

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

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.2713/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2012-13)

DCIT-19(1) Room No.203, 2 nd Floor, Matru Mandir, Tardeo Road, Mumbai-400007.	बनाम/ Vs.	M/s. Dauji & Co. DW-6160, 6 th Floor, Bharat Diamond Bourse, Bandra (E), Mumbai-400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAFD0646F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by:	Shri R. Sindhu (Sr. AR)
Assessee by:	None

सुनवाई की तारीख / Date of Hearing: 16/05/2019
घोषणा की तारीख /Date of Pronouncement: 24/06/2019

आदेश / ORDER

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 04.01.2018 passed by the Commissioner of Income Tax (Appeals) -55, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2012-13 in which the penalty levied by AO has been ordered to be deleted.

2. The revenue has raised the following grounds: -

"1. Whether on the facts and in circumstances of the case and in law, the Ld. CIT(A) was right in deleting the penalty u/s 271G in the assessee's case when he assessee had clearly failed in maintaining the documentation as required u/s 92D(3) of the I.T. Act.

2. *The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the AO be restored.*
3. *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

3. The brief facts of the case are that the assessment of the assessee was finalized on 15.01.2016 u/s 92CA(3). The TPO had initiated the penalty u/s 271G of the Act, 1961 against the assessee for non-submission of details called for during the course of TPO proceeding. The relevant details for initiation of penalty proceeding in the order u/s 92CA(3) dated 15.01.2016 is hereby reproduced as under for ready reference.:-

"3. Taxpayer's profile:

Dauji & Co. is a partnership firm that is engaged in the business of trading in diamonds exclusively. The firm purchases locally diamond and the same are either exported or sold locally. In respect of exports, the same are either exported to the Ae's viz M/s. Dow Gems Inc. and M/s. Kuber Mfg. Inc. or to several non-AE's.

Details of International Transaction:

Sr. No	Nature of Transaction	Amount (Rs.)
1	Export of cut and polished diamonds	21,19,74,097

5. 1 The Assessee has submitted that it is engaged in the business of *manufacture and sale of studded jewelery. The assessee total sale is Rs.31,69,34,162/- and out of it Sales to AE is Rs. 21,19,74,097/- which comes to 67%. The assessee has used entity level TNMM method to benchmark these transactions. The calculation of its profit margin has been submitted by the assessee in the study report. Based on these figure the assessee has submitted its operating profit margin of 2.93% being better than the margins of comparable, all the above transaction should be treated as arm's length.*

5.2A reference of the profit and loss account indicated that calculation of the profit margin of the assessee has been done at entity level. it is observed that the total international transaction on the sale side is Rs. 21.19 crores whereas the assessee has considered the total operating

revenue of Rs. 31.69 a-ores for margin calculation. Thus international transaction on the sale side constitutes only 6796 of the total revenue. it is observed that international Transactions constitutes less than 67% of the assessee total transaction and the remaining 33 % are third party transactions. This type of aggregation of AE transaction with Non AEs transaction is not permissible law under the TNMM Method. in this connection reference is made to rule 1 O(B)(l)(e).

Transactional net margin method, by which, -

i) the net profit margin realized by the enterprise from an international transaction 55c[or a specified domestic transaction] entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

'ii) the net profit margin realized by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction 55c(or the specified domestic transaction) and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

iv) the net profit margin realized by the enterprise and referred to in sub- clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii); the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction the specified domestic transaction.

(Unquote)

5.3 The above indicates that for the purpose of application of TNMM, profit from the International Transactions alone has to be considered. The law does not permit the aggregation of International Transactions with other uncontrolled transactions for the purpose of determining ALP under TNMM. In this connection reliance is placed upon the decision of TEAT in the case of UCB India Pvt. Ltd. vs. ITAT (1TA No. 428 & 429 of 2007) which has been consistently followed by the ITAT on this issue.

5.4 The term transaction has been defined in Rule 10A to include a number of closely linked transactions. Two or more International

Transactions can be aggregated only when they are established to be closely linked. Therefore, when the law is so clear so as to permit aggregation of International Transactions only when they are closely linked, there is no mandate under law to aggregate AE and non AI? transactions. Even from common sense perspective, when the AI? transaction constitutes around 67% of the total transaction, the operating profit margin at entity level does not reflect the impact of AI? transaction but in fact is a reflection of Non AI? transaction. Therefore, entity level bench mark any undertaken by the assessee is rejected.

5.5 The assessee was asked to calculate the separate profitability of AI? and non AI? transactions vide its notice dated 23.02.2015 and 14.09.2015. From the submission, it is found that the assessee is having two segments namely AI? sales and Non-AE sales. The assessee has claimed that as per accounting standards it is not required to maintain and furnished segmental AE & Non AI? workings. However, the assessee has furnished filed one segmental working which is based on allocation of all costs in the ratio of sale to AE? and non AE. All costs have been allocated to the AI? and non AI? segment. This kind of margin working which does not reflect the real profitability for the purpose of benchmarking of International Transactions cannot be accepted. If the contention of the assessee is to be accepted, then the whole scheme of Transfer Pricing provision will be defeated as TNIV1M at the entity level will be applied in the every case in disregard the of criteria mentioned in Rule 100 for the selection of the WM. Therefore, the TNMM is not the MAM in this case.

5.6 Further under rule 10D(1) - clauses (g) & (h), the Assessee is required to maintain the price and profits earned in AI? & Non AI? Transactions separately. But the Assessee has neither maintained the price details of different qualities of diamond sold nor the profits earned on controlled and uncontrolled transaction separately. Hence the assessee has failed to maintain documentation as required under Rule 10D because of which the ALP of the international transactions could not be properly verified as per the methods prescribed u/s. 92C(1).

5.7 Where the assessee fails to benchmark the IT in accordance with the MAM and where the assessee fails to maintain and furnish documents the same u/s 92CA3), the TPO is required to determine ALP on the basis of information available on record. In this case, either CUP or TNMM or PSM are the only methods which could have been applied. As the assessee, has transaction both of purchase and sale, cost Plus and RPM cannot be applied. For the application of CUP method, complete details of purchase price in respect of different items is required so that the rate

at which the AR purchase and sale are made could be compared with non AB purchase and sale. However, the assessee has failed to maintain separate records of different quality. Similarly, for the application of TNMM, separate profitability on transaction is required. But the assessee has failed to furnish the details.

5.8 For the application of PSM, the profit earned by the AE and assessee is required which is also not furnished by the assessee. Thus assessee has prevented the revenue for making any determination of ALP by not furnishing the required documents. Though the law requires the TPO to determine the ALP based on information available on the records, however, due to the failure of assessee to maintain and furnish the basic information pertaining to the AE and non AE transactions, the TPO has been prevented from making any determination. In view of the same, for want of even the basic information, no adjustment is made to the value of International Transactions, though, from the material on record it cannot be concluded whether the IT are at ALP or not.

5.9 Under these circumstances, penalty u/ s 271G is initiated separately for failure of assessee to furnish the required documentation."

4. Thereafter, an opportunity of being heard was given to the assessee to levy the penalty, thereafter, the AO levied the penalty in sum of Rs.42,39,482/- u/s 271G of the I.T. Act, 1961. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who deleted the penalty, therefore, the revenue has filed the present appeal before us.

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5. We have heard the argument advanced by the Ld. Representative of the Department and has gone through the record carefully. The Ld. Representative of the revenue has argued that the Ld. CIT(A) has wrongly deleted the penalty, therefore, the finding of the CIT(A) is not justifiable, hence, is liable to be set aside. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by

the CIT(A) in question. Before going further, we deem it necessary to advert the finding of the CIT(A) on record.:-

“The appeal is filed against the Penalty Levied u/s 271 G of the IT Act 1961. The facts of the case is that the appellant is a partnership firm that is engaged in the business of trading in diamonds exclusively. The firm purchases diamonds locally and sells it locally or export it to its AE's - M/s Dow Gems Inc and M/s Kuber MIS. Inc.

During the course of transfer Pricing proceedings, the TPO observed that the assessee has used entity level TNMM to benchmark the transaction. The TPO held that this type of aggregation of AE transaction with non AE transaction is not permissible law under the TNMM method and as per Rule 10(8)(1)(e) for the purpose of application of TNMM, profit from the international transaction alone has to be considered.

The assessee was asked to calculate the separate profitability of AE and non AE transaction. It was found from the submission of the assessee that it is having two segments namely AE sales and Non AE sales. The assessee submitted that as per Accounting Standards it is not required to maintain and furnish segmental AE and Non AE workings. However, the assessee submitted one segmental working which was based on allocation of all costs in the ratio of sale to AE and Non AE.

The TPO opined that this kind of margin working does not reflect the real profitability and cannot be accepted for benchmarking the international transaction.

The TPO concluded that through the law Requires the TPO to determine the ALP based on information available on records, however due to the failure of the assessee to maintain and furnish the basic information pertaining to the AE and non AE transactions, the TPO has been prevented from making any determination and so no adjustment have been made to the value of international transaction and hence penalty His 271G was initiated and imposed for failure to furnish the required documentation.

During the course of appellate proceedings, the AR of the appellant submitted following:

- 1. Form NO. 3CEB under rule 10E was furnished which contained details of information and documents kept and maintained by the appellant u/s 92D read with section 10D (1)(a) to (m).*

2. TPO has asked during the course of proceedings u/s 92CA audited segmental accounts. The appellant had submitted before the TPO that it is dealing only in one business segments and therefore as per Accounting Standards 17 which governs the method by which the financial statements are prepared and audited, it is not required to exhibit separate segments in the financial statements.

3. The TPO did not agree with the working of the appellant, and though did not made any adjustment, imposed a penalty u/s 271G for not maintaining separate accounts for transactions with AE and non AE.

4. The appellant further submitted that Penalty u/s 271 G is leviable when the assessee fails to furnish any document and information that he is required to maintain u/s 920(3) r.w.r 10D and not when the information submitted by the assessee is not acceptable to the TPO.

5. it was further submitted that even Rule 100 (g) and (h) does not stipulate that the said data as requested by the TPO be maintained in an audited basis and even when it is contrary to the requirement of the Accounting Standards.

6. Reliance has been placed on following decisions:

(a) Decision of Hyderabad Bench of ITAT in the case of Annapurna Business Solution VS ACIT Circle 6(1) reported in 17 Taxman.com 125 in this regard.

After analyzing the contention of the TPO and of submissions of the appellant and relying on above case laws I am of the considered opinion that penalty u/s 271G is not warranted in the above case and I find that appellant cannot be held responsible for failure to furnish information or documents u/s 93D(3). And so I find that appellant has furnished all information and documents which it was required to produce as per Accounting Standards.”

6. On appraisal of the above mentioned finding, we noticed that the CIT(A) has passed the order on the basis of this fact that the assessee has furnished the relevant documents u/s 92D(3) r.w.r. 10D of the Act. The penalty is not laviable specifically on the facts and circumstances when the assessee submitted all the necessary/relevant information to the TPO which was not acceptable if any by TPO. The CIT(A) has also relied upon the

decision of Hon'ble ITAT of **Hyderabad Bench in the case of Annapurna Business Solution Vs. ACIT Circle 6(1) reported in 17 Taxman.com 125**. The facts are not distinguishable at this stage also. The basic requirement of Section 271G of the Act is that the assessee failed to submit the relevant information/document required u/s 992D(3) of the Act. But in the instant case, the necessary information was given but was not acceptable by TOP so these facts nowhere entitled the TPO to levy the penalty. No law contrary to the law relied upon the CIT(A) if any has not been produced before us. Taking into account, all the facts and circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage.

7. In the result, the appeal filed by the **revenue is hereby ordered to be dismissed.**

Order pronounced in the open court on 24/06/2019.

Sd/-

(SHAMIM YAHYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated :24/06/2019

Vijay

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**