IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAJ KUMAR CHAUHAN (JUDICIAL MEMBER)

ITA No. 1916/MUM/2024
Assessment Year: 2012-13

ACIT-23(1), 511, 5th floor, Piramal Chamber, Lalbaug, Parel, Mumbai-400012.	**Vs.**	Parishi Diamonds, CC2091 to CC 2093 Tower Central Wings Bharat Diamond Bourse Bandra Kurla Complex, Bandra East, Mumbai-400051. **PAN NO. AAJFP 2118 B**
Appellant		**Respondent**

Assessee by	:	Mr. Rajesh Sanghavi
Revenue by	:	Mrs. Pradnya R. Gholap, Sr. DR

Date of Hearing	:	20/08/2024
Date of pronouncement	:	22/10/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against order dated 15.02.2024 passed by the Ld. Commissioner of Income-tax (Appeals) – 57, Mumbai [in short 'the Ld. CIT(A)'] for penalty levied by the Assessing Officer u/s 271G of the Income-tax Act, 1961 (in short 'the Act') for assessment year 2012-13 in relation to non-

maintenance of records /documents /information required under Chapter of Transfer Pricing Provisions. The grounds raised by the Revenue in appeal are reproduced as under:

> *1. "Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in deleting the penalty levied u/s 271G of the I.T. Act, 196 lof Rs. 1,86,34,620/-?*
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> *2. "Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in deleting the penalty levied u/s 271G of the I.T. Act, 1961of Rs. 1,86,34,620/- without considering the facts that during the transfer pricing proceedings the assessee has failed to furnish the details required by the TPO in notice U/s 92CA(1) r.w.s. 92D(3) of the IT. Act, 1961"*
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> *3. "Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in deleting the penalty levied u/s 271G of the I.T. Act, 1961of Rs. 1,86,34,620/-, whereas the TPO found that the assessee had not maintained the documents/ information required under the provisions of Chapter X of the I.T. Act, particularly, Section 92,92C and section 92D of the I.T. Act and Rule 10C, Rule 10B(1), Rule 10B(2) and (3) and Rule 10D(g), (h), (i) and i) of the I.T. Rule ?"*

2. In the grounds raised only sole issue in dispute is deletion of the penalty amounting to Rs.1,86,34,620/-levied by the Assessing Officer u/s 271G of the Act.

3. We have heard rival submissions of the parties and perused relevant material on record. The assessee company was engaged in the business of trading and manufacturing of rough and polished diamonds. During the year under consideration, the assessee entered into international transactions with its associated enterprises (AE) namely M/s Parishi Diamond (HK) Ltd. for sale of polished diamonds amounting to Rs.93,17,30,982/-. In the transfer pricing study report, the transaction was benchmarked using

comparable un-controlled price (CUP) method as most appropriate method. The relevant conclusion mentioned (PB 121) in the transfer pricing report is reproduced as under:

> ***"Conclusion***
>
> *As the firm has also sold diamonds to independent parties; the price charged to independent party is available for comparison which are considered for determining arm's length test under CUP method In view of the above, CUP method is considered to be the most appropriate method for determining arm's length price of transaction of sale of finished products to AE."*

3.1 However, during the course of transfer pricing proceedings before the TPO, the assessee could not substantiate the comparable transactions for CUP method and the assessee opted for taking the transactional net margin method (TNMM) as most appropriate methos. The Ld. TPO asked the assessee to submit profitability of AE and non-AE with audited segmental financial using TNMM method. But the assessee submitted that no separate segmental financials were prepared and requested for taking entity level financials for the purpose of TNMM. The Ld. TPO held that in absence of segmental results of AE and non-AE and due to non-providing of actual detail of purchase and sale of different types of diamonds from AE and non-AE, other methods could not be applied for computation of arm's length value of international transaction. Accordingly, he expressed difficulty in benchmarking the international transaction reported by the assessee. In view of the non-maintenance of the documents/information required for the purpose of benchmarking either using the CUP method or TNMM

method, the Ld. TPO initiated the penalty proceedings u/s 271G of the Act. After considering the submission of the assessee, the Ld. TPO given a detailed finding which is relevant to reproduce as under:

> *"11. Since the crux of the matter revolves around the compliance of the assessee with respect to documentation requirement, it is necessary to refer to the provisions of section 92D and Rule 10D. The requirement under Rule 10D is to be examined in the light of the comparability factors contained in Rule 10B(2) and criterion for judging appropriateness contained in Rule 10C. The same are extracted below for ready reference.*
>
> *12. Sec.92D of the Income Tax Act, 1961 provides as follows:*
>
> *" Maintenance and keeping of information and document by persons entering into an international transaction or specified domestic transaction.*
>
> *(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.*
>
> *12.1 Thus, Subsection (1) of section 92D mandates and puts an onus on the assessee to maintain and keep such information and documents as may be prescribed in respect of International Transactions'*
>
> *13. Rule 10D of the Income Tax Rules, 1962 prescribes the information and documents required to be maintained by every*

person who has entered into an international transaction. The same reads as follows:

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 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.

14. An analysis of the type of information and documents that are required to be maintained under Rule 10D shows that they can be classified under-

- *Information relating to the assessee company and its group companies – clause (a) (b) and (c)*
- *Information relating to the international transaction in particular - clause (d), (e) and (f)*
- *Information relating to uncontrolled transactions - clause (g)*
- *Information relating to establishing comparability between uncontrolled transaction and relevant international transaction - clause (h) and*
- *Information relating to the actual working of ALP under different methods - clause (i), (j). (k), (l) and (m).*

15. Thus it can be seen that the information required to be maintained under Rule 10D is quite intensive and broad. First and foremost, the assessee has to maintain complete information in respect of actual international transaction undertaken.

Thereafter, the assessee has to maintain full details of uncontrolled transactions and analyse their comparability with the international transaction particularly having regard to the nature, terms and conditions of the respective transactions. The assessee is further required to fully document the process of selecting the most appropriate method alongwith full explanation for the same, the actual determination of ALP and adjustments made, if any.

16. It may be noted that all these information and documents as specified in clause (a) to clause (m) are mandated to be kept and maintained by the assessee in respect of the International Transaction. These are the documents required to be maintained by the assessee to substantiate the ALP of the international Transaction, irrespective of the method employed to justify the ALP of the International Transaction. As per clause (g) the assessee is required to keep record of uncontrolled transactions which have been taken into account for analysing their comparability with international transactions. Uncontrolled transactions for this purpose would include transactions of similar nature entered into by the assessee with third parties. Further, as per clause (hì, the assessee has to maintain a record of the analysis performed to evaluate comparability between uncontrolled transaction and international transaction. As per clause (i), the assessee has lo justify the selection of the most appropriate method with explanations and as per clause (i) a record of the actual working carried out for determining ALP including details of comparable data and financial information used in applying the most appropriate method has to be maintained.

17. Thus, the assessee has to maintain documents giving various details about the international transaction like nature and terms, FAR analysis, record of forecasts budgets etc; documents explaining and justifying the selection of the most appropriate method considering the factors specified in Rule 10C; and also the documents related to uncontrolled transactions to establish comparability and ALP of the international transaction by applying such most appropriate method.

18. Rule 10B(2) prescribes the Comparability factors to be taken into account, which reads as under:

(2) For the purposes of sub-rule (1), the comparability of an international transaction or a specified domestic transaction with an uncontrolled transaction shall be judged with reference to the following, namely:—

(a) the specific characteristics of the property transferred or services provided in either transaction;

(b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

(c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

(d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

18.1 Ant evaluation of Rule 10B(2) shows that the comparability between international transaction and uncontrolled transaction has to be judged with reference to the specific characteristics of the property and the functions performed, assets employed and risks assumed by the parties to the transaction and the contractual terms of the transactions that shows how risks and rewards are divided between the parties. Thus for the purpose of establishing comparability, complete details of the relevant international transaction are mandatory as also the details of the comparable uncontrolled transaction being considered.

19. Rule 10C which discusses the 'Most appropriate method' reads as under:

"Most appropriate method.

10C. (1) For the purposes of sub-section (1) of section 92C, the most appropriate method shall be the method which is best suited to the facts and circumstances of each particular international transaction 56a[or specified domestic transaction], and which provides the most reliable measure of an arm's length price in relation to the international transaction 56a[or the specified domestic transaction, as the case may be].

(2) In selecting the most appropriate method as specified in sub-rule (1), the following factors shall be taken into account, namely:—

a. *the nature and class of the international transaction 56a[or the specified domestic transaction];*
b. *the class or classes of associated enterprises entering into the transaction and the functions performed by them taking into account assets employed or to be employed and risks assumed by such enterprises;*
c. *the availability, coverage and reliability of data necessary for application of the method;*
d. *the degree of comparability existing between the international transaction 56a[or the specified domestic transaction] and the uncontrolled transaction and between the enterprises entering into such transactions;*

e. *the extent to which reliable and accurate adjustments can be made to account for differences, if any, between the international transaction 56a[or the specified domestic transaction] and the comparable uncontrolled transaction or between the enterprises entering into such transactions;*
f. *the nature, extent and reliability of assumptions required to be made in application of a method.*

19.1 Rule 10C (1) provides for selection of the method which provides the most reliable measure of ALP of international transaction. Sub rule (2) provides for various factors to be taken into account for determination of the most appropriate method. This inter-alia includes the degree of comparability existing between the international transaction and uncontrolled transaction' and 'the nature and extent and reliability of assumptions required to be made in application of a method'. Thus, the mandate of the rule for selection of most appropriate method is that it will provide the most reliable measure of ALP and the assumptions made in application of the method are also reliable. An evaluation of Rule 10C(2) further shows that even for the purpose of selecting the most appropriate method, maximum importance is being given to the nature and class of international transaction and the functions performed, assets employed and risks assumed therein. Choice of appropriate method also depends on the comparability between the international transaction and the uncontrolled transaction. A choice of the method is governed by the availability of reliable data necessary for application of method. Thus, even for the purposes of selecting the most appropriate method, it is necessary to have complete information about the international transaction, the uncontrolled transaction and the comparability between the same.

20. At this juncture, it is relevant to note the provisions of Rule 10B(1)(e) which provides for the manner of determination of ALP of an international transaction while applying TN MM, which reads as under:

[10B. Determination of arm's length price under section 92C.

(1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely:

a……

……..

……(e) transactional net margin method, by which,—

(i) the net profit margin realised by the enterprise from an international transaction or a specified domestic transaction entered

into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

(ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction 5or the specified domestic transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);

(v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction or the specified domestic transaction;

20.1 Clause (i) of Rule 10B(1)(e) specifically provides that net profit margin realised by an enterprise from an international transaction is computed. Thus the law mandates that whenever TNMM is applied or sought to be applied, as a Ist step the profit margin realised from the International transaction is to be computed.

21. On a combined reading of section 92D, rule 10D(I), Rule 10B(2), Rule 10C and 10B(1)(e), it is clear that the law mandates the assessee to choose any of the method described in section 92C(1) as the most appropriate method by considering the factors specified in rule 10C, which will provide the most reliable measure of ALP of international transaction and maintain records as to why such method was selected as most appropriate method and how it was applied in each case [refer clause(i) of Rule 10D(1)]. Further, having selected the most appropriate method, the assessee would also maintain a record of the uncontrolled transaction (including a record of uncontrolled transaction entered into by the assessce with the 3rd parties) which were taken into account for analysing their comparability with international transaction [refer clause(g) of Rule 10D(I)), in line with the method selected as the most appropriate method. Thereafter, the assessee is also mandated to keep a record of the analysis performed to evaluate comparability of uncontrolled transaction with international transaction (refer clause(h) of Rule 10D(1)] in line with the method selected as the most appropriate method. Further, the assessee is mandated to maintain a record of the actual working carried out for determination of ALP including

details of financial information used in applying the most appropriate method [refer clause(i) of Rule 10D(1)]. Thus if TNMM is applied, the assessee is mandated to keep a record of the actual working carried out for determination of ALP by applying TNMM as per the method of determination prescribed under Rule 10B(1)(e).

22. Thus it can be seen that the documentation requirements prescribed in Rule 10D are of such a nature that both the assessee as well as the AO is enabled to select the most appropriate method based on the documentation maintained and is also able to establish comparability between the international transaction and uncontrolled transaction.

23. As per facts on record, the Assessee had disclosed transactions of 'export of finished diamonds 'in its Form 3CEB, wherein it is stated that comparable uncontrolled price method (CUP) was considered as the most appropriate method and it was applied to determine the ALP of the said international transaction. In this regard, following was stated in the 3CEB Report:-

According to the information and explanations given to us, the assessee has. computed the arm's length price for sale of products mentioned above as per Comparaule Uncontrolled Price Method (CUP Method). The assessee has analysed external uncontrolled comparable transactions entered during the year and has adjusted the said price for different attributes viz. volume of supply, geographical location, time of transaction, size of the market, extent of competition in the market, relative competitive positions of buyers and sellers, supply and demand in the market, terms and conditions of payment (credit period) etc.

Moreover, the assessee is of the opinion that due to mixing of goods of multiple grade, vast variety, lack of homogeneity, interchangeability in the stock of above items and the way in which business is done world over, which are peculiarities of diamond trade the computation of arm's length price as per Comparable Uncontrolled Price Method (CUP Method) is appropriate.

24. In the transfer pricing study report submitted by the assessee vide letter dated 21.12.2015 also the assessec stated that CUP is the most appropriate method in this regard, the following was stated in the TPSR

COMPARABLE UNCONTROLLED PRICE.

As the FIRM has sold diamonds to its AE and also to independent customer, data of international price charged to AE and independent parties is available with the firm and therefore CUP is considered to be the most appropriate method under Section 92C of the Income Tin Act, 1961, for the purpose of determining arm's length price of the transaction.

CONCLUSION.

As the firm has also sold diamonds to independent parties; the price charged to independent party is available for comparison which are considered for determining arm's length test under CUP method.

In view of the hove, CUP method is considered to be the most appropriate method for determining arm's length price of transaction of sale of finished products to AE."

25. A detailed questionnaire dated 07.09.2015 was issued to the assessee wherein it was specifically called upon to provide information/ documents in respect of each international transaction that it has maintained in accordance with Rule 10D of the IT Rules. Further details regarding the determination of ALP under the CUP method were also called for as under:

I. Please provide a complete statement of the price charged or paid for the property transferred or services provided in respect of all the international transactions. In this connection please provide the details of date, rate per unit, quantity and amount in respect of each of the product/service comprised in the international transaction.

II. Please provide complete details of all transactions with third parties undertaken by the assessee in respect of services and property that are similar to the property or service transferred under the international transaction.

III. Please provide complete details of all transactions undertaken by third parties in respect of services and property that are similar to the property or services transferred under the international transaction (i.e. External CUP)

IV. Please provide the calculation of ALP based on comparable transactions after giving reasons for accepting/rejecting any comparable transaction.

V. Whether any database (eg Tips data base etc) has been used for indentifying comparables in applying CUP method? If any, please state the Database used by the assessee for conducting the search, search strategy and list of comparable transaction so selected and rejected with reasons for the same.

VI. Furnish all the supporting documents of evidentiary value, that have been examined by you to establish the comparability in terms of Rule 10B(2), based on which the comparable cases have been accepted or rejected.

VII. Please provide the details of any adjustments made to the price of the comparable transaction in terms of Rule 10B(1)(a)(ii), explaining the methodology adopted for doing the same.

VIII. Where any set off is claimed between the excess price and any shortfall, reasons for justifying the same may be given.

IX. *Please explain the treatment given to Foreign exchange gain or loss in arriving at the ALP of the International transaction as well as the comparable transaction.*

26. In this questionnaire the assessee was inter-alia also required to furnish the following detail

"14. If the assessee is performing more than one type of activity (for e.g., trading and manufacturing or providing different types of services for e.g., software and ITES), please furnish the audited segmental accounts for each of these activities. The segmental account should indicate clearly operating and non operating expense/income and reconcile the same with profit and loss account. The basis of segmentation should be explained in detail.

15. If within n segment, the assessee mdertakes transactions with AE and ion-AE, please submit their separate audited profitability workings. The basis of segmentation should be explained in details.

27. The object of calling for this information was-

- *To understand the nature and class of international transaction, class of Associated Enterprises and the functions performed by such persons.*
- *To ascertain whether the assessee has chosen the most appropriate method to determine the ALP and*
- *To ascertain whether the assessee has applied the method correctly in accordance with the mechanism provided in Rule 10B.*

28. The assessee, by a separate letter dated 21.12.2015 submitted on 29.12.2015, claimed that although initially, CUP method was applied, it will not be the most appropriate method and requested for considering TNMM as the most appropriate method. In this regard it stated as under:

With reference to above and under instruction of our above mentioned client we submit the following details and explanations-

Though initially the transfer pricing return was filed by adopting CUP method, later on while studying the nature of transactions, nature of commodity and industry in depth we observed that-

Rule 10B(1)(a) provides that the main criteria for applying CUP method is that - Market price should be comparable to the same or similar nature of goods charged under similar market conditions. Thus not only there should be huge similarity in the products but also in the business functions. Even a minor changes in the properties of the products, renders the applicability of CUP method inapplicable. Thus products comparability is an absolute key in CUP, because physical features such as size, weight, appearance, volume and reliability of the products etc, has to be examined

Assessee firm being part of diamond industry, minor variation in the feature such as size, weight, shape, colour, clarity grade, polishing etc of diamonds leads to very high fluctuation in its price, which makes the prices completely uncomparable.

Even 2 same looking stones might have dissimilarity in its features. It is a very distinct possibility that one can find 2 stones which are exactly identical in all parameters.

It is practically impossible to make theoretical adjustment in value for each change in each parameter of the stones. Each stone has its unique characteristic and hence a unique value for itself.

Keeping in mind all the above stated reasons, in practicality CUP will not be an appropriate method.

The said legal preposition is also approved by Courts in the case of ACIT VS. SUPER DIAMONDS 33 CCH 412 (Mum):

Even transfer pricing assessment for the assessment Year 2011-12 was rightly completed by applying TNMM method due to above reasons.

29. Further, Vide letter dated 23.12.2015, the assessee claimed that keeping in mind the practical difficulties, it is not possible to maintain separate profitability for transactions with AE and non AF. and requested to do the comparablity analysis at entity level by taking external comparables. A fresh TPSR was prepared and submitted on 08.01.2016 taking TNMM as the MAM wherein the following was mentioned:-

"During the year, the firm has sold polished diamonds to AÈ and also to independent parties; on comparison of price charged to AB with price charged to independent parties, the price charged to former was considered to be at AJ.P under CUP method. However, such comparison of price was on broader perspective upon selection of certain sample transactions. On detailed study of transactions, we are of the opinion that CUP method cannot be considered as most appropriate method for the reasons discussed below :

The rule 10B (1)(a) provides that Comparable Uncontrolled Price method i.e. CUP, is comparison of the prices of the property or services transferred in a control transaction to the price charged in the property or services transferred in a comparable uncontrolled transaction. The main criteria are that, the market price should be comparable to the same or similar nature of goods which has been charged under similar conditions. Thus, not only there should be huge similarity in the products but also in the business functions. Even a minor changes in the properties of the products, renders the applicability of CUP method inapplicable. The product comparability is an absolute key in CUP, because physical features such as size,

weight, appearance, volume and reliability of the product etc, has to be examined.

Assessee firm being part of diamond industry/business, within the same product of diamond, there is a huge dissimilarity and variation of features which leads to difference in the prices. The pricing of the diamonds depends upon various parameters/factors like size of the diamond, carat weight, various types of shape, colour florescence, clarity grade, polishing, height and depth angle, girdle thickness etc., which leads to differential pricing of the diamonds. In such a condition it becomes very difficult to apply CUP method in bench marking the pricing of the diamond. The said legal preposition is also approved by Courts in the case of ACIT vs SUPER DIAMONDS 33 CCH 412 (Mum)

In view of the above and considering the fact that in AY 11-12 TNMM is accepted as MAM in transfer pricing scrutiny, we would like to considers TNMM to be the most appropriate method for determination of ALP for the international transaction in lieu of CUP method

It may be noted in the said TPSR, no rationale has been provided for comparing profitability at entity level instead of transaction level.

30. Thus it is seen that the assessee has not kept and maintained the documents as mandated by Rule 10D. The assessee has not maintained proper documents to justify selection of CUP or TNMM as the most appropriate method. Initially, CUP was considered as MAM, which was later changed to INMM. So, if TNMM was to be considered as most appropriate method, then as per the mandate of Rule 10C(2)(d), the assessee should have considered the degree of comparability existing between international transaction and uncontrolled transaction and should have maintained documents in this regard as per the mandate of Rule 10D(1)(i). Similarly, if TNMM was to be considered as most appropriate method, then the assessee should have worked out the net profit margin realised from the international transaction as per mandate of Rule 10B(1)(e) and should have maintained a record of detailed workings in this regard as required by Rule10D(1)(j).

31. Since the assessee claimed that TNMM was the most appropriate method for determination of ALP of the International Transaction, in accordance with Rule 10B(1)(e) r.w. Rule 10D(1)(), the assessee was required by the TPO during TP proceedings to file the audited segmental profitability of the AE and Non-AE segments vide Q. No 14 & 15 of notice u/s 92CA (3) r.w.s. 92D (3) dated 07.09.2015, so that the actual profits earned by the assessee from the International transaction with AE can be ascertained. In this regard, the assessee vide letter dated 21.12.2015 submitted that it is not possible for the assessee to differentiate the profitability between transactions with AE and transactions with Von-NE. Further vide its letter dated 04.01.2016 it contended that :-

"...We strongly feel that practically it is not possible to provide the separate profitability for the transaction with AE and with Non-AE. Also the statute does not mandate to maintain such separate profitability. In addition our accounting package and system does not support us either to serve the purpose. Due to peculiar nature of diamond industry and due to above stated limitations, it is not practically possible to provide these segregated P & L. Since these details have been strongly insisted upon, we have tried to provide the statements to the best of our ability and available information. We are enclosing a copy of the same....

With this reply, the assessee has also submitted an ad-hoc segmental account of the AF and Non-AE segments prepared on the basis of SALES value, thereby making an inherent and unsubstantiated assumption that all the transactions with AE and non-AE is of similar goods with same profitability and FAR analysis is same for it. It is to be noted that the segmental account of the AE and Non-AE segments was prepared on arbitrary basis and NOT based on ACTUAL transaction values. It may be mentioned that the assessee has on 27.01.2016 (subsequent to the passing of the order u/s 92CA(3) on 22.01.2016) submitted another segmental account of the AE and Non-AE segments claimed to be prepared on the basis of cost of material of goods sold to AE, which is also arbitrary and NOT based on ACTUAL transaction values. There is an inherent fallacy in these approaches as they do not calculate the actual profitability from the International transaction as required by Rule 10B(1)(e)i), the actual working of which was required to be furnished by the asessee as per Rule 10D(1)(j).

32. In this regard, the assessee has clearly stated above that against a sale made to At, the assessee is unable to identify the corresponding costs and other expenses so as to determine the profits. Thus, by assessee's own admission, the basic requirement under the TNMM ie to compare the profit earned on an international transaction with a profit earned on an uncontrolled transaction, remains to be fulfilled. Considering the fact that AE transaction is forming only a part of the total transaction, either the AE profits have to be separately ascertained or the TNMM is not the most appropriate method in this case. Thus it is concluded that though the assessee itself chose TNMM as the most appropriate method, it failed to comply with the documentation requirements applicable for adoption of the said method.

33. The assessee by considering the entity level profitability for application of TNMM, has violated the provisions of Rule 10D(1)(g)&(h) r.w 10C(2)(d) r.w 10B(1)(e). This is because each of this clause speaks about comparability between international transaction and uncontrolled transaction. An 'uncontrolled transaction' as per Rule 10A(ab) means 'a transaction between enterprises other than associated enterprises, whether resident or non-resident. Accordingly, an uncontrolled transaction is a transaction entered into between 2 unrelated parties, which would also include transactions

entered into by the assessee with an independent party. So if entity level profitability is considered, this profitability would also include the profits on transactions entered into by the assessee with independent parties. This would be clearly against the provisions of law and the manner provided for determination of ALP. By considering the profitability at entity level, the record of uncontrolled transactions as per Rule 10D(1)(g) has not been furnished and accordingly record of analysis as mandated by Rule 10D(1)(h) has also not been furnished. Similarly, by considering the profitability at entity level, the provisions of Rule 10C(2)(d) has not been considered for selection of the most appropriate method and accordingly the assessee has also violated the requirements of Rule 10D(2)(i) Further; since the assessee has not worked out the net profit margin realised from the international transaction as per rule10B(1)(e), it has also violated the requirements of Rule 10D(1)G).

34. Thus, it is clear that the assessee has violated the provisions of Rule 10D(1) and has not furnished the documents before the TPO, for which Penalty u/s 271G is leviable. It may be mentioned that the law prescribes the initial onus on the assessee for maintenance of records and justification of ALP of the international transaction. If the assessee does not fulfil its onus, the ALP cannot be correctly determined for want of relevant data, which can only be in the possession of the assessee.

Reasonable cause

35. One argument raised by the assessee is that it was prevented by reasonable cause from maintaining and furnishing the information relating to international transaction as well as comparable uncontrolled transaction as called for from time to time. In this connection the assessee has submitted that there was reasonable cause due to which segmental accounts for each of activities undertaken during the year with AE and non-AE could not be furnished during the TP proceedings.

36. The reasonable cause as explained by the assessee was that

- *it was unable to ascertain the corresponding costs*
- *considering the technicalities involved and the nature of trade and practice prevailing in the industry, each diamond packet losses its individual identity when its gets mixed in the lots purchased from AEs as well as Non-AEs*
- *Considering, the nature of trade, it is not possible for the assessee to prepare the separate accounts for trading and manufacturing activities.*

37. in this background, it is submitted that the assessee itself adopted TNMM as the most appropriate method tor benchmarking its international transactions. In this regard, it is important for the assessee to comply to the requirements of Rule 10(1)(e). If due to the reasonable cause, the assessee could not furnish the relevant

information/ documents, the assessee could have resorted to any one of the method prescribed under section 92C(1).

38. The assessee's main argument is that due to the trade practice prevailing in the diamond industry separate identity of the diamond cannot be maintained qua AE and non-AE. Accordingly, the assessee's primary argument for failure to comply with clause (g), (h), (i) and (i) of Rule 10D is the peculiarities of the diamond industry and the industry practice of not maintaining separate record of stock relating to trading and manufacturing activities as also AE and non-AE sources.

39. The assessee's arguments are considered. As already explained, Chapter X of the Income Tax Act contains a special anti-avoidance Rule enacted to prevent base erosion. The Chapter provides that income arising from an international transaction has to be computed having regard to arm's length price. The requirement to maintain documentation is mandatory as provided in sec.92D) r.w. Rule 10D. The significance of maintenance of documentation has already been explained in the earlier paragraphs and the same is crucial for the correct determination of ALP. If the relevant documents are not maintained, the requirement of determining ALP cannot be fulfilled defeating the very purpose of enacting the transfer pricing provisions. Further, the non-production of documents is not in the nature of a technical breach or in the nature of a delay. Where the documents are not produced in respect of the international transaction, comparable uncontrolled transaction and evidence for establishing comparability, the whole process of determining ALP is vitiated as has happened in this case. In this connection, it may be relevant to note that in the order u/ s.92CA(3) (as extracted at Para 5 above), a finding has been specifically recorded that there is no material to evaluate or determine the ALP of the international transactions in this case.

40. In view of the above, it follows that the mandate contained in sec. 92 i.e. income arising from an international transaction should be determined having regard to the arm's length price has not been complied with in this case. Hence it cannot be said that the non-compliance is in the nature of a technical breach. Rather, the noncompliance has gone to the root of the issue of determination of ALP of the interactional transaction.

41. Moreover the claim that it is practically not possible to provide separate profitability for transactions with AF and Von-AE, is on the face of it an incorrect assertion. Every businessman while working out the sale price of any item would necessarily take into consideration the cost incurred by him for the same. In other words, he would have adequate records to corelate the cost price with the sale price. Even if there is mixing of various diamonds during the Manufacturing process, the assessee would have relevant cost details for the final output, which the assessee has not produced for the TPO. Further, the plea that its accounting package and system

does not support them to compute separate profitability is also not acceptable as the law specifically mandates the assessce to maintain such documents. An incorrect accounting software which does not maintain data as required under law cannot be taken as a plea since the employment of the software is within the control of the

42. As regards the argument regarding the industry practice in the diamond industry, the difficulty in applying any of the methods and the difficulty to comply with the documentation requirement, the said argument has been considered by the Hon'ble ITAT in the case of DCIT v/s. Starlite (2010] 133 TT) 0425. The findings of the Hon'ble ITAT in this regard are as under:

" Plain reading of the above provisions in the Act as well as in the Rules, show that it is mandatory for the assessee, to follow one of the prescribed method and demonstrate that the international transactions, entered into by it, with an associated enterprise, are at Arms Length Price. By simply saying that none of the methods can be applied and citing excuses for the same, in our considered opinion does not absolve the assessee of its statutory duty in determining ALP as per the law. In a number of cases, where different assessees are having similar lines of business, transfer pricing report has been filed and one of the methods specified under the Act was used to arrive at as most appropriate method. Surprisingly, in this case, the assessee in our humble opinion, contrary to the stand of many similar organizations, has taken unsustainable stand that none of the methods prescribed under law, can be followed by it. Thus, on this aspect, we uphold the order of the TPO."

43. Similarly in the case of ACIT v/s. Golawala Diamonds (2011) 44 SOT 645, the Hon'ble ITAT has held that the provisions of Chapter X relating to computation of ALP have to be mandatorily followed and the specific provisions contained therein have to be fully applied. At para 9 and 10 of the said order, the Hon'ble ITAT has rejected the argument of the assessce that following the rules laid down in the Statute is not possible in this line of business. The Hon'ble ITAT has categorically mentioned that when diamonds are exported information is furnished to the Customs unit wise. The relevant para is extracted below:

"9. We respectfully follow the consistent view of this Bench of the Tribunal in various cases, that under the TNMM, what is to be compared is the net margin of a transaction or a class of transaction and not gross profit margins at the entity level. The argument of the assessee that this was neither the case of the AO nor that of the assessed and hence the Tribunal should not insist on following the specific provisions stipulated under chapter X, for computing the ALP along with the rules thereon, is devoid of merit. The statute has prescribed the method and it is to be followed. The argument that following the rules laid down in the statute is not possible in this line of business, is also not correct. When diamonds are exported, information is furnished to the customs unit-wise. While so we do not

understand what is the difficulty for the assessee in providing comparable transactions. Even in case there is a difficulty, it is not for the Tribunal to prescribe a new method. The assessee may approach appropriate authorities in this regard.

10. In view of the above discussion, we reject the contentions of the assessee and set aside the issue to the file of the AO for fresh adjudication in line with the decision of the Tribunal in the case of Tej Diam (supra).

44. A similar issue pertaining to diamond industry came up for decision before the Hon'ble jurisdictional Bombay High Court in the case of CIT v/s. Shatrunjay Diamonds /261 ITR 258; 2003/ wherein the issue before the Hon'ble High Court was whether purchases made by the assessee from a related party at rates higher than the purchase rate from third parties was liable for disallowance u/s.40A(2)(b) or not. In this connection, the assessee in that case submitted that there are 7000 different varieties of diamonds and there can be no generalization or averaging of rate with respect lo different varieties of diamonds. The High Court held that once the provisions of sec.40A(2)(b) becomes applicable the burden is on the assessee to show with appropriate evidence that the purchase price in respect of transactions with related parties is not excessive or unreasonable as compared to third party prices. Though the assessee took the argument of industry practice and there being a large number and variety of diamonds, the High Court held that in a case covered by sec.40A(2)(b) the assessee necessarily has to produce evidence to show that the purchase price is reasonable. In this case the assessee had furnished group wise summary of transactions with related parties as well as some certificates from other parties. But the Court held that there was no evidence produced to prove the veracity of these rerbificates. in this case the assessee could not establish co-relation between imported rough diamond and exported polished diamond on account of assessee not maintaining lot wise chart showing the quantity, quality and cost either in respect of purchases or sales in respect of the finished products. The relevant part of the order is reproduced as under:

9. The undisputed facts are that the assessee and M/s. Paras Gems from whom the assessee has imported rough diamonds, fall within the category specified under section 40A(2)(b). Therefore, if the expenses incurred on purchase of rough diamonds from M/s. Paras Gems is found by the assessing officer to be excessive or unreasonable, then the burden is on the assessee to establish that the price is not excessive and that there is no over-invoicing. In the present case, the assessee had furnished a summary chart of purchases in respect of rough diamonds showing the price at which such diamonds have been purchased from different parties : The assessee had also furnished group-wise summary of the cut and polished diamonds exported by the assessee. It appears that the assessee had furnished certificates of several parties, but no evidence was led in the matter to prove the veracity of those

certificates. Since correlation between imported rough diamonds and exported polished diamonds could not be established and no further enquiry was possible on account of the assessee not maintaining lot-wise chart showing the quantity; quality and cost either in respect of purchases or sales of the finished products, the assessing officer brought the differential amount to tax. The Commissioner (Appeals) as well as the Tribunal deleted the disallowance merely following their earlier decisions without going into the question as to whether the assessee had discharged its burden to establish that the price paid by it was not excessive.

11. It is important to bear in mind that certain trade practices prevalent in the Diamond Industry are within the knowledge of the assessee. The purpose behind the legislature enacting section 40A(2)(b) was to provide for shifting of burden on the assessee in cases where the transactions are not at arms length. In this case, M/s. Paras Gems is a sister concern of the assessee, which is not in dispute. It is located in Belgium. The purchases are made by the assessee from its sister concern. In such cases, the intricacies of the transactions are required to be explained by the assessee. The decision of the Tribunal in this case and the decision of the Tribunal in the case of the very assessee in the last year prior to the assessment year in question are all on the department. It is for this reason that an important question of law arises in this case which is mentioned hereinbelow. In our opinion, the burden of proof shifts on to the assessee in cases falling under section 40A(2)(b) and in such cases it is the duty of the assessee to prove and discharge its burden by leading proper evidencing subject to cross-examination by the department.

45. The above judgment of the Bombay High Court highlights the fact that when transactions are undertaken with related parties, the burden of proof is with the assessee who has to produce necessary documents to show that the transaction is at arm's length. In this connection it is important to note that u/ 5.40A(2)(b) there were no requirements to maintain or produce documentation of the nature insisted by the High Court. Even then, the High Court has insisted that when the burden of proof is on the assessee to establish a claim, the same has to be discharged by leading proper evidence. As compared to the position prevailing u/s.40A(2)(b), the provisions of Chapter X stand on a much higher footing as the same are accompanied by specific documentation requirements. The assessee's argument on reasonable cause are not in respect of any factor operating specifically in its casc but rather refers to a difficulty faced by the entire diamond industry as a whole. However, as arcady pointed out, the applicability of transfer pricing provisions in the case of diamond industry has been considered by the ITAT and the relevant findings have already been extracted carlier. The peculiarities of the diamond industry have also been considered by the Bombay High Court in the case of Shatrunjay Diamonds and still the High Court has arrived at the conclusion that documentary evidence has to be furnished.

46. In view of the above it is concluded that the assessee's arguments regarding industry practice and difficuity in maintaining documentation on that account cannot constitute reasonable cause. It has already been held in cases relating to diamond industry that the provisions of Chapter X should be implemented in full and there is no escape from the mandatory requirements of law. In any event reasonable cause cannot be interpreted in a manner so as to defeat the very provisions of Chapter X of the Act. The law has provided five different methods and it is for the assessee to choose any one of the methods and maintain the necessary documentation appropriate to the method chosen by it. There is no merit in the assessee's argument that on the one hand the stock is continuously mixed with one another and re-assorted, thereby losing its identity, while at the same time contending that there are so many varieties of stock and each has a different price. Therefore, the assessee's argument on reasonable cause is rejected.

47. Based on the facts & circumstances of the case, it is clear that assessee has failed to provide any authentic information, data or document in respect of segmental accounts with regard to transactions made with Als and non-Als. Accordingly, it can be inferred that the assessee had failed to provide complete segmental accounts for net profit margin with regard to sales made to AE and non-AE segments. Therefore, it is clearly evident that the assessee has failed to furnish information called for under Rule 10D(1), and has also failed to furnish the supporting authentic documentation required to be furnished under Rule 10D(3).

48. Therefore, the assessee has clearly violated the lawful requirement under clauses "g", "h" and "i" of rule 10D(1) read with section 92D and under rule 10D(3) to maintain and produce documentation as called for by the TPO.

49. At this juncture, it is important to mention that the TPO in his order has clearly spelt out that due to non-production of relevant documents by the assessec as required under statute, the TPO was constrained to use only the information made available to him to arrive at the ALP of the transaction with AF. This was done because all the relevant material could only be in the possession of the assessee which the assessee has expressly stated at various junctures that it has not maintained, in first place, such documents to compute net profit margin from AB transactions and thal it is only doing some allocations of cost only to arrive at some ad-hoc profitability figures. This admission by the assessee of not maintaining required documents have constrained the TPO within the time permitted by law to use only the documents made available by the assessee and other data available in public domain to arrive at a decision with the constraints of the fact that this was a time-barring matter before the TPO.

50. It may be further clarified that the determination of ALP and the invoking of provisions of Sec 271G of the Act are not related to each

other. 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 TPO 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 u/s. 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"

51. As regards the reliance by the assessee on the decision of Hon'ble Delhi ITAT in the case of Cargill India Pvt Ltd, it can be observed that reliance is misplaced. In that case, the ITAT observed that if the TPO is satisfied that the ALP has been properly and correctly determined by the taxpayer then it is the end of the matter and no penalty u/s. 271G can be levied. However, the facts of this case as discussed by the TPO in his order as well as the detailed discussions made above, it is unambiguously brought out by the TPO that he was NOT satisfied that the ALP has been correctly determined by the assessee but because of the non-furnishing of the documents as required in the law (which the TPO cannot create or prepare and it is only the assessee who can provide such statutory details) the TPO was constrained to hold the ALP of the transaction with AE. Also, in this case the TPO has issued notices to the assessce to submit various documents and was given various opportunities to fulfil the conditions laid down in the law so that TPO can arrive at the correct ALP which the assessee failed to comply. Thus the principles laid down in this decision is not applicable to the facts of this case.

52. Similarly, the reliance of assessee on the decision of Magick Woods Experts Pvt Ltd passed by Hon'ble Chennai ITAT is also misplaced. In that case, the ITAT held that since the TPO has duly accepted the comectness and adequacy of documents maintained by the assessee, thus penalty for maintenance is not justified. However, in the case in hand as discussed above, the TPO has clearly expressly spelt out and held that it is not accepting the adequacy and correctness of the documents furnished by the assessee as per

legal provisions in this regard, but due to the constraints put on him by the assessee by non-production of documents required to be maintained as Per Rule 10D discussed above, he was forced to accept the transaction at ALP. Hence the facts of this case are different.

53. As regards the claim that it was assessed in past wherein benchmarking was performed using external TNMM at entity level and thereby applying principle of consistency, no penalty be levied, reliance is placed on a recent decision of Honourable Delhi High Court in ITA No.381/2013 dated22.07.2016 in the case of M/s Sumitomo Corporation India Pvt limited, wherein their Lordships dealing with the issue of principle of consistency have held as under:

35. One of the principal issues before the Tribunal concerned the applicability of TNMM with Berry ratio as the PLI, as the most appropriate method. Mr Aggarwal had sought to contend before us that the TPO had rejected the PLI of Berry ratio but had not rejected the TNMM as the most appropriate method and, therefore, it was incumbent upon him to replace the PLI with whichever ratio he considered appropriate as had been done in the preceding years. He contended that on principles of consistency, he was required to follow the TNMM method. There is much merit in the contention that a method once considered appropriate should be consistently applied unless for good reasons, the TPO decides otherwise. However, this is a salutary guiding principle and would not fetter the TPO from independently examining the transfer pricing approach reported by the Assessee. The purpose of imputing ALP to international transactions is to ensure that the real income of the Assessee in respect of international transactions (and with effect from 1st April, 2013 certain domestic transactions) are charged to tax under the Act. It is thus, implicit that the exercise to determine such income be undertaken for each assessment year.

36. The special provisions for assessing income from international transactions having regard to ALP is of a recent vintage and was introduced by the Finance Act, 2001. The provisions under Chapter X of the Act have undergone significant changes over a period of time. The principles for computation of ALP are also evolving and as such, we are not persuaded to accept that the TPO was required to simply follow the transfer pricing methodology adopted in the preceding years. It is also well settled that principles of res judicata do not apply in assessment proceedings as assessment for each year is a separate proceeding and inquiry into the ALP in respect of international transactions under Section 92 of the Act is in aid of assessing the income chargeable to tax for the year under consideration.

In the case at hand, it has been aptly demonstrated that entity level benchmarking is not permitted by the rules. Hence, (even if for arguments sake), if the revenue has wrongly adopted entity level benchmarking in carlier years, the mistake cannot be allowed to be

perpetuated in this year. Further, as mentioned above principles of 'res judicata do not apply in assessment proceedings. Accordingly, this claim of the assessee is also rejected.

54. Based on the above facts & circumstances of the case and for the reasons discussed above, I am satisfied that the case squarely attracts the levy of penalty u/s. 271G of the Act as the assessee has entered into an international transaction with its AE and has failed to furnish document or information as required by sub-section (3) of section 92D. The total value of relevant international transactions under consideration in this case is Rs.93,17,30,982/-. The value of 2% of International transaction comes out to be Rs.1,86,34,620/- Hence, being satisfied, I hereby levy a penalty of sum of Rs. 1,86,34,620/- u/s. 271G of the Income Tax Act, 1961."

3.2 On further appeal, the Ld. CIT(A) observed that identical issue was raised in other cases decided by the Co-ordinate Bench of the Tribunal, wherein it was held that in view of reasonable cause of the complexity of the diamond trade it was not possible to maintain those records and therefore, the penalty levied in similar cases has been deleted. The Ld. CIT(A) following the finding of the Co-ordinate Bench of the Tribunal deleted the penalty levied observing as under:

"5.3.3 The appellant is engaged in the business of trading and manufacturing of rough and polished diamonds. The penalty u/s. 271G has been levied in respect of international transaction on sale of polished diamonds to AE based at Hongkong. The basis of levy of penalty u/s.271G by the TPO is that the appellant did not maintain and submit relevant documents as per provisions of Chapter X of the IT Act, particularly, section 92, 92C and 92D of the IT Act and Rule 10C, Rule 10B(1), Rule 10B(2) and (3) and Rule 10D(1)(g), (h), (i) and j) of IT Rules. Further, the appellant could not provide audited segmentals of AE and non-AE profitability and also the AE and non-AE segmentals were prepared on the basis of estimates.

During the appellate proceedings, the appellant explained that the diamond industry faced a peculiar problem in maintaining the exact details of the cost of rough diamonds purchased and the sale price of polished diamonds. Such difficulty was expressed to the Revenue Secretary by Gems & Jewellery

Export Promotional Council (GJEPC). The appellant has demonstrated that various details called for by the TPO were submitted from time-to-time. The appellant has submitted paperbook in which the copies of details submitted to the TPO have been compiled. It was explained to the TPO that due to peculiar nature of diamond industry, it was not possible to prepare the segmental of AE and non-AE on actual basis, however, following the general methodology of allocation of cost on the basis of sales and allocation of other expenses on scientific method, the segmentals were prepared The appellant submitted that under similar circumstances and non-submission of audited segmental of AE and non-AE and preparation of segmentals not on actual basis, the penalty u/s.271G was levied in a number of other cases. Various ITATs and the Bombay High Court have deleted the penalty levied by the TPO u/s.271G considering the facts and difficulties faced by the diamond industry due to peculiar nature of diamond business. The appellant has relied upon the decision in the case of ACIT vs. D Navinchandra Exports Pvt. Ltd. (ITA Nos. 6304/Mum/2016), ACIT vs. Antrix Diamond Exports (P.) Ltd (ITA Nos. 176/SRT/2022), ACIT vs. Kapu Gems (ITA No. 6713/Mum/2019), DCIT vs. Dharmanandan Diamonds (P) Ltd. (ITA No. 4232/Mum/2019, DCIT vs. Fire Stone International Pvt. Ltd. (ITA No. 5304/Mum/2016), DCIT vs Ankit Gems Pvt Ltd (ITA No. 4840/Mum/2017), ACIT vs DA Jhaveri, (ITA No 1971/Mum/2017), DCIT vs. Leo Schachter Diamonds India (ITA No. 5931/mum/2017) and DCIT vs Kama Schacter Jewellery P. Ltd. (ITA No. 2010/Mum/2019). The appellant also submitted that decision of ITAT in the case of D. Navinchandra Exports Pvt. Ltd. (supra) has been upheld by the Bombay High Court. The decision relied upon by the appellant has been perused. The facts of the case of. the appellant and the facts of the case of decision rendered by the ITAT are the same. The decision of the ITAT, Mumbai, being jurisdictional ITAT, has to be followed. Therefore, respectfully following the above mentioned decisions rendered by the ITAT and the Hon'ble Bombay High Court in the case of D Navinchandra Exports Pvt. Ltd. (supra), on similar facts and circumstances of the case, the TPO was not justified in levy of penalty u/s.271G, particularly, when the appellant complied to the provisions of section 92D of the Act and Rule 10B(1), Rule 10B(2) and (3), Rule 10C and 10D(1) of IT Rules. Thus, the penalty of Rs. 1,86,34,620/- levied by the TPO u/s.271G is deleted."

3.3 Since, the Ld. CIT(A) has followed binding decisions of the Co-ordinate Bench of the Tribunal passed in identical circumstances and therefore we do not finding any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The grounds raised by the Revenue are accordingly dismissed.

4. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 22/10/2024.

Sd/-	**Sd/-**
(RAJ KUMAR CHAUHAN)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 22/10/2024
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai