IN THE INCOME-TAX APPELLATE TRIBUNAL "K" BENCH MUMBAI

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND

SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.4951/Mum/2018 (Assessment Year 2007-08)

ITA No.4952/Mum/2018 (Assessment Year 2007-08)

Kaybee Private Limited. 301, 'A' Wing, Solaris-1, Saki Vihar Road, Andheri (E), Mumbai -400072. **PAN: AAACK1715H**	Vs.	ITO-10(1)(3) Room No. 25 B, Ground Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.
Appellant		Respondent

Appellant by : Shri Madhur Agarwal (AR)

Respondent by : Shri Akhtar H. Ansari (DR)

Date of Hearing : 29.06.2020

Date of Pronouncement : 29.06.2020

ORDER UNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. These two appeal by assessee are directed against the order ld. CIT(A)-17, Mumbai dated 27.06.2018, confirming the penalty orders passed under section 271AA and 271BA for Assessment Year 2007-08. In ITA No. 4951/Mum/2018, the assessee has raised following grounds of appeal:

> Each of the grounds 1 sub-grounds of appeal is independent 'and without prejudice to the other.
>
> 1. The Ld. Commissioner of Income-tax (Appeals) -17 ['CIT(A)'] grossly erred in law in holding that the penalty order dated 23.03.2016 passed by the Ld. Assessing Officer ('AO') under section 271AA of the Income-tax Act, 1961 ('Act') is a valid order even when -
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> a. The show cause notice dated 12.03.2013 issued by the Ld. AO under section 274 of the Act was issued in a standard printed format without

pointing out reasons for invoking penalty proceedings under section 271AA in the present case of Appellant; and

b. That even impugned penalty order does not point out the specific information and document which are applicable in the Appellant's case which the Appellant failed to keep and maintain.

Thus, the impugned penalty order does not meet the mandatory jurisdictional requirement of the law.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in upholding the impugned penalty of Rs. 79,231/- under section 271AA of the Act.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in upholding the Ld. AO's impugned penalty order without appreciating the fact that the Appellants' quantum appeal before the Hon'ble Income Tax Appellate Tribunal ('ITAT') for the subject assessment year is pending for adjudication.

4. (a) On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in upholding the impugned penalty under section 271M of the Act without appreciating that whether Kaybee Exim Pte. Ltd., Singapore ('KEPTL') and the Appellant are AEs is a debatable issue and where the Appellant follows one of the bonafide view relying on CBOT Circular and Memorandum explaining the provisions of the Finance Act 2002, the Appellant has a "reasonable cause" under section 273B of the Act for non maintenance of documentation as per section 920 of the Act.

(b) On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in not appreciating that the Appellant was under a bonafide belief that the provisions of section 92 of the Act are not applicable to the transaction between the Appellant and KEPTL based on which the Appellant did not maintain documentation as per section 920 of the Act and hence Appellant's case falls within the ambit of section 273B of the Act.

5. On the facts and circumstances of the case and in law, the Ld. CIT(A) gross erred in upholding the impugned penalty under section 271AA of the Act without appreciating that the Appellant furnished required documents and evidences in the course of proceedings so as to demonstrate that the transactions with respect to yarn brokerage commission rate was at arm's length and as per

market rate of yarn brokerage and hence the Appellant has made sufficient compliance under the law.

6. On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in upholding the Ld. AO's calculation of penalty under section 271AA of the Act at Rs 79,321/- being 2% of transfer pricing adjustment of Rs 33,66,603/- instead of 2% of the amount of the transaction entered into between the Appellant and KEPTL i.e. Rs. 23,79,638/-.

2. The assessee in ITA No. 4952/Mum/2018 has raised the following grounds of appeal:

Each of the grounds I sub-grounds of appeal is independent and without prejudice to the other.

1. The Ld. Commissioner of Income-tax (Appeals) -17 ['CIT(A)'] grossly erred in law in holding that the penalty order dated 23.03.2016 passed by the Ld. Assessing Officer ('AD') under section 271BA of the Income-tax Act, 1961 ('Act') is a valid order even when -

a. The show cause notice dated 12.03.2013 issued by Ld. AO under section 274 of the Act does not specify reasons for invoking penalty proceedings under section 271 BA in the present case of Appellant and thus does not meet the mandatory jurisdictional requirement of the law

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in upholding the impugned penalty of Rs 1,00,000/- under section 271 BA of the Act.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in upholding the Ld. AO's impugned penalty order without appreciating the fact that the Appellants quantum appeal before the Hon'ble Income Tax Appellate Tribunal ('ITAT') for the subject assessment year is pending for adjudication.

4. (a) On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in upholding the impugned penalty under section 271 BA of the Act without appreciating the fact that whether Kaybee Exim Pte. Ltd., Singapore ('KEPTL') and the Appellant are AEs is a debatable issue and where the Appellant follows one of the bonafide views relying on CBDT Circular and Memorandum explaining the provisions of the Finance Act 2002, the Appellant

has a "reasonable cause" under section 273B of the Act for non obtaining audit report in Form 3CEB as per section 92E of the Act.

(b) On the facts and circumstances of the case and in law, the Ld. CIT(A) grossly erred in not appreciating that the Appellant was under a bonafide belief that the provisions of section 92 of the Act are not applicable to the transaction between the Appellant and KEPTL based on which the Appellant had not obtained audit report in Form 3CEB as per section 92E of the Act and hence Appellant's case falls within the ambit of section 273B of the Act.

3. Brief facts of the case are that the assessee-company is engaged in running a service centre and providing assistance in sourcing and procurement of yarn, textiles, home furnishing fabrics, garments, steel, tyres etc. from sources within India to Kaybee Exim Pte Limited Singapore (KEPL). Initially assessment for the year under consideration was completed under section 143(3) on 25.11.2009. Subsequently, the case was reopened under section 148, vide notice dated 30.03.2012. The assessment was completed under section 147/143(3) on 12.03.2013. The assessing officer while passing re-assessment order held that the assessee is associate enterprises (AE) of KEPL and made addition/ adjustment on account of Arms Lengths Price of (ALP) of Rs. 39,66,063/- in respect of the service charge received from KEPL. The assessing officer also initiated penalty under section 271AA and 271BA. The assessing officer and levied penalty under section 271AA of Rs.79,321/- being 2% of the alleged international transaction of Rs. 39,66,063/- between assessee and KEPL and penalty under section 271BA of Rs. 100,000/-, vide order dated 23.03.2016. On appeal before learned

CIT(A), both the orders for levying of penalty under section 271AA and 271BA was confirmed. Thus, in the aforesaid background both the appeals are filed before this Tribunal.

4. We have heard the submissions of the learned authorised representative (ld AR) for the assessee and the learned departmental representative (DR) for the revenue and perused the record carefully. At the outset of hearing the learned AR of the assessee submitted in quantum appeals before the Tribunal in ITA No. 2165/Mumbai/2015 dated 28th of 2020, the Tribunal held that the assessee and KEPL Singapore is not associated enterprises (AE). It was held that no arms length price adjustment could be made on the transaction between assessee and KEPL. The learned AR of the assessee submits their copy of decision of Tribunal dated 28th Februray 2020 is filed. The learned AR further submits that one it was held that assessee is not associated enterprises of KEPL, then it could not be said that assessee had entered to any international transaction. Accordingly, the learned AR of the assessee submits that the assessee has no occasion to report the international transaction or for maintaining any record as provided under section 92E. It was argued that once, the foundation of impugned penalty orders does not survive, therefore the penalty order under section 271 AA and 271BA are liable to be deleted. The ld. AR for the assessee further submits that similar penalty order for assessment year 2006-07 on similar facts were deleted by Tribunal vide order dated 28.02.2020.

5. On the other and the learned DR for the revenue after going through the order of Tribunal in quantum assessment wherein the coordinate bench of the Tribunal held that assessee is not associated enterprises of KEPL Singapore. The learned DR submits that he strongly relied upon the order of lower authorities.

6. We have considered the rival submission of the parties and have gone through the orders of lower authorities. We have also gone through the order of coordinate bench of Tribunal in ITA No. 2165/Mumbai/2015 dated 20th February 2020, wherein it was held that the assessee is not AE of KEPL. The coordinate bench of Tribunal passed following order

> " 2. When this appeal was called out for hearing, learned senior counsel for the assessee submitted that though this appeal involves several legal issues, including the question on validity of the reassessment proceedings, the fundamental issue in this appeal deals with the question as to whether the assessee can be said to be an 'associated enterprises', within meanings assigned under section 92A, of Kaybee Exim Pte Ltd, a Singapore based entity, and, in the event of this issue being held in favour of the assessee, all other issues will be rendered academic and infructuous. He, however, hastens to add that while this issue is now required to be decided in favour of the assessee in the light of binding judicial precedents from Hon'ble Courts above, there are decisions against the assessee, by coordinate benches, in assessee's own cases for preceding assessment years. We are thus urged to take up this issue first, and, thereafter, if necessary, deal with other issues in the appeal. Learned Departmental Representative, even though he is emphatic that there is no reason to deviate from the earlier decisions of the coordinate benches, does not oppose the approach suggested by the learned senior counsel. We,

therefore, begin by taking up the related ground of appeal, i.e. ground no. 3, which is as follows:

The learned CIT(A) erred, in facts and in law, in upholding that Kaybee Exim Pte Ltd Singapore (KPEPTL) is an associated enterprise (AE) of the appellant within the meanings of Section 92A

3. --------

4. ---------

5. -------

18. Learned representatives fairly agree that the case of the Assessing Officer hinges only on application of Section 92A(1) and it does not meet any of the specific conditions set out in Section 92A(2). Once we hold that Section 92A(1) cannot be applied on standalone basis, and has to be essentially considered in conjunction of Section 92A(2) – only when it satisfies at least one of the conditions set out therein, it is clear that the relationship between the assessee company and its KE-S cannot be said to be that of the associated enterprises. The case of the revenue must, therefore, fail on this test.

19. In view of the above discussions, as also bearing in mind entirety of the case, we have to hold that the relationship between the assessee and the KE-S was not of the AEs, and, accordingly, no arm's length price adjustments could be made on the transactions between these two entities. Ground no. 3 is thus allowed, and, as a corollary thereto, the impugned ALP adjustment must, therefore, be deleted for this short reason alone. Ordered, accordingly.

20. As we have decided the appeal on the short issue, as discussed above, we see no need to deal with the other legal and factual issues raised in this appeal. These grievances are academic at this stage.

21. In the result, the appeal is allowed in the terms indicated above."

7. Considering the finding of coordinate bench of Tribunal that the assessee is not associated enterprises of KEPTL for the year under consideration, we are of the view that when the very basis of the foundation of impugned penalties has been set aside, thus, the penalty order would also not survive, therefore we direct the assessing officer to delete the penalty under section 271AA and 271BA, levied vide order dated 23.03.2016 .

8. In the result, both the appeal of the assessee is allowed.

Order pronounced in the open court on 29 /06/2020.

Sd/-	**Sd/-**
S. RIFAUR RAHMAN	**PAWAN SINGH**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 29 .06.2020
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Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "K" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai