

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, 'A': NEW DELHI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No.1570/DEL/2020
[Assessment Year: 2015-16]**

M/S ATEPL RAHEE JOINT VENTURE, A-41, 1 st Floor, Green Park Main, Delhi-110016 PAN-AADAA2155J	Vs	ACIT, Circle-62(1), New Delhi
Assessee		Revenue

Assessee by	Smt. Rano Jain, Adv. & Smt./Ms. Mansi Jain, CA
Revenue by	Sh. Kanv Bali, Sr. DR

Date of Hearing	22.11.2022
Date of Pronouncement	06.12.2022

ORDER

PER SHAMIM YAHYA, AM,

This appeal by the assessee is directed against the order of Ld. CIT (Appeals)-20, New Delhi, dated 13.02.2020 for the Assessment Year 2015-16.

2. The grounds of appeal read as under:-

- 1) *On the facts and circumstances of the case, the order passed by the Id. Commissioner of Income Tax (Appeals) [CIT(A)], is bad both in the eye of law and on facts.*
- 2) *On the facts and circumstances of the case, Ld.CIT(A) has erred, both on facts and in law, in confirming the action of the A.O. in levying penalty of Rs. 1,44,15,934/- under section 271AA of the Act.*
- 3) *On the facts and circumstances of the case, Ld. CIT(A) has erred, both on facts and in law, in confirming the penalty*

despite the fact that there is no failure on the part of assessee to keep and maintain information and documents as required under section 92D or in furnishing of incorrect information or documents.

- 4) On the facts and circumstances of the case, Ld. CIT(A) has erred, both on facts and in law, in confirming the penalty rejecting the contention of the assessee that the wrong mention of the method employed in the TP report was on account of an inadvertent error on the part of the assessee.*
- 5) On the facts and circumstances of the case, Ld. CIT(A) has erred, both on facts and in law, in confirming the penalty ejecting the contention of the assessee that the notice issued by the A.O. initiating the penalty proceedings under section 271 AA is bad in law in view of non-mentioning of the limb under which the penalty was initiated.*
- 6) On the facts and circumstances of the case, Ld. CIT(A) has erred, both on facts and in law, in confirming the penalty despite the fact that the Ld. TPO has drawn no adverse inference and no adjustment on account of difference in Arm's Length Price (ALP) was proposed by him.*
- 7) That the provisions for levying of penalty under section 271AA are discriminatory and not mandatory in nature.*

3. Brief facts of the case are that in this case, return declaring income of Rs. 1,15,62,960/- was filed electronically on 27.11.2015. The case was selected for Limited scrutiny through CASS. During the assessment proceedings, it was found that the assessee has entered into Specified Domestic Transaction to the tune of Rs.72,07,69,703/- with its associate enterprises M/s Arvind Techno Engineers Pvt. Ltd and M/s Rahee Infrastructure Limited. Therefore, the case was referred by the AO to Additional Commissioner of Income Tax(TPO) for computation of Arms Length Price (ALP). The TPO had passed order u/s 92CA (3) of the

Income Tax Act, 1961 dated 26.03.2018. In his order u/s 92CA(3), the TPO has noted that :-

"It has been observed that in 3CEB, method used for benchmarking transaction is "Any other method as per rule 10AB" whereas the method used for benchmarking transaction in TP report is TNMM. On being asked the above discrepancy, the assessee company explained that as per Form no. 3CEB, method mentioned as "Any other method as per rule 10AB" is correct but written wrongly by mistake in the TP report as Net Margin/TNMM method. The Assessing Officer may consider initiation of penalty u/s 271AA(1) of the IT Act, 1961 for failure to keep and maintain information and documents etc., and penalty u/s 271AA(iii) for maintaining or furnishing an incorrect information or document to report SDT in respect of above transaction."

3.1. However, no transfer pricing adjustment was suggested by the TPO. Referring to the above note of the TPO, the AO observed that in this case that the assessee has failed to keep and maintain any such information and documents as required by sub section 1 or sub section 2 of section 92D and maintain or furnish incorrect information or document to report SDT in respect of domestic transactions, therefore, penalty proceedings u/s 271AA of the Act was also initiated by him and penalty of Rs.1,44,15,934/- was levied. The assessee has submitted before the AO reporting of benchmarking of transaction in transfer pricing report as net margin/TNMM method was clerical mistake. This was not accepted by the TPO despite fact that the so called mistake did not result in any transfer pricing adjustment to be done by the AO or TPO.

4. Against the above penalty order, the assessee appealed before the Ld. CIT(A).

5. The Ld. CIT(A) upheld the order of the penalty by observing as under:-

“4.3.2. It is seen from the order of the AO that the Assessing Officer has clearly mentioned in his penalty order that the assessee could not give any cogent reason for wrong reporting of benchmarking transaction in TP report as "Net Margin/TNMM method". The submission of the assessee that it is a clerical mistake is not acceptable as accounts are audited by Sr. Chartered Accountant and TP report is also prepared by a qualified Chartered Accountant. It may also be noted here that as per provisions of section 92D read with rule 10D of I.T. Rules the assessee is required to maintain 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 specified domestic transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions. However, the assessee has failed to do so. The assessee has reported two different methods used for benchmarking transaction in form 3CEB and in TP report. Therefore, considering the facts and circumstances of the case, it is held that the assessee has failed to keep and maintain any such information and documents as required by sub-section 1 or subsection 2 of section 92D and maintain or furnish incorrect information or document to report SDT in respect of domestic transactions without any reasonable cause. Since, the assessee has made a default as envisaged in section 271AA of the Income-tax Act, 1961, accordingly, penalty u/s 271AA of the I.T. Act of Rs. 1,44,15,394/- (i.e. 2% of value of transaction Rs. 72,07,69,703/-) is hereby confirmed.”

6. Against the above order, the assessee is in appeal before us.

7. We have heard both the parties and perused the records. The Ld. Counsel for the assessee reiterated before us that reference has been made to the TPO and no adjustment on account of Arm's Length Price (ALP) of the specified domestic transaction is proposed by the TPO. She submitted that in this report, the method used under section 92(1) was stated to be 'any other method as per Rule 10AB'. However, in the

transfer pricing study maintained by the assessee, the method selected was stated to net margin method. Only on the basis of these facts, The AO has initiated penalty proceedings u/s 271AA of the Act. She further submitted that correct method was any other method as per Rule 10AB and it was out of an inadvertent error that the method was mentioned as net margin method in the transfer pricing study. A revised transfer pricing study was also filed before the TPO, however, not appreciating the arguments of the assessee, the AO imposed penalty amounting to Rs.1,44,15,394/- being 2% of the value of specified domestic transactions. Furthermore, the Ld. Counsel for the assessee filed elaborate submission in this case as under:-

“No mention of the Specific Charge

The penalty has been levied by the Ld. AO under Section 271AA of the Act which reads as under:-

“271 AA. (1)Without prejudice to the provisions of section 270A or] section 271 or section 271 BA, if any person in respect of an international transaction or specified domestic transaction,-

- (i) fails to keep and maintain any such information and document as required by sub-section (1) or sub-section (2) of section 92D;
- (ii) fails to report such transaction which he is required to do so; or
- (iii) maintains or furnished an incorrect information or document,

the Assessing Officer or Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to two per cent of the value of each international transaction or specified domestic transaction] entered into by such person.

6[(2) If any person fails to furnish the information and the document as required under sub-section (4) of section 92D, the prescribed income-tax authority referred to in the said

sub-section may direct that such person shall pay, by way of penalty, a sum of five hundred thousand rupee"

It can be seen that there are three limbs under which this penalty may be levied. However, while issuing notice under Section 271AA of the Act, the Ld. AO has nowhere mentioned the specific charge levied by him against the assessee. The copy of notice is placed at PB Pg. 31.

It is a settled law that no adverse inference against the assessee can be drawn without apprising him the specific charge. Reliance is placed on the following judgments:-

1. **SSA's Emerald Meadows, C.C. No. 11485/2016**
2. **PCIT vs. Sahara India Life Insurance Ltd., ITA No. 475/2019 dated 02.08.2019 (Del HC)**
3. **CIT vs. Manjunath Cotton and Ginning Factory (2013) 359 ITR 565 (Karnataka)**
4. **PCIT vs. New Era Sova Mine, Tax Appeal No. 70/2018**
5. **CIT vs Shri Samson Perinchery, ITA No.1154/2016 dated 05.01.2017**

Inadvertent Mistake

This has also been settled by the Hon'ble Supreme Court in the case of Price Waterhouse Copper Pvt. Ltd. Vs. CIT (2012) 348 ITR 306 (SC) that no penalty on account of a human error can be levied. The observations of the Hon'ble Supreme Court read as under:-

“19. The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. It appears to us that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. This can only be described as a human error which we are all prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present does not mean that the assessed is guilty of either furnishing inaccurate particulars or attempting to conceal its income. ”

Reliance is also placed on the following judgments:-

1. CIT Vs. Compro Technologies Pvt. Ltd., ITA No. 744/2014 (Delhi HC)
2. Fixopan Machines Pvt. Ltd. Vs. ACIT, ITA No. 1436/Del/2014 dated 07.05.2019 (Delhi ITAT)
3. Hindustan Steels Ltd. Vs. State of Orissa (1972) 83 ITA 26 (SC)
4. CIT vs. GAIL India Ltd. (2013) 356 ITR 711

Benefit of Section 273B

It is to be appreciated that Section 273B of the Act provides for the situation under which penalty should not be imposed. The provisions of Section 273B read as under:-

“Penalty not to be imposed in certain cases.

273B. Notwithstanding anything contained in the provisions of clause (b) of sub-section (1) of section 271, section 271 A, section 271AA, section 271B, section 271BA, section 271BB, section 271C, section 271CA, section 271D, section 271E, section 271F, section 271FA, section 271FAB, section 271FB, section 271G, section 271GA, section 271GB, section 271H section 271-1, section 271J, clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA or section 272B or sub-section (1) or sub-section (1A) of section 272BB or] sub-section (1) of section 272BBB or clause (b) of sub-section (1) or clause (b) or clause (c) of sub-section (2) of section 273, 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 for the said failure."

Section 271AA is covered under Section 273B where it has been provided that in case the assessee is able to prove the reasonable cause for failure, penalty should not be levied. In the present case, from the face of the facts only, it becomes too clear that the mistake occurred only out of a simple human error. In the background of the fact that the Ld. TPO has not proposed any adjustment and no loss to Revenue is occurring because of such failure, it is quite evitable that it was just an innocent error which should not result in such heavy penalty.

No revenue loss should result in such huge penalty

There are number of judgments passed by the various Courts wherein it was held that if mistake in inadvertent and no loss has occurred to the Department no penalty should have been levied. Reliance is placed on the following judgments:-

1. **ITO vs. PPN Power Generating Company Pvt. Ltd., ITA No. 774/2007 dated 21.10.2011 (Madras HC)**
2. **ACIT vs. BSE and CJN, ITA No. 1401/Del/2016 dated 14.02.2019 (Delhi ITAT)**
3. **ACIT vs. Integrated Decisions And Systems (India) Pvt. Ltd., ITA No. 127/JP/2013 dated 24.02.2016 (Jaipur ITAT)**
4. **DCIT vs. M/s. Bebo Technologies Pvt. Ltd., ITA No. 532/CHD/2010**
5. **DCIT Vs. Kodak Graphic Communication Ltd. ITA 7152/mum/2012, dt. 29.10.2014**
6. **ACIT Vs. Nippo Battery Co. Ltd. ITA 1180/Mds/2011, dt. 09.03.2012**

In view of the above, the penalty levied under Section 271AA confirmed by the Ld. CIT(A) may kindly be deleted.”

8. Per Contra, the Ld. DR relied upon the orders of the authorities below.

9. Upon careful consideration, we find that the Transfer Pricing Officer has not found necessary to make any transfer pricing adjustment. Hence, undoubtedly, in substance, there was no defect in the transfer pricing conducted by the assessee. The only issue is erroneous mention in the transfer pricing report about the method though it did not result in any transfer pricing adjustment and was revenue neutral. This has been taken a reason enough to levy huge penalty u/s 271AA of the Act. The assessee plea that there was an inadvertent mistake has been rejected. In our consideration opinion, there is no reason as to why the plea of inadvertent mistake should be rejected on the touchstone of Hon'ble Supreme Court decision in Price Waterhouse Coopers Pvt.Ltd vs C.I.T 348 ITR 346, wherein, it was explained that there should not be any penalty on account of human error. Furthermore, without any loss of

Revenue, it is strange that penalty has been levied. In this connection, the case laws referred by the Ld. Counsel for the assessee are germane and support the case of the assessee. In this view of the matter, the penalty levied cannot be sustained. Hence, in the background of aforesaid discussion and precedents we set-aside the orders of the authorities below and delete the penalty levied.

10. Since, we have deleted the penalty accepting the ground of inadvertent mistake and no loss to revenue, the other aspect of non-specification of charge in the penalty notice is not being addressed and it is now only of academic interest.

11. In the result, the appeal of the assessee stands allowed.

Order pronounced in the open court on 06th December, 2022.

Sd/-
[ANUBHAV SHARMA]
JUDICIAL MEMBER

Delhi; Dated: 06.12.2022.

Shekhar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-
[SHAMIM YAHYA]
ACCOUNTANT MEMBER

Asst. Registrar,
ITAT, New Delhi

