

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER &
SHRI PAWAN SINGH, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No.151/Mum/2012
(निर्धारण वर्ष / Assessment Years : 2006-07)

Sybase Software (I) P. Ltd., 4 th Floor, Platina, C-29, G Block, Bandra (E).	बनाम/ Vs.	ACIT, Range – 10(1) Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAHCS5015K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by :	Shri Aliasger Rampurawala & Shri Pinal Chandramaniyam
प्रत्यर्थी की ओर से/Respondent by :	Shri Amit Pratap Singh, DR

सुनवाई की तारीख / Date of Hearing	03/10/2019
घोषणा की तारीख/Date of Pronouncement	10/12 /2019

आदेश / ORDER

PER SHRI SHAMIM YAHYA- AM:

This is an appeal by the assessee is directed against the order of CIT(A), Mumbai for the A.Y 2006-07.

2. The issue raised is that the Ld. CIT(A) erred in sustaining the levy of penalty u/s 271(1)(c) of the Act amounting Rs. 53,89,368/-. Brief facts of the case leading to the levy of penalty are as under:

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2.1 During the year, assessee company was engaged in software and development services to Sybase Inc. It was also engaged in the distribution of Sybase Inc Production in India. Its transaction in its distribution activity had been accepted by the Transfer Pricing Officer. However adjustment had been made to the transfer pricing with respect to the software research and development services. The assessee had earned an operating profit on total cost of 12.46% for software research and development services. The TPO rejected 42 comparables out of 44 comparables used by the assessee in its TP study report to justify its international transaction of software development on ground that the comparable used by the assessee showed a low margin as compared to the margins of the 14 comparables created by the TPO for companies engaged in the similar line of business. Further assessee company had also carried out certain economic adjustments including a working capital and risk adjustments. Assessee's adjustment on working capital was accepted by the TPO, however, risk adjustment was not accepted. Accordingly, an operating profit was computed at 19.56% of the total cost i.e Rs. 3,14,30,120/- as against 12.46% i.e, Rs.

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2,00,13,499/- computed by the assessee company. Thus the transfer pricing adjustment of Rs. 1,14,16,621/- was made to the value of transaction for the software research and development services. Therefore, it is held that assessee has deliberately furnished inaccurate particulars of its income and concealed its income within the meaning of Sec. 271(1)(c) of the Act.

2.2 During the course of assessment proceedings, notices u/s. 133(6) of the Act were issued to various parties and information was gathered in connections with the claim of expenses made by the assessee company. It was noticed that total expenditure claimed by the assessee in respect of three parties viz. International Travel House (Rs. 29,30,751/-) Cox & Kings (Rs. 91,61,503/-) and Regus Business (Rs. 26,42,563/-) were at Rs. 1,47,34,790/- whereas the expenditure as per party's account was Rs. 1,01,40,217/- (Rs. 11,53,576/, Rs. 33,91,486/- and 49,511/- respectively). The assessee company could not reconcile the difference of Rs. 45,94,573/-. Hence, the AO held that the onus to prove the correctness of the claims made by the assessee was on the assessee itself which it had failed to discharge. Therefore, he held that the

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assessee had knowingly furnished inaccurate particulars of its income and concealed its income within the meaning of Sec. 271(1)(c) of the Act, and accordingly penalty was levied.

3. Upon assessee's appeal Ld. CIT(A) upheld the penalty. Against this order assessee is in appeal before us.

4. We have heard both the counsels and perused the material available on record. We note that as regards the levy of penalty for the Transfer Pricing adjustment, upon assessee's appeal the ITAT had granted relief to the assessee by the order dated 20.12.2018. Hence, the ITAT has accepted the assessee's request for exclusion of certain comparables and the transfer pricing officer has been directed to recomputed the margin accordingly. In this view of the matter the transfer pricing adjustment stands diluted by the ITAT order the penalty levied on this issue does not survive.

4.1 Another issue on which penalty has been levied is with regard to difference in reconciliation with the parties. In this regard it is noted that AO had sought information from parties regarding balances. In this regard difference in the were noted in case of the three parties as compared to the

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assessee's books amounting to Rs. 45,93,573/- upon this addition penalty has been levied.

5. We have heard both the counsels and perused the record. We find that section 271(1)(c) of the Act postulates imposition of penalty for furnishing of inaccurate particulars and concealment of income. In the present case, We find that the difference has arisen only because in the case of these parties where proper re-conciliation was not done. The addition is totally based upon the difference in assessee's book and that recorded in other parties books. We find that this addition based on difference in reconciliation cannot be termed as furnishing of inaccurate particulars or concealment so as to warrant of levy of penalty u/s. 271(1)(c). Hence, in our considered opinion, the penalty in this regard is liable to be deleted.

7. In this regard, we place reliance from the Apex Court decision rendered by a larger Bench comprising of three of their Lordships in the case of Hindustan Steel vs. State of Orissa in 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

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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 bonafide belief that the offender is not liable to act in the manner prescribed by the statute.”

8. We would also like to refer to the Hon’ble Apex Court decision in the case of CIT vs. Reliance Petro Products Ltd. in Civil Appeal No. 2463 of 2010. In this case vide order dated 17.3.2010 it has been held that the law laid down in the Dilip Sheroff case 291 ITR 519 (SC) as to the meaning of word ‘concealment’ and ‘inaccurate’ continues to be a good law because what was overruled in the Dharmender Textile

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case was only that part in Dilip Sheroff case where it was held that mensrea was a essential requirement of penalty u/s 271(1)(c). The Hon'ble Apex Court also observed that if the contention of the revenue is accepted then in case of every return where the claim is not accepted by the Assessing Officer for any reason, the assessee will invite the penalty u/s 271(1)(c). This is clearly not the intendment of legislature.

9. In the background of the aforesaid discussions and precedents, We set aside the orders of the authorities below and delete the levy of penalty.

10. In the result, the appeal filed by the assessee is allowed.

This Order pronounced in Open Court on 10 /12/2019
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Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai, Dated 10 /12/2019

KRK, PS

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आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asst. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद/ ITAT, Mumbai