

आयकर अपीलिय अधिकरण
मुंबई पीठ "जे", मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
सुश्री पद्मावती.एस, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
MS. PADMAVATHY.S, ACCOUNTANT MEMBER

आअसं. 7492 / मुं/2014 (नि. व. 2004-05)
ITA NO.7492/MUM/2014 (A.Y.2004-05)
आअसं. 7493 / मुं/2014 (नि. व. 2005-06)
ITA NO.7493/MUM/2014 (A.Y.2005-06)

M/s. Schindler India P. Ltd.
E-401, Delphi, Hiranandani Business Park,
Powai, Mumbai – 400 076.
PAN: AAECs-1548-J

..... अपीलार्थी/Appellant

बनाम Vs.

The Deputy Commissioner of Income-tax,
Range – 8(3),
Aaykar Bhavan, MK Road,
Mumbai – 400 020.

..... प्रतिवादी/Respondent

Assessee by : Shri Yogesh Thar &
Ms.Sakshi Dande
Revenue by : Shri Pankaj Kumar

सुनवाई की तिथि/ Date of hearing : 06/07/2023
घोषणा की तिथि/ Date of pronouncement : 22/09/2023

आदेश/ORDER

PER VIKAS AWASTHY, JM:

These two appeals by the assessee are directed against the order of Commissioner of Income Tax (Appeals)-15, Mumbai [in short 'the CIT(A)'] for the Assessment Years 2004-05 and 2005-06, respectively confirming penalty levied u/s. 271(1)(c) of the Income Tax Act, 1961 [in short 'the Act']. Both the impugned orders are of even date i.e. 10/09/2014. Since, the facts

germane to the issue in appeals are identical, the appeals are taken up for adjudication together and are decided by this common order.

2. For the sake of convenience the appeals are decided in the sequence of Assessment Years.

ITA NO.7492/MUM/2014- A.Y.2004-05:

3. Shri Yogesh Thar appearing on behalf of the assessee submitted that penalty u/s. 271(1)(c) of the Act has been levied in respect of Transfer Pricing adjustments. He contended that during the period relevant to assessment year under appeal, the assessee had entered into international transactions with overseas Associated Enterprises (AEs) in respect of; purchase of stores and spares, purchase of lifts and escalators, professional fees and reimbursement of expenses. The assessee selected Transactional Net Margin Method (TNMM) as the most appropriate method. The Transfer Pricing Officer (TPO) accepted TNMM as the most appropriate method and the companies selected by the assessee as comparables to benchmark international transactions. The assessee had made certain adjustments to arrive at Operating Margin ratio of 1.03%. The various adjustments made by the assessee were in respect of:

- (i) Annual Maintenance Contract (AMC) Income;
- (ii) Cost Saving on account of differential duties and incidental expenses;
- (iii) Extraordinary Replacement Cost; and
- (iv) Indigenization Cost.

The TPO rejected the adjustments made by the assessee, and applied operating profit margin of selected comparable companies at 4.21%. As against the total expenses shown by the assessee at Rs.76,24,40,768/-, the TPO determined the value of expenditure at Rs.52,63,45,887/- by applying operating margin @4.21%. This resulted in upward adjustment of Rs.23.60 crores (Rs. 76.24crores – Rs.52.63 crores) Since, the value of international transaction was Rs.7.43 crores only, the TPO restricted the adjustment to Rs.2.30 cores, attributing to AE expenses in proportion to AE and non-AE expenses. The adjustment made by the TPO was primarily on estimations without there being any actual basis. The TPO in his order had observed that there is possibility of inflation of expenses in respect of AEs as well as non AEs. He made adjustment only in respect of AEs only and left the attribution of expenses to non-AEs on the Assessing Officer The Assessing Officer while passing the assessment order made no adjustment in respect of non AE expenditure. He initiated penalty under section 271(1)(c) of the Act in respect of the adjustment made by the TPO.

3.1 The Id. Authorized Representative of the assessee pointed that in so far as merits of the TP adjustment are concerned, they have been upheld by the Tribunal in ITA NO.7470/Mum/2011 vide order dated 03/04/2023.

3.2 The Id. Authorized Representative of the assessee raised multiple propositions against levy of penalty u/s. 271(1)(c) of the Act. The first proposition put forth by the Id. Authorized Representative of the assessee is that the assessee can rely on OECD guidelines while benchmarking the transaction under transfer pricing mechanism. The assessee has computed

Arm's Length Price (ALP) based on OECD guidelines in good faith. If the TPO is not in agreement with the benchmarking of the assessee, the penalty proceedings cannot be initiated on the adjustment made by the TPO. In support of his first contention, he placed reliance on the following decisions:

- (i) *PCIT vs. Almatix Alumina (P) Ltd.*, 137 taxmann.com202 (Cal)
- (ii) *Virtusa Consulting Services (P) Ltd. V. DCIT*, 124 taxmann.com 309 (Mad)
- (iii) *Ranbaxy Laboratories Ltd. V. ACIT*, 68 taxmann.com 322(Del-Trib)

3.3 The second proposition advanced the Id. Authorized Representative of the assessee is, that no particulars were withheld by the assessee while making adjustment. It is not a case of furnishing inaccurate particulars or concealment of income. If, the adjustment made by the assessee to arrive at adjusted operating margin are not acceptable to the TPO, it cannot be a case of furnishing of inaccurate particulars or concealment. The adjustment was made in a bonafide manner and after disclosure of all the facts. Hence, penalty cannot be levied u/s. 271(1)(c) of the Act. To support this proposition he placed reliance on the decision in the case of CIT vs. Reliance Petroproducts (P). Ltd. , 189 Taxman 322(SC).

3.4 The third proposition against levy of penalty u/s. 271(1)(c) of the Act advanced by Id. Authorized Representative of the assessee is, that no penalty can be levied on addition made on adhoc /estimation basis. To support this proposition he placed reliance on the following decisions:

- (i) *Vinod Obroi v. ITO* ,ITA No.5779/Del/2019.
- (ii) *ACIT v. Vision Research & Management (P) Ltd.* 63 taxmann.com 8

Lucknow-Trib)

- (iii) CIT v. Norton Electronics Systems (P). Ltd. 41 taxmann.com 280(Allh)*
- (iv) Naresh Chand Agarwal v. CIT, 38 taxmann.com 397 (Allh)*
- (v) Dressr-Rand India (P) Ltd. v. DCIT, 37 taxmann.com 328(Mum-Trib)*
- (vi) CIT v. Arjun Prasad Ajit Kumar, 214 CTR 355 (Allh)*

3.5 The forth and the last proposition of the Id. Authorized Representative of the assessee against levy of penalty is that adjustment to PLI is accepted by T.P. Auditor, therefore, the assessee's claim is in good faith and with due diligence. To buttress this proposition he relied on following decisions:

- (i) ITO v. Tianjin Tianshi (India) Ltd., taxmann.com 388 (Del-Trib)*
- (ii) Halcrow Consulting India (P) Ltd. v. DCIT, 87 taxmann.com 331 (Delhi-Trib)*
- (iii) ITO vs. Bio Vet Industries 88 taxmann.com 844 (Mum-Trib)*
- (iv) DCIT v. RBS equities, 13 taxmann.com 30 (Mum-Trib)*

4. Per contra, Shri Pankaj Kumar representing the Department strongly supported the penalty order and the order of CIT(A) confirming levy of penalty. He submitted that the Tribunal has already upheld the findings of the TPO/Assessing Officer confirming T.P. adjustment, therefore, it is a fit case for levy of penalty u/s. 271(1)(c) of the Act on the aforesaid adjustment/addition.

5. We have heard the submissions made by rival sides and have examined the orders of authorities below. It is no more res-integra that levy of penalty u/s. 271(1)(c) of the Act is not automatic or if quantum addition has been confirmed by the Appellate Authorities, the penalty proceedings u/s. 271(1)(c)

of the Act must also succeed. Assessment proceedings and ;penalty proceedings are two separate independent proceedings [Re. CIT vs. Khoday Eswarsa & Sons, 83 ITR 369(SC)]

6. In the present case we find that the Assessing Officer has initiated penalty proceedings u/s. 271(1)(c) of the Act in respect of T.P adjustment Rs.2.30 crores. A perusal of the T.P order dated 22/12/2006 reveals that TPO has accepted the TNMM as the most appropriate method adopted by the assessee. The TPO has also accepted the comparables selected by the assessee to benchmark its international transaction. The TPO has not disputed the quantum of international transactions disclosed by the assessee, either. The TPO has rejected adjustment made by the assessee in respect of AMC margins, cost savings on differential duties and incidental expenses , Extraordinary replacement costs. and indigenization cost. The aforesaid adjustment made by the assessee were part of TP study and were ostensibly based on OECD guidelines. The Hon'ble Apex Court in the case of Reliance Petroproducts (P). Ltd. (supra) has held that penalty u/s. 271(1)(c) of the Act cannot be levied merely because the claim made by the assessee was not accepted or acceptable to the Revenue. For the sake of completeness the relevant observations of Hon'ble Apex Court on the issue are reproduced herein below:

“9. We have already seen the meaning of the word “particulars” in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the return, which are not accurate, not exactor correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting

the penalty under section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars.

10 It was tried to be argued that the falsehood in accounts can take either of the two forms ; (i) an item of receipt may be suppressed fraudulently ; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. **Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under section 271(1)(c). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature."**

There has to be concealment of particulars of income or furnishing of inaccurate particulars of income for levy of penalty u/s. 271(1)(c) of the Act. The Assessing Officer while initiating penalty u/s.271(1)(c) of the Act has not pointed the concealment or inaccurate particulars of income in reporting of the international transactions. The TPO has rejected adjustments claimed by the assessee. Merely for the reason adjustment made by the assessee are rejected by the TPO and the findings of TPO have been upheld by the Tribunal cannot be a valid reason for levy of penalty u/s. 271(1)(c) of the Act.

7. We further observe that the TPO after rejecting the adjustments made by the assessee came to the conclusion that TP adjustment is required to be made to the tune of Rs.23.60 cores. Since, the total value of international

transactions were only to the tune of Rs.7.43 crores, the TPO himself felt unfair to make such huge addition. He thereafter estimated the addition in respect of transactions with AEs to Rs.2.30 crores. He attributed the remaining amount of non-AE transaction in proportion of AE and non-AE expenses. No addition was made by the Assessing Officer in respect of non-AE transactions. Thus, in respect of similar expenditure, TPO made addition for AEs and Assessing Officer made no addition for non-AEs. Penal provisions under section 271(1)(c) of the Act cannot be invoked on estimation and adhoc additions. There has to be a specific findings highlighting concealment of income or furnishing inaccurate particulars of income. Additions made on estimations cannot form basis for levy of penalty. To support this proposition reliance is placed on the decision in the case of CIT vs. Norton Electronic Systems Pvt. Ltd.(supra) and Naresh Chand Agarwal vs. CIT (supra). There are several other decisions supporting similar view by different Hon'ble High Courts and various benches of the Tribunal. Thus, the penalty levied u/s. 271(1)(c) of the Act in the instant case is unsustainable on this ground as well.

8. In the result, impugned order is set-aside and appeal of the assessee is allowed.

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9. Both sides are unanimous in stating that the grounds raised in the appeal against levy of penalty and the facts germane for levy of penalty in the impugned assessment year are similar to the grounds and facts in Assessment Year 2004-05. We find that the reason for levy of penalty in the impugned assessment year is identical to the one in Assessment Year 2004-05,

except the amounts. The detailed findings given by us while adjudicating the issue raised in Assessment Year 2004-05 would *mutatis mutandis* apply to the present Assessment Year as well. Since, the facts are *pari-materia*, the impugned order is set-aside and the appeal of assessee is allowed for parity of reasons.

10. To sum up, penalty levied u/s. 271(1)(c) of the Act for both the impugned assessment years is directed to be deleted, the impugned orders are set-aside and the appeals of the assessee are allowed.

Order pronounced in the open court on Friday the 22nd day of September, 2023.

Sd/-

(PADMAVATHY. S)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 22/09/2023

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar)/Sr. Private Secretary ITAT,
Mumbai