

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No.6285/M/2019
Assessment Year: 2013-14**

ACIT-6(2)(2), Room No.504, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Enhance Ambient Communication Pvt. Ltd., Top Floor, Times Tower Kamala City, Senapati Bapat Marg, Lower Parel, Mumbai – 400 013 PAN: AAACE1568L
(Appellant)		(Respondent)

Present for:

Assessee by : None
Revenue by : Shri Jayant Jhaveri, D.R.

Date of Hearing : 24.01.2022
Date of Pronouncement : 24.01.2022

O R D E R

Per Kuldip Singh, Judicial Member:

The Appellant, ACIT-6(2)(2) Mumbai (hereinafter referred to as 'the Revenue) by filing the present appeal sought to set aside the impugned order dated 11.07.2019 passed by the Commissioner of Income-tax (Appeals)-56, Mumbai [hereinafter referred to as the CIT(A)] in consonance with the orders passed by the Id. Transfer

Pricing Officer (TPO)/Assessing Officer (AO) qua the assessment year 2013-14 on the grounds inter alia that :-

“1. On the facts and circumstances of the case and in law the CIT(A) was not justified in deleting the penalty levied u/s 271G of the Act of Rs.3,99,22,018/- by stating that penalty u/s 271G is for default in complying with provisions to section 92D(3) and 92C whereas the notice dated 17.02.2016 was issued to the assessee for submission of documents which is clearly required as per provisions of Section 92D(3).

2. On the facts and circumstances of the case and in law, the CIT(A) was not justified in ignoring the non compliance of the assessee with regard to submission of documents required as per section 92D(3) wherein the details called for, on 17.02.2016, were only submitted on 21.09.2016, which made the assessee liable for penalty u/s 271G and hence the TPO was correct in levying the same.

3. Without prejudice to the above, “On the facts and circumstances of the case and in law, it can be concluded that the notice given for penalty is for default of submission of details called for, as such default of 92D and the later mistake of mention of 92C qualities to be curable mistake”.

4. The appellant prays that the order of the CIT(Appeals) on the above grounds be set aside and that of the AO be restored.

5. The appellant craves leave to amend or alter any ground or to submit additional new ground, which may be necessary.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Enhance Ambient Communication Pvt. Ltd. (hereinafter referred to as the assessee) is a packaging company manufacturing laminated and seamless or extruded plastic tubes catering to the oral care, cosmetics, personal care, pharmaceutical, food and industrial sectors. The company has its headquarter at Mumbai, India, and is part of the Essel group.

3. On receiving a reference under section 92CA(1) of the Income Tax Act (for short ‘the Act’) the TPO issued a notice to the

assessee under section 92CA(2) and under section 92C of the Act on 17.02.2016 and then the assessee through its representative filed a letter dated 29.02.2016 along with audited financials, form No.3CEB, form No.3CED, copy of ROI and a copy of transfer pricing report in compact disc (CD), but failed to enclose the said CD with the letter. Consequently, the order under section 92CA(3) of the Act was passed on 28.10.2016. Since the assessee has failed to furnish the copy of transfer pricing study report and supporting documents allegedly containing in the CD, penalty proceedings under section 271G of the Act were initiated. Declining the contentions raised by the assessee, the TPO levied a penalty of Rs.3,99,22,018/- being (Rs.2,17,27,118/- and Rs.1,81,94,900/- @ 2% of the international transaction amount and 2% of specific domestic transaction amount respectively) under section 271G of the Act.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the penalty by allowing the same. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

5. Despite issuance of the notice to the assessee company none appeared on behalf of it, so the Bench decided to decide this appeal on the basis of material available on record with the assistance of the Ld. D.R. for the Revenue.

6. We have heard the Ld. Departmental Representative for the Revenue, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and case law relied upon.

7. Undisputedly, pursuant to the reference made under section 92CA(1) of the Act, the TPO passed an order dated 28.10.2016 under section 92CA(3) of the Act making transfer pricing adjustment to the tune of Rs.3,39,94,405/-. It is also not in dispute that when the TPO has recorded his satisfaction to initiate the penalty proceedings, he sought to initiate the penalty proceedings under section 271(1)(c) of the Act. It is also not in dispute that the impugned penalty order has been passed by the TPO levying penalty under section 271G of the Act. It is also not in dispute that the TPO called upon the assessee to furnish specific details under section 92C within the meaning of section 92D(3) of the Act in order to benchmark the international transactions entered into by the assessee with its AE.

8. In the backdrop of the aforesaid undisputed facts, the Ld. CIT(A) deleted the penalty by recording following findings:

“9. Examination of the notice dated 17.02.2016 reveal that the same is captioned “Request for submission of documents for the purpose of section 92C of the Income Tax Act 1961 – A.Y. 2013- 14”. Nowhere in the notice the section number 92D is mentioned. This notice was complied with on 12.05.2016. The date of compliance is not material to this case, since at initial state, the validity of this penalty proceedings is under examination.

10. *The penalty imposed here is under section 271G. This penalty is for default under section 92D. The Assessing Officer cites notice dated 17.02.2016 as the one not complied with — fixing same as default. The notice is not under section 92D and hence penalty under section 271G cannot be imposed. Penalty under section 271G cannot be imposed on account of any alleged default under section 92CA(3) which is procedure for Transfer Pricing Officer to follow in computation of Arm's Length Price and 92C which deals with computation of Arm's Length Price and corresponding to these two sections, penalty under section 271G does not apply. In fact section 92C(3)(d) which Transfer Pricing Officer refers to in page 4 of the order is manner of computation of Arm's length price and not a clause which specifies default.*

11. *The matter was examined from the angle of section 292B of Income Tax Act 1961. The proceedings concern a penalty and has reference to point of initiation. Clear specification of default in sine qua non before penalty is imposed. Hence here even section 292B does not come to rescue.”*

9. First of all, when we examine the satisfaction recorded by TPO to initiate the penalty proceedings for non compliance of the notice issued to the assessee to furnish necessary documents for completion of the transfer pricing proceedings as extracted in the assessment order which is recorded as under:

“In view of the adjustment made by the DCIT (Transfer Pricing) - 2(2)(1), Mumbai an amount of Rs.3,39,94,405/- is added to the total income of the assessee. Penalty proceedings u/s 271(1)(c) of the I.T. Act, 1961 are initiated separately for furnishing inaccurate particulars by the assessee within the meaning of that section.”

This satisfaction recorded by the TPO is not a valid one, because the penalty proceedings sought to be initiated under section 271(1)(c) of the Act are not attracted at all to the issue in controversy rather notice was required to be issued under section 92D of the Act to attract provisions contained under section 271G of the Act. Thereafter, bare perusal of the penalty proceedings

shows that the penalty has been levied under section 271G of the Act. So when valid satisfaction has not been recorded no penalty under section 271G of the Act can be levied.

10. Secondly, the Ld. CIT(A) has also dealt with the issue as to issuing an invalid notice being not issued under section 92D of the Act rather notice was issued for alleged default under section 92CA(3) of the Act which is procedure to be followed by TPO for computation of Arm's Length Price. So when firstly valid satisfaction has not been recorded and then valid notice has not been issued very initiation of penalty proceedings are not sustainable in the eyes of law, hence nullity.

11. In view of what has been discussed above, finding no illegality or perversity in the impugned order passed by the Ld. CIT(A), the same is upheld and resultantly the appeal filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 24.01.2022.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 24.01.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.