

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : I-1 : NEW DELHI

BEFORE SHRI R.S. SYAL, AM AND SHRI C.M. GARG, JM

ITA No.550/Del/2016
Assessment Year : 2010-11

Mitsui Prime Advanced Composites India Pvt. Ltd., FF-08, First Floor, JMD Regent Plaza, Near Guru Dronacharya Metro Station, MG Road, Gurgaon. PAN : AAFCM1458C	Vs.	DCIT, Circle-6(1), New Delhi.
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(Appellant)

(Respondent)

Assessee By	:	Shri Kanchan Kaushal, CA & Shri Ravi Sharma, Advocate
Department By	:	Shri Amrendra Kumar, CIT, DR

Date of Hearing	:	19.04.2016
Date of Pronouncement	:	28.04.2016

ORDER

PER R.S. SYAL, AM:

This appeal by the assessee is directed against the order passed by the
CIT(A) on 16.10.2005 confirming the penalty of Rs.1,20,00,000/- imposed

by the Assessing Officer (AO) u/s 271(1)(c) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2010-11.

2. The facts leading to the imposition and confirmation of this penalty are that the assessee is a subsidiary of Mitsui Chemicals Inc., a company incorporated in Japan. The assessee came to be incorporated to carry on the business of manufacture and sale of all types of poly propylene and poly propylene compounds. It filed its return declaring loss of Rs.40,65,21,868. Six international transactions were reported in Form no. 3CEB. The assessee applied Transactional Net Margin Method (TNMM) with Profit level indicator (PLI) of Operating profit/Operating revenue (OP/OR) to demonstrate that its international transactions were at arm's length price (ALP). On a reference made by the AO to the Transfer Pricing Officer (TPO) for determining the ALP of the international transactions, the latter accepted all the international transactions at ALP save and except 'Availing of specified business and consultancy services' with transacted value of Rs.3,14,94,387/-; 'Availing of engineering support services'

worth Rs.13,03,786/-; and 'Availing of management support services' with value of Rs.3,91,181/-. The TPO observed that the assessee is a routine manufacturer and marketer of specialty chemicals and compounds used for manufacturing automotive parts. He proceeded to analyse the services availed by the assessee through these international transactions.

3. *Qua* the first international transaction of 'Availing of specified business and consultancy services', the TPO observed that the assessee entered into a contract of accession with its AE wherein the AE, namely, Grand Siam Composites Co. Ltd. (GSC) agreed to provide the assessee the consultancy services in relation to the project of supply of polypropylene compounds to Maruti Suzuki Ltd. The assessee justified the ALP of this transaction by submitting, as has been extracted on page 3 of the TPO's order, that payments made to GSC was for Business (i.e. sale of polypropylene compound business with Maruti Suzuki Ltd.) and consultancy services. It was explained that the assessee, being a new player in the industry, did not have its own customer base in India and that is why it entered into an agreement with GSC for transfer of its business

with Maruti Suzuki Ltd. to it along with consultancy services, against payment of BAHT 22396805 (converted into Indian rupee at Rs.3.14 crore).

4. As regards the international transaction of 'Availing of engineering support services' with transacted value of Rs.13,03,786/-, the TPO required the assessee to furnish information with regard to nature of such services availed by it. Such information was given stating, *inter alia*, that it entered into an Agreement with its AEs (Mitsui Chemicals Inc., Prime Polymer Company Ltd. and Mitsui Chemicals Asia Pacific Ltd.) whereby the AEs agreed to provide technical and engineering services to the assessee by seconding their employees. The AEs provided the services as have been enumerated on page 4 of the TPO's order. Need for services was also given stating that it was setting up a manufacturing facility in Alwar, Rajasthan, for manufacture of poly propylene compounds for which technical services for construction of facility, such as, assistance in plant design, procurement of material and other relevant consultancy were

provided by the AEs by sending experts/personnel with required skills and experience available with them.

5. For the third international transaction of 'Availing of management support services' with value of Rs.3,91,181/-, the assessee submitted that it entered into agreement with its AE, namely, Mitsui Chemicals Inc., for availing management support services for the purposes of establishing and developing operating systems of logistics in India. Need for such services was also tendered, which has reproduced on page 5 of the TPO's order.

6. The TPO noticed that the assessee did not identify and provide details of the services and corresponding payment made for each and every service. The assessee was required to furnish the cost benefit analysis. After relying on certain decisions, the TPO came to hold that consideration paid for availing the above referred three services to different AEs was to be considered as separate class of transactions requiring separate benchmarking under the transfer pricing provisions. He went on to analyse the assessee's submissions given on the need for availing these services and held that the assessee failed to give any evidence as to the benefit

accruing to it by the supposed receipt of these services and even otherwise there was high possibility of duplication of such services. In this background of the factual matrix, the TPO held that no enterprise would enter into a blanket agreement with identified performance delivery promise by the service provider under uncontrolled situation. In the ultimate analysis, he separated these three international transactions of intra-group services from the other international transactions and determined their ALP under the Comparable Uncontrolled Price (CUP) method at Nil, which led to the recommendation of a transfer pricing adjustment amounting to Rs.3,31,89,364/-. The AO passed the assessment order making such addition, thereby reducing the declared loss to Rs.37.33 crore. The assessee did not challenge the addition in appeal. Thereafter, penalty proceedings were initiated by the AO. During the course of such penalty proceedings, the assessee urged for not imposing any penalty on the ground that it was not a case of concealment of income or furnishing of inaccurate particulars as the addition was not challenged in quantum proceedings because the returned loss was marginally reduced from Rs.40.65 crore to Rs.37.33 crore. The assessee also reiterated the reasons

advanced during the course of proceedings before the TPO that the services were, in fact, availed for which these payments totaling to Rs.3.31 crore were made. Not convinced, the AO imposed penalty at Rs.1.20 crore, which came to be upheld in the first appeal. The assessee is aggrieved against the sustenance of this penalty.

7. We have heard the rival submissions and perused the relevant material on record. Rejecting the application of TNMM on entity level, the TPO proposed transfer pricing adjustment amounting to Rs.3.31 crore by determining Nil ALP of the three international transactions under the CUP method by basing his conclusion on the fact that the assessee did not avail any services inasmuch as no benefit was derived by it and, in any case, it amounted to duplication of services. Under such circumstances, a question arises as to whether penalty u/s 271(1)(c) can be imposed. In this regard, we find that the relevant provision is Explanation 7 to section 271(1), which reads as under:-

“Explanation 7.—Where in the case of an assessee who has entered into an international transaction or specified domestic transaction defined in section 92B, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or

disallowed shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good faith and with due diligence.”

8. A perusal of this Explanation transpires that any addition on account of transfer pricing adjustment shall be deemed to represent income in respect of which particulars have been concealed or inaccurate particulars have been furnished in terms of section 271(1)(c), thereby inviting penalty under this provision. However, the exception enshrined in this provision itself states that no penalty will be imposed pursuant to the addition on account of transfer pricing adjustment, if the assessee proves to the satisfaction of the authority that the price charged or paid in such a transaction was in accordance with the provisions of section 92C and such price was computed as per the manner prescribed under that section in good faith and due diligence. This divulges that penalty u/s 271(1)(c) in respect of addition on account of transfer pricing adjustment is not imposable only when the assessee proves to the authority that the price

paid by it was computed in terms of section 92C and in a manner prescribed under the section and this exercise was done in good faith and due diligence.

9. Section 92C of the Act deals with the 'Computation of arm's length price.' Sub-section (1) provides that 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, having regard to the nature of transaction or class of transaction etc., namely :— (a) comparable uncontrolled price method; (b) resale price method; (c) cost plus method; (d) profit split method; (e) transactional net margin method; (f) such other method as may be prescribed by the Board. Sub-section (2) provides that the most appropriate method referred to in sub-section (1) shall be applied for determining ALP in the manner as may be prescribed. Thus, it can be noticed that there are five methods specifically mentioned in addition to clause (f) of section 92C(1) which refers to 'such other method as may be prescribed by the Board.' The 'other method' has been prescribed by the Board in terms of Rule 10AB with retrospective effect

from 1.4.2012 applicable to assessment year 2012-13 and subsequent years. We are dealing with assessment year 2010-11. As such, the ALP for the year under consideration could have been determined only by applying any of the five specified methods. The assessee applied TNMM as per clause (e) of section 92C(1), which was rejected by the TPO, who applied CUP as the most appropriate method as per clause (a) of section 92C(1). Thus, it is clear that the assessee's application of TNMM in respect of the three international transactions under consideration is 'in accordance with the provisions contained in section 92C'. Further, such determination is 'in the manner prescribed under that section' because the TPO has nowhere held that the assessee calculated ALP of these transactions in a manner different from the one prescribed under rule 10B(1)(e), which contains mechanism for calculating the ALP under the TNMM.

10. The next ingredient which is crucial for evading penalty u/s 271(1)(c) is that the application by the assessee of most appropriate method for determining ALP should be 'in good faith and with due diligence.' Now,

the moot question is whether the assessee's application of the TNMM on entity level can be considered as done in good faith and with due diligence and whether the TPO was lawfully justified in departing from the assessee's method and in making the extant addition.

11. To find an answer to this question, we need to briefly revisit the vital facts. The TPO has determined Nil ALP of the three international transactions by holding that the assessee did not avail any services for which the payment was made to its AEs as no benefit was shown to have been received, and, in any case, it was a case of duplication of services.

12. We do not find any force in the view point of the TPO that it was a case of duplication of services. It is for the reason that the assessee was incorporated in the Financial year 2007-08 and its Annual accounts for the year under consideration show that the manufacturing activity was undertaken for the first time during this year, as against the only trading activity in the preceding year. Manufacturing activity was undertaken as a consequence of the assessee entering into 'Project consultancy and Business transfer agreement' dated 1.8.2009 with GSC which is engaged

in the business, *inter alia*, of manufacture and supply of poly propylene compounds and was hitherto an established supplier of poly propylene compounds to Maruti Suzuki India Ltd. Under this Agreement, the assessee acquired 'Specified business' and consultancy services from GSC for a consideration of Rs.3.14 crore. The 'Specified business' of GSC with Maruti Suzuki Ltd. was transferred to the assessee with all business activities, transactions, contracts, orders, inquiries and the consultancy services in relation to the transition of such business. In addition to that, GSC also agreed to provide all technical information, know-how, data, formulae and knowledge relating to the products manufactured and sold to Maruti Suzuki, which stood transferred to the assessee by means of this Agreement. It appears that the TPO misdirected himself in evaluating the international transaction of payment of Rs.3.15 crore to GSC as a mere rendering of services alone in disregard to the fact that this payment was mainly for acquiring business of Maruti Suzuki Ltd. and receipt of technical know-how, etc. for the manufacture of desired products to be sold to Maruti Suzuki Ltd. A crucial factor which ought to have been considered by the AO was if such payment falls in capital or revenue field.

Since the AO has imposed penalty by considering the transfer pricing adjustment made by the TPO on the premise of `non-availing of services`, which position is contrary to the actual factual matrix of having also received the entire business with Maruti Suzuki Ltd. for the stated consideration, we cannot improve the assessment order or the consequential penalty order to rope in another new reason for confirming the penalty. Fate of the penalty could have been different if a proper analysis of the Business transfer Agreement had been made by the authorities to ascertain if such payment of Rs.3.14 crore (out of total addition of Rs.3.31 crore) was a capital or a revenue expenditure. Back to our context, it is found that the assessee did receive business from GSC and technical know-how as a *quid pro quo* for the payment of Rs.3.14 crore.

13. The second transaction of availing Engineering support services was entered into pursuant to Agreement dated 1.10.2007 with its AE, a copy of which is available at page 551 to 568 of the paper book. This Agreement divulges that the assessee was planning to build a new plant and desired to

receive certain engineering services through the employees of its AE. This demonstrates that whereas consideration of Rs.3.14 crore was mainly for acquiring `Business' of supply of goods to Maruti Suzuki, for which it was to set up its own plant and the second amount of Rs13.03 lac was paid for availing the engineering services in installing such plant and machinery. The third international transaction is payment of a small amount of Rs.3.91 lac paid to AE for availing management support services. These services were received pursuant to an Agreement with Prime Polymer Co. Ltd., Japan, a copy of which is available at page 569 of the paper book. The services provided under such Agreement have been set out in clause 1.2, which states that the AE shall assist in business operations of the assessee and in market development in India apart from rendering engineering and technical support services in India. A brief description of the above Agreements amply shows that the assessee paid under these international transactions for acquiring the `Business' of supply to Maruti Suzuki Ltd. and availing engineering services for setting up of plant required for manufacturing of the products to be supplied to Maruti Suzuki. Since no manufacturing activity was done by the assessee in past as it was simply a

trader, acquiring of `Business' and availing of the services under these three Agreements cannot be characterized as duplication of services.

14. The second point of view of the TPO for determining Nil ALP that the assessee did not avail any services at all, is clearly not correct. We have noted the factum of the assessee actually acquiring `Business' from GSC for supply of products to Maruti Suzuki Ltd. and then availing engineering services for setting up of plant for manufacturing the designated products. It is pursuant to such setting up of new manufacturing facility that the assessee made sales of manufactured goods during the year amounting to Rs.30.43 crore. This indicates that the benefit derived by the assessee from payments under these three international transactions cannot be considered as Nil as has been done by the authorities below. The patent reason is that the assessee not only acquired a new business from GSC but also availed services for setting up its plant etc. Detail of the nature of services availed by the assessee from its AEs is contained in the letter dated 18.12.2013 addressed to the TPO, a copy of which is available at page 132 of the paper book. This letter runs

into 48 pages through which the assessee explained to the TPO about the nature and the need for services. We find that there is a sufficient elaboration of the nature of services availed by the assessee under these three international transactions, which have not been properly considered by the TPO in determining Nil ALP. He has simply brushed aside the assessee's contentions and determined Nil ALP of these three international transactions basically on the premise that either no services were received or in the alternate, the services, if any, received by the assessee amounted to duplication of services.

15. Be that as it may, we find that on the 'Benefit test' as applied by the TPO for determining the ALP at Nil, the Hon'ble Punjab & Haryana High Court in *Knorr-Bremse India P. Ltd. vs. ACIT (2016)380 ITR 307 (P&H)* has held that the question whether a transaction is at an arm's length price or not is not dependent on whether the transaction results in an increase in the assessee's profit. A view to the contrary would then raise a question as to the extent of profitability necessary for an assessee to establish that the transaction was at an arm's length price. A further question that may arise

is whether the arm's length price is to be determined in proportion to the extent of profit. Thus, while profit may reflect upon the genuineness of an assessee's claim, it is not determinative of the same. It went on to hold that business decisions are at times good and profitable and at times bad and unprofitable. Business decisions may and, in fact, often do result in a loss. The question whether the decision was commercially sound or not is not relevant. The only question is whether the transaction was entered into *bona fide* or not or whether it was sham and only for the purpose of diverting the profits. Reverting to the facts of the extant case, we have found out above that the three international transactions entered in to by the assessee with its AEs were not only genuine and *bona fide* but were also given effect to.

16. It is manifest that the TPO applied CUP method for determining the ALP of these three international transactions. While applying the CUP method, it was obligatory upon him to bring on record some comparable uncontrolled instances availing similar services as per the mandate of rule 10B(1)(a)(i). Not even a single comparable instance has been brought on

record to facilitate a comparison between the price for the services availed by the assessee *vis-à-vis* that paid by other comparables in similar circumstances.

17. Even otherwise, we notice that the action of the TPO in determining Nil ALP of these three international transactions on the ground that no such services were required to be availed or it was a duplication of services and then the AO making addition simply on the basis of recommendation of the TPO, is not in accordance with the judgment of the Hon'ble jurisdictional High Court in *CIT v. Cushman & Wakefield (India) (P.) Ltd. (2014) 367 ITR 730 (Del)*, in which it has been held that the authority of the TPO is limited to conducting transfer pricing analysis for determining the ALP of an international transaction and not to decide if such services exist or benefits did accrue to the assessee. Such later aspects have been held to be falling in the exclusive domain of the AO. In that case, it was observed that the e-mails considered by tribunal from Mr. Braganza and Mr. Choudhary dealt with specific interaction and related to benefits obtained by assessee, providing a sufficient basis to hold that

benefit accrued to assessee. As the details of specific activities for which cost was incurred by both AEs (for activities of Mr. Braganza and Mr. Choudhary), and attendant benefits to assessee were not considered, the Hon'ble High Court remanded the matter to file of concerned AO for an ALP assessment by TPO, followed by AO's assessment order in accordance with law considering the deductibility or otherwise as per section 37(1) of the Act.

18. When we advert to the facts of the instant case, it turns out that the TPO proposed the transfer pricing adjustment equal to the stated value of three international transactions at Rs.3.31 crore and odd by holding that no benefit was received by the assessee as a result of availing the services or these amounted to duplication of services and hence no payment on these scores was warranted. The AO in his draft order has taken ALP of these international transaction at Nil on the basis of recommendation of the TPO without carrying out any independent investigation in terms of the deductibility or otherwise of such payment in terms of section 37(1) of the Act. This addition has been made by the AO in his final assessment order

giving effect to the direction given by the DRP and not by invoking section 37(1) of the Act. As per the *ratio decidendi* of *Cushman & Wakefield India (P.) Ltd. (supra)*, the TPO was required to simply determine the ALP of these three international transactions, unconcerned with the fact, if any benefit accrued to the assessee and thereafter, it was for the AO to decide the deductibility of this amount u/s 37(1) of the Act. As the TPO in the instant case initially determined Nil ALP by holding that no benefit accrued to the assessee etc. and the AO made the addition without examining the applicability of section 37(1) of the Act, we find the actions of the AO/TPO running in contradiction to the ratio laid down in *Cushman & Wakefield (supra)*. Following this decision, the matter in quantum, if appealed against, would have required a remit to the file of AO/TPO for deciding it in conformity with the law laid down by the Hon'ble jurisdictional High Court in this case.

19. Coming back to the Explanation 7 to section 271(1), we find that no doubt the addition of Rs.3.31 crore has been made on account of transfer pricing adjustment in respect of these three international transactions, but,

the same cannot be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished because the assessee has proved that the price paid by it under such transactions was computed in accordance with the provisions of section 92C and in the manner prescribed under the TNMM in good faith and with due diligence. Further the action of the TPO in changing the most appropriate method from TNMM to CUP without bringing on record any comparable instance, is itself faulty. In any case, it was the AO who was to determine whether or not such expenses were deductible in terms of section 37(1) and not the TPO, as has been done. We have noticed above that the exercise done by the TPO in determining Nil ALP on the premise that either no services were availed by the assessee or in any case it was a case of duplication of services, is not only unsubstantiated but contrary to the material on record. The mere fact that the TPO determined Nil ALP of the international transactions cannot be a reason to impose penalty u/s 271(1)(c) of the Act.

20. The ld. DR vehemently argued that penalty u/s 271(1)(c) should be confirmed because the assessee accepted the addition on account of transfer pricing adjustment without assailing it in quantum proceedings. It is not in dispute that the assessee accepted the addition without challenging it before the appellate forums. But in our considered opinion, the mere fact that an addition has been made or confirmed does not *per se* leads to imposition of penalty u/s 271(1)(c). It is simple and plain that both the assessment and penalty proceedings are distinct from each other. If the contention of the ld. DR that the acceptance of addition or confirmation of addition in quantum proceedings would automatically justify imposition of penalty is taken to a logical conclusion, then, there was no need to have separate penalty proceedings. The very fact that the legislature has not made penalty automatic of the addition or its confirmation in the appellate proceedings and has created separate penalty proceedings during which the assessee is given due opportunity to put forth his point of view for non-imposition of penalty notwithstanding the sustenance of addition, amply goes to show that penalty is not automatic of addition. The Hon'ble Calcutta High Court in *CIT vs. Bimal Kumar Damani (2003) 261 ITR 87*

(Cal), has laid down that penalty is not automatic as it is an independent proceedings which is required to be initiated separately and such penalty can be imposed only after giving opportunity to the assessee. Similar view has been taken in a catena of decisions which we are not referring to herein for the sake of brevity. In our considered opinion, the necessary criteria for imposition or non-imposition of penalty is not the surrender or non-surrender of income; acceptance or non-acceptance of addition; and confirmation or deletion of addition in quantum proceedings. In fact, it is the evaluation of the circumstances leading to the surrender/addition or confirmation of addition, which decide the fate of penalty. Where a surrender or an addition is made due to absence of *bona fide* in the conduct of the assessee, it may be a good case for imposition of penalty. On the other hand, if a surrender or an addition is made due to failure of the assessee to establish his case to the satisfaction of the AO despite the genuineness of the explanation, it will not call for imposition of penalty, notwithstanding such an addition having been confirmed in appeals. Further, an honest difference of opinion between the assessee and the Revenue can never be a cause for imposition of penalty. Under such

circumstances, the contention of the ld. DR that the factum of the assessee not assailing the addition in quantum proceedings should be considered as fatal, in our considered opinion, is devoid of merits.

21. The ld. DR also placed reliance on the judgments of the Hon'ble Supreme Court in the case of *Mak Data P. Ltd. vs. CIT (2013) 358 ITR 593 (SC)*; *Union of India vs. Dharmendra Textile Processors and Ors. (2008) 306 ITR 277 (SC)* and *CIT vs. Atul Mohan Bindal (2009) 317 ITR 1 (SC)* to support the sustenance of the instant penalty. In our considered opinion, such a reliance is improper in so far as the facts under consideration are concerned. In *Mak Data P. Ltd. (supra)*, there was a survey conducted in case of that assessee's sister concern which divulged the assessee's involvement. The assessee surrendered a particular amount which was brought to tax. When the question came about imposition of penalty, the assessee contended that the surrender was made to avoid litigation and to buy peace. This contention failed to convince the Hon'ble Supreme Court because the voluntary surrender was made in view of detection by the AO. Similar is the position regarding another judgment of the Hon'ble High

Court in *CIT vs. Usha International Ltd. (2012) 254 CTR 509 (Del)*, relied by the ld. DR, in which the act of the assessee filing a revised return, withdrawing wrong claim of deduction, was not accepted as a genuine reason for evading penalty when the concealment already stood detected by the AO. We find that these two judgments, namely, *Mak Data P. Ltd. (supra)* and *Usha International Ltd. (supra)* are not relevant in the background of the facts as are instantly prevailing. It is not a case where the assessee either surrendered any income or filed a revised return offering the income. Nor did the assessee come forward to surrender the amount of Rs.3.31 crore and odd. On the contrary, it is a case in which the addition was made by the AO, which was not further appealed against. The reason for non-assailing of this addition of Rs.3.31 crore in quantum proceedings is understandable inasmuch as the assessee furnished its return declaring loss of Rs.40.65 crore and after making this addition, still there was a loss of Rs.37.33 crore. The ld. DR vehemently contended that penalty cannot be deleted even if the income returned and assessed is a loss. We are in full agreement with this proposition. However, it is not the case of the assessee that no penalty be levied due to returned and assessed

loss. On the contrary, the assessee is trying to prove its *bona fide* in not assailing the addition in quantum proceedings on the ground that the addition was not challenged due to existence of loss even after addition and the assessee opting not to contest addition to avoid protracted litigation.

22. In *Dharmendra Textile Processors and Ors. (supra)*, the Hon'ble Supreme Court laid down that *mens rea* is not an essential ingredient of section 271(1)(c) and there is no discretion with the authority competent to impose penalty to levy penalty below the prescribed limit. It is pertinent to mention that the Hon'ble Supreme Court in its later decision in *Union of India vs. Rajasthan Spinning and Weaving Mills (2009) 224 CTR 1 (SC)* has explained its earlier decision in *Dharmendra Textile Processors and Ors (supra)* by laying down that the earlier decision cannot be said to hold that penalty u/s 11AC of Central Excise Act would apply to every case. It has been mentioned that the decision in *Dharmendra Textile Processors (supra)* must be understood to mean that though the application of section 11AC would depend upon the existence or otherwise of the condition

expressly stated in the section, but, once the section is applicable in a case, then, concerned authority would have no discretion in quantifying the amount of penalty. In so far as the reliance of the ld. DR on decision in the case of *Atul Mohan Bindal (supra)* is concerned, we find that in this case the Hon'ble Supreme Court has simply restored the matter to the Hon'ble High Court for taking a fresh decision in the light of the judgments in the case of *Dharmendra Textile (supra)* and *Rajasthan Spinning and Weaving Mills (supra)*. It is further noticed that the Hon'ble Supreme Court in a later judgment in *CIT vs. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 (SC)* has held that a mere making of a claim which is not sustainable in law, by itself will not attract penalty u/s 271(1)(c) when the assessee furnishes all the relevant particulars in the return which are not found to be inaccurate. This shows that each and every addition does not lead to imposition of penalty as has been canvassed on behalf of the Revenue.

23. The reliance of the ld. DR on the judgments in *CIT vs. Mussadi Lal Ram Bharose 165 ITR 14 (SC)* and *Calcutta Discount Company Ltd. vs. ITO 41 ITR 191 (SC)* is again improper because unlike those decisions, we

are not faced with a situation in which the explanation of the assessee for determining the ALP in the manner as done by it, was not *bona fide*. Similar is the position insofar as the reliance of the ld. DR on *CIT vs. Zoom Communication Pvt. Ltd. (2010) 327 ITR 0510 (Del)* is concerned. In that case penalty was confirmed in respect of claim on account of payment of income-tax and capital expenditure written off in the P&L a/c of the assessee. In upholding the penalty, the Hon'ble High Court found that the claims besides being incorrect in law, were *mala fide*. We have noticed above that the assessee acted in a *bona fide* manner in determining the ALP of the international transaction. Rather, it is the action of the TPO in determining Nil ALP, which by no standard can be upheld in view of the discussion made hereinabove.

24. The ld. DR relied on an order passed by the Mumbai Bench of the Tribunal in *Genom Biotech (P) Ltd. vs. ITO (2016) 67 Taxmann.com 219 (Mum) (Trib)* in which penalty has been confirmed u/s 271(1)(c). The facts of that case are that the assessee therein benchmarked its international transactions by adopting the Cost plus method (CPM). During the course

of proceedings, it was found by the TPO that AEs of the assessee were engaged in buying similar products for sale from unrelated parties as well. He, therefore, applied the CUP method by treating such transaction with third parties as a benchmark. The addition so made by the TPO was accepted by that assessee, which led to the imposition of penalty u/s 271(1)(c). When the matter of penalty finally came up before the Tribunal, it was observed that the assessee did not adopt CUP method knowing very well that internally comparable uncontrolled transactions were available. The assessee's applying CPM in such circumstances was found to be an evidence of absence of due diligence and good faith. When we advert to the facts of the instant case, we find that even the TPO has not brought out any comparable transaction under the CUP method. His entire case is based on duplication of services and/or non-availment of any services by the assessee from its AEs, which has been found by us to be untenable. Thus, this decision of Mumbai Bench is distinguishable and does not support the Revenue's case. On the contrary, we find that the assessee's case is covered by another decision of the Mumbai Bench of the Tribunal in *DCIT vs. RBS Equities India Ltd. (2011) 13 Taxmann.com 30 (Mum)* in

which penalty u/s 271(1)(c) has been deleted in somewhat similar circumstances. If we accept the contention of the Id. DR that addition on account of transfer pricing adjustment invariably means absence of good faith and due diligence, then, each and every case involving transfer pricing adjustment would call for imposition of penalty u/s 271(1)(c). The proposition so propounded on behalf of the Revenue is too wide and clearly unacceptable inasmuch as the intention of the legislature is to impose penalty due to addition on account of transfer pricing adjustment only when good faith and due diligence are lacking and not because of a genuine and valid difference of opinion in the determination of ALP of an international transaction.

25. In view of the foregoing discussion, we are satisfied that the assessee has satisfied all the requisite conditions as stipulated in the exception crafted in Explanation 7 granting immunity and hence it cannot be visited with penalty u/s 271(1)(c) of the Act. *Ex consequenti*, the impugned order is set aside and the penalty is deleted.

26. In the result, the appeal is allowed.

The order pronounced in the open court on 28.04.2016.

Sd/-

Sd/-

[C.M. GARG]
JUDICIAL MEMBER

[R.S. SYAL]
ACCOUNTANT MEMBER

Dated, 28th April, 2016.

dk

Copy forwarded to:

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

AR, ITAT, NEW DELHI.