



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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

ITA no.6321/Mum./2018  
(Assessment Year : 2013-14)

Dy. Commissioner of Income Tax  
Circle-5(2)(1), Mumbai

..... Appellant

v/s

Kiran Gems Pvt. Ltd.  
FD-5011, G-Block  
Bharat Diamond Bourse  
Bandra Kurla Complex  
Bandra (E), Mumbai 400 051  
PAN - AADCK1665M

..... Respondent

Revenue by : Shri Akhtar Husain Ansari  
Assessee by : Shri K.A. Vaidyalingan

Date of Hearing - 04.02.2020

Date of Order - 20.03.2020

**ORDER**

**PER SAKTIJIT DEY. J.M.**

The Revenue has filed the present appeal challenging the order dated 16<sup>th</sup> August 2018, passed by the learned Commissioner of Income Tax (Appeals)-56, Mumbai, deleting the penalty imposed of ₹ 61,45,46,880 under section 271G of the Income Tax Act, 1961 (for short "*the Act*").

2. Brief facts are, the assessee, a resident company, is engaged in the business of importing rough diamond, getting them cut & polished and thereafter exporting to various parties outside the Country including the Associated Enterprise (AEs) of the assessee situated abroad. In the transfer pricing study report, the assessee benchmarked the international transaction with the AEs relating to sale of polished diamond adopting Transactional Net Margin Method (TNMM) as the most appropriate method with operating profit / sales as the profit level indicator (PLI). Since the margin shown by the assessee @ 6.00% was higher than the average margin of the comparables worked out @ 3.55%, the transaction with the AEs was claimed to be at arm's length. In course of proceeding the Transfer Pricing Officer called upon the assessee to furnish net profit margin of the AE and non-AE segments. In response to the query raised, the assessee furnished the net profit margin of AE and non-AE segments. The Transfer Pricing Officer, however, found fault with the segmental profit margin furnished by the assessee by stating that such profit margin is on the basis of cost of goods sold (COGS) in proportion of sales. He observed, non-furnishing of information called for prevented him from evaluating the correctness of the arm's length price of the transaction with AEs. Though, ultimately, he accepted the transactions with AEs to be at arm's length. Having done so, alleging non-

maintenance of specified documents as per rule 10D, he initiated proceedings under section 271G the Act and ultimately passed an order on 30.05.2017 imposing penalty of ₹61,45,46,880, under section 271G of the Act. The assessee challenged the penalty order by preferring appeal before the first appellate authority.

3. After considering the submissions of the assessee in the context of facts and material on record, learned Commissioner (Appeals) observed, though the Transfer Pricing Officer objected to the COGS method adopted by the assessee, however, he himself has not stated in which method it was required to be furnished. Further, he observed, the Transfer Pricing Officer has not stated whether the data sought for really exists considering the nature of assessee's business. He observed, the Transfer Pricing Officer has not specified which documents the assessee was required to maintain as per rule 10D but not maintained. Further, he observed, the Transfer Pricing Officer has ultimately accepted the transaction with AEs to be at arm's length. In view of the above, learned Commissioner (Appeals) deleted the penalty imposed.

4. The learned Departmental Representative strongly relying upon the observations of the Transfer Pricing Officer in the penalty order passed under section 271G of the Act submitted, due to non-

maintenance of documents the Transfer Pricing Officer found it difficult to determine the arm's length price of the transaction with the AEs, hence, was compelled to accept the price charged by the assessee. Thus, he submitted, the penalty imposed under section 271G of the Act should be restored.

5. The learned Authorised Representative submitted, the assessee has maintained all preliminary and basic documents and has also prepared a transfer pricing study report benchmarking the transaction with the AEs. He submitted, being called upon by the Transfer Pricing Officer the assessee had also furnished the segmental profit margins. He submitted, the Transfer Pricing Officer has ultimately accepted the transaction with the AEs to be at arm's length. Therefore, there is no justification in imposing penalty under section 271G of the Act. Further, he submitted, the issue is otherwise covered in favour of the assessee as while deciding identical matter in assessee's own case in assessment year 2011-12 the Tribunal has upheld deletion of penalty imposed under section 271G of the Act.

6. We have considered rival submissions in the light of the decision relied upon and perused the material on record. Materials on record make it clear that the assessee has maintained primary books of account/documents in respect of its business activity. In fact, the

documents relating to transaction entered into with the AEs have also been maintained by the assessee which is evident from the fact that the assessee has prepared a transfer pricing study report benchmarking the transaction with the AEs under TNMM. This shows that the assessee has maintained documents/books of account as required under the statute. It is also evident, in the course of proceedings before the Transfer Pricing Officer, the assessee has made substantial compliance by furnishing transfer pricing study report as well as many other documents. In fact, being called upon the assessee has also furnished segmental profit margins. Notably, though, the Transfer Pricing Officer has alleged that non-furnishing of segmental profitability in a particular manner, though not specified by him, makes it difficult for him to correctly ascertain the arm's length price, however, ultimately the Transfer Pricing Officer has accepted the transaction with the AEs to be at arm's length. If the Transfer Pricing Officer was not satisfied with the benchmarking of the assessee under TNMM, nothing prevented him from rejecting assessee's benchmarking and determining the arm's length price of the transaction with the AEs independently by applying any one of the prescribed methods. The blame for failure on the part of the Transfer Pricing Officer to determine the arm's length price cannot be fastened with the assessee. It is worth mentioning, while deciding identical matter of

imposition of penalty under section 271G of the Act under similar facts and circumstances in assessee's own case in assessment year 2011-12, the Tribunal in ITA no.5626/Mum/2016 and others dated 01.11.2018 upheld the decision of learned Commissioner (Appeals) in deleting the penalty. In view of the aforesaid, we do not find any infirmity in the decision of learned Commissioner (Appeals). Grounds raised are dismissed.

7. In the result, appeal is dismissed.

Order pronounced in the open court on 20.03.2020

**Sd/-**  
**G. MANJUNATHA**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 20.03.2020**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury  
Sr. Private Secretary

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai