

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.5719/M/2017
Assessment Year: 2012-13**

DCIT Central Circle -1(1), R.No.903, 9 th Floor, Old CGO (Annexe), M.K. Road, Mumbai - 400020	Vs.	M/s. Edelweiss Financial Services Ltd., 4 th Floor, Edelweiss House, Off C.S.T. Road, Kalina, Santacruz (East), Mumbai - 400 098 PAN: AAACE1461E
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Jitendra Jain, A.R.
Shri Ravikant Pathav, A.R.

Revenue by : Shri R. Manjunatha Swamy, D.R.

Date of Hearing : 05.09.2019

Date of Pronouncement : 22.10.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the Revenue against the order dated 30.06.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2012-13.

2. The Revenue has raised the following grounds of appeal:

(i) "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the penalty u/s. 271G of the Act by stating that the period of sixty days should be counted from the date of receipt of notice u/s. 92D(3) and not notice u/s. 92CA(2) of the Act,"

(ii) "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the penalty levied u/s. 271G of the Act by stating that there no transfer pricing adjustment when it is mentioned in the Act that penalty @ 2% of

international transaction entered into by the assessee is to be levied in case the assessee fails to furnish the details within sixty days."

(iii) "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the penalty by holding that the change of consultant as a reasonable cause u/s. 273B of the Act for delay of the submission of details when the letter of authority was given to the consultant on 24.09.2015."

2. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the A.O. be restored,

3. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."

3. The common issue challenged in all the three grounds is against the deletion of penalty of Rs.7.00 crore by Ld. CIT(A) as levied by the AO under section 271G of the Act.

4. The facts in brief are that a reference under section 92CA(1) of the Act, 1961 dated 10.11.2004 was received on 10.11.2014 from the AO. The AO made a reference to TPO for determination of arm length price (hereinafter referred to as ALP) with regard to all transactions reported in form 3CEB filed by the assessee. During the proceedings under section 92CA, a notice was issued on 11.11.2014 to the assessee calling for the details with respect to international transactions. Thereafter, another notice was issued on 06.05.2015 calling for the said details when the assessee did not file these appeals. The TPO again issued notice on 06.11.2015 but despite several notices, the assessee failed to furnish the documents as per the provisions of section 92DE(iii) of the Act. Thus the provisions of 271G of the Act were invoked for non filing of informations/details. The TPO passed the order under section 92CA(iii) of the Act on 29.01.2016 wherein he initiated the penalty proceedings under section 270G on 08.02.2016 by issuing notice under section 274 read with section 271G of the

Act. It is pertinent to state that no TP adjustment was made by the TPO in respect of international transactions entered into by the assessee with its associated enterprises. The assessee replied to the notice vide letter dated 08.03.2016 and 18.03.2016 by submitting as under:

"2. The assessee vide their letter dated 8th March 2016 and 18th August 2016 has submitted as under;

- a) As per section 92D(3J) of the I.T. Act 1961, the assessee is required to furnish any information or document in respect of an international transaction or specified domestic transaction as prescribed under subsection (1) of Section
- b) 92D within a period of 30 days from the date of receipt of a notice issued in this regard.
Provided that the AO or the CIT(A) may on an application made by such person extend the period of 30 days by a further period not exceeding 60 days.

The assessee submits that notice was received on 6th November 2015 and the assessee filed the details on 23rd December after requesting for further time on 18th November 2015.

Pleas of reasonable cause: As per Section 273B of the Act no penalty can be imposed for failure of the person to furnish documents in time, if such failure is proved to be due to a reasonable cause.

In this regards, the assessee submits that the assessee had a change of tax consultant in the period June to October 2015. The new tax consultants were appointed at the end of October 2015 and they took some time to inspect the records and represent.

- c) The assessee has also submitted that there was no intention of not submitting the information/documentation already maintained by the assessee under rule 10D of the IT. Rules 1962. The assessee therefore requests that as there was reasonable cause for filing the details immediately on receipt of notice, the penalty proceedings should be dropped.
- d) The assessee has relied on the following decisions
 - i) ITAT decision in the case of Dy.CIT company circle IV(1) Chennai v/s Magick Woods Exports (P) Ltd (2012)25 taxmann.com -20(Chennai) wherein it was held that since default as to late filing of details was explain delay caused in filing details, and moreover TPO had not suggested any adjustment in ALP reported by assessee, the penalty imposed u/s 271G r.w.s. 92D is to be deleted.
 - ii) The assessee has also relied on the Delhi HC decision in the case of CIT II v/s Jhonson of the Act was that based on the documentation filed by the assessee no addition was made to the value of international transaction entered by the assessee."

5. Thereafter the TPO, after rejecting the contentions of the assessee and after analyzing the provisions of section 92D, rule 10D, rule 10C, finally imposed a penalty @ 2% of value of international transaction at Rs.7,76,68,773/- under section 271G of the Act by observing as under:

“17. From the discussion above, it is evident that the TPO has called for specific details within the meaning of section 92D(3) of Income Tax Act, 1961 by issuing notices dated 11/11/2014, 06/05/2015 and 11/11/2015 and the details called for were not filed within 30 days. There does not exist any reasonable cause for not furnishing the details called for even after more than 11 months after issue of first notice dtd. November 2014.

18. Further due to late submission before the TPO, the TPO is left with very little time to examine the details and conduct an in-depth study to draw a conclusion with respect to the arm's length price. As per the Scheme of Transfer Pricing Audit the TPO is required to examine whether the method and the data chosen by the Assessee to determine the ALP are in accordance with the provisions of the Act including the choice of the most appropriate method. If it comes to a finding that it is not so, he has to determine the ALP himself based on the material or information or documents available with him. This would include doing database searches, finding out appropriate uncontrolled transactions, choose the most appropriate method and then determine the ALP. This exercise is time-consuming as well as rigorous. There is no provision for the best judgement assessment or estimated determination of ALP by the TPO. It is perhaps, for this reason that statutory time limit has been provided for in Section 92D(3) for furnishing the documents maintained by the Assessee under Rule 10D(1) and 100(3) unlike the provisions of Income tax assessment under section 143(2) and 142(1). The delay in the submissions thwarts the efforts of the TPO in properly and fully evaluating the analysis done by the assessee and in determining the ALP himself if assessee's analysis is not found correct.

19. Based on the above facts & circumstances of the case and for the reasons discussed above, I am satisfied that the case squarely attracted the penalty proceeding u/s 271G of the Income Tax due to the fact that the assessee had clearly violated the lawful requirement under section 92D(3) as to furnish documentation as called for by the TPO. The total value of relevant international transactions under consideration in this case being Foreign Currency Loan and interest received from AE amounting to Rs:388,34,38,641/- The Value of 2% International Transaction comes out to be, Rs.7,76,68,773/- Hence being satisfied, I hereby levy penalty of a sum Rs.7,76,68,773/- u/s 271G of the Income Tax Act, 1961.”

6. In the appellate proceedings, the Ld. CIT(A), after taking into account the submissions and contentions of the Ld. A.R. of

the assessee, deleted the penalty as imposed by DCIT(TP) u/s 271G of the Act by observing and holding as under

"I have perused the penalty order u/s 92CA(3) and u/s 271G of the Act passed by the TPO, written submission and paper book filed by the Appellant. There is no dispute with the fact as emerging from TPO's order and details and submission filed by the Appellant. The first contention of the Appellant is that period of sixty days have to be counted from the receipt of notice issued u/s 92D(3) of the Act. The AO has considered this issue in paragraph 6 and 17 of the penalty order passed u/s 271G of the Act wherein the AO has stated that the Appellant has not submitted the details for the period of notice dated 11.11.2014 u/s 92CA(3) of the Act. Thus, the question for consideration before me is as to sixty days is to be computed from which notice either 92CA(3) or 92D(3) of the Act?. In order to decide the above issue, the provision of transfer pricing assessment has been referred. The transfer pricing assessment as explained in the Act states that once the case is referred to the TPO; he will serve a notice u/s 92CA(2) of the Act to the assessee to call for basic and general details pertaining to the international transaction entered into by him with its AEs. If, on perusal of the information or documents filed by the assessee in response to notice issued u/s 92CA(2) of the Act, the TPO is satisfied that the transaction entered into by the assessee is at arm's length price then it is end to the matter. However, if the TPO is not satisfied with the details submitted by the assessee, then he needs to issue notice u/s 92D(3) of the Act asking for the specific details to be filed by the assessee. If contention of the AO is to be accepted that the details have to be filed within the sixty days from the issue of notice u/s 92CA(2) of the Act, then there is no use of section 92D(3) of the Act in the transfer pricing assessment. The legislature in their own wisdom has drafted the law in such a way that first collect the basis or general information of the transaction by serving notice u/s 92CA(2) of the Act and subsequently if further details are required then the TPO is required to issue another notice u/s 92D(3) of the Act asking the specific details from the assessee. My above view is fully supported by the following decisions referred in detail in written submission of the Appellant:

- CIT vs Johnson Matthey India (F) Ltd [2015- 229 Taxmann 0453 Delhi]
- ACIT vs Global One India Pvt. Ltd \53 SOT 0106 PeI]
- PCIT vs Leroy Somer & Control (India) P. Ltd fITA 1330/PeV2011]
- Cargill India (P) Ltd vs DCIT[110ITD 0616 Del ITAT]

On reading of provision in the Act and judgments quoted above, I am of the view that the period of sixty days have to be counted from the notice issued u/s 92D(3) of the Act. The AO's action of counting the sixty days from the notice u/s 92CA(2) of the Act is contrary to the provisions of the Act. Therefore/ the AO's action is quashed and the Appeal of the Appellant is allowed on this point only. However, for the completeness of the order, the other arguments of the Appellant are also considered.

Next contention of the Appellant is that penalty u/s 271G of the Act cannot be levied as there is no TP adjustment and the Appellant's transaction have been accepted at the arms length price determined by the Appellant. This aspect has been considered by the TPO in paragraph 15.2 of the penalty order passed u/s

271G of the Act. The Appellants contentions have been considered in the light of observation made by the TPO in the penalty order passed u/s 271G of the Act. The Appellant has correctly explained that section 271G of the Act has been inserted to curb the practice of tax avoidance which is evident from the Finance Act, 2001. I found force in the submission of the Appellant that there is no TP adjustment in the case of the Appellant and the transaction of the Appellant with AEs have been accepted at the arms length price determined by the Appellant; thus, there is no tax evasion in the case of the Appellant. On perusal of the documents on record and Finance Act, 2001 I am of the considered view that section 271G of the Act have been inserted as a measure to curb tax avoidance. In the case of Appellant, since the transaction have been accepted at ALP decided by the Appellant, there is no tax evasion on the Part of the Appellant; hence, the AO has not justified in levying the penalty u/s 271G of the Act. My above is also supported by the following judicial precedents:

- CIT vs Tohnsn Matthey India (P) Ltd [2015- 229 Taxmann 0453 Delhi]
- PCIT vs Magick Wood Exports (P) Ltd [53 SOT 0293 Chenl
- Mavar India Limited (ITA No. 1872fDel/2014)
- Annapura Business Solutions v. ACIT [2012117 taxmann.com 125 (Hyd.)

In view of the above provision in the law and judicial pronouncements I am of the view that penalty levied by the TPO is grossly unjustified as there is no adjustment in the transaction done by the Appellant with its AE.

Next contention of the Appellant was that all the details of the transaction have been furnished during the assessment proceeding of 2011-12. As per Rule 10D(4) if the transaction have effect over the years, then the assessee is not required to maintain fresh documentation separately in respect of each previous year unless there is any significant change in the nature of terms of the international transaction. The facts of the Appellants case that it has given the foreign currency loan to its AEs in the preceding year on which it has charged the interest @ 3.78% whereas in the present year under consideration the rate of interest charged from the AEs are 9.80 % to 10.54%. In order to fall in provision of Rule 10D(4) of the Rules the conditions needs to be satisfied are that there must be no significant change in (i) nature of transactions (ii) terms of transaction and (iii) assumption made. The variation in the interest rate clearly suggest that there is change in the terms of the transaction; therefore, the Appellant is not entitled to the benefit of Rule 10D(4) of the Rules. The Appellants contention to this effect is rejected.

The Appellant, in the alternative and without prejudice/ also submitted that it could not file details due to various reasonable causes such as (i) change in consultant (ii) change in employees / executive (iii) Compliance with Companies Act 2013 and tax consultant (iv) statutory compliance in November 2015. The TPO has considered the issue of reasonable cause in paragraph 7, 8,12,13,17 and 18 of the penalty order u/s 271G of the Act. On perusal of the detailed reasons given in the written submission by the Appellant I am of the view that the Appellant was precluded by the various valid reasons to not file the details before the TPO. I am of the considered view that in absence of executive familiar with the transaction who were involved at the time to transfer pricing audit, it is difficult to file information and documents before the TPO. I'm also of the view that in absence of a well versed

consultant, it is very difficult to represent the case before the departmental authorities. I am also ^convinced with the reasonable cause that the Appellant was busy with Income Tax Returns and Transfer Pricing Report in the month of November, 2015. The non-filing of returns, Tax Audit Report and Transfer Pricing Report has severe consequences in the Income Tax Law; therefore, the Appellant has rightly given the first priority to that the transfer pricing assessment were getting time barred. On study of TPO's order in juxtaposition with the submission of the Appellant, I am of the considered view that the Appellants case is covered u/s 273B of the Act (i.e. the Appellant could not file the details due to reasonable cause); therefore, the penalty levied by the TPO is deleted. My above view is fully supported by the following decisions:

- PCIT v. Magick Woods Exports (P.) Ltd. [20121 25 taxmann.com 20 (Chennai)
- Cargill India Private Limited vs PCIT U110 ITD 0616 Del ITAT]
- Gillette India Ltd. Vs. ACIT (IT A No. 598/TF/2012)

In view of the above facts and judicial pronouncements, I am of the view that the TPO has unjustified in levying the penalty u/s 271G of the Act; therefore, the penalty levied by the TPO is deleted.”

The Ld. D.R. submitted before us that the penalty as imposed by the AO under section 271G of the Act for failing to furnish documents required under section 92D(3) of the Act has wrongly been deleted by the Ld. CIT(A) without appreciating the fact that assessee despite three opportunities granted by the Ld. TPO has failed to furnish the documents as required by the TPO. Under these facts the penalty has rightly been imposed under section 271G of the Act. The Ld. D.R. submitted that the TPO has called for specific details from the assessee vide three notices dated 11.11.2014, 06.05.2015 and 11.11.2015 and the details called for were not furnished within 30 days. The Ld. D.R. submitted that the assessee has not explained any reasonable cause for not complying with the notices ny not furnishing the detail even after 11 months after the issue of the notice dated 11.11.2014. The Ld. D.R. submitted that in the transfer pricing issues the TPO is required to examine whether the method and data chosen by the assessee to determine ALP

are in accordance with the provisions of the Act. However, the assessee has not co-operated and thus failed to furnish these information within the statutory time limit as provided in section 92D(3) as maintained by the assessee under rule 10D(i) and 10D(iii). Thus, the failure on the part of the assessee has resulted into putting the TPO in great jeopardy in properly and correctly evaluating the international transactions. The Ld. D.R. finally submitted that under these circumstances, the TPO has rightly imposed the penalty equal to 2% of the value of the international transactions which worked out to Rs.7,76,68,773/-. The Ld. D.R. submitted that the Ld. CIT(A) has completely mis-appreciated the facts of the case and deleted the addition by taking the period of default from the notice issued under section 92D(3) instead of 92CA(ii) of the Act and therefore the Ld. D.R. prayed that the Ld. CIT(A) has completely misconstrued the facts of the case and deleted the addition by taking the period from the notice issued under section 92D3 instead of 92CA(ii) of the Act and therefore the Ld. D.R. prayed that the order of the Ld. CIT(A) may be set aside and that of the AO may be restored.

7. We have heard the rival submissions of both the parties and perused the material on record including the impugned order of the Ld. CIT(A). In this case the assessee has entered into international transactions with its foreign AE and has reported all the transactions in form No.3CEB. The AO referred the matter under section 92CA(i) of the Act to the TPO for determining the Arm Length Price of all the transactions reported in form 3CEB and thereafter the TPO issued three notices to the assessee on various dates as under:

- (1) 11.11.2014 under section 92CA(ii) of the Act
- (2) 06.05.2015 under section 92CA(ii) of the Act
- (3) 06.11.2015 under section 92D3 of the Act.

The Id TPO imposed the penalty u/s 271G of the Act by taking 60 days from the date of the first notices issued under section 92CA(ii) . The Ld. CIT(A) has calculated the 60 days from the date of notice issued under section 92D of the Act. The Ld. CIT(A) also noted that if the 60 days are reckoned from the date of issue of notice under section 92CA of the Act then the provision of section 92D(iii) would become redundant and otious. The Ld. CIT(A) has relied on a series of decisions as has been reproduced hereinabove in the reproduction of operative part of Ld. CIT(A)'s order considering the provision of the section 92CA(iii), 92D(iii). We are in agreement with the Ld. CIT(A) that period of 60 days are to be reckoned from the date of issue of notice under section 92D(iii) of the Act.

8. On the second issue raised by the AR that there is no transfer pricing adjustment made by the TPO and therefore the levy of penalty @ 2% on total value of international transaction can not be imposed. We observe that Ld. CIT(A) has rightly appreciated the fact that the section 271G of the Act has been inserted on the statute book to curb the tax avoidance and therefore when there is no TP adjustment made by the TPO there is no tax evasion and consequently the penalty was rightly deleted on this count also.

9. On the issue of reasonable cause we are quite convinced with the contentions of the Ld. A.R. that even if the period of 60 days is considered from the date of notices issued under section

92CA(iii) even then the assessee can not be attributed the delay in filing the details beyond 60 days as there existed a reasonable cause for the same which has been comprehensively explained and dealt with by the Ld. CIT(A). We note that there has been a change in the tax consultant of the assessee and change in employees and various other statutory compliances in November, 2015 and the delay has been explained to be beyond the control of the assessee. In our opinion, Ld. CIT(A) has rightly appreciated the delay to be on account of reasons which were duly explained and justified by the assessee. Accordingly, we uphold the order of Ld. CIT(A) on this account also.

10. In view of the above discussion, we are inclined to uphold the order of Ld. CIT(A) by dismissing the appeal of the Revenue.

Order pronounced in the open court on 22.10.2019.

**Sd/-
(Mahavir Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 22.10.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.