

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI

BEFORE SHRI PRASHANT MAHARSHI (ACCOUNTANT MEMBER) &
KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 5454/MUM/2017 (A.Y.2012-13)

Dy. Commissioner of Income-tax- 5(3)(1), Room No.519, 5 th Floor Aayakar Bhavan, M.K. Road Mumbai-400 020	vs	Ratnakala Export Pvt Ltd DC-7250, Bharat Diamond Bourse BKC Bandra (E), Mumbai-400 051 PAN : AAECR3763L
APPELLANT		RESPONDENT

Assessee represented by	None
Department represented by	Shri Sunil Kumar Jha (CIT)

Date of hearing	05/05/2022
Date of pronouncement	25/05/2022

ORDER

Per Kavitha Rajagopal (JM):

This appeal has been filed by the Revenue against the order passed by the Ld.CIT(A)-57, Mumbai dated 31/05/2017 deleting the penalty levied by the Assessing Officer under section 271G of the I.T. Act for assessment year 2012-

13. The grounds of appeal are as follow:-

- "1. Whether the CIT(A) was correct in deleting the penalty levied u/s 271G by holding that the assessee had made substantial compliance, failing to note that under TNMM adopted by the assessee, the profit of the international transaction has to be furnished, whereas the assessee has only furnished the entire level margins which consists of overall profits on AE and significant non-AE transactions.*
- 2. Whether the decision of the CIT(A) is not vitiated for the reason that the CIT(A) has not given any finding on how the assessee has complied with clause (D),(g),(h) and (m) of Rule 10D(1), that have been specifically invoked by the TPO.*

3. *Whether the CIT(A) was not incorrect in stating that the TPO should have asked for copies of profit and loss accounts and balance sheets of AE's to make an overall comparison with the gross profitability levels of the assessee with AE's to ascertain diversion of profits, if any ignoring the finding of the ITAT in the case of Aztec Software Technology Services Ltd. Vs ACIT (ITA No. 584/Bang/2006), in which it has been held that there is no legal requirement for the AO to prima facie demonstrate tax avoidance before invoking the provisions of section 92 and 92CA of the Act.*

4. *The Id. CIT(A) erred in holding that there was reasonable cause for non-compliance of sec.92D r/w. Rule 10D(1) without specifying the cause of such non-compliance or demonstrating how the same was reasonable.*

5. *The Id. CIT(A) erred in deleting the penalty for the reason that no adjustment was made to the ALP, failing to note that by not producing the material documents necessary to determine the ALP under any of the prescribed methods u/s 92C(1), the assessee effectively prevented the TPO to make any determination as recorded by the TPO in Para 8 of the order u/.92CA(3)."*

3. The brief facts are that the assessee is engaged in the business of purchasing rough diamonds within and outside India, cutting / polishing the same into finished goods and selling the polished diamonds to customers including foreign entities. The assessment order under section 143(3) read with section 92CA(3) of the I.T. Act dated 21/01/2016 was passed. During the course of the assessment proceedings, the Assessing Officer made reference to the Transfer Pricing Officer (for short 'TPO') to determine the arms length price for the following international transactions:-

S.No.	Nature of the international transactions	Amount in (Rs.)
1.	Purchase of rough diamonds	254,07,36,605
2.	Sales of rough diamonds	39,05,59,371
3.	Sale of Polished diamonds	109,70,42,045
	Total	402,83,38,021

The TPO had sought for details and documents from the Assessee as per rule 10D1) and 10D(3) of the I.T. Rules, 1962 and upon furnishing the said details, the Assessee was called for specific details of the segmental profitability for AE

and non AE transactions. The Assessee had failed to furnish the segmental profitability of AE and non AE transactions on the pretext that the Assessee had not maintained separate books of account for AE and non AE segment. Subsequently, the TPO after issuing a show cause notice under section 271G of the I.T. Act, levied penalty under section 271G of I.T. Act, 1961 of Rs.8,05,66,760/- on the ground that non furnishing of segmental transaction has hampered the TPO from benchmarking various transactions.

4. Aggrieved by the said order, the Assessee was in appeal before the Ld.CIT(A). The Ld.CIT(A) had stated that the TPO alleged that the Assessee has inappropriately applied the TNMM method and that by not furnishing of details the Assessee has not provided the basis for comparing the transactions of AE with another AE and / or non AE, failing to provide any alternative method for benchmarking the international transactions resulting in the TPO accepting the arms length price without examining and determining the same. The Ld.CIT(A) has further contended that all details including segment-wise PLI was furnished by the Assessee. The Ld CIT(A) held that the Assessee had made substantial compliance of providing all necessary information sought for by the TPO for determining the ALP which was accepted by the TPO thereby deleted the penalty levied under section 271G of the I.T. Act, 1961.

5. The Revenue is in appeal before us against the order of Ld. CIT(A) in deleting the penalty levied under section 271G.

6. Though there was no representation on behalf of the Assessee, we proceed to hear the Ld.DR after perusing the materials available on record. The Ld.DR argued that the Assessee being a diamond merchant ought to have

maintained the books of account for each and every transaction and that the order of Assessing Officer levying penalty has to be sustained.

7. Having heard the Ld.DR and perused the materials on record, we are of the view that though there are various grounds of appeal, the only substantial issue that has to be decided is whether the CIT(A) was justified in deleting the penalty levied under section 271G, the other grounds being ancillary to this. From the facts of the case, it is evident that the Assessee has furnished the necessary details for determination of the arm's length price though (ALP) was unable to provide segment-wise profit & loss account of the AE segment and the non AE segment since the Assessee did not maintain separate books of account for AE & non AE segments. Apart from this, the Assessee has complied with the TPO's requirement.

8. As it is noticed that the co-ordinate bench of this Tribunal in Deputy Commissioner of Income Tax 10(1)(2), Mumbai vs Kama Schachter Jewellery (P) Ltd in ITA No.2010/MUM of 2019 dated February 8, 2021 (2021) 127 taxmann.com 677 (Mumbai-Trib) has decided this issue with identical facts relating to furnishing of segmental data of Profit & Loss Account of AE and non AE segment has deleted the penalty levied under section 271G. The relevant portion of the order is hereby reproduced as below:-

"We find, that the aforesaid order of the Tribunal had thereafter been upheld by the Hon'ble High Court of Gujarat in D. Navinchandra Exports (P.) Ltd. 's case (supra). In the backdrop of the aforesaid facts, we herein respectfully follow the view taken by the Tribunal in the case of D. Navinchandra Exports (P.) Ltd. (supra), wherein it was observed that considering the practical difficulties involved in furnishing the segmental details of AE transactions and non-AE transactions in the diamond industry, penalty under Sec. 271G could not be justifiably imposed., Before parting, we may herein observe, that the Tribunal in its aforesaid order had observed that¹ considering the reasonable cause for non-furnishing of the segmental details of the AE transactions and non-AE transactions because of the peculiar nature of the trade in diamond industry,

penalty' u/s 271G even otherwise could not have been imposed as per the mandate of Sec. 273B of the Act. Concurring with the view taken by the Tribunal in its aforesaid order which as observed by us hereinabove had been approved by the Hon'ble High Court, we respectfully follow the same."

9. From the above observation, it is pertinent to point out that the Assessee's case would squarely fall under the decision of the co-ordinate bench and we find no justification in taking a contrary view. Therefore, the findings of the Ld. CIT(A) stands confirmed. The issues of Revenue's appeal are dismissed

10. In the result, the appeal of the Revenue stands dismissed.

Order pronounced in the open Court on 25th day of May, 2022.

Sd/-

sd/-

(PRASHANT MAHARSHI)	(KAVITHA RAJAGOPAL)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated: 25/05/2022

Pavanan

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai