. That being the case, assessee could not have computed the margin of the comparables by using multiple year data. He submitted, as the assessee has not computed the price charged for the international transactions in accordance with the provisions contained in section 92C, or in the manner prescribed therein, it amounts to furnishing of inaccurate particulars, hence, the Assessing Officer was justified in imposing penalty under section 271(1)(c). As far as penalty imposed on the addition made under section 40(a)(ia), learned Departmental Representative submitted,

there is no requirement under the law that the Assessing Officer while framing the draft assessment order should initiate proceeding under section 271(1)(c). He submitted at the time of the final assessment order also, the Assessing Officer can initiate proceeding for imposition of penalty under section 271(1)(c).

5. Learned Authorised Representative strongly relying upon the observations of the first appellate authority, submitted, as far as the transfer pricing adjustment is concerned, the only difference between the margin computed by the assessee and the Transfer Pricing Officer is as a result of use of multiple data by the assessee in respect of comparables as against current year data used by the Transfer Pricing Officer. He submitted, when the transfer pricing study was prepared and even at the time of submissions of the return of income, current year data in respect of the comparables were not available in public domain. Therefore, in any case of the matter, assessee could not have computed the margin of the comparable companies by using single year data. Learned Authorised Representative submitted, contemporaneous data would effectively mean the data available in public domain on the due date of filing of return of income. Therefore, the data which comes into public domain subsequently and on the basis of which the Transfer Pricing Officer makes the adjustment

cannot be considered as a contemporaneous data. Therefore, penalty under section 271(1)(c) cannot be imposed alleging furnishing of inaccurate particulars of income. As far as the issue of imposition of penalty on the disallowance made under section 40(a)(ia), learned Authorised Representative submitted, since the Assessing Officer did not initiate penalty proceeding under section 271(1)(c) in the draft assessment order, he cannot do so in the final assessment order as the final assessment order is to be passed in conformity with the directions of the DRP. He submitted, as the issue of imposition of penalty under section 271(1)(c) was not in the draft assessment order, the same cannot be considered to be a part of directions of DRP for initiating the proceeding in the final assessment order. Finally, the learned Authorised Representative submitted, issue relating to transfer pricing adjustment is now subject matter of adjudication before the High Court as in the appeal preferred by the assessee the Hon'ble High Court has admitted the substantial question of law framed on the issue. He, therefore submitted, as substantial question of law arising out of the transfer pricing adjustment has been admitted by Hon'ble High Court, no penalty under section 271(1)(c) can be imposed. For such proposition, he relied upon the following decisions:-

- i. *DCIT v/s M/s. Crisil Ltd. [ITA No 941/Mum/2008] (Mumbai ITAT)*
- ii. *M/s Nayan Builders and Developers P Ltd v/s ITO [ITA No. 2379/Murn./2009]*

- iii. *Sudhakar M Shetty v/s ACIT [ITA Nos.65 14 & 65 1 5/Mum/20 11] (Mumbai ITAT)*
- iv. *CIT v/s Nayan Builders and Developers (Bombay HC)*
- v. *DCIT v/s M/s Ankita Electronics Private Ltd. [ITA No. 297/2014]*
- vi. *Rupam Mercantiles Ltd. v/s DOT [91 ITD 2371 (Ahmedabad ITAT – Third Member)*
- vii. *M/s Jyotsna v/s ACIT (ITA No.2187-2189/Kol/2001 (Kolkata ITAT)*
- viii. *CIT vs Maharaja Exhibitors [251 ITR 767] (Gujarat HC)*

6. In rejoinder, learned Departmental Representative submitted, only because the High Court admits a substantial question of law, on that ground alone penalty under section 271(1)(c) cannot be deleted as under section 260A(4), the respondent can always bring it to the notice of the High Court that there is no substantial question of law involved in the case. In support of his contention, learned Departmental Representative relied upon the following decision:–

CIT v/s Prakash S. Vyas, ITA no.606 of 2010, dated 15.11.2011

7. We have considered the submissions of the parties and perused the material available on record. We have also applied our mind to the decisions relied upon. As stated earlier, assessee had bench marked the price charged for the international transaction by selecting TNMM as most appropriate method with OP/OC as PLI. Assessee has also

selected 12 companies as comparable by using multiple year data. It is evident on record that Transfer Pricing Officer has no dispute with regard to the adoption of TNMM as most appropriate method with OP/OC as PLI. He has also accepted all the comparables selected by the assessee except one. The only dispute between the assessee and the Transfer Pricing Officer is in relation to computation of margin of the comparables. While the assessee has computed the margin of the comparables by using multiple year data, the Transfer Pricing Officer has computed on the basis of current year. This alone is the sole reason for the adjustment made by the Transfer Pricing Officer. Uncontroverted facts emerging from record as well as finding of learned Commissioner (Appeals) indicate that on the due date of filing of return current year data in respect of many of the comparables were not available in the public domain, therefore, the assessee considering the data available in public domain, whether current year or multiple year, computed the margin of comparables. Nothing has been brought on record by the Department to establish that current year data in respect of all the comparables were available in public domain on the due date of filing of return of income. Therefore, it cannot be said that the determination of the international transaction by the assessee is not in accordance with the provisions of section 92C r/w rule 10B(4) or not in good faith or without due diligence as proviso

to rule 10B(4) provides under certain contingencies use of previous years data is permissible.

8. Moreover, it is a fact on record, assessee has furnished all relevant information in respect of international transaction with A.E. in the audit report as well as transfer pricing study. In fact, the Transfer Pricing Officer himself admits that the assessee furnished the updated margins of the comparables. The Transfer Pricing Officer has not found any of the information submitted by the assessee misleading or unreliable. Therefore, in our view, a case of furnishing of inaccurate particulars of income has not been made out to justify imposition of penalty under section 271(1)(c). Even otherwise also, it is evident on record that against the order of the Tribunal confirming the transfer pricing adjustment assessee has preferred appeal before the High Court under the provisions of section 260A of the Act. It is also a fact, High Court has admitted the substantial question of law framed on the issue of transfer pricing adjustment which is as under:-

"Whether in the facts and circumstances of the case, the Appellate Tribunal's confirmation of the determination of the arm's length price margin at 17.50 per cent for marketing support and consultancy services provided by the Appellants to its associated enterprises in the assessment year 2006-07 is correct and proper?"

It is observed, in case of Nayan Builders and Developers Pvt. Ltd. v/s ITO, ITA no.2379/Mum./2009, the Tribunal, Mumbai Bench, has

held that when the High Court on a particular issue admits a substantial question of law, penalty under section 271(1)(c) need not be imposed as the issue is debatable one and assessee's claim is on bonafide basis. The aforesaid view of the Tribunal was approved by the Hon'ble Jurisdictional High Court in Nayan Builders and Developers Pvt. Ltd., ITA no.415/2012, dated 8th July 2014. The Hon'ble Jurisdictional High Court while dismissing the appeal of the Department, held as under:–

"1. Having heard Mr Ahuja, learned counsel appearing on behalf of the Appellant, we find that this Appeal cannot be entertained as it does not raise any substantial question of law. The imposition of penalty was found not to be justified and the Appeal was allowed. As a proof that the penalty was debatable and arguable issue, the Tribunal referred to the order on Assessee's Appeal in Quantum proceedings and the substantial questions of law which have been framed therein. We have also perused that order dated 27th September 2010 admitting Income Tax Appeal no.2368 of 2009. In our view, there was no case made out for imposition of penalty and the same was rightly set aside. The Appeal raises no substantial question of law, it is dismissed. No costs."

Similar view has also been expressed by the Hon'ble Karnataka High Court in DCIT v/s Ankita Electronics Pvt. Ltd., ITA no.297/2014. Though, the learned Departmental Representative has relied upon the decision of the Hon'ble Gujarat High Court in CIT v/s Prakash S. Vyas, in Tax Appeal no.606/2010, wherein a contrary view has been expressed, but, we are persuaded to follow the decision of the Hon'ble

Jurisdictional High Court in *Nayan Builders and Developers P. Ltd.* (supra), which is binding on us. Therefore, looked at from any angle, imposition of penalty under section 271(1)(c) in the present case is not justified. The bonafide of the assessee is further proved from the fact that voluntarily it has made adjustment of ₹ 92 lakh to the price charged. In the circumstances, in our considered opinion, learned Commissioner (Appeals) was justified in deleting the penalty under section 271(1)(c).

9. As far as the issue relating to penalty on the addition made under section 40(a)(ia), admittedly, in the draft assessment order, the Assessing Officer has not initiated proceeding for imposition of penalty. It is only in the final assessment order the Assessing Officer initiated proceeding for imposition of penalty in respect of disallowance made under section 40(a)(ia). On a perusal of the provisions contained under section 144C, it is to be noted that the as per sub-section 3, if the assessee intimates the Assessing Officer the acceptance of variation made in the draft assessment order or no objections are received within the period prescribed under sub-section (2), Assessing Officer shall complete the assessment on the basis of draft order. However, in case, the assessee raises objection against the draft assessment order, as per sub-section (13) of section 144C, the

Assessing Officer shall pass the final assessment order in conformity with the direction of the DRP without providing any further opportunity of being heard to the assessee. Thus, the final assessment order as contemplated under section 144C(13) is only to implement the directions of the DRP. Therefore, in our view, if the Assessing Officer has not initiated penalty proceedings under section 271(1)(c) in respect of a particular item of addition in the draft assessment order, he cannot do so in the final assessment order.

10. It is a well known fact, certain additions made by the Assessing Officer, which assessee would otherwise have accepted, is forced to challenge in appeal due to the sword of penalty under section 271(1)(c) dangling over his head. Therefore, when in the draft assessment order the Assessing Officer does not initiate proceedings for imposition of penalty in respect of a particular addition, the assessee believing that spectre of penalty under section 271(1)(c) is no more staring at him, may not contest the addition before the DRP and as a result the addition gets confirmed. Thus, in such a situation, if at the stage of final assessment, the Assessing Officer initiates penalty proceedings under section 271(1)(c) against additions not objected / contested before DRP, assessee would be put to a very precarious position, because in terms of section 144C(13), final assessment order has to be passed without affording any further

opportunity of being heard to assessee. Therefore, on a harmonious construction of relevant statutory provisions, we are of the view, if the Assessing Officer did not initiate proceeding for imposition of penalty under section 271(1)(c) in respect of a particular addition in the draft assessment order, he cannot do so in the final assessment order.

11. In view of the aforesaid, finding no infirmity in the order of the learned Commissioner (Appeals), we uphold the same by dismissing the ground raised by the Revenue.

12. In the result, Revenue's appeal is dismissed.

Order pronounced in the open Court on 31.03.2016

Sd/-
ASHWANI TANEJA
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 31.03.2016

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai