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

Before Shri Mahavir Singh(JUDICIAL MEMBER)

AND
Shri G Manjunatha (ACCOUNTANT MEMBER)

ITA No. 6009/Mum/2017 - AY 2012-13
ITA No. 716/Mum/2018 - AY 2009-10

DCIT-12(1)(1), Mumbai	vs	M/s Amore Jewels P Ltd Plot No.3A, Pandit Motilal Nehru Marg Behind Patel Aluminium, Itt Bhatti Goregaon (W), Mumbai 400 062 PAN : AAECA7184J
APPELLANT		**RESPONDEDNT**

Appellant by	Shri Ajay Malik
Respondent by	Smt. Arati Vissanji

Date of hearing	27-02-2019
Date of pronouncement	10-04-2019

O R D E R

Per G Manjunatha, AM :

These two appeals filed by the revenue are directed against separate, but identical orders of the CIT(A)-55, Mumbai, both dated 28-06-2017 and 08-09-2017 and they pertain to AYs 2009-10 and 2012-13. Since facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed of by this consolidated order.

2. The revenue, has more or less, raised common grounds of appeal for both the assessment years. For the sake of brevity, grounds of appeal taken for AY 2012-13 are extracted below:-

> "1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) was not justified in deleting the penalty u/s.271G in the assessee case even when the assessee had clearly failed in maintaining the documentation as required u/s.92D(3) of the Income Tax Act, 1961.
> 2. That on the facts and circumstances of the case and in law, the decision of CIT(A) is vitiated for the reason that the CIT(AJ has not given any findings on how the assessee has complied with the clauses (d),(g) ,(h) and (m) of rule 10D(1), that has been specifically invoked by the TPO.
> 3. That on the facts and circumstances of the case and in law, the CIT(A) was not justified in stating that the TPO should have asked for copies of profit and loss accounts and balance sheets of AEs to make an overall comparison with the gross profitability levels of the assessee with the AE's to ascertain diversion of profits, if any, ignoring the findings of the ITAT in the case of Aztec Software Technology Services Ltd vs ACIT(ITA no.584/Ban/2Q06), in which it has been held that there is no legal requirement for the AO to prima facie demonstrate tax avoidance before invoking the provisions of section 92 and 92CA of the Income Tax Act, 1961.
> 4. That on the facts and circumstances of the case and in law, the Ld.CIT(A) erred in holding that there was reasonable cause for noncompliance of sec 92D r/w rule 10D(1) without specifying the cause of such noncompliance or demonstrating how the same was reasonable.
> 5. That on the facts and circumstances of the case and in law, the Ld.CIT(A) erred in deleting the penalty for the reason that no adjustment was made to the ALP, failing to note that by not producing the material documents necessary to determine the ALP under any of the prescribed methods u/s.92C(l), the assesee effectively prevented the TPO to make determination as recorded by the TPO in para 5 of the order u/s.92CA(3).
> 6. That on the facts and circumstances of the case and in law ,the CIT(A) was not justified in arriving at the conclusion that the TPO could have tried to work out the gross profits and net profits by averaging the purchase prices and the expenses in proportion of exports sales of each one of the segments to arrive at average profitability of each segment and then to compare the same with the average profitability of other public companies whose details were available in public domain, when it was not possible to do so in the absence of proper documentation."

3. The brief facts of the case are that the assessee is engaged in the business of buying rough and polished diamonds, processing of rough

diamond, manufacturing polished diamonds and selling polished diamonds. The assessee is also engaged in purchase of raw materials (gold, gold mountings, polished diamonds and other items), assortment of polished diamond, manufacturing of jewellery and sale of jewellery. During the current financial year, the assessee has entered into international transactions of purchase and sale of rough as well as polished diamonds from its associate enterprises. The assessee has applied TNMM to benchmark international transactions with its AEs. During assessment proceedings, a reference u/s 92CA(1) of the Income-tax Act, 1961 was made to the TPO to determine ALP of international transactions with its AE. During the course of proceedings, the assessee justified TNMM by comparing its profits margin with the margin earned by third parties engaged in similar activities. However, the assessee did not furnish segmental profitability between the AE. The TPO has accepted assessee's international transactions with its AE is at ALP without making any adjustment u/s 92CA(3); however, the TPO has made observation with regard to non furnishing of certain documents with regard to the RPM or CUP method to determine ALP of its international transactions. Therefore, he had accepted TNMM method selected by the assessee to benchmark its international transactions without any adjustment.

4. Thereafter, the TPO initiated penalty proceedings u/s 271G of the I.T. Act, 1961 and issued a show cause notice dated 27-01-2016 and asked as to why penalty shall not be levied for non furnishing of documents specified u/r 10D(1) of I.T. Rules, 1962. In response, the assessee, vide its letters dated 12-02-2016 and 18-02-2016 submitted that it has furnished necessary information in connection with TNMM method selected for benchmarking its international transactions. However, when the AO has asked for further documentation in respect of RPM and CPU, the information was not readily available including segment-wise P&L Account, therefore, it is not correct to say that there is no compliance to the provisions of Rule 10D(1), which warrants levy of penalty u/s 271G of the Act.

5. The AO, after considering submissions of the assessee and also on analysis of provisions of rule 10D(1) held that the assessee has failed to comply with the requirements of Rule 10D(1) in view of failure to file specific details required under law, as per the provisions of rule 10D(1) to compute ALP of its international transactions. The AO / TPO further observed that the contention of the assessee that it was prevented by reasonable cause for not maintaining and furnishing the information relating to international transactions as well as comparable uncontrolled transactions, as called for from time to time, cannot be acceptable merely for the reason that the details cannot be maintained

considering the nature and complexity of trade. Therefore, he opined that reasons given by the assessee for not maintaining or furnishing necessary documentation or information as required under law cannot come under the purview of reasonable cause as provided u/s 273B and accordingly, it is a fit case for levy of penalty u/s 271G of the Act. Accordingly, he levied penalty of 2% of total international transactions which comes t Rs.3,56,02,903.

6. Aggrieved by the penalty order, assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has filed elaborate written submissions on the issue which has been reproduced at para 5 on pages 7 to 45 of the order of Ld.CIT(A). The sum and substance of arguments of the assessee before the CIT(A) was that the AO / TPO was erred in levying penalty u/s 271G of the I.T. Act, 1961 when the documents required as per law in respect of method selected by the assessee were filed ignoring the fact that the other documents / information in respect of different method selected by the TPO to benchmark its international transactions with AEs were not readily available and also which could not be furnished considering the nature and complexity of diamond trade industry. The Ld.CIT(A), after considering submissions of the assessee and also relying upon certain judicial precedents, held that levy of penalty u/s 271G of the Act, in the given facts and circumstances of the case is neither fair nor reasonable and, therefore, does not justify in facts of the case,

i.e. the nature of diamond trade, substantial compliance made by the assessee and the reasonable cause showed by the assessee and above all, when there is no adjustment made in the ALP. Accordingly, he deleted penalty levied u/s 271G of the Act. The relevant finding of the Ld.CIT(A) is extracted below:-

> "6.12 In this regard, reliance is also placed on following decisions:
> 1) ITQ-V/S. Nets Soft India Ltd. -2013/35/Taxmann..com/579/Mumba: 1TAT
> *2)* AC1TV/S.Gillette India Ltd.—2015/54/Taxman.com/313/Jaipur ITAT
> 1 have gone through the above and found that the facts of the above case laws are similar to the facts of" the assessee's case. In view of the above, 1 am of the opinion that levy of penalty u/s.271G of the l.T.Act,1961 is neither fair nor reasonable and therefore ii is not justified in facts of the case, viz., the nature of diamond trade, substantial compliance made by the assessee and the reasonable cause showed by the assessee and above all, when there is no adjustment made in the ALP. In nutshell, the levy of penalty of Rs.35,602,903/- under section 271G of I.T.Act, 1961 is hereby deleted.
> 7. In view of the fact that levy of penalty under section 271G of IT.Act, 1961 is itself deleted, other objections raised by the assessee before the TPO and in appeal are not considered relevant and are not discussed. In nutshell, levy of penalty under section 271G of I.T.Act, 1961 is hereby deleted."

7. The Ld.DR submitted that the Ld.CIT(A) was erred in deleting penalty levied u/s 271G of the Act, even when the assessee had clearly failed in maintaining the documentation as required u/s 92D(3) of I.T. Act, 1961. The Ld.DR further submitted that the Ld.CIT(A) was erred in not considering facts brought out by the TPO in light of provisions of Rule 10D(1)(ii)(b) & (m) and also clear facts in the light of documentation furnished by the assessee to come to the conclusion that requirement of law has not been complied with.

Therefore, it is a fit case for levy of penalty u/s 271G of the Act. The Ld.DR further submitted that the Ld.CIT(A) was not correct in stating that the TPO should have asked for copies of P&L account and balance-sheets of AE to make an overall comparison with gross profitability levels of the assessee with the AEs to ascertain diversion of profits, if any ignoring the findings of the ITAT in the case of Aztec Technology Services Ltd vs ACIT (ITA No.584) to prima facie demonstrate tax avoidance before invoking the provisions of sections 92 and 92C of the Act.

8. The Ld.AR for the assessee, at the time of hearing, submitted that this issue is squarely covered in favour of the assessee by the decision of ITAT, Mumbai Bench "K" in the case of ACIT vs D Navinchandra Exports (P) Ltd (2017 87 taxmann.com 306. The Tribunal has considered the issue of levy of penalty u/s 271G of the Act in light of nature and complexity of diamond trade industry and held that where TPO directed assessee diamond merchant to furnish segmental profitability for AE transactions and non AE transactions, the practical difficulty in furnishing segment-wise P&L Account of AE segment and non AE segment was expressed by diamond industry, penalty u/s 271G was not called for. The Ld.AR further submitted that it is not a case of the TPO that no document was furnished. In fact, the assessee has filed complete set of documents in respect of TNMM method including separate trading results for

AE as well as non AE segment. However, the TPO was asking for further documentation / information in respect of each lot of goods manufactured. The Ld.AR further submitted that it is difficult to furnish segment-wise details in respect of each lot of goods manufactured, because when a rough diamond is cut into polished diamonds, each diamond pocket loss its individual identity and get mixed in the lots purchased from AE as well as non AEs. Therefore, it is incorrect on the part of the TPO to come to the conclusion that there was failure to comply with the provisions of Rule 10D(1) of the I.T. Rules, which warrants levy of penalty u/s 271G of the Act.

9. We have heard both the parties, perused the materials available on record and gone through the orders of authorities below. We find that an identical issue has been considered by the co-ordinate bench in the case of ACIT vs D Navinchandra Exports (P) Ltd (supra). The co-ordinate bench, after considering relevant facts and difficulties expressed by diamond trade industry for maintenance of documents as required by the TPO in view of Rule 10D(1) of I.T. Rules, 1962 and also after considering the provisions of section 271G, Rule 10D(1) and 10D(3), came to the conclusion that there is reasonable cause of the assessee for not maintaining specific informations / documentation in light of provisions of Rule 10D(1) and 10D(2) which comes within the ambit of 'reasonable cause' as provided u/s 273B and hence, the AO was erred in

levying penalty u/s 271G for failure to file segment-wise P&L Account of AE segment and non AE segment when the assessee has expressed its difficulty by considering the nature and complexity of trade. The relevant observations of the Tribunal are as under:-

> "A careful perusal of the very nature of the business of manufacturing and trading of diamonds therein glaringly reveals that certain information which was called for by the TPO could not be furnished by the assessee. The Commissioner (Appeals) had observed that as the assessee had purchased a mix of imported rough and polished diamonds from AEs and non-AEs, and had also sold/exported rough and polished diamonds to AEs as well as the non-AEs, the Profit & loss account of the assessee reflected a mixture of purchases and sales both from the AEs and the non-AEs. The view of the Commissioner (Appeals) was to be agreed that now when the rough/polished diamonds were traded on lot wise basis, it was difficult to identify and say whether a polished diamond came out of a particular lot of rough diamonds or the other and/or out of the polished diamonds purchased locally by the assessee. The export bills of the cut and polished diamonds exported to the AEs and the non-AEs revealed that the diamonds of varying size, quality, colour and carat weight were exported as was evident from the price per carat charged in each bill, and similar would have been the position in respect of cut and polished diamonds purchased and sold locally and/or purchased from abroad but sold locally. In the backdrop of the aforesaid peculiar nature of the trade of the assessee, it could safely or rather inescapably be concluded that it was extremely difficult to identify which rough diamond got converted into which polished diamond, unless the single piece rough diamond happened to be of exceptionally high carat value, therein making the tracing out and identification of the polished diamond physically possible and convenient. The aforesaid practical difficulties in providing the details being faced by the industry can be *well gathered* from the letter of the GJEPC to the CIT-Transfer Pricing, wherein the aforesaid aspects involved in the diamond manufacturing business were explained. [Para 18]
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> • In light of the aforesaid practical difficulties which were being faced by the diamond industry, the TPO should have exercised the viable option of determining the arm's length price of the international transactions of the assessee, either by making some comparison of realisation of prices in respect of export sales to AEs and non-AEs by comparing prices of diamonds of similar size, quality and weight to the best extent possible, or in the alternative could have asked for the copies of the profit & loss accounts and the balance sheets of the AEs in order to make an overall comparison with the gross profitability levels of the assessee with its AEs, which would have clearly revealed diversion of profits, if any, by the assessee to its AEs. It cannot be

comprehended as to on what basis the TPO expected the assessee to have carried out the benchmarking by following CUP method. As the comparison by internal CUP method could only be made if two lots of diamonds were 'similar in size, colour, shape and clarity, which in light of the peculiar nature of the trade of the assessee would not be possible. If one lot had diamonds of variety of size, colour, shape and clarity, the prices would vary from diamond to diamond and lot to lot, and further, now when the entire lot of diamonds had a common price tag per carat for the whole lot, therefore, it was not possible to evaluate the price of each diamond even otherwise in the diamond trade line, unless a diamond would weigh half carat or more or one carat or more, the same would not be priced separately in the bill because it was not practical to price diamonds of weights of lower than half carat or one carat separately weight wise per diamond in the lot. The insistence of the TPO that the assessee should have followed CUP method was misconceived and impractical. If the TPO would have carried out a comparison of the profit & loss account and balance sheets of the AEs, the same would have revealed the gross profit margins and levels of profitability earned by the AEs in their businesses, and as such any abnormal variation in their gross profitability would have revealed the aberrations in the international transactions. [Para 1 9]

The nature and level of business of the assessee during the year under consideration had increased almost two fold. While for the gross profits of the assessee had also increased from 7.4 per cent for assessment year 2010-1 1 to 8.7 per cent for the year under consideration, *viz.* assessment year 201 1-12, the Net profit had also witnessed a growth from 3.9 per cent in the immediate preceding year to 4.9 per cent during the year under consideration. As observed by the Commissioner (Appeal) that in the preceding year, *i.e* assessment year 2010-1 1 the TPO did not propose any adjustment in the ALP. There is the fault finding approach adopted by the TPO without understanding the intricacies of the diamond manufacture and trading business, he instead of determining the arm's length price by asking for the Profit & loss account and Balance Sheets of the AEs and comparing the financial ratios in general, had rather hushed through the matter and imposed penalty under section 27 1G on the assessee. The assessee to the extent possible in the backdrop of the nature of its trade had furnished several details on several occasions from time to time with the TPO. Thus, the assessee had substantially complied with the directions of the TPO and placed on his record the requisite information, to the extent the same was practically possible in light of the very nature of its trade. Though the assessee may not have effected absolute compliance to the directions of the TPO and furnished all the requisite details as were called for by him on account of practical difficulties failure to the said extent on the part of the assessee to comply with the directions of the TPO can safely be held to be backed by a reasonable cause, which thus would bring the case of the assessee with the sweep of section 273B. Thus, in the backdrop of aforesaid observations the view taken by the Commissioner (Appeals) was to be agreed. [Para 20]”

8. A similar issue has been considered by the Hon'ble Delhi High Court in the case of CIT vs Leroy Somer And Controls (India) P. Ltd (supra). The Hon'ble Delhi High Court, after considering relevant facts and also provisions of section 271G, held that when the assessee has furnished specific information or documentation, the other documentation or information relating to data base or transactions entered into by third parties may require collection from time to time, therefore, when the assessee has furnished details, the AO was erred in levying penalty u/s 271G for non compliance with provisions of Rule 10D without specifying which particular documentation was not furnished by the assessee. The relevant observations of the Court are as under:-

> "Held, *dismissing the appeal, that the order passed by the Assessing Officer merely recorded that there was failure to file rule 10D documentation without specifying or stating which document or information was not furnished in spite of the notice calling for the information or document under section ,92D(3). In the absence of the basic details or facts, the order of the penalty under section 271G could not be sustained."*

9. in this view of the matter and respectfully following the case laws discussed hereinabove, we are of the considered view that there is no error in the findings recorded by the Ld.CIT(A) while deleting penalty levied u/s 271G of the Act. Hence, we are inclined to uphold the order of Ld.CIT(A) and dismiss appeal filed by the revenue.

10. In the result, appeal filed by the revenue is dismissed.

ITA No.716/Mum/2018

11. The facts and issue involved in this appeal are identical to the facts and issue, which we have already considered in ITA No.6009/Mum/2017 for AY 2012-13. The reasons given by us in preceding paragraphs in ITA No.6009/Mum/2017 shall mutatis mutandis apply to this appeal also. Therefore, for the detailed reasons given in preceding paragraphs, we dismiss appeal filed by the revenue.

12. In the result, both the appeals filed by the revenue are dismissed.

Order pronounced in the open court on 10-04-2019.

Sd/-	sd/-
(Mahavir Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 10th April, 2019
Pk/-
Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/ By order

Asstt. Registrar, ITAT, Mumbai