IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : H : NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.8751/Del/2019
Assessment Year: 2013-14

Trend Micro India Private Limited, 10th Floor, Eros Corporate Tower, Nehru Place, New Delhi.	Vs	ACIT, Circle-25(2), New Delhi.

PAN: AACCT2082Q

(Appellant) (Respondent)

Assessee by : Shri Vishal Kalra, Advocate &
Shri S.S. Tomar, Advocate
Revenue by : Shri Amit Katoch, Sr. DR

Date of Hearing : 27.03.2024
Date of Pronouncement : 31.05.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the order dated 29.08.2019 of the Commissioner of Income Tax (Appeals)-28, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in Appeal No.118/18-19/1146 arising out of the appeal before it against the order dated 29.06.2017 passed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter

referred as 'the Act'), by the ACIT, Circle 25(2), New Delhi (hereinafter referred to as the Ld. AO).

2. The assessee is a private limited company engaged in providing pre-sales and post sales, marketing and research and development support services to its Associated Enterprises (AEs). In this case, the return of income was filed on 21.09.2013 declaring an income of Rs.2,56,68,170/-. The case was selected for scrutiny and during the assessment proceedings, the issue of transactions related to transfer pricing was forwarded to TPO and he made certain adjustments by increasing the amount of Rs. 1,49,29,635/- by applying the TNMM Method treating the most appropriate method. While enhancing the valuation, he made comparable analysis of operating profit/operating cost (OP/OC) as the profit level indicator of 10 companies by rejecting 05 comparable companies identified by appellant. He computed the average OP/OC at 13.87% by making adjustment of Rs. 1,49,29,635/- pertaining to business support services and Rs. 59,160/- on account of interest outstanding receivables. Against the order of TPO/AO, assessee did not prefer appeal and accepted the adjustments made by TPO/AO. Consequently, AO determined the arm's length OP/OC at 13.87% and made the net addition of Rs. 1,49,88,795/- which was computed being difference between figures as shown by assessee and as finally computed.

2.1 In due course, AO initiated the penalty proceedings u/s 271(l)(c) of the Act for the addition of Rs. 1,49,29,635/- and provided opportunity to assessee by issuing the notice under the said section to which submissions were given by it as discussed in the penalty order. The AO was not convinced with the explanation or assessee and after considering the merit of the addition and relying on the ratio of decision in the case **CIT vs Zoom Communication Pvt. Ltd 327 ITR 51** of Jurisdictional High Court alongwith other decisions of different Courts, concluded that the assessee has concealed the income by furnishing inaccurate particulars of income to the extent of Rs. 1,49,29,635/- and imposed the penalty of Rs. 48,43,920/-, being 100% of the tax sought to be evaded on the above income and passed the order.

2.2 On behalf of the assessee, a specific plea was raised that Explanation-7 to section 271(1)(c) of the Act was not invoked appropriately and the assessee should have been given benefit of the fact that arm's length price of international transactions were calculated with bona fides, in good faith and with due diligence. However, the CIT(A) was not satisfied and sustained the addition with the following findings:-

> *"5. I have considered the facts of the case, basis of imposition of penalty and' submissions given by appellant. As can be seen from the submissions that appellant has raised the several issues on legal grounds as well as on merits. However, it can be seen from the provisions of section 271(1)(c) of IT Act, the specific provisions have been brought in statute to deal with the cases related to additions or disallowances made u/s 92C of the Act. Under Explanation-7 to section 271(1)(c) of the Income-tax Act, 1961, an addition or disallowance made while computing the income under section 92C of the*

Act is deemed to be concealed income or income for which inaccurate particulars have been furnished. Expianation-7, however, states that penalty is not to be imposed where the assessee establishes that the price charged or paid was computed in accordance with the provisions of section 92C and the assessee had acted in good faith and with due diligence. The conduct of the assessee is the distinguishing and relevant factor to be adjudicated in the penalty proceedings. The onus to establish good faith and exercise of due diligence is on the assessee. The explanation of the assessee on the computation of the arm's length price may be the same, but appreciation and consideration is from a different point of view, i. e., good faith and due diligence.

5.1 In view of the above legal position, now the case of the appellant has to be examined. It can be seen that while applying the TNMM method, the appellant has taken into consideration the OP/OC of those selected companies which suited it most and the average remained such that no true results .could be achieved. However, the TPO took a larger base for arriving at the average of OP/OC and reached reasonable better average for computation of transactions. The appellant has accepted the method and conclusion drawn by AO/TPO and did not contest the issue in the appeal. Thus, it is clear that the appellant had wrongly computed the OP/OC margin of comparable companies in both ways. These facts clearly show that the appellant had neither acted in good faith nor with due diligence. Since the conduct of appellant was neither in good faith nor with due diligence, the addition/disallowance made by AO has to be termed as concealment of income of income or income for which inaccurate particulars have been furnished, in view of the deeming provisions of Explanation-7, as above. In view of this, it is held that appellant has concealed the income by furnishing inaccurate particulars to the extent of Rs.1,49,29,635/-. I, therefore, confirm the penalty of Rs. 48,43,920/- levied by AO and dismiss the grounds taken by appellant."

3. The assessee is in appeal raising the following grounds:-

"1. That on the facts and circumstances of the case and in law, the order passed by the Assessing Officer ("AO") in levying penalty of amounting to INR 4,843,920 under section 271(1)(c) of the Income Tax Act, 1961 ("Act") is bad in iaw and void ab initio, and therefore, deserves to be quashed.

2. That on the facts and circumstances of the case and in law, the penalty order passed by the AO deserves to be quashed as the same has been passed without recording adequate satisfaction and the CIT(A) has erred in upholding the same.

3. That on the facts and circumstances of the case and in law, the AO has erred in invoking the Explanation (1) to section 271(1)(c) of the Act, without appreciating that for levying penalty in relation to transfer pricing adjustments, Explanation 7 to section 271(1)(c) of the Act should be invoked. Therefore, the penalty order is bad in law and liable to be quashed and the CIT(A) erred in upholding the same.

4. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO levying penalty under section 271(1)(c) of the Act, in relation to computation of transfer pricing adjustment for the provisions of business support and research & development services, without appreciating that the Appellant has acted in good faith and with due diligence , therefore the Assessee could not have been malafide in computing incorrect transfer pricing,

5. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO levying penalty under section 271(1)(c) of the Act, without appreciating that there was only a mere difference of opinion regarding selection/ rejection of comparable companies for provisions of business support and research & development services.

6. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO levying penalty under section 271(1)(c) of the Act, on addition on account of alleged international transaction of interest on receivables that should've been charged, disregarding the submissions of the Appellant.

6.1 Without prejudice, the CIT(A) has erred in upholding the levy of penalty on an adjustment which has been computed on based on guess work and conjectures without substantiating reason for rate of interest considered by the AO.

7. That on the facts and circumstances of the case and in law, the CIT(A) erred in not appreciating the fact that the Commissioner of Income Tax (Appeals) for AY 2012-13 and AY 2014-15, had deleted the penalty imposed by the Ld. AO under section 271 (1)(c) of the Act where the facts on which the penalty was imposed are identical to AY 2013-14.

That the above grounds are independent and without prejudice to each other.

The appellant craves leave to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal as they may be advised."

4. Heard and perused the record.

5. On behalf of the appellant, the ld. counsel has primarily re-asserted the contentions made before the tax authorities below and has further relied the order of the Mumbai Bench of the Tribunal in ***Cherokee India (P) Ltd. (2016) 68 taxmann.com 132 (Mumbai-Trib.)*** and the coordinate bench of Delhi order in ***Verizon Communication India (P) Ltd. vs. DCIT, (2012) 27 taxmann.com 328 (Delhi).*** Reliance was also placed on the judgement of Hon'ble Delhi High Court in PCIT vs. Verizon India Pvt. Ltd., order dated 22.08.2016.

6. The ld. DR, however, defended the findings of ld. tax authorities below.

7. Appreciating the material on record, it comes up that primarily the TPO was of the belief that;

> *"the assessee did not use the current year data in the bench marking analysis submitted by it at all. In this respect, it was submitted that the same could not have been used by the assessee as the data was not available at that time. In this respect it can be seen that rule 10B (4) is very categorical in the use of data to be used for analysis to the data relating to financial year in which transaction was taken place. Thus, it can be seen that last two years data can be used on addition to the current year's data that too only if the effect of earlier data can be shown on the current year's data. It can be seen that in the transfer pricing*

analysis, the assessee has not used the current year data at all. By not using the current year data at all, the transfer pricing document is against the provisions of Rule 10B(4) of the Income Tax Rules."

8. The same became the foundation for levying the penalty by the AO and sustaining the same by the CIT(A). In this context, we are of the considered view that Rule 10B(4) which has laid down categorically for use of data relating to financial year in which transaction has taken place was inserted w.e.f. 19.10.2015 while the case of the assessee pertains to AY 2013-14. The TP order is dated 26.10.2016. Therefore, the TPO has heavily relied Rule 10B(4) alleging that there was deliberate act to not take current year data. In ***Verizon Communication India (P) Ltd. vs. PCIT (supra***), the coordinate Bench has dealt with similar issue where TPO was of the opinion that current year data was to be used and added some comparables making transfer pricing adjustments. The coordinate Bench has held that as there was a legal debate as to current year data has to be used or multiple data has to be used, assessee's bona fides cannot be questioned.

9. Further, there is no allegation that on account of any inaccuracy, discrepancy or concealment found in the information and documents furnished by the assessee in accordance with section 92C of the Act, there was concealment of income so the bona fides of the assessee cannot be questioned. The Mumbai Bench in the case of ***Cherokee India (P) Ltd. (supra),*** while

dealing with such issue has laid down that certainly, onus shall be on the assessee to demonstrate that the price charged or paid in such an international transaction was computed in the manner prescribed in section 92C in good faith and with due diligence. However, if the addition is due to difference in pricing methodology adopted by the income-tax authorities for determining the expected profits from the associated enterprises and the addition determined by the income-tax authorities is not on account of inaccuracy or discrepancy or concealment found in the information and documents furnished by the assessee for determining the arm's length price of the international transaction with the AEs, the assessee's claim of good faith and due diligence by virtue of Explanation-7 to section 271(1)(c) is considerable. The Hon'ble Delhi High Court in ***PCIT vs. Verizon India Pvt. Ltd.*** (supra) has dealt with the matter with a broader perspective and held as follows:-

> *"The present appeal against the order dated 08.08.2016 of Income Tax Appellate Tribunal is barred because the revenue has refiled it with a delay of 550 days. On this ground alone, the appeal is liable to be rejected.*
>
> *This Court has considered the merits of the appeal as well. The brief facts are that during the relevant period, i.e. AY 2007-08, the assessee had, in the course of its return, relied upon a transfer pricing report. The report inter alia sought benefit of six comparables, by applying the Transactional Net Margin Method (TNMM) under Section 92C of the Income Tax Act, 1961. The report had relied upon twelve comparables; the Transfer Pricing Officer (TPO) rejected nine of them and based upon the surviving data, determined the Arms Length Pricing (ALP) and made adjustments in the final return. The Assessing Officer (AO), while accepting TPO's determination, was of the opinion that as per Explanation 7 to Section 271(1)(c), the addition was to be deemed to represent income and was, therefore, liable, and consequently penalty was leviable. The AO's order was set-aside by the ITAT.*

We have considered the circumstances. The assessee in this case could not, in the opinion of this Court, visualize that out of the twelve comparables furnished, nine would be rejected and the matrix of calculations, as it worked, would radically undergo change. Pertinently, for the previous year 2006-07, the assessee's comparables – including some of those which were rejected in the present order, were in fact accepted when the matter reached finality. In these circumstances, the interpretation adopted by the AO was plainly erroneous. The Court is also of the opinion that in the absence of any overt act, which disclosed conscious and material suppression, invocation of Explanation 7 in a blanket manner could not only be injurious to the assessee but ultimately would be contrary to the purpose for which it was engrafted in the statute. It might lead to a rather peculiar situation where the assessees who might otherwise accept such determination may be forced to litigate further to escape the clutches of Explanation 7. For the above reasons, we are also satisfied that no substantial question of law arises. The appeal is accordingly dismissed along with the pending application."

10. Further, the ld. AR has also pointed out that the notice as issued dated 09.05.2017 was defective. We have gone through the copy of the same made available at page 78 of the paper book and find that the notice does not mention as to which limb of section 271 of the Act has been invoked as the assessee was called upon to show cause for: *"have concealed the particulars of your income or have furnished inaccurate particulars of such income."* The law in this regard stands settled that such an ambiguous notice is not sustainable in law. Reliance can be placed on Hon'ble Supreme Court judgement in the case of CIT vs. Reliance Petro Products Pvt. Ltd. 322 ITR 158 (SC) and CIT vs. SSA's Emerald Meadows (2016) 73 com 248. There should be categorical communication as to under which limb the assessee is show caused. The AO had concluded that there was: *"the furnishing of inaccurate information, thus, relates to furnishing of factually incorrect details and information about*

income." In para 8, the AO, while levying the penalty has observed that: *"I am satisfied that the assessee has furnished inaccurate particulars of its income leading to concealment of income and as discussed supra and, thus, mens-rea of the assessee is proved and charge against the assessee in respect of concealment of his income is established and, accordingly, it is absolutely a fit case for imposition of penalty u/s 271(1)(c) of the IT Act."*

11. The CIT(A), while not accepting the plea of good faith or due diligence of the assessee has concluded that:

> *"…… Since the conduct of appellant was neither in good faith nor with due diligence, the addition/disallowance made by AO has to be termed as concealment of income of income or income for which inaccurate particulars have been furnished, in view of the deeming provisions of Explanation-7, as above. In view of this, it is held that appellant has concealed the income by furnishing inaccurate particulars to the extent of Rs.1,49,29,635/-. …"*

12. Having considered the provisions of Explanation-7 to section 271(1)(c) of the Act, as the Revenue authorities contend that it is a deeming provision and the assessee is deemed to have concealed income or income of which inaccurate particulars have been furnished and the onus is on the assessee to establish bona fide and due diligence, then, what is required is that the notice should be specific and there should not be any ambiguity of any sort, rather, the notice should specifically provide that the penalty is being invoked in the light of the Explanation-7 of section 271(1)(c) of the Act, as the presumption of the

deeming provision is called to be rebutted by the assessee. Thus on ground of ambiguity in the notice too the penalty order cannot be sustained.

13. In the light of the aforesaid discussion, we are inclined to allow the grounds raised. The appeal is allowed. The impugned penalty is quashed.

Order pronounced in the open court on 31.05.2024.

Sd/-	Sd/-
(G.S. PANNU) VICE PRESIDENT	(ANUBHAV SHARMA) JUDICIAL MEMBER

Dated: 31st May, 2024.

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Copy forwarded to:

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

Asstt. Registrar, ITAT, New Delhi