

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C' NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**I.T.A.Nos.7201 & 7202/Del/2018
Assessment Year: 2014-15**

**M/s Juvalia Sales P. Ltd., vs Addl. Commissioner of Income-tax,
D-119, Lajpat Nagar-1, Range-5, New Delhi.
New Delhi.
PAN : AACCI9530H**

(Appellant)

(Respondent)

Appellant by: Shri K. Sampath, Advocate
Respondent by: Shri Sandeep Kumar, CIT DR

Date of hearing: 23/09/2019
Date of order : 18/11/2019

ORDER

PER K. NARASIMHA CHARY, J.M.

The assessee has filed two appeals against the orders both dated 29.8.2018 passed by the Commissioner of Income-tax (Appeals)-36, New Delhi {for short "CIT(A)"} u/s 271AA and 271BA in Appeal Nos. 251/17-18 and 252/17-18 respectively for Asstt. Year 2014-15.

2. Brief facts of the case are that the assessee is in the business of sale and purchase of artificial jewellery by way of e-commerce (online) or otherwise. For the Assessment Year 2014-15, they have filed their return

of income on 30.9.2014 declaring a loss of Rs.35,92,71,623/-. Since the assessee had entered into international transaction with the Associated Enterprises ("AEs"), determination of Arm's Length Price (ALP) was referred to the Transfer Pricing Officer (Ld. TPO). Ld. TPO passed the order dated 5.10.2017 under section 92CA(3) of the Income-tax Act, 1961 ("the Act") without drawing any adverse inference in respect of the international transaction/specified domestic transaction undertaken by the assessee during the financial year 2013-14.

3. Learned Assessing Officer observed that the AEs are covered by Section 92BA of the Act which is covered by TP Regulation and the assessee company is a statutorily required to file report from an accountant in form No.3CEB and shall be verified in the manner indicated therein. According to the learned Assessing Officer the assessee company had failed to file the audit report in form No.3CEB and documentation under section 92D of the Act and also to file the report under section 92E of the Act. A show cause notice was issued to to the assessee requiring him explain the lapse by 22.5.2017, but, according to the learned Assessing Officer the assessee filed the reply on 25.5.2017.

4. In the reply, assessee pleaded that that they appointed M/s I.R.& Associates, Chartered Accountant to conduct the audit, file report under section 92E of the Act and a copy of tax audit report in form No.3CEB was filed along with the reply filed on 22.5.2017. Assessee further pleaded that the mistake was unintentional without any malafide intention and there is a reasonable cause for such lapse. Learned Assessing Officer, however, recorded that the assessee company failed to state any specific cause which resulted in non-compliance with the provisions of section 92

BA of the Act and therefore the assessee is liable to pay penalty of Rs. 34,14,052/-under section 271 AA of the Act for violating the statutory requirement under section 92D of the Act, and a sum of Rs. 1 lakh of penalty under section 271 BA of the Act for violating the statutory requirement under section 92E of the Act.

5. Assessee preferred separate appeals challenging the levy of penalty under section 271AA and section 271BA of the Act before the Ld. CIT(A). Ld. CIT(A) by orders dated 29.8.2018 dismissed both the appeals holding that the submissions filed by the assessee were considered and not found acceptable, and the case law cited are distinguishable in facts. Recording so, Ld. CIT(A) held that there was no reason to interfere with the assessment order, and consequently dismissed both the appeals.

6. Aggrieved by the impugned orders, the assessee preferred these appeals. It is argued by the Ld. AR that in this matter the breach of law is only technical and venial in nature inasmuch as it is factually incorrect to say that the assessee did not keep and maintained the information and documents required by Rule 10D of the Income Tax Rules, 1962 ("the Rules"). He submitted that the order of the Ld. TPO clearly shows that the assessee had maintained the documentation under section 92D of the Act and the same was produced before the Ld. TPO. Further, as against the observations of the learned Assessing Officer that the Transfer Pricing Study is also grossly incomplete insofar as it relates to the payment of purchase and sales from and to the AEs, no adverse comment was found in the report of the Ld. TPO. Ld. AR reiterated before us the stand that was taken before the Ld. CIT(A) and submitted that in this matter the due date for submission of the report was 30.11.2014 whereas the report in

form 3CEB was obtained on 15.10.2014 itself, but only due to inadvertence and failure on the part of the Chartered Accountants, the same could not be filed within due date, whereas having realised the mistake, the assessee filed the report by 7.12.2016 successfully as is evidenced by the copy of dashboard of income tax site. It is only 10 months thereafter, Ld. TPO passed the order dated 5.10.2017 under section 92CA(3) of the Act based on which the learned Assessing Officer passed the order under section 143(3) of the Act on 27.12.2017.

7. The sum and substance of the argument of the Ld. AR is that as a matter of fact the assessee kept and maintained the requisite information under Rule 10 D of the Rules, submitted the same before the Ld. TPO and he also submitted the audit report along with the income-tax return, but only lapse that took place was that the audit report could not be filed before the due date and having realised the mistake, they did it almost one year before the passing of the order under section 143(3) of the Act. On this basis, it is submitted that the breach is only technical and venial in nature and does not call for the penalty under section 271AA and 271BA of the Act.

8. He submitted that in Section 271 AA and Section 271 BA of the Act, the legislature used the words "may direct" and in its wisdom the legislature did not use the word "shall", and therefore, it is not mandatory for the learned Assessing Officer to levy the penalty and it is discretionary, he may not levy the penalty also. He cited before us the decision of the Hon'ble Supreme Court in the case of Malik Ram vs. State of Rajasthan, AIR 1961 SC 1575 for the principle that the word "may" also includes "may not". He placed reliance on the decision of the Kolkata

benches of the Tribunal in the case of M/s JJ exports Ltd vs. DCIT in ITA No. 315/Kol/2010 by order dated 07.01.2011 in support of his contention that when all the information and evidences were available before the authorities for completing the assessment under section 143(3) of the Act and the accounts of the assessee were duly audited under section 44 AB of the Act, if a reasonable cause is shown by the assessee, no penalty could be levied or sustained. He further placed reliance on the decision of the Hon'ble Apex Court in the case of Hindustan steel vs. State of Orissa, 83 ITR 26 wherein it was held that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act, or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

9. Per contra, Ld. DR heavily placed reliance on the orders of the authorities below and contended that even before the Assessing Officer, the assessee admitted the default in filing tax audit report in form No.3CEB and documentation under Section92D of the Act and also failed

to state or substantiate that there was reasonable cause for not filing the audit report in form No.3CEB, and, therefore, having satisfied that the assessee had not complied with the statutory requirement under section 92D and 92E of the Act, the learned Assessing Officer rightly levied the penalty and the Ld. CIT(A) rightly justified in sustaining the same.

10. We have gone through the record in the light of the submissions made on either side. It was pleaded by the assessee before the Ld. CIT(A) that the assessee had maintained the documentation under section 92D of the Act and the same was produced before the Ld.TPO, based on which the Ld.TPO determined the ALP without making any adverse comment and, therefore, there is no truth in the learned Assessing Officer saying that the transfer pricing study was also grossly incomplete. Ld. CIT(A) did not advert to this aspect at all in his order and even before us also Revenue is unable to controvert the same.

11. It could be seen from the record, the admitted facts establish that the assessee filed the income tax return on 30.9.2014, and though the due date for filing the audit report was 30.11.2014, they filed the same on 7.12.2016. The statement of the assessee that while filing the return of income, the assessee enclosed the audit report. Further, when the assessee filed the report on 7.12.2016, Ld.TPO passed the order on 25.9.2017 and the assessment under section 143(3) of the Act was complete on 27.12.2017. It is, therefore, clear that as on the date of passing of the TP order as well as the order under section 143(3) of the Act, all the requisite documents were available before the authorities and based on such documents only, the assessment was done. It is pertinent

to note that no adverse comment was made by the Ld. TPO about the documentation or production thereof.

12. In view of the above, we are of the considered opinion that it is not a case where the assessee did not keep and maintain the requisite information and documents as specified under Rule 10D of the Rules, but is only a case of belated filing of the audit report.

13. In the case of M/s JJ exports Ltd vs. DCIT in ITA No. 315/Kol/2010 by order dated 07.01.2011 the Kolkata Bench of the Tribunal held that when all the information and evidences were available before the authorities for completing the assessment under section 143(3) of the Act and the accounts of the assessee were duly audited under section 44 AB of the Act, if a reasonable cause is shown by the assessee, no penalty could be levied or sustained. Relevant observations of the Tribunal need to be extracted and those read thus, -

“There is no dispute that the required audit report u/s. 92E was not filed within the prescribed time, resulting in penalty action u/s. 271BA of the Act. According to the assessee, it was due to bona fide and technical mistake that such default committed only for the first year of its international transactions. It is a well-settled principle as laid down by the various courts that the word "may" employed in penal provisions of the Act may be interpreted as discretionary and that discretion is limited within the meaning of such provisions providing the procedure thereof. The provisions give discretion to the taxing authority not to impose penalty having regard to the facts and circumstances of the case. The A.O. has been conferred upon with the inherent discretion in the matter of imposing penalty. In our considered opinion, tax authority is to see what information and documents are relevant for determining the ALP before issuing notice u/s. 92E of the Act. In this connection, we may refer to sec. 92D which speaks of maintenance and keeping of information & document by persons entering into an international transaction. Sub-clause (3) of that section reads as under :-

"The Assessing Officer or the Commissioner (Appeals) may, in the course of any proceeding under this Act, require any person who has entered into an international transaction to furnish any information or document in respect thereof, as may be prescribed under sub-section (1), within a period of thirty days from the date of receipt of a notice issued in this regard."

As stated above, the assessee during course of assessment proceeding had filed the report of the accountant in Form 3CEB as per sec. 92E of the Act in respect of its international transactions and on the basis of which the A.O. himself determined the ALP of the assessee for the year under consideration. Therefore, all the information and evidences were well with the A.O. for completing the assessment u/s. 143(3) of the Act. Further, it is also not disputed that the assessment year under consideration was the first year of assessee's international business and that being so, as pointed out by the learned counsel for the assessee, there may be reasonable ground for such laps in not getting the accounts audited u/s. 92E and filing of the same within the prescribed time. It is also pertinent to mention here that for the subsequent years, there had been no such default as committed in the first year of its international business. Further, the assessee's accounts are duly audited u/s. 44AB of the Act and there is no such default as occurred in respect of international business. Considering the totality of the facts and circumstances of the case and submissions of the parties, we are of the opinion that the delay in submission of the report u/s. 92E of the Act within the prescribed time by the assessee was due to a reasonable cause and, therefore, penalty is not sustainable on this ground. Moreover, the penalty has been imposed on mere technical ground. In view of settled law, no penalty is imposable for technical or venial default. 6.1. At the time of hearing, the Id. Departmental Representative filed a copy of judgment in the case of CIT vs. Sunil Kumar Goel (supra), wherein it has been held that that the Tribunal is duty bound to record tangible and cogent reasons for upsetting the orders passed by the tax authorities in penalty matters u/s. 271D and 271E of the Act. Sections 271D and 271E are directed in respect of penalty for failure to comply with the provisions of Sec. 269SS and 269T if a person accepts or repays any loan or deposit in cash, as the case may be. In such cases, there is no requirement of special information as is required in the case of international transaction, requiring the assessee to furnish report of the accountant about such international transactions."

The Tribunal further held that,-

“Further, as per sec. 271BA, the A.O. may direct an assessee to pay by way of penalty of Rs. 1 lakh on his failure to furnish report u/s. 92E of the Act. Therefore, the power of the A.O. is discretionary, which is based on facts and circumstances of each case.”

14. In Hindustan steel vs. State of Orissa, 83 ITR 26, Hon’ble Apex Court held that even if a minimum penalty is prescribed, the authorities competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act, or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. It is relevant to extract the observations of the Hon’ble Court, which are as follows: -

“An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi- criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.”

15. In the preceding paragraphs, while appreciating the facts, we noticed that the assessee did not act deliberately in defiance of law nor was guilty of conduct contumacious or dishonest, nor acted in conscious disregard of its obligation, but as a matter of fact having obtained the 3CEB report by 15.10.2014, they do not stand to gain by withholding it from filing till 7.12.2016. There is nothing before us to suggest anything falsity to the statement of the assessee that it is only because of the mistake committed by M/s I.R & Associates,

the delay in filing such report occurred. We are of the considered opinion that there is only a technical or venial breach of the provisions of the Act in this matter. We, therefore, while respectfully following the decision of the Hon'ble Apex Court in the case of Hindustan Steel (supra) and also the decision of the Tribunal in the case of M/s JJ exports Ltd (supra) hold that in this particular set of facts and circumstances, it would be difficult to sustain levy of penalty on two counts, namely, under section 271AA and section 271BA of the Act. Consequently, we allow the grounds of appeal and direct the Assessing Officer to delete the impugned penalty.

16. In the result, both the appeals of the assessee are allowed.

Pronounced in open court on 18th November, 2019.

Sd/-
(G.S. PANNU)
VICE PRESIDENT

Sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Dated: 18th November, 2019

'VJ'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, DELHI