**IN THE INCOME TAX APPELLATE TRIBUNAL**
**(DELHI BENCH 'I-1' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER**
**and**
**SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1415/Del./2017**
**(Assessment Year : 2011-12)**

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| M/s. Bio-Rad Laboratories (India) Private Limited, 86-87, Udyog Vihar – IV, Gurgaon – 122 015 (Haryana). | vs. | DCIT, Circle 5 (1) & 6(1), New Delhi. |
| **(PAN : AAACB3202A)** | | |
| (APPELLANT) | | (RESPONDENT) |

ASSESSEE BY : Shri K.M. Gupta, Advocate
REVENUE BY : Shri Sanjay I. Bara, CIT DR

Date of Hearing : 01.10.2019
Date of Order : 18.11.2019

**O R D E R**

**PER KULDIP SINGH, JUDICIAL MEMBER**

The Appellant, M/s. Bio-Rad Laboratories (India) Pvt. Ltd. (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 14.12.2016 passed by the Commissioner of Income-tax (Appeals)-19, New Delhi in consonance with the orders passed by the ld. TPO/AO qua the assessment year 2011-12 on the grounds inter alia that :-

***"1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the penalty order passed***

***under section 271G of the Act passed by Additional Commissioner of Income-tax, Transfer Pricing Officer- 1(1), New Delhi ('Ld. TPO') imposing a penalty amounting to INR 17,347,910 alleging that the appellant has failed to comply with provisions of Section 92D(3) of the Act.***

***2. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in disregarding the reasonable cause of the failure by the appellant to comply with provisions of Section 92D(3) of the Act and not appreciating the provisions of Section 273B of the Act.***

***3. That on the facts and circumstances of the case and in law, the Ld. CIT(A) ought to have appreciated that the appellant had duly submitted the documents or information as required by sub-section (3) of Section 92D of the Act as well as appellant had submitted necessary back-up documentary evidences I information I explanations to support arm's length pricing (ALP) of the international transactions prior to completion of Transfer Pricing assessment, thus alleged default, if any, is merely technical for which no penalty could be levied under section 271G of Act on facts of the case.***

***4. That on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in disregarding the limitation period provided under Section 275 of the Act for the orders under the section covered by Chapter XXI of the Act.***

***4.1. That on the facts and circumstances of the case and in law, the Hon'ble CIT(A) (on without prejudice basis) erred in arbitrarily concluding that the issuance of show-cause for initiating the proceedings under Section 271G of the Act does not imply initiation of proceedings under such section.***

***5. Without prejudice to Ground NO.4 and 4.1. and in alternate, the Hon'ble CITCA) erred in not quashing the order passed under section 271G of the Act by TPO as without jurisdiction and bad in law as the powers of the Ld. TPO to pass order under section 271G of the Act were provided by the Finance Act 2014 with effect from 01.10.2014 and would not be applicable for failure to comply with provisions of Section 92D(3) of the Act before the amendment in Finance Act 2014."***

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : Assessee is engaged into the business of distribution of diagnostic and laboratory equipment products of its

group company, having its office located in New Delhi. During the year under assessment, assessee dealt with clinic diagnostics, life science research, informatics saddler, process separation, life science education and food/animal environment testing. During the year under assessment, assessee entered into international transactions as recorded in Form 3CEB as under

| ***Nature of Transaction*** | ***Value (in INR)*** | ***Name of the AE*** |
|---|---|---|
| ***Availing of management services*** | ***56022884*** | ***Bio Rad Lab Pacific Ltd.*** |
| ***Availing of IT Services*** | ***44202716*** | ***Bio Rad Lab (USA)*** |
| ***Purchase of finished reagents instrumentation and fine chemicals*** | ***718122991*** | ***Bio Rad Lab***<br>***Bio Rad Lab Gmbh Mumchen***<br>***Bio Rad Lab Singapore Pte. Ltd.***<br>***Bio Rad France***<br>***Bio Rad Lab Deeside Ltd. UK***<br>***Diamed Gmbh Switzerland***<br>***Diamed Instruments Logistics SAS France***<br>***Nobiloril France*** |
| ***Provision of market support services*** | ***45160066*** | ***Bio Rad Pacific Ltd. Hongkong*** |

4. On the reference made by the Assessing Officer (AO) to the Transfer Pricing Officer (TPO) for determination of Arm's Length Price (ALP) entered into by the assessee with its Associated Enterprises (AE) during the year assessment, the ld. TPO while making cumulative adjustments for intra-group services to the tune of Rs.5,60,22,884/- proceeded to initiate penalty proceedings under

section 271G of the Income-tax Act, 1961 (for short 'the Act') on the ground that the assessee has failed to file the requisite documents by 16.09.2013 in compliance to the notice issued under section 92CA(2) and 92D(3) of the Act. However, the assessee has finally filed the requisite documents on 10.09.2014.

5. Ld. TPO / AO initiated the penalty proceedings. AO, after declining the contentions raised by the assessee, levied the penalty of Rs.1,73,47,910/- i.e. equal to 2% of the international transactions under section 92D(3) of the Act on the ground that assessee has failed to substantiate the reasons for its non-compliance of the notice issued under section 92CA(2) & 92D(3) for over a period of one year. Ld. CIT (A) affirmed the penalty levied by the AO.

6. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

7. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

8. Undisputedly. Ld. TPO passed the order under section 92A(3) making an adjustment of Rs.5,60,22,884/-. It is also not in dispute that notice dated 16.09.2013 was issued by the TPO u/s

92CA (2)/92D(3) calling upon the assessee to file documents as required u/s 10D of the Income-Tax Rules, 1963. It is also not in dispute that the assessee has filed requisite documents before the ld. TPO on 10.09.2014. It is also not in dispute that notice u/s 271G of the Act was issued on 23.03.2015 to which assessee has filed submissions for non-imposition of the penalty on 15.04.2015 and ultimately penalty order has been passed on 27.04.2015. It is also not in dispute that the penalty order was passed by the ld. TPO for alleged default committed prior to the amendment in section 271G of the Act by the Finance (No.2) Act, 2014 with effect from October 1, 2014.

9. In the backdrop of the aforesaid undisputed facts & circumstances of the case and orders passed by the lower Revenue authorities the sole question arises for determination in this case is:-

> ***"as to whether TPO was empowered to levy a penalty under section 271G of the Act for the alleged default of non-submission of documents within stipulated period as required under section 92D(3) prior to the amendment in section 271G of the Act by Finance (No.2) Act, 2014 effective from October 1, 2014.***

10. Ld. AR for the assessee challenging the impugned order passed by the ld. CIT (A) affirming the penalty levied by the AO

u/s 271G contended that ld. TPO was not empowered to levy the penalty u/s 271G for the alleged default of non-submission of the documents as required under section 92D(3) prior to the amendment in section 271G i.e. with effect from October 1, 2014 and relied upon the order passed by the Hon'ble Delhi High Court in case of ***Ericsson India Private Ltd. vs. Addl. CIT (2019) 411 ITR 333 (Delhi)***.

11. Undisputedly, prior to 1st October, 2014, only AO was empowered to levy the penalty for committing default by the assessee under section 92D(3) of the Act and it is only after 01.10.2014 that ld. TPO got the power to levy the penalty. In the instant case, ld. TPO initiated the penalty proceedings u/s 271G against the assessee for committing default to comply with the notice dated 16.09.2013. Notice for initiating the penalty was issued u/s 271G of the Act for levying the penalty on 23.03.2015.

12. Hon'ble High Court of Delhi in case of ***Ericsson India Pvt. Ltd.*** (supra) decided the identical issue in favour of the assessee holding that "*when event of default occurred in March, 2014 i.e. well prior to the date of coming into force of the amendment i.e. w.e.f. 01.10.2014, the impugned order passed by TPO is without jurisdiction.*"

13. For Reddy perusal, operative part of the aforesaid order passed by the Hon'ble Delhi High Court is extracted as under :-

> ***"4. Learned Senior Counsel for the assessee contended that the penalty event, as it emerges in the present case, could not be postponed or varied. Learned counsel relied upon the rulings of the Supreme Court in Brij Mohan vs. Commissioner of Income Tax, (1979) 120 ITR 1 SC and also Varkey Chacko vs. Commissioner of Income Tax, (1993) 203 ITR 885 (SC), to say that event of default or at the most the event of recording reasons constitutes the defining point of jurisdiction. In the present case, so called default, noticed by the AO, was acted upon on 25.03.2014. The mere circumstance that the AO did not choose to act upon, it did not mean that the cause for imposing penalty was postponed within the period when the power was expanded under amendment to Section 271G of the Act.***
>
> ***5. The revenue's contention in these proceedings -in defence of the penalty imposed is that the first notice was not proceeded with. The TPO deemed it appropriate to give a second chance and issued fresh notice to the assessee on 05.12.2014 – after the amendment was brought into force w.e.f 01.10.2014.When he issued the notice, the TPO possessed the power. The consequent imposition of penalty on was warranted and within the jurisdiction. Learned counsel for the Revenue relies upon Securities and Exchange Board of India vs. Classic Credit Ltd., JT 2017 (9) SC 558, to say that the amendment to Section 271Gmerely changed the forum but did not in any way confer fresh jurisdiction on a new authority.***
>
> ***6. In Brij Mohan (supra), the Supreme Court articulated the correct position in the case of assessments and the law applicable with respect to jurisdiction and other substantive proposition on one hand and the correct position in respect of penalty on the other hand by holding as follows:***
>
> > ***".....In our opinion, the assessment of the total income and, the computation of tax liability is a proceeding which, for that purpose, is governed by entirely different considerations from a proceeding for penalty imposed for concealment of income. And this is so notwithstanding that the income concealed is the income assessed to tax. In the case of the assessment of income and the determination of the consequent tax liability, the relevant law is the law which rules during the assessment year in respect of which the total income is assessed and the tax liability determined. The rate of tax is determined by the relevant Finance Act. In the case of a penalty, however,***

> ***we must remember that a penalty is imposed on account of the commission of a wrongful act, and plainly it is the law operating on the date on which the wrongful act is committed which determines the penalty. Where penalty is imposed for concealment of particulars of income, it is the law ruling on the date when the act of concealment takes place which is relevant. It is wholly immaterial that the income concealed was to be assessed in relation to an assessment year in the past......"***

***7. In Varkey Chacko(supra), the Supreme Court stated as follows:***

> ***"A penalty for concealment of particulars of income or for furnishing inaccurate particulars of income can be imposed only when the assessing authority is satisfied that there has been such concealment or furnishing of inaccurate particulars. A penalty proceeding, therefore, can be initiated only after in assessment order has been made which finds such concealment or furnishing of inaccurate particulars. Who, at this point of time, has the authority to impose the penalty is what is relevant. Whoever this authority may be, he is obliged to impose such penalty as was permissible under the law in that behalf on the date on which the offence of concealment of income was committed, that is to say, on the date of the offending return. The two aspects must firmly be borne in mind, namely, who may impose the penalty and in what measure."***

***8. In Varkey Chacko (supra), the Supreme Court considered the formulation of law in Brij Mohan(supra) and reiterated it. The assessee's contention was that the concealment exercise – being penal in nature, committed when the return was filed and cognizance taken by the authority, by virtue of the subsequent amendment, was not legal. It was in these circumstances that the Court held that the penalty for concealment of particulars of income for furnishing inaccurate particulars would be upon the assessing authority for satisfaction in that regard.***

***9. The reliance on Securities and Exchange Board of India (supra) (by Revenue) in the opinion of this Court is insubstantial. The amendment to the Securities and Exchange Board of India Act empowers the Sessions Court to entertain, take cognizance and try offences under that enactment; either of those offences were triable by the Magistrate. The Supreme Court repelled the submissions made on behalf of the accused/opposite party of prejudice. The arguments made on their behalf was that the Magistrates were empowered to try summarily offences, that was the subject matter of the complaint and other proceedings before***

> ***them and that this had led to the approval of valuable rights under Section 260 of the Code of Criminal Procedure (Cr.P.C). The Supreme Court repelled this argument, stating that there was no right to particular procedure and that even otherwise under Section 260/262 Cr.P.C, a Magistrate had discretion to ignore the summary proceedings and continue to try the offence in a regular manner. In the opinion of this Court, that judgment does not help the revenue's answer on the charge of lack of jurisdiction and the law as enunciated in Brij Mohan and Varkey Chacko(supra) i.e. that the event of default defines the jurisdiction of the concerned authority, who may proceed to initiate the penalty proceedings. In the present case, since "event of default" occurred in March, 2014 i.e. well prior to the date of coming into force the amendment (i.e. 01.10.2014), the impugned order was wholly without jurisdiction."***

14. Following the ratio laid down by Hon'ble Delhi High Court in the case of ***Ericsson India Pvt. Ltd.*** (supra), when we appreciate the facts of the instant case in which notice under section 92CA(2) & 92D(3) was issued by the TPO on September 16, 2013 and due to its non compliance, issued notice to the assessee on October 28, 2013, to show cause as to why the penalty proceedings u/s 271G should not be initiated, it is a apparently clear that, *"the event of default took place in the instant case on October 28, 2013 i.e. well before the amendment of section 271G, which came into force w.e.f. October 1, 2014."*

15. We are of the considered view that on October 28, 2013, when penalty proceedings initiated u/s 271G only AO was empowered to levy the penalty and not the TPO as has been done in the present case. In other words, penalty under section 271G is

leviable for omission or commission of the wrongful act in accordance with the law applicable on the date of such commission or omission. So, we are of the considered view that on the date of non-compliance of the notice as required under section 92D (3) i.e. October 23, 2013, only AO was having the power to levy the penalty u/s 271G and not the TPO. So, the penalty levied by the TPO vide order dated 27.04.2015 and confirmed by the ld. CIT (A) by passing the impugned order is not sustainable in the eyes of law.

16. Even on merits, the penalty levied by the ld. TPO and sustained by the ld. CIT (A), is not sustainable because undisputedly assessee has submitted documents on the basis of which ld. TPO has proposed the adjustment and no prejudice whatsoever is caused to the Revenue. Hon'ble Apex Court in the case of Hindustan Steel Ltd. vs. State of Orissa 83 ITR 26 (SC) held that, "*when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed the statue, the competent authority may not impose the penalty.*"

17. So, we are of the considered you that though there is a delay on the part of the assessee to file the requisite documents but ultimately documents have been filed and assessment has been framed and moreover no malafide on the part of the assessee not to

comply with the provisions contained under section 92D (3) has come on record and as such, penalty levied in this case is not sustainable on merits also.

16. In view of what has been discussed above, we are of the considered view that penalty levied by the TPO and confirmed by the ld. CIT (A) is not sustainable on account of jurisdictional error, hence penalty order is quashed and the appeal filed by the assessee is allowed.

**Order pronounced in open court on this 18th day of November, 2019.**

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|---|---|
| **Sd/-** | **sd/-** |
| **(R.K. PANDA)** | **(KULDIP SINGH)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

**Dated the 18th day of November, 2019**
**TS**

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)-19, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.