IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI K BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Pavan Kumar Gadale (Judicial Member)]

ITA No. 1223/Mum/2019
Assessment year 2014-15

JSW Energy Limited **..……Appellant**
JSW Center, Bandra Kurla Complex
Bandra (East), Mumbai 400 051
[PAN: AAACJ8109N]

Vs.

Deputy Commissioner of Income Tax
Transfer Pricing- 2(3)(1), Mumbai. **……...……Respondent**

Appearances by:
Rishabh Shah *for the appellant*
Milind Chavan *for the respondent*

Date of concluding the hearing : 14/05/2022
Date of pronouncing the order : 12/08/2022

O R D E R

Per Pramod Kumar VP

1. By way of this appeal, the assessee appellant has challenged the correctness of the order dated 30th January 2019 passed by the learned CIT(A), in the matter of penalty under section 271G of the Income Tax Act, 1961 *(hereinafter referred to as 'the Act')* for the assessment year 2014-15. Grievance of the assessee, in substance and as set out as the first ground of appeal, is that "on the facts and in the circumstances of the case as well as in law, the learned CIT(A) erred in confirming the action of the Transfer Pricing Officer in levying penalty of Rs 50,97,0400 under section 271G r.w.s. 274 of the Income Tax Act, 1961 in relation to the international and specified domestic transactions undertaken by the appellant."

2. The relevant material facts are as follows. The assessee before us is a public company engaged in the business of generation of power, and operation and maintenance of the power plants, as also other allied activities. During the course of its assessment proceedings, the Assessing Officer made a reference under section 92CA(1), for determination of the arm's length price of the international transactions and specified domestic transaction entered into by the assessee with its associated enterprises (AEs), to the Deputy Commissioner of Income Tax,

Transfer Pricing 2(3)(1), Mumbai *(hereinafter referred to as the Transfer Pricing Officer')*. Based on the determination of the arm's length price of the determination of arm's length price by the DCIT, arm's length price adjustments were made in respect of interest received on loans given to the AEs, amounting to Rs 11,88,79,423, in respect of interest on overdue receivable from AEs, amounting to Rs 3,05,278, and in respect of power conversion charges, amounting to Rs 52,95,000, were made by the Assessing Officer. The matter, however, did not rest there. The Transfer Pricing Officer also noted that there was a lapse on the part of the assessee inasmuch the assessee did not comply with, well within the stipulated time of 30 days of receipt of the notice, the requisition made by the TPO for furnishing information maintained under rule 10D. It was noted that the requisitioned information was not furnished within the prescribed period, despite the service of notice issued by the TPO under section 92CA(2) as well as 92D(3), on the assessee. The explanation given by the assessee for the delay in filing of information did not impress the Assessing Officer. He rejected these reasons as 'unacceptable'. It was in this backdrop that the proceedings under section 271G were initiated as the penalty for "failure to furnish information or document under section 92D", for this delay in filing the information requisitioned by the Transfer Pricing Officer. The Transfer Pricing Officer noted that a notice under section 92CA(2) was issued to the assessee on 23.11.2016. The information so requisitioned had as many as twenty points, including, apart from records maintained under rules 10D(1) and 10D(3), certain records, such as '**mechanism (along with supporting documents) by which the price of each transaction was set by you with your associated enterprise**s' to '**copy of assessment order for the AY 2013-14, if any, and copy of appeal orders, DRP orders (if any) for AY 2011-12 and 2012-13**". There is no dispute that there was partial compliance to this requisition as evident from the observations of the TPO, in the impugned penalty order, to the effect that "**the assessee, vide letter dated 5.12.2016, filed the details such as …… However, other details called for, including…….. were not submitted**". Once again, notice under section 92CA(2) dated 22.12.2016 was issued to the assessee calling upon the assessee to furnish the following:

> **(i) A copy of the complete Annual Report of the assessee along with Audited financial statements, Form No.3CEB, Form No.3CD and Return of Income along with computation of income for the year ended 31.03.2014.**
>
> **(ii) Copy of the Transfer Pricing Study Report/Documentation prescribed under Rule 10D(1) or Rule 10D(2A) in the case of an assessee having eligible specified domestic transaction referred to in Rule 10THB].**
>
> **(iii) Copies of all agreements entered into by you with your Associated Enterprises till date.**

3. Once again, the assessee sought an adjournment on 4th January 2017. As noted by the TPO, the adjournment was declined, and, even till 13th February 2017, the assessee did not furnish the requisitioned information. On 13th February 2017, the TPO, for the first time issued a notice under section 92D(3), which was partly complied with. The relevant observations in the penalty order are as follows:

> **6.3 Further, the TPO issued notice u/s 92D(3) of Act on 13.02.2017 requesting the assessee to submit the above-mentioned information/documents as was called for by the notice issued u/s 92CA(2) dated 22.12.2016. In response to the same, vide letter dated 24.02.2017, the assessee filed the Copy of form no 3CEB, financials of the assessee for AY 2014-15, order of CIT(A) for A.Y. 2011-12 but did not submit**

the Transfer pricing study report and other documents prescribed under Rule 10D(1) of Income Tax Rules 1962, in respect of the transactions entered into by the assessee with its AEs.

4. As for the balance information, the assessee prayed for, vide letter dated 24th February 2017, "**to grant us** *(i.e. the assessee)* **an adjournment**". However, no adjournment was granted by the Transfer Pricing Officer. As evident from the impugned penalty order, the requisite transfer pricing study was filed on 7th July 2017, and there has been full compliance with the requisitions made by the TPO subsequently. Elaborate submissions were made to explain the delay in submission of details and on the circumstances in which the delay took place. The assessee's explanation for the inordinate delay in filing of the information mainly was that there was a change of the Chief Financial Officer, and once the new CFO was appointed and was able to take complete charge of things, the due compliances were made. It was thus explained that there was a reasonable cause for the delay. This explanation, as also other submissions made by the assessee, did not, however, impress the Transfer Pricing Officer. He rejected the submissions of the assessee and observed as follows:

8.4 The contentions raised by the assessee are not acceptable for the following reasons:-

a) The TPO issued notices U/s 92CA(2) of the Act dated 23.11.2016 & 22.12.2016 and also the notice U/s 92D(3) of the Act dated 13.02.2017. This shows that TPO has given sufficient time and opportunity to the assessee to Study Report (TPSR) and other furnish Transfer Pricing documents/information required to be maintained under the provision of Rule 10D in respect of the international and specified domestic transactions entered into by the assessee with its AEs. In the present case, notice u/s 92D(3) of the Act was issued to the assessee on 13.02.2017, but the assessee did not furnish a single document/information required to be maintained under sub Rule (a) to (m) of Rule 10D(1) within 30 days (which can be extended by 30 days with the permission TPO, no adjournment granted by PO in this case).

b) Further the assessee has not given any concrete evidence, for its contention that the person concerned looking into the matter was on leave. Also the assessee stated that the company was in the process of appointing of the Chief Financial Officer and this resulted in some inordinate transitional delay. In support to this the assessee submitted certified true copy of board resolution dated 23.01.2017 and 13.06.017. From the copy of resolution dated 23.01.2017, it is evident that Mr. Jyoti Kumar Agarwal was appointed as Chief Financial Officer. However, notice under section 92D(3) was issued on 13.02.2017 . From this it is clear that there was a Chief Financial Officer present in the Company when notice u/s 92D(3) was issued and he/she could have complied with the notice. Without prejudice to the above, it needs to be noted that the TPS and other documents/information as per Rule 10D(1) are supposed to be with the assessee while filing Form 3CEB (in this case on or before 30th Nov. 2014) and those can be furnished before the TPO within 30 days, just by copying one set, which does not require any application of mind and can be submitted without a CFO also, However, in this case, the assessee did not furnish a single document/information required to be maintained under sub Rule (a) to (m) of Rule 10D(1) within 30 days.

c) Further the assessee contented that TP Study (for specified domestic transactions) was already submitted vide letter dated 7th July 2017. In this regard it is pertinent to mention that this filing of TPS of Specified domestic transactions by the assessee was not within the time of 30 days after receipt of notice under section 92D(3) as prescribed under section 92D(3).

d) The, assessee relied upon Annapurna Business Solutions vs Assistant Commissioner of Income-tax, Circle 6(1) [17 taxmann.com 125 (Hyderabad - Trib.) 2012] which states that if documents and information prescribed under Rule 10D are voluminous then it would only be in rare cases that all the clauses of aforesaid sub-rules would be attracted. Further, supporting documents, official publications, agreements, reports, market research studies, technical publications of Government or other institute of national or international repute, and all the documents mentioned in Rule 10D(3) may not be necessary in case of every Assessee. This contention is also not acceptable as in this case, as stated above, not a single document required to be maintained under Rule 10D was furnished by the assessee within 30 days on receipt of the notice under section 92CA(2) as well as 92D(3).

e) Further, the contention of the assessee that penalty under section 271G could only be initiated only for specific failure to furnish information or document as required under section 92D(3) of the Act is factually incorrect as the assessee has failed to furnish any of the documents required to be maintained under the rule 10D within the time allotted under section 92D(3). Therefore the case laws relating to the specific failure as cited by the assessee are not relevant in this case.

f) Assessee further stated that he filed the balance information required to be maintained under Rule 10D vide submission dated 14 August 2017, 23 August 2017, 8 September 2017, 21 September 2017, 28 September 2017 and 16 October 2017, which is well within the time prescribed under section 92D(3) of the Act. The said contention of the assessee is not relevant and factually incorrect as the assessee has failed to furnish any of the documents required to be maintained under the rule 10D within the time allotted under section 92D(3). Further, in this case, the issue is not of furnishing the documents or information but of furnishing the same within the prescribed time as stipulated in the Act.

g) The contention of the assessee that the TP order passed for AY 2014-15 does not state that the penalty proceedings under section 271G should be initiated separately is not factually correct as in the present case, TPO has stated in para 2 of the order under section 92CA(3) that notice u/s 271G r.w.s. 274 of the Act dated 12.06.2017 was issued to the assessee to show cause why an order imposing penalty should not be made u/s 271G of the Act.

Without prejudice to the above, it is not requirement of law to state in the TP order that the penalty proceedings under section 271G should be initiated separately. Penalty proceedings under section 271G can be initiated even before passing the order u/s. 92CA(3) if there is failure on part of the assessee to furnish any such information or document as required by sub-section (3) of section 92D of the Act.

h) The contention of the assessee that TPO accepted Transfer Pricing Report of the assessee is not acceptable. In this regard it is stated that on a plain reading of provisions of Sec 271G of the Act, it may be seen that there is no mention or linkage to the adjustment made by the TPO/ALP determined by the TO or acceptance of Transfer Pricing Study Report as one of the basis for levy of Penalty under this Section. Section 271G has to be seen independently of the final adjustment made by the TPO in the ALP of the transactions with AE. It is important to mention that in case an ALP adjustment was made in the case of the assessee then the penalty provisions us. 271(1) (c) would have been separately considered by the Assessing Officer, which is mutually exclusive from the levy of Penalty under Section 271G of the Act in this case. Both these penalty provisions are mutually exclusive and not overlapping. The fact that making an ALP adjustment is not a condition precedent for levy of penalty under section 271G is apparent from the provisions of this section which is reproduced below for ready reference:

> **"If any person who has entered into an international transaction or specified domestic transaction fails to furnish any such document or information as required by sub-section (3) of section 92D, the Assessing Officer or the Transfer Pricing Officer as referred to in section 92CA or the Commissioner (Appeals) may direct that such person shall be liable to a penalty a sum equal to two per cent value of the international transactions for each such failure"**

Without prejudice to the above, in this case TPO has not accepted TPSR (Transfer Pricing Study Report) as it is and made adjustment in Arm's Length Price as stated in Para 5 above.

i) Assessee also has stated that they have maintained the proper documentation as prescribed by the Income Tax Act. It is pertinent to mention here that in this case maintenance of documents is not the issue but furnishing the same within prescribed time is the issue.

8.5 In this case, notice under section 92CA(2) was issued on 23.11.2016 and 19.12.2016 to furnish information/documents required to be maintained under Rule 10D(1). Further, the TPO issued the notice u/s 92D(3) of the Act on 13.02.17. However, the assessee furnished TPS and some of the information/documents as required by section 92D only on 07.07.2017. From the above, it is explicitly clear that the assessee had failed, without reasonable cause, to furnish the information/documents as required in section 92D within the specified time limit of 30 days as stated in section 92D(3) of Act. It is also pertinent to mention here that the assessee partly complied on 07.07.2017 that is, after more than 220 days from the issuance of the first notice.

8.6 On the issue of levy of penalty u/s 271G for non furnishing of documents/information as required u/s 92D, it is pertinent to have a look at the intention of the legislature for introducing section 271G. The relevant portion of memorandum of budget 2001 is reproduced below

> **"With a view to ensuring that multinational enterprises comply with the requirements of the new sections, it is also proposed to amend section 271 and insert new sections 271AA, 271BA and 271G in the Income-tax Act, so as to provide for the penalty to be levied in cases of non-compliance with the procedural requirements and in cases of understatement of profits through fraud or wilful negligence.**

It is clear from the above that the intention of the legislature for levying penalty u/s 271G is for non-compliance with the procedural requirements. In this case, also as stated above, the assessee has failed to furnish, without reasonable cause, the documents/information as required by section 92D within the stipulated time and this is nothing but non-compliance to statutory notices with procedural requirements.

8.7 Therefore, in view of the above facts and circumstances of the case, I am of the considered opinion that the assessee has, without any reasonable cause, failed to furnish the information/document as required under section 92D(3), within the specified time limit of 30 days as stated in section 92D(3) of Act in respect to the International transactions and specified domestic transactions entered into with its AEs, and accordingly, I am satisfied that it is a fit case to levy penalty u/s. 271G r.w.s. 274 of the Act.

5. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) confirmed the action of the Transfer Pricing Officer, and, while doing so, observed as follows:

> **5. The alleged default is that on 13.02.2017 a notice under section 92D(3) was issued, which was not complied with. A copy of the notice is as under:**
>
> **Office of The**
> **DEPUTY COMMISSIONER OF INCOME TAX,**
> **[Transfer Pricing]-2(3)(1),**
> **Room No 14, 30th Floor, Air India Building, Nariman Point,**
> **MUMBAI-400021**
>
> **No. DCIT/TP-2(3)(1)/92D/2016-17** **Date:13.02.2017**
>
> **The Principal Officer,**
> **JSW Energy Ltd,**
> **JSW Centre,**
> **Bandra Kurla Complex,**
> **Bandra (East),**
> **Mumbai-400081**
>
> **Sub: Notice u/s 92D(3) of the I.T Act, 1961- information to be furnished in connection with the proceedings of JSW Energy Ltd (PAN AAACJ81098) u/s. 92CA(1) of the Act- A.Y. 2014-15 – regarding.**
> *****************
>
> **Your case has been referred by DCIT-Central-8(3) Mumbai, to this office u/s. 92CA(1) for determination of Arm's Length price for the specified domestic/international transactions as specified in their letter dated 07.11.2016.**
>
> **2. In this connection you are requested to submit the following information/documents.**
>
> **(i) A copy of the complete Annual Report of the assessee alongwith Audited financial statements, Form No. 3CEB, Form No. 3CD and Return of Income alongwith computation of income for the year ended 31.03.2014.**
>
> **(ii) Copy of the Transfer Pricing Study Report/Documentation prescribed under Rule 10D(1) of Rule 10D(2A) in the case of an assessee having eligible specified domestic transaction referred to in Rule 10THB.**
>
> **(iii) Copies of all agreements entered into by your with your Associated Enterprises till date.**
>
> **3. The aforesaid documents may please submitted on or before 24.02.2017.**
>
> **Sd/-**
> **Dy. Commissioner of Income-Tax**
> **Transfer Pricing-2(3)(1)**
> **Mumbai.**

The above notice was to be complied with within 30 days under section 92D(3) and further on an application, it can be extended by 30 days in accordance with the proviso to said section.

6. In the instant case there is no doubt that the notice is not complied with. Thus initiation is correct and assessee has been establish reasonable cause within meaning under section 273B of Income Tax Act 1961.

7. The objections of the appellant are:

A. Over all, within the proceedings, the company acted in good faith and all details were provided to Transfer Pricing Officer (Para 12 of written submission)

B. At the specific point of time of default company was in process of appointing new CFO which is words of appellant *" resulted in some inordinate transitional delays - including delay in appointment of the authorized personnel of the Company. As a result of this, the appellant was facing hardship in collation of the requisite information."* (Para 12 of written submission).

C. The Transfer Pricing study report (for specified domestic transaction) was submitted to Transfer Pricing Officer on 07.07.2017 (para 14 of written submission).

D. There was no application of mind on part of Transfer Pricing Officer (para 20 of written submission).

E. It is not recorded in the assessment order that penalty proceedings under section 271G is separately initiated (Para 22 of written submission).

8. The Transfer Pricing Officer in order of penalty mention regarding compliance as under:

> **6.3 Further, the TPO issued notice u/s 92D(3) of Act on 13.02.2017 requesting the assessee to submit the above mentioned information/documents as was called for by the notice issued u/s 92CA(2) dated 22.12.2016. In response to the same, vide letter dated 24.02.2017, the assessee filed the Copy of form no 3CEB, financials of the assessee for A.Y. 2U14-15, order of CIT(A) for A.Y. 2011-12 but did not submit the Transfer Pricing study report and other documents prescribed under Rule 10D(1) of Income Tax Rules 1962, in respect of the transactions entered into by the assessee with its AEs.**

Therefore penalty proceedings was initiated on 12.06.2017. Reply to notice under section 274 r.w. 271G was given on 15.03.2018, in between transfer pricing order under section 92CA(3) was passed.

9. The objections before me is similar to what is stated before Transfer Pricing Officer. The view of Transfer Pricing Officer on the specific reason attributed for the default is reproduced below:

> **(b) Further the assessee has not given any concrete evidence for its contention that the person concerned looking into matter was on leave. Also the assessee stated that the company was in the process of appointing of the Chief Financial Officer**

and this resulted in some inordinate transitional delay. In support to this the assessee submitted certified true copy of board resolution dated 23.1.2017 and 13.06.2017. From the copy of resolution dated 23.01.2017, it is evident that Mr. Jyoti Kumar Agarwal was appointed as Chief Financial Officer. However, notice under section 92D(3) was issued on 13.02.2017. From this it is clear that there was a chief Financial Officer present in the Company when notice u/s. 92D(3) was issued and h/she could have complied with the notice. Without prejudice to the above, it needs to be noted that the TPSR and other documents/information as per Rule 10D(1) are supposed to be with the assessee while filing Form 32EB (in this case on or before 30th Nov, 2014) and those can be furnished before the TPO within 30 days, just by copying one set, which does not require any application of mind and can be submitted without a CFO also. However, in this case, the assessee did not furnish a single document/information required to be maintained under sub Rule (a) to (m) of Rule 10D(1) within 30 days.

10. The first question is whether the default has taken place. There is no doubt that item 2 of the notice under section dated 13.02.2017 did describe *"Documentation as prescribed in Rule 10D(1) for Rule 10D(2A) is a case of assessue lining eligible specified domestic transaction referred to in Rule 10THB]"*. There is no lack of clarity in the same. Moreover law does not prescribe form in which information required under section 92D(3) is to be furnished.

11. Next comes the compliance part. A statutory notice is to be complied. In the notice it is clearly specified to be one under section 92D(3). The Transfer Pricing Officer issued notice with direction to assessee to comply by 24.02.2017, short of the statutory 30 day period. Any person who has received a notice from a statutory authority has to comply with the same. If there are practical difficulties, an application is to be made and here the time is extendable upto 60 days.

12. The notice issued is calling for the production of pre existing documents which is to be maintained compulsorily and is prescribed in section 92D(1). These were existing at time Transfer Pricing study is finalised. There is no application of mind involved and just a mechanical delivery is sufficient here. Maintenance of the document prescribed in Rule 10D(1)/10D(2) is a separate matter. The issue is non-production when called for by Transfer Pricing Officer and for this reasonable cause is to be established.

13. The sole factual reason adduced is the appointment of CFO. The new CFO has been appointed one month prior to same. Hence the non-production of the same before Transfer Pricing Officer has no bearing on the reason adduced.

14. I had noted the fact that eventually all details were produced before Transfer Pricing Officer. But the procedural default does not get effaced by not complying with the point (i) to notice dated 13.02.2017. I note that point (i) is complied which is the non statutory part. (i) of notice in the first place is the statutory part. Nothing happened after receipt of notice, no time extension sought within 30 days and no *suo motu* compliance made ever within 60 days. Reasons adduced is not justified. In fact the details were provided after initiation and issue of notice under section 271G. (Refer Para 6.5 of order of penalty, which contain specific reference to notice dated 13.02.2017).

15. In regard to non-recording of initiation of penalty proceedings in assessment order, firstly unlike section 271(1)(c), where proceedings is to be initiated in course of assessment such requirement is not needed here since law does not prescribe so. Moreover even before

order under section 92CA(3) of TPO and the assessment order the penalty proceedings under section 271G was initiated.

16. In regard to application of mind, the notice of Transfer Pricing Officer is focused. One statutory particulars plus two supporting documents were called for. The allegation of non-application of mind is rejected.

17. Considering all aspects I hold that the penalty imposed by Transfer Pricing Officer is justified. Accordingly, the grounds 1 to 5 are dismissed.

6. The assessee is not satisfied and is in further appeal before us.

7. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position.

8. Let us begin by reproducing the relevant statutory provisions, namely Sections 92D and Section 271G of the Income Tax Act, 1961 and rule 10D of the Income Tax Rules, 1962, as these provisions stood at the material point of time:

Maintenance and keeping of information and document by persons entering into an international transaction or specified domestic transaction

92D. (1) Every person who has entered into an international transaction or specified domestic transaction shall keep and maintain such information and document in respect thereof, as may be prescribed.

(2) Without prejudice to the provisions contained in sub-section (1), the Board may prescribe the period for which the information and document shall be kept and maintained under that sub-section.

(3) The Assessing Officer or the Commissioner (Appeals) may, in the course of any proceeding under this Act, require any person who has entered into an international transaction or specified domestic transaction to furnish any information or document in respect thereof, as may be prescribed under sub-section (1), within a period of thirty days from the date of receipt of a notice issued in this regard:

Provided that the Assessing Officer or the Commissioner (Appeals) may, on an application made by such person, extend the period of thirty days by a further period not exceeding thirty days.

Penalty for failure to furnish information or document under section 92D.

271G. If any person who has entered into an international transaction or specified domestic transaction fails to furnish any such information or document as required by sub-section (3) of section 92D, the Assessing Officer or the Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to two percent of the value of the international transaction or specified domestic transaction for each such failure.

Information and documents to be kept and maintained under section 92D.

10D. (1) Every person who has entered into an international transaction or a specified domestic transaction shall keep and maintain the following information and documents, namely:—

(a) a description of the ownership structure of the assessee enterprise with details of shares or other ownership interest held therein by other enterprises;

(b) a profile of the multinational group of which the assessee enterprise is a part along with the name, address, legal status and country of tax residence of each of the enterprises comprised in the group with whom international transactions or specified domestic transactions, as the case may be, have been entered into by the assessee, and ownership linkages among them;

(c) a broad description of the business of the assessee and the industry in which the assessee operates, and of the business of the associated enterprises with whom the assessee has transacted;

(d) the nature and terms (including prices) of international transactions or specified domestic transactions] entered into with each associated enterprise, details of property transferred or services provided and the quantum and the value of each such transaction or class of such transaction;

(e) a description of the functions performed, risks assumed and assets employed or to be employed by the assessee and by the associated enterprises involved in the international transaction or the specified domestic transaction;

(f) a record of the economic and market analyses, forecasts, budgets or any other financial estimates prepared by the assessee for the business as a whole and for each division or product separately, which may have a bearing on the international transactions or the specified domestic transactions entered into by the assessee;

(g) a record of uncontrolled transactions taken into account for analysing their comparability with the international transactions or the specified domestic transactions] entered into, including a record of the nature, terms and conditions relating to any uncontrolled transaction with third parties which may be of relevance to the pricing of the international transactions or specified domestic transactions, as the case may be];

(h) a record of the analysis performed to evaluate the comparability of uncontrolled transactions with the relevant international transaction or specified domestic transaction;

(i) a description of the methods considered for determining the arm's length price in relation to each international transaction or specified domestic transaction or class of transaction, the method selected as the most appropriate method along with explanations as to why such method was so selected, and how such method was applied in each case;

(j) a record of the actual working carried out for determining the arm's length price, including details of the comparable data and financial information used in applying the most appropriate method, and adjustments, if any, which were made to account for differences between the international transaction or the specified domestic transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions;

(k) the assumptions, policies and price negotiations, if any, which have critically affected the determination of the arm's length price;

(l) details of the adjustments, if any, made to transfer prices to align them with arm's length prices determined under these rules and consequent adjustment made to the total income for tax purposes;

(m) any other information, data or document, including information or data relating to the associated enterprise, which may be relevant for determination of the arm's length price.

(2) Nothing contained in sub-rule (1), in so far as it relates to an international transaction, shall apply in a case where the aggregate value, as recorded in the books of account, of international transactions entered into by the assessee does not exceed one crore rupees :

Provided that the assessee shall be required to substantiate, on the basis of material available with him, that income arising from international transactions entered into by him has been computed in accordance with section 92.

(2A) Nothing contained in sub-rule (1), in so far as it relates to an eligible specified domestic transaction referred to in rule 10THB, shall apply in a case of an eligible assessee mentioned in rule 10THA and—

(a) the eligible assessee, referred to in clause (i) of rule 10THA, shall keep and maintain the following information and documents, namely:—

(i) a description of the ownership structure of the assessee enterprise with details of shares or other ownership interest held therein by other enterprises;
(ii) a broad description of the business of the assessee and the industry in which the assessee operates, and of the business of the associated enterprises with whom the assessee has transacted;
(iii) the nature and terms (including prices) of specified domestic transactions entered into with each associated enterprise and the quantum and value of each such transaction or class of such transaction;
(iv) a record of proceedings, if any, before the regulatory commission and orders of such commission relating to the specified domestic transaction;
(v) a record of the actual working carried out for determining the transfer price of the specified domestic transaction;
(vi) the assumptions, policies and price negotiations, if any, which have critically affected the determination of the transfer price; and
(vii) any other information, data or document, including information or data relating to the associated enterprise, which may be relevant for determination of the transfer price;

(b) the eligible assessee, referred to in clause (ii) of rule 10THA, shall keep and maintain the following information and documents, namely:—

(i) a description of the ownership structure of the assessee co-operative society with details of shares or other ownership interest held therein by the members;
(ii) description of members including their addresses and period of membership;
(iii) the nature and terms (including prices) of specified domestic transactions entered into with each member and the quantum and value of each such transaction or class of such transaction;
(iv) a record of the actual working carried out for determining the transfer price of the specified domestic transaction;
(v) the assumptions, policies and price negotiations, if any, which have critically affected the determination of the transfer price;
(vi) the documentation regarding price being routinely declared in transparent manner and being available in public domain; and

(vii) any other information, data or document which may be relevant for determination of the transfer price.

(3) The information specified in sub-rules (1) and (2A) shall be supported by authentic documents, which may include the following :

(a) official publications, reports, studies and data bases from the Government of the country of residence of the associated enterprise, or of any other country;
(b) reports of market research studies carried out and technical publications brought out by institutions of national or international repute;
(c) price publications including stock exchange and commodity market quotations;
(d) published accounts and financial statements relating to the business affairs of the associated enterprises;
(e) agreements and contracts entered into with associated enterprises or with unrelated enterprises in respect of transactions similar to the international transactions or the specified domestic transactions, as the case may be;
(f) letters and other correspondence documenting any terms negotiated between the assessee and the associated enterprise;
(g) documents normally issued in connection with various transactions under the accounting practices followed.

(4) The information and documents specified under sub-rules (1), (2) and (2A), should, as far as possible, be contemporaneous and should exist latest by the specified date referred to in clause (iv) of section 92F:

Provided that where an international transaction or a specified domestic transaction continues to have effect over more than one previous year, fresh documentation need not be maintained separately in respect of each previous year, unless there is any significant change in the nature or terms of the international transaction or the specified domestic transaction, as the case may be, in the assumptions made, or in any other factor which could influence the transfer price, and in the case of such significant change, fresh documentation as may be necessary under sub-rules (1), (2) and (2A) shall be maintained bringing out the impact of the change on the pricing of the international transaction or the specified domestic transaction.

(5) The information and documents specified in sub-rules (1), (2) and (2A) shall be kept and maintained for a period of eight years from the end of the relevant assessment year.

9. As a plain reading of the above statutory provisions show, condition precedent for imposition of penalty under section 271G is failure "**to furnish any such information or document as required by sub-section (3) of section 92D".** Section 92D(3), in turn, provides that an Assessing Officer or the Commissioner (Appeals) may, in the course of any proceedings under the Income Tax Act, 1961, "**require any person who has entered into an international transaction or specified domestic transaction to furnish any information or document in respect thereof, as may be prescribed",** under section 92D(1), **"within a period of thirty days from the date of receipt of a notice issued in this regard"**. Rule 10D sets out the information and documents to be maintained under section 92D(1),. A proviso to Section 92D(3) permits the Assessing Officer or the Commissioner (Appeals), on an application being made to them, to extend the period for furnishing the information by another 30 days. What essentially follows

that in order to be a valid notice under section 92D(3), it must permit at least 30 days' time to the assessee for furnishing the information maintained under rule 92D(1) read with rule 10D, and as requisitioned in the notice. This period of 30 days, upon an application being made by the assessee, can be extended by a maximum period of another 30 days, but that is at the discretion of the Assessing Officer or the Commissioner (Appeals)- as the case may be. As we deal with these provisions, we may also take note of the provisions of Section 92CA(2) which provide that where a reference is made to the Transfer Pricing Officer under section 92CA(1), "**the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction or specified domestic transaction referred to in subsection (1)**". It is important to bear in mind the fact that the notices under section 92D(3) and notices under section 92CA(2) are qualitatively different and have different consequences for non-compliance or for delay in compliance. The first significant point of distinction is that the former deals with the information prescribed to be maintained under section 92D(1) read with rule 10D, and the latter deals with "any evidence on which the assessee may rely in support of the computation made by him of the arm's length price". The second important point of distinction is, and that is material in the present context, that while non-compliance with a notice under section 92D(3) may result in being visited with a penalty under section 271G, no such consequence is visualized, under section 271G, for non-compliance with the notices under section 92CA(2). The third important point of distinction is that while a valid notice under section 92D(3) must at least allow 30 days of time to the assessee for furnishing of the requisitioned information, no such time restrictions are visualized for notices under section 92CA(2). Accordingly, the time permitted for compliance to notice under section 92CA(2) is to be tested on the ground of 'reasonableness' alone. As we deal with these aspects of the matter, and particularly from the point of view of first and second points of distinction, we may usefully refer to the observations made by a coordinate bench of this Tribunal, in the case of **Cargill India Pvt Ltd Vs DCIT [(2008) 110 ITD 616 (Del)], as follows:**

> **27……..If in the notice non-prescribed information is also called for, it would not be treated as notice under section 92D(3) but under section 92CA(3) or some other provision of the Act irrespective of the title or label is given to such a notice. Relevant information can be sought under a notice under section 92CA(3) also. Further, there is no restriction on furnishing prescribed information in response to notice under section 92CA(2) of the Act to support the computation of ALP by the taxpayer. However, we do not see any authority under section 92D(3) with the T.P.O. to require the taxpayer to furnish non-specified information or such information or document already filed by the taxpayer or use of the provision without asking the taxpayer to support first its ALP of International transactions. The case of any person other than the taxpayer for notice under section 92D(3) stands on a different footing than of the taxpayer to whom a notice under section 92CA(2) has been issued**".
>
> **29.1 It is evident from the above provisions that penalty under section 271G can be imposed on any person who has entered into an international transaction but fails to furnish information or document as required under sub-section (3) of section 92D. ……..**
>
> **30. With the above legal background, we proceed to consider facts and circumstances of the case. The TPO in this case issued first notice on 22-9-2005 which has been reproduced in the earlier part of this order. In para 1 of the notice, he asked the assessee to support and substantiate the computation of ALP in international transactions. This is required by**

section 92CA(2). As per para No. 2 the T.P.O. further required to furnish information including the balance sheet, profit and loss account, statement of computation of income, audit report, tax report and also, "information and documents maintained as prescribed under section 92D of Income-tax Act, 1961 read with rule 10D of Income-tax Rules" without specifying any particular information clause of rule 10D. The aforesaid notice was a notice under section 92CA(2) but the TPO by asking further information made it a notice under section 92CA(3). Only under above sub-section TPO can call for information like balance sheet, P&L account, and audit report, which already stood filed and which are un-prescribed. Such unspecific information could not be required under section 92D(3). Why and how information already furnished and could be obtained from Assessing Officer was required or needed is not clear from the notice or other material available on record. The notice was issued in a casual manner. The TPO had not examined records of the tax payer nor nature or details of International transactions. There was total lack of application of mind as to what information was required in this case. It was a omnibus notice without any regard of unwarranted heavy burden it was likely to place on the taxpayer not authorized under section 92D(3). It was an unintelligible notice where all the information and documents maintained under rule 10D of Income-tax Rules were required in addition to the information referred to above.

31. The second notice issued on similar lines on 13-10-2005 asking for submission of documents by 7-11-2005 did not improve the situation. A third notice dated 8-11-2005 was again issued quoting provision of section 92D and calling upon the assessee to file information and documents latest by 21-11-2005. The said notice also had all infirmities noted in the first notice.

32. In the light of what we have discussed above relating to the requirement of valid notice under section 92D(3) of the Act, above mentioned notices cannot be treated as valid and legal to justify the application of provision under section 271G of the Act and levy of penalty ……These are *omnibus* notices issued without application of mind and without considering documents already placed by the taxpayer on record and without consideration as to which of the specific clauses of sub-rule (1) or other sub-rules was attracted or which relevant information was needed in this case. Under section 92D(3), Assessing Officer or CIT (Appeals) is authorized to require prescribed information but here both prescribed and un-prescribed information like balance sheet, profit and loss account, computation of income etc. was also required to be furnished from the taxpayer before the taxpayer could file evidence under section 92CA(2). Not only primary documents necessary to support the computation of ALP of taxpayer, but also supporting documents detailed in sub-rule (3) of rule 10D were required to be furnished without considering which supporting documents out of several mentioned in various clauses of the said sub-rule were available with the taxpayer. …….. The notice being illegal question of levy of penalty did not arise.

[Emphasis, by underlining, supplied by us]

10. Let us, in the light of our foregoing analysis of the legal position and the above-extracted views of the coordinate bench, revert to the facts of this case. We have noted that, in the present case, there was only one notice issued by the Transfer Pricing Officer under section 92D(3), and that was a notice dated 13th February 2017- which is reproduced on page 6 and 7 of this order. This notice is vitiated in law for more reasons than one. This notice requires the assessee to submit the information by 24th February 2017, which gives less than 30 days of time to the assessee- as is the mandatory requirement under section 92D(3). It is also important to note that, vide letter dated 24th February 2017, the assessee made part compliance to the requisition and

specifically prayed for an adjournment to furnish the balance information. No such adjournment was granted by the Transfer Pricing Officer. The notice dated 13th February 2017 was thus contrary to the scheme of the law, and the defect therein was not even addressed later. The trigger for the imposition of the impugned penalty was non-compliance with the notice dated 13th February 2017, but then, in the light of the above discussions, this notice was vitiated in law. A valid notice under section 92D(3) being served upon the assessee is a condition precedent for imposition of penalty for non-compliance with such a notice. As a matter of fact, learned CIT(A) has, as noted earlier in this order, himself observed that "**The Transfer Pricing Officer issued notice with direction to assessee to comply by 24.02.2017, short of the statutory 30 day period**" and that should be reason enough to hold the notice as illegal. However, learned CIT(A) goes on to add that "**Nothing happened after receipt of notice, no time extension sought within 30 days and no *suo motu* compliance made ever within 60 days";** this is factually incorrect. After service of notice, the part-compliance was made, and the assessee specifically requested for extension of time, vide letter dated 24th February 2017- a copy of which is placed before us in the paper-book, and there is nothing on record even to suggest that this prayer was disposed of. As for the question of *suo-motu* compliance, that is irrelevant for the purpose of penalty under section 271G. It is so because it is only a non-compliance to notice under section 92D(3), which can be visited with a penalty under section 271G. Whether there is compliance to Section 92D(1) or not, on a standalone basis, cannot cause enough for the imposition of penalty under section 271G, or even non-furnishing of such information to the Assessing Officer can be visited with penalty under section 271G, unless the assessee is served with a lawful notice under section 92D(3) and such a notice has not been complied with. There is no, and cannot be any, a dispute about this fundamental legal position. Therefore, unless a non-compliance with a valid notice under section 92D(3) is established, there is no occasion to impose a penalty under section 271G. It is also elementary that when the notice, stated to be a notice under section 92D(3), itself is illegal inasmuch as it is contrary to the scheme of Section 92D(3), it cannot have a legal consequence either. The present proceedings are with respect to non-compliance with this notice dated 13th February 2017, which is in fact the only notice issued under section 92D(3) of the Act, and, therefore, the very foundation of the impugned penalty ceases to hold good in law on account to the above discrepancy, and illegality, in the notice dated 13th February 2017. The second reason as to why we must uphold the plea of the assessee is this. We have also noted that the Transfer Pricing Office has requisitioned the following information in the said notice- (i) a copy of the complete Annual Report of the assessee along with Audited financial statements, Form No. 3CEB, Form No. 3CD and Return of Income along with computation of income for the year ended 31.03.2014; (ii) a copy of the Transfer Pricing Study Report/Documentation prescribed under Rule 10D(1) of Rule 10D(2A) in the case of an assessee having eligible specified domestic transaction referred to in Rule 10THB: and (iii) copies of all agreements entered into by your with your Associated Enterprises till date. Clearly, therefore, the notice, termed as notice under section 92D(3), requisitions information other than the information prescribed under section 92D(1) read with rule 10 D as well; item no. (i) and item no. (iii) admittedly indicates information other than the prescribed information. In view of the observations of the coordinate bench, in the case of **Cargill India** *(supra),* to the effect that "**The aforesaid notice was a notice under section 92CA(2) but the TPO by asking further information made it a notice under section 92CA(3). Only under above sub-section TPO can call for information like balance sheet, P&L account, and audit report, which already stood filed and which are un-prescribed. Such unspecific information could not be required under section 92D(3)",** such a course of action was impermissible under section 92D(3). The notice under section 92D(3) was vitiated in law for this reason also. The third

reason why the plea of the assessee deserves to be upheld is this. The proceedings under section 271G are subject to the provisions of Section 273 B, which categorically stated that "**notwithstanding anything contained in the provisions of"** *inter alia* **section 271G, "no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause[46] for the said failure**". It cannot be in dispute that penalty under section 271G is not an automatic consequence of non-furnishing of the information maintained under section 92D(1) read with rule 10D, since section 273 i*nter alia* provides that penalty under section 271G cannot be imposed in case the person concerned can demonstrate that there was a reasonable cause for his failure referred to in section 271G. In other words, in case the assessee can show reasonable cause for his failure for non-furnishing of the information within the stipulated time, a penalty under section 271G cannot be imposed. However, what will constitute reasonable cause, is essentially a question of fact, which needs to be determined after taking into account the facts and circumstances of each case. These facts and circumstances are best known by the person concerned and, therefore, it is clearly his responsibility to give the necessary explanations to the officer who is to adjudicate whether or penalty is to be levied. When an explanation is offered by the person concerned, it is the duty of the officer to objectively consider the same and determine whether, on the facts of a particular case, such an explanation could possibly explain the default. The officer is not to elaborate upon what should have happened in ideal circumstances, but he has only to ascertain whether there are any real inconsistencies or factual errors in the explanation and whether, in a real-life situation, assessee's explanation may hold good. As observed by the Hon'ble Supreme Court in the case of Hindustan Steel Ltd Vs State of Orissa [(1972) 83 ITR 26 (SC)], "an order imposing a penalty for failure to carry out a statutory obligation is the result of quasi-criminal proceedings, and 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 to its obligations." Having discussed this position of settled law, let us come back to the facts of this case. The reason for non-furnishing of information within the stipulated time is that there was no Chief Financial Officer at the relevant point of time. The Transfer Pricing Officer has rejected this explanation on the ground that, firstly, the resolution for the appointment of the CFO was passed on 23.01.2017 and 13.06.2017 and that, in any event, the information in question could "**be furnished before the TPO within 30 days, just by copying one set, which does not require any application of mind and can be submitted without CFO also**". The absence of a CFO, in a large organization like the assessee, is indeed something serious and not a matter of course. Even when a new CFO is appointed, it takes him a while to get a grip over things and ensure the smooth running of the business. It is, therefore, indeed possible that the absence of the CFO, or the fact that it was a transitory phase when the new CFO was taking over, could have been the real reason for the delay in furnishing the information. The balance of probabilities does favour this explanation of the assessee. No doubt that in an ideal situation, such a situation should not have developed, and people at the operational level should have ensured scrupulous compliance with all requisitions from the TPO, but we are not sitting in judgment about what should have happened in an ideal situation. We are only concerned with whether the explanation of the assessee is a reasonable explanation vis-à-vis the ground realities. In our considered view, the explanation of the assessee deserves to be accepted as it is quite in harmony with the ground realities of life, and there is no good reason to reject the same. The rejection of assessee's explanation, on the basis of their subjective perceptions as to what should have happened in an ideal situation, to our mind, was not the judicious way of examining the matter in a quasi-criminal proceeding that a penalty proceeding inherently is. The explanation of the assessee should have been examined in an objective and impartial manner and in the light of

human probabilities, and not on the basis of his perceptions about what should have happened in an ideal situation. We are, therefore, of the considered view that the explanation of the assessee, for the delay in submission of the requisitioned information- even on merits, ought to have been accepted. In any event, the requisitioned information is furnished subsequently, and the trigger for the impugned penalty is only the delay in the submission of the requisitioned information. The explanation for the delay, in our considered view and for the detailed reasons set out above, ought to have been accepted. For this reason also, the plea of the assessee must be upheld. In view of all these reasons, independent of each other, we are of the considered view that the imposition of penalty under section 271G on the facts of this case was vitiated in law, and we, therefore, delete the impugned penalty. The assessee gets the relief accordingly.

11. In the result, the appeal is allowed. Pronounced in the open court today on the 12th day of August, 2022.

Sd/-	Sd/-
Pavan Kumar Gadale	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 12th day of August, 2022

Copies to: *(1)* *The appellant* *(2)* *The respondent*
(3) *CIT* *(4)* *CIT(A)*
(5) *DR* *(6)* *Guard File*

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai