IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI
BEFORE SHRI SHAMIM YAHYA (AM) & SHRI PAWAN SINGH (JM)

ITA No. 1675/Mum/2013 (Assessment Year: 2006-07)

Sitel India Ltd. 501, Wing A &B, Boomerang, Chandivali Farm Road, Andheri (E) Mumbai-400 072 **PAN : AAFCS1297M**	vs	DCIT, Range-8(3), Room No. 217, 2nd Floor, Aayakar Bhavan, M.K. Marg, Mumbai-400020
APPELLANT		**RESPONDEDNT**

Appellant by	Shri Komal Sawhney / Shri Abhishek Tilak (ARs)
Respondent by	Shri Amit Pratap Singh (Sr. DR)
Date of hearing	03-10-2019
Date of pronouncement	08-11-2019

O R D E R

PER PAWAN SINGH, JM :

1. This appeal filed by the assessee is directed against the order of CIT(A)-15, Mumbai dated 19-12-2012 for the Assessment Year 2006-07. The assessee has raised the following grounds of appeal:-

> "1) The C.I.T. (A) erred both on facts and in law in passing the impugned order and in upholding the order of the Assessing Officer (A.O.) confirming the penalty under section 271 (1) (c) of the Income-tax Act, 1961 (hereafter the said 'Act[1])
> 2) The C.I.T. (A) erred in not appreciating that the Appellant had furnished all the information necessary and made full disclosure of international transactions to the A.O. and the Transfer Pricing Officer ((T.P. O) for the purpose of determining the Arms Length Price (ALP) of its international transactions.
> 3) The C.I.T. (A) erred in not appreciating that the bench marking of international transactions by applying the Transactional Net Margin Method (TNMM) was accepted by the TPO/AO and there was no concealment or furnishing of inaccurate particulars of income attracting penalty under section 271 (1) (c) of the Act
> 4) The C.I.T. (A) erred in invoking explanation 7 to section 271 (1) (c) of the Act, without appreciating that the Appellant had charged prices in

international transactions in accordance with the provisions of section 92C of the Act and in the manner prescribed under the Act, in complete good faith and with due diligence. The impugned order has been passed on a complete miss-appreciation of the facts of the case and is therefore; liable to be set aside."

2. The brief facts of the case are that the assessee-company is engaged in the business of call centre, filed its return of income on 29-11-2006 declaring income of Rs.73,81,379/-. In the return of income, the assessee disclosed international transaction with its Associate Enterprises (AEs). The assessee also furnished report in Form of 3CEB reporting of international transaction. Consequent upon, the Assessing Officer (AO) made a reference to Transfer Pricing Officer (TPO) for computation of Arm's Length Price (ALP). The TPO, while computing the ALP made adjustment on account of transfer pricing upward adjustment of Rs. 4.37 crore and software expenses of Rs.47,39,071/-.On software expenses disallowance, the assessee filed an application under section 154 for rectification of disallowance, which was allowed vide order dated 18.03.2011, thereby leaving an addition to the extent of Rs. 5,30,786/-only. The Assessing Officer initiated penalty proceedings u/s 271(1)(c) of I.T. Act, 1961.

3. On show-cause notice, the assessee filed reply vide reply dated 16.03.2011, with regard to the issue of adjustment on account of transfer pricing, the assessee stated that they had submitted the information to the extent available in response to the TPO's query. However, the TPO had failed to consider the submission and disregarded the flood loss adjustment

undertaken by the Company in its transfer pricing study. The assessee further stated that merely because of difference of opinion on whether the said adjustment should be made to the margin of the Company or not, one cannot conclude that the price charged or paid in such transaction was not computed in accordance with the provisions contained in section 92C of the Act. The assessee also stated that they carried out the Transfer Pricing Study in the manner prescribed under the statutory provision, in good faith and with due diligence. With regard to the use of comparable companies are concerned, the assessee has stated that out of the set of 13 comparable companies, 2 companies were common with the comparable companies selected by the Company in its Transfer Pricing study report. Out of the balance 11 companies, 5 comparables did not exist in the database list generated using the comprehensive search process adopted by the assessee at the time of undertaking the economic analysis. The assessee further stated that the companies as selected by TPO were either functionally not comparable, had controlled transactions or the financial data was not available in the public domain at the time of conducting the search. The assessee thus contended that there was no case for levying the penalty u/s. 271(l)(c) of the Act. The price charged or paid in such

transaction was computed in accordance with the provisions contained in Section 92C of the Act and in the manner prescribed under that section, in good faith and with due diligence. The assessee stated that since, the TPO had accepted the documentation maintained by the assessee and also accepted the TNMM used for the benchmarking the international transaction, it cannot be construed, that the company has submitted inaccurate particulars or had tried to conceal income. With regard to the issue of disallowance of software expenses, the assessee stated that the issue whether software expenses are capital or revenue in nature was clearly a debatable issue and that penalty u/s. 271(l)(c) of the Act cannot be levied on debatable issues. The assessee in its reply concluded that, it has neither concealed any income nor furnished any inaccurate particulars of income in respect of all the above grounds on which penalty u/s.271(l)(c) had been initiated.

4. The reply of assessee was not accepted by the AO. The AO levied penalty @100% on tax sought to be evaded. On appeal before CIT(A), the Action of AO in levying penalty was upheld. Further aggrieved, the assessee has filed this appeal before this Tribunal.

5. We have heard the submissions of the Ld. Authorized Representative (AR) for the assessee and the submissions of the Ld. Departmental

Representative (DR) for revenue and perused the material available on record. The Ld.AR for the assessee submitted that the comparable companies selected by TPO were either functionally not comparable, had controlled transactions or the financial data were not available in the public domain at the time of conducting the search. The Ld. AR of the assessee, thus submitted that there was no case of penalty u/s.271(l)(c) of the Act, since price charged or paid in such transaction was computed in accordance with the provisions contained in Section 92C of the Act and in the manner prescribed under that section, in good faith and with due diligence. The Ld.AR for the assessee also submitted that the TPO had accepted the documentation maintained by the assessee and also accepted the Transaction Net Margin Method (TNMM) as most appropriate method used for the benchmarking the international transaction, it cannot be construed, that the company has submitted inaccurate particulars or had tried to conceal income. The Ld. AR for the assessee also submitted that as regards the issue of software expenses was concerned, the assessee, in its written submissions had stated that the issue whether software expenses are capital or revenue in nature was clearly a debatable issue and that penalty u/s.271(l)(c) of the Act cannot be levied on debatable issues.

The assessee company, in its written submissions, has also relied upon various other decisions of Tribunals and High Courts, which were, however, found to be not relevant to the present case by the AO inasmuch as the facts and circumstances of those cases are distinct from that of the instant case. The Ld.AR of the assessee, therefore, prayed that the penalty levied by the AO and confirmed by the CIT(A) is liable to be deleted.

6. On the other hand, the Ld. DR for the revenue submits that the assessee failed to prove to the satisfaction of the lower authorities that the price charged or paid in international transactions was computed in accordance with the provisions contained in section 92C of the Act.

7. We have considered the submissions of both the parties, perused the orders of authorities below. The Assessing Officer levied the penalty on upward adjustment suggested by TPO of Rs. 4.37 crore and the software expenses disallowances. The software expenses was ultimately restricted to Rs.5,30,786/-. The assessing officer while levying the penalty took his view that the assessee suppressed the real income by Rs. 4.42 Crore (4.37 + .53) and levied penalty @ 100% of tax sought to be evaded. On appeal before ld Commissioner (Appeals)

the penalty on the adjustment on account of ALP was upheld, however, it was deleted on software expenses disallowance.

8. We are conscious of the fact that the Explanation 7 to section 271(1)(c) of the Act makes it clear that the onus on the assessee to show that the ALP was computed by the assessee in accordance with the scheme of section 92C of the Act in good faith and due diligence. We have noted that it is not in dispute here that the ALP was computed in accordance with the scheme of section 92C inasmuch as TNMM Method was used for bench marking. The most appropriate method adopted by assessee was not disputed by assessing officer. The upward adjustment was suggested by TPO by including new comparable in the final set of comparables. We have seen that the assessee in its reply before the assessing officer has specifically stated that the margin computed in TP study are in accordance with the provisions of section 92C in good faith and with due diligence. The assessing officer while passing the penalty order has no where mentioned that the transfer study carried out by the assessee was not in accordance with the statutory provision or not in good faith or with due diligence.

9. We are also of the view that in the absence of any overt act, which disclosed conscious and material suppression, invocation of Explanation

7 in a blanket manner could not only be injurious to the assessee but ultimately would be contrary to the purpose for which it was engrafted in the statute. It might lead to a rather peculiar situation where the assessee who might otherwise accept such determination may be forced to litigate further to escape the clutches of Explanation 7.

10. The Coordinate bench of Delhi Tribunal in Halscrow Consulting India Pvt Ltd Vs DCIT (2017) 87 taxmann.com 331 (Delhi Tri) while considering the similar grounds of appeal on similar set of facts held as under;

> **5.** We have heard the rival submissions and perused the material available on record. As far as the penalty levied on transfer pricing adjustment is concerned, it is seen that during the year under consideration, the assessee had entered into following international transactions:—
>
> Provisions of technical services (receivables from Associated Enterprises)
>
> Availing of technical services (Payable to Associated enterprises)
>
> The assessee selected Cost Plus Method for both these transactions. Further, there was also apportionment of expenses towards business support services payable to the Associated Enterprises (AE), foreign currency component of salary of expatriate employees payable to the foreign AE and reimbursement of various expenses receivable from the AE. All these three were at cost. It was the assessee's view that no benchmarking was required in respect if these three transactions. However, during the transfer pricing proceedings, the TPO was of the view that while computing Profit Level Indicator (PLI) using Cost Plus Method, the assessee had claimed idle capacity adjustment of Rs. 2,46,46,065/- which was reduced from the direct cost was not to be included and, accordingly, the TPO excluded the same. The TPO also required the assessee to show cause as to why Cost Plus Method should

not be rejected and TNMM should not be applied as the Most Appropriate Method. The TPO also asked the assessee to show cause as to why the intra group services payable to the assessee should not be treated as nil by applying CUP method. Thereafter, the TPO proceeded to make adjustment with respect to idle capacity amounting to Rs. 2,46,46,065/- and of Rs. 1,56,32,267/- with respect to intra group services by taking the ALP of intra group services at nil.

5.1 It is seen that the Assessing Officer, while imposing the penalty, simply relied on the addition/adjustment made by the TPO and did not examine in detail as to whether penalty was imposable on such adjustments or not. On appeal, the Ld. CIT (A) also noted that the assessee had not acted in good faith while computing the ALP. The Ld. CIT (A) also took note of the fact that the assessee had not preferred any appeal against the ALP adjustment and, therefore, the assessee had accepted that the ALP had not been computed correctly by him and as such, the penalty was imposable.

5.2 The main argument of the Ld. AR against the levy of penalty on the difference in determination of ALP is that it is a debatable issue and, therefore, the penalty cannot be sustained. The scheme of *Explanation* 7 to section 271(1)(c) of the Act makes it clear that the onus on the assessee is only to show that the ALP was computed by the assessee in accordance with the scheme of section 92 C of the Act in good faith and due diligence. It is not in dispute here that the ALP was computed in accordance with the scheme of section 92C inasmuch as Cost Plus Method was used. The TPO only substituted Cost Plus Method with TNMM and also computed the ALP of intra group services by taking the ALP as nil by applying the CUP Method. Whatever may be the merits in the action of the TPO changing the method of computation of ALP, the same cannot be a fit case for imposition of penalty inasmuch as it cannot be said that the ALP had not been computed by the assessee under the scheme of section 92C. The scope of connotations of expressed 'in good faith' and appearing in *Explanation* 7 can be found from section 3(22) of the General Clauses Act which states that "a thing shall be deemed to be done in 'good faith' where it is in fact done honestly. Therefore, it is not even necessary whether in doing that thing the assessee has been negligent or not. Thus, there is no way that the assessee can prove his honesty, because honesty, in practical terms, only implies lack of dishonesty, and proving not being dishonest is essentially proving a negative, which as the Hon'ble Supreme Court has observed in the case of *K.P. Verghese* v. *ITO* [1981] 131 ITR 597/7 Taxman 13 is almost impossible. However, as the expression 'good faith' is used along with 'due diligence' which refers to

'proper care'. It is also essential that not only the action of the assessee should be in good faith but also with proper care. An act done with due diligence would mean the act done with as much as care as a prudent person would take in such circumstances. Thus, as long as no dishonesty is found in the conduct of the assessee, as long as he has done what a reasonable man would have done in his circumstances, to ensure that the ALP was determined in accordance with the scheme of section 92C, deeming fiction under *Explanation* 7 to section 271(1)(c) cannot be invoked.

5.3 It is seen that the grounds on which the ALP determined by the assessee has been rejected are reasonably debatable. The assessee had obtained a transfer pricing study from an outside expert and the objectivity of the same was not called into question. Therefore, lack of due diligence in determining the ALP is neither indicated nor can be inferred. In such a situation, it cannot be said that the assessee had not determined the ALP in accordance with the scheme of section 92C in good faith and with due diligence and accordingly, the conditions precedent for invoking Explanation 7 to section 271(1)(c) did not exist on the facts of the instant case. We also find that the assessee's case is covered by the order of the ITAT Mumbai Bench in the case of *RBS Equities India Ltd.* (*supra*) in which the penalty u/s 271(1)(c) had been deleted in a somewhat similar circumstance. If we accept the contentions of the department that addition on account of transfer pricing adjustment invariably means absence of good faith and due diligence, then each and every case involving transfer pricing adjustment would call for imposition of penalty us/ 271(1)(c) of the Act. ITAT Delhi had also taken a similar view on identical facts in case of *Mitsui Prime Advanced Composites India (P.) Ltd.* (*supra*) and had deleted the penalty imposed u/s 271(1)(c) of the Act. The Hon'ble High Court of Delhi has also upheld this order of the ITAT on the appeal of the department in ITA No. 913/2016 vide order dated 17.01.2017. Further, the Hon'ble High Court of Delhi has held in the case of *Verizon India (P.) Ltd.* (*supra*) that in absence of any overt act, which indicates conscious and material suppression, invocation of *Explanation* 7 in a blanket manner could not only be injurious to the assessee but ultimately would be contrary to the purpose for which it was engrafted in the statute. The Hon'ble Delhi High Court further observed that it might lead to a rather peculiar situation where the assessee who might otherwise accept such determination may be forced to litigate further to escape the clutches of *Explanation* 7. Therefore, in view of the factual circumstances and respectfully following the ratio of the decisions of the various judicial authorities, we are of the opinion that the assessee

cannot be visited with penalty u/s 271(1)(c) of the Act on this issue and accordingly, the impugned order is set aside and penalty is deleted.

5.4 As far as the second which on which the penalty has been imposed, it is seen that penalty has been imposed on disallowance of advances/balances written off and disallowance out of miscellaneous expenses. The Ld. CIT (A) has confirmed the penalty on these additions on the ground that the assessee had accepted these additions and that the assessee did not furnish any evidence in support of the write off of advances. The penalty on miscellaneous expenses has been confirmed on the ground that some personal element in the expenditure could not be ruled out. However, it is clear that in the instant case it cannot be said that the assessee had withheld any relevant information regarding miscellaneous expenses or advances/balances written off. The assessee has duly disclosed these amounts in its profit/loss account and has also submitted details thereof during the assessment proceedings. The only reason the penalty was imposed was that the lower authorities did not accept the explanation of the assessee and imposed penalty for concealment of income. Thus, the *bona fides* of the assessee cannot be doubted in such circumstances. With regard to the provisions of section 271(1)(c) of the Act pertaining to penalty, the Hon'ble Apex Court has authoritatively laid down that making of a claim by the assessee which is not sustainable will not tantamount to furnishing inaccurate particulars. In *CIT* v. *Reliance Petroproducts (P.) Ltd.* [2010] 322 ITR 158/189 Taxman 322 (SC), the Hon'ble Apex Court has held as follows:

> 'A glance at this provision would suggest that in order to be covered, there has to be concealment of particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The present is not a case of concealment of income. That is not the case of the Revenue either. However, the Ld. Counsel for the revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the section 271 (1) (c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars. The learned counsel argued that "submitting

> an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income." We do not think that such can be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars.'
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> **5.5** Although both the lower authorities have held that the assessee has concealed particulars of income, on a consideration on the facts, such a view is not tenable is the present appeal. Therefore, respectfully following the judgment of the Hon'ble Apex Court in the case of *Reliance Petroproducts (P.) Ltd.* (*Supra*) we set aside the order of the Ld. CIT (Appeals) and direct the AO to delete the penalty.

11. In view of the aforesaid discussions, we are of the view that the action of assessing officer is not justified in levying the penalty under section 271(1)(c) of the Act. Hence, we accept the appeal of the assessee and direct the assessing officer to delete the penalty.

12. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 08-11-2019.

Sd/-	**Sd/-**
SHAMIM YAHYA	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 8th November, 2019
Pk/-
Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order
Asstt. Registrar, ITAT, Mumbai