

आयकरअपीलीयअधिकरण, 'ए' न्यायपीठ,चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवंश्री एस जयरामन, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 1278/Mds/2016

निर्धारण वर्ष/Assessment Years : 2005-06

Deputy Commissioner of Income Tax,
Corporate Circle -1(1),
Chennai – 600 034.

M/s. Dishnet Wireless Ltd.,
Vs. Spencer Plaza, 5th Floor,
769, Anna Salai,
Chennai – 600 002.

[PAN: AAACD 5767E]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/Appellant by

: Shri. Sreenivasan, JCIT

प्रत्यर्थीकीओरसे/Respondent by

: Shri. Ravi Sharma, CA

सुनवाईकीतारीख/Date of Hearing

: 27.06.2017

घोषणाकीतारीख/Date of Pronouncement

: 06.09.2017

आदेश / O R D E R

PER S. JAYARAMAN, ACCOUNTANT MEMBER:

The Revenue filed this appeal against the order of the Commissioner of Income Tax (Appeals)-1, Chennai in ITA No. 66/09-10 dated 11.02.2016.

2. M/s. Dishnet Wireless Ltd., the assessee, is engaged in the business of broadband internet service providing trading in video conferencing equipment and internet protocol phones, telecom consultancy, software and GSM services. Since, the value of international transactions with Siva Limited for international bandwidth capacity was for Rs. 24,50,00,000/- and Dishnet Wireless (Mauritius) Limited for 2 Mbps line circuit-bandwidth capacity was for Rs. 2,18,750/- as per Form 3CEB, which exceeded Rs. 15 crores for assessment year 2005-06, the AO made a reference to the TPO u/s. 92A(1) for determining Arm's Length Price. The TPO in her order dated 20.10.2008 has concluded that no adjustment was necessary to the value of international transactions entered into by the assessee. However, she recorded a finding that since the assessee failed to furnish the details called for by the TPO vide her office notices dated 14.03.2007 and 07.05.2008 and letter dated 03.08.2008, the provisions of section 271G are attracted for each failure and hence initiated penalty proceedings u/s. 271G. The assessee pleaded that the provisions of section 273(B) overrides the provisions of section 271G and the assessee had reasonable cause for the failure like (a) there was change of ownership of DWL w.e.f. 21.03.2006 and the details required by the TPO could not be furnished since those details were not furnished by the erstwhile

management & (b) the information required by the TPO was not publicly available and the same was not also furnished to the company by the erstwhile management. After hearing the appellant, the AO passed penalty order u/s. 271G dated 30.06.2009 levying a penalty of Rs. 1,47,13,125/-. Aggrieved, the assessee filed an appeal before the CIT(A). The CIT (A) held that the default was not patent, hence the penalty u/s. 271G was sustainable in law and directed the AO to delete the penalty. Aggrieved against that order, the Revenue filed this appeal, inter alia, with the following grounds:

2.1 The learned CIT(A) erred in deleting the penalty levied u/s. 271G of the IT Act to the tune of Rs. 1,47,13,125/-

2.2 The learned CIT(A) erred in deleting the penalty by stating that the assessee has reasonable cause to furnish the information/document u/s. 92D of the IT Act.

2.3 The learned CIT(A) erred in accepting the reason adduced by the appellant that there was change in the management of the assessee company due to which the assessee was incapacitated from furnishing the information required u/s. 92D of the IT Act.

2.4 The learned CIT(A) erred in not appreciating the fact that the information and documents in relation to the international transactions reported in Form 3CEB constitutes contemporaneous documentation which required to be kept and maintained by the assessee mandatorily.

2.5 The learned CIT(A) failed to appreciate that keeping and maintain the documentation u/s. 92D has got nothing to do with the change in the ownership/management of the assessee company.

2.6 *The learned CIT(A) failed to appreciate that the assessee entity continues to be in existence as a going concern irrespective of the change in the management of the company. Therefore the relief granted to the assessee is not in accordance with the provisions of law."*

3. The DR invited our attention to the copy of the Annexure – I of Annexure to Form No. 3CEB in the paper book furnished by the assessee and submitted that the assessee has declared Dishnet Wireless (Mauritius) Ltd., and Siva Limited as Associated Enterprises with whom it has entered into international transactions and the value of the international transactions with them has been computed by applying internal comparable uncontrolled price method as prescribed u/s. 92C . Thereafter, he invited our attention to the AO's observation in the assessment order for the initiation of penalty proceedings and submitted that since the assessee has not furnished the details required by the AO and has not explained the reasonable causes for not furnishing the required details. So, the levy of penalty is justified. Per contra, the AR submitted that during the course of the assessment, the assessee had pleaded before the TPO that Siva Limited, Bermuda and Dishnet Wireless (Mauritius) Limited, were not its Associated Enterprises and requested for dropping the proceedings. In order to drop the proceedings, the TPO vide her notice's dated October 14, 2007, May

7, 2008 and July 3, 2008 had called for some documents/information to substantiate its claim before the TPO that SLB and DWML are not its Associated Enterprises ('AEs'). In the absence of details/documents, the TPO wanted to conclude that the TP provisions are applicable. Thereupon, the TPO had discussions with the Authorised Representative of the assessee to determine the Arm's Length Price ('ALP') of the international transaction and after discussions and consideration of documents furnished before her, she has concluded that the international transactions are at Arm's Length. Though the information as per Rule 10D were furnished to the satisfaction of the TPO, She had considered them and concluded that the transactions are at Arm's Length, still the TPO considered that the provisions of section 271G are applicable and initiated penalty proceedings. Although the assessee had pleaded before the Assessing Officer that there had been a change in the management of the Appellant Company due to which it did not have exhaustive documentation to support its contention etc, the AO disregarded them and levied penalty. In support, the AR invited our attention to its letter dated 16.05.2007 to Shri D. Rama Prasad, Group CFO, Siva Ventures Limited, on the subject of information for transfer price assessment for the assessment year 2005-06-Dishnet Wireless Limited, Chennai . Further, the AR relied on the order of

the CIT (A) and submitted that on proper appreciation of the facts and circumstances of its case and after considering the reasonable causes, the appellate authority allowed its appeal and then invited our attention to the relevant portions of the CIT(A) order.

4. We heard the rival submissions. The relevant portion of the order of the CIT(A) is extracted as under:

"15. I have carefully considered the facts, order of the AO, submissions made by the appellant and material on record. As is evident from the above the proceedings u/s 271 G were initiated and penalty levied for failure to furnish information called for by the TPO. It necessitates the presence of the ingredients viz., (i) that the person ought to have entered into an international transaction with an AE which mandates reference to the TPO u/s 92CA (ii) that on being called for to produce information or document the same remain uncomplished. The provisions of s.271 G are to be read along with s.273B which require penalty not to be imposed in case the appellant proves that he was precluded from complying with the requirements of production of documents or information called for by the TPO by reasonable cause.

16. From the submissions made by the appellant what is evident are as follows:

(i) that the TPO had finalized the order u/s 92CA not proposing any adjustment to the value of international transactions entered into by the appellant and accepting the transactions to be at arms length.

(ii) that certain information called for by the TPO could not be furnished by the appellant on account of change of ownership of the appellant company w.e.f. 21.3.2006 consequent to which there was a change in erstwhile management.

(iii) that the information called for by the TPO was not in public domain and the same were also not furnished by the erstwhile management.

(iv) that SIVA Ltd., Bermuda (SLB) and Dishnet Wireless (Mauritius) Ltd (DWML) are not AEs of the appellant and hence the provisions of transfer pricing including the obligation of complying with the same would not apply. This fact was submitted by the appellant before the TPO vide its submission dt. 14.3.2007 that SLB and DWML were not associated enterprises in terms of provisions of s. 92A and hence transfer pricing provisions were not applicable to the appellant.

(v) that the appellant had stated before the TPO that the management had changed after being taken over by the Maxis Group effective from 21.03.2006.

(vi) that there was a finding by the TPO while finalizing the order u/s 92CA that " The case was discussed with the assessee's representative. After examining international transactions, no adjustment is considered necessary to the value of the international transactions entered into by the assessee. As the assessee failed to furnish the details called for vide this office notings dated 14.3.2007 and 7.5.2008 and letter dated 3.7.2008, the provisions of section 271G is attracted for each failure of the assessee." (extracted by the appellant from the order of TPO and made part of the submission.

(vii) that the submissions made by the appellant dated 20.1.2009 before the AO needed to be considered.

17. The reading of the order imposing penalty also is indicative of the several reasons as to why the reasons advanced would constitute "reasonable cause" which were not considered by the AO. This is further made clear in para 4 of the penalty order with regard to the documents and information requested by the TPO. The above reasons read along with those listed out by the appellant in para 5 above and relied upon case- laws do go in to support the view that

the appellant was precluded from complying with the requirements with regard to information and documents requisitioned by the TPO by reasonable cause. Accordingly, I am of the considered view that the default was not patent and hence the penalty u/s 271 G was not sustainable in law. The AO is directed to delete the penalty. This ground of appeal is allowed."

4.1 From the above it is clear, that the assessee has established that SIVA Ltd., Bermuda and Dishnet Wireless (Mauritius) Ltd are not its AEs and hence the provisions of transfer pricing including the obligation of complying with the same would not apply. Certain information called for by the TPO could not be furnished by the assessee on account of change of ownership of the appellant company w.e.f. 21.3.2006 consequent to which there was a change in erstwhile management. The information called for by the TPO was not in public domain and the same were also not furnished by the erstwhile management. Thereafter, the TPO based on the elaborate details furnished by the assessee had finalized the order u/s 92CA without making any adjustment to the value of international transactions and accepted the declared transactions to be at arm's length. When we consider the above facts and circumstances and the reasons given by the CIT(A) , as extracted supra, it is clear that the assessee has established reasonable causes for the impugned non-compliance and hence there is no ground for the levy of

penalty. The order passed by the CIT (A) does not require any interference and hence the Revenue's grounds of appeal fail.

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

Order pronounced on Wednesday, the 6th day of September, 2017 at Chennai.

Sd/-

(एन.आर.एस. गणेशन)

(N.R.S. GANESAN)

न्यायिकसदस्य/Judicial Member

Sd/-

(एसजयरामन)

(S. JAYARAMAN)

लेखासदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated: 06th September, 2017

JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF