THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 3603/Mum/2015 (Assessment Year 2009-10)

ITO-10(1)(1) Room No. 25 Ground Floor Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Hilti Manufacturing India Pvt. Ltd. (Previously know as Bhukhanwala Diamond Systems Pvt. Ltd.) Koteshwar Palace CHS Jiva mahale Marg Koldongri Lane No. 4 Opp. Lane HSBC Bank Andheri(East) Mumbai-400 069. PAN : AADCB2566L
(Appellant)		(Respondent)

Assessee by	Shri Niraj Sheth
Department by	Shri S. Senthil Kumar
Date of Hearing	13.6.2019
Date of Pronouncement	2.8.2019

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Revenue is directed against the order of learned CIT(A) dated 13.3.2015 and pertains to A.Y. 2009-10.

2. The issue raised is that learned CIT(A) erred in deleting the penalty u/s. 271(1)(c) of the Act amounting to Rs. 8,15,83,320/-.

3. Brief facts of the case are as under :-

Hilti Manufacturing India Pvt. Ltd. (earlier known as Bhukhanwala Diamond Systems Pvt. Ltd.) is a company primarily engaged in manufacture of diamond saws blades, segments, grinding tools and core drills. These products are used in industrial and construction related products. For the period

relevant to A.Y. 2009-10, the assessee filed its return of income on 29.07.2009 claiming to have incurred a business loss of Rs. 40,08,03,873. Thereafter, in May, 2012, the management of the company suspected serious financial malpractices being carried on by the erstwhile CFO. The management filed an FIR against the CFO and also investigated the transactions where the financial malpractices had been carried on. Based on such investigation, discrepancies in the returns of income filed for A.Y. 2009-10 to A.Y. 2012-13 were identified and revised returns were filed by the assessee correcting such errors for the years in which the time for filing revised return was available and revised computations of the correct income for the years where the time for filing revised returns had lapsed. For the period relevant to A.Y. 2009-10, the assessee filed a letter on 20.12.2012 offering to tax loss on account of embezzlement amounting to Rs. 85, 87,283 and a wrong claim of foreign exchange losses amounting to Rs. 18, 96,25, 000 that had been claimed as an allowable expense in the return of income filed earlier for that year.

4. The return of income for A.Y. 2009-10 was taken up for scrutiny and also referred to the TPO for an evaluation of the international transactions of the assessee in that year. The TPO recommended a transfer pricing adjustment of Rs.5,03,96,524 that was incorporated in the assessment order passed on 12.03.2013. Losses on account of embezzlement and on account of foreign exchange fluctuation loss, that were offered to tax suo-moto by the assessee .were also disallowed in the scrutiny assessment order. The assessee accepted the disallowances and additions to the returned income made in the, assessment-order so passed and did not prefer any further appeal. In pursuance of the penalty proceedings u/s. 271(1)(c) that had been initiated in the course of the assessment proceedings, the AO provided an opportunity of hearing to the assessee and vide his order dated 27.09.2013, a concealment penalty of Rs. 24,00)21, 523 on account of transfer pricing adjustment (Rs.5, 03, 96,523) and also on account of foreign exchange fluctuation loss (Rs. 18, 96,25, 000) was imposed on the assessee. Though penalty proceedings on account of losses on embezzlement claimed in the return filed had also been

initiated, the AO found the explanation of the assessee to be acceptable and no levy of penalty on such loss was considered necessary

5. Aggrieved with the imposition of concealment penalty on the transfer pricing adjustment and also on the loss disallowed on foreign exchange fluctuation, the assessee filed appeal before learned CIT(A).

6. As regards levy of penalty with regard to transfer pricing adjustment by the TPO by ignoring the assessee's method cost plus (CPM) and substituting the same with transaction net margin method (TNMM) as most appropriate method (MAM), learned CIT(A) deleted the penalty holding the same to be a matter of two opinions and there was no concealment.

7. We may gainfully referred to the order of learned CIT(A) as under :-

> "7. From the records available before the undersigned, it is seen that the TPO had treated the benchmarking analysis of the assessee as unscientific largely for the reason that the assessee had followed an approach of carrying out the benchmarking with respect to only the top 50 products and not by taking into account the entire quantum of the concerned international transactions. Further, the assessee had carried out its benchmarking using the .standard cost of each product to determine the gross comparable margins under the CPM, While the observations of the TPO on both these accounts were broadly justified as far as the TP Study Report carried out by the assessee was concerned, the assessee vide further submissions filed on 25.10.2012 before the TPO had provided a CPM working on the actual basis for the entire 100% of its international transactions wherein the transactions with its AEs were found to yield a better gross margin than comparable transactions with the non AEs. Through the same submissions filed on 25.10.2012, the assessee had also given an internal TNMM analysis showing that profit margins of the transactions with the AEs was better than the similar transactions carried out with non AEs. It was only with respect to the TNMM analysis made using external comparables that the transaction with the AEs showed a lesser margin than the arithmetic mean of the margins earned by such external comparables, leading to the TP adjustment quantified. The assessee in its submissions had also voluntarily offered to tax such TP adjustment primarily on account of its huge-business losses for the year, such TP adjustment would have no financial implications to it and also to buy peace with the Department and to avoid protracted litigation.
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> 8. The contemporaneous TP Study Report may have been inadequate or even unscientific but such short comings had been removed in the fresh CPM working filed before the TPO in the course of the transfer pricing assessment proceedings. The shortcomings pointed out by the TPO had been removed. Such CPM analysis would be required to be considered as prepared in a

> manner prescribed u/s.92C of the Act in good faith and with due diligence. The TPO may have in the end preferred to use the TNMM analysis based on external comparables but such dispute over the most appropriate method could be classified as being on account of a difference of opinion between the assessee and the TPO. Such difference of opinion would not bring into question the good faith- or due diligence of the assessee in its benchmarking analysis. In the same context, it is also seen that a transfer pricing study report prepared by the assessee in the very same manner for the immediately succeeding A.Y. 2010-11 had been accepted by the TPO in that year and that no TP adjustment was found necessary. In view of these facts and keeping in mind the provisions of Explanation-7 to section 271(1)(c) of the Act, it is hereby held that no penalty would be leviable on the assessee on this transfer pricing adjustment computed by the assessee itself on the request of the TPO and also offered to tax. The AO is hereby directed to delete the penalty imposed on this ground".

8. As regards levy of penalty for disallowance of claim of foreign exchange loss as 'revenue expense', learned CIT(A) noted that the assessee has voluntarily offered such loss for disallowance in assessment proceedings trough its letter dated 20.12.2012 without any prior detection by the Assessing Officer or even any enquiry by the Assessing Officer in this regard. Learned CIT(A) noted that the assessee's contention that foreign exchange term loan has been utilised for discharing the purchase consideration of diamond cutting tools business which the assessee has acquired on a slump purchase basis. That there was an element of doubt in this regard. That foreign exchange loss relatable to an asset imported had to be reduced from the actual cost of the relatable assets. Considering the assessee's explanation, learned CIT(A) observed that the assessee's explanation was bonafide. That there was an element of doubt over the allowability of the foreign exchange fluctuation loss not relatable to an imported asset. He observed that Hon'ble Apex Court decision in the case of Maruti Udyog case and Hon'ble Jurisdictional High Court decision in the case of DDIT Vs. Stabuli A.G. India Branch Office (40 SOT 14) shows that the explanation givne by the assessee cannot be frivolous. Furthermore, learned CIT(A) held that all relevant facts were available in the return of income and he also noted that the assessee has voluntarily offered such losses to tax even before the same was detected by the Assessing Officer or any enquiries made in this regard. Learned CIT(A) deleted the penalty.

9. Against this order the Revenue is in appeal before us.

10. We have heard both the counsel and perused the records. Learned Departmental Representative relied upon the order of the Assessing Officer.

11. Per contra, learned Counsel of the assessee supported the order of the learned CIT(A). As regards addition on account of transfer pricing adjustment by change of method from assessee's method of CPM to TNMM, learned Counsel of the assessee submitted that in the subsequent year the TPO himself has allowed CPM. That in the present year the assessee has not challenged the TPO's change of method from CPM to TNMM as the assessee has huge amount of carried forward loss and it did not want to engage into unnecessary litigation. Moreover, learned Counsel of the assessee submitted that all facts were available on record and the TPO's change of method from CPM to TNMM cannot lead to inference that the assessee was guilty of furnishing of inaccurate particulars of income.

12. As regards foreign exchange loss, learned Counsel of the assessee submitted that it was an inadvertent mistaken claim and the same was withdrawn before issue of notice and detection thereof by the Assessing Officer. Hence, learned counsel submitted that the assessee cannot be visited with rigours of penalty u/s. 271(1)(c) of the Act. He further submitted that in subsequent year, the Revenue itself has treated foreign exchange loss to be 'revenue expenses'.

13. Upon careful consideration, we find that as regard levy of penalty with regard to transfer pricing adjustment by change of method from CUP to TNMM as MAM we note that the TPO in subsequent year himself has accepted CUP as most appropriate method. In these circumstances, we find ourselves in agreement with the findings of learned CIT(A). There is no case of concealment or furnishing of inaccurate particulars in this case. All the particulars were available. Assessee was of the opinion that most appropriate method would be CUP. However, the TPO substituted the same to TNMM. Furthermore in

subsequent year, the TPO himself has accepted CUP is the most appropriate method. In these circumstances in our considered opinion deletion of penalty on this account need not be interfere with.

14. As regards deletion of levy of penalty with regard to foreign exchange fluctuation loss to be a revenue loss, we note that the same was withdrawn by the assessee itself before detection by the Assessing Officer or issue of any notice in this regard. In this view of the matter, assessee's claim that it was inadvertent error is sustainable in this case.

15. We refer to Hon'ble Apex Court decision in the case of Price Waterhouse Coopers Pvt. Ltd. Vs. CIT (Civil Appeal No. 6924 of 2012 dt. 18.12.2008) for the proposition that inadvertent error need not be visited with penalty u/s. 271(1)(c) of the Act. Moreover, we also note that it is undisputed that the claim was withdrawn before detection or issue of notice by the Assessing Officer, hence, assessee's conduct cannot be said to be contumacious warranting of levy of penalty u/s. 271(1)(c). This proposition supported by the Hon'ble Apex Court decision in the case of Hindustan Steel Ltd. Vs. State of Orissa (1972) 83 ITR 26(SC). In this case a larger Bench of Hon'ble Apex Court held that penalty need not be levied if the conduct of the assessee is not contumacious. Moreover, we also note that the issue is not free from debate as detailed in learned CIT(A)'s order as above. In this view of the matter, in our considered opinion there is no infirmity in the order of learned CIT(A) deleting levy of penalty. In the result, we uphold the order of learned CIT(A).

16. In the result, appeal filed by the Revenue stands dismissed.

Order has been pronounced in the Court on 2.8.2019.

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 2/8/2019

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.

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai