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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **INCOME TAX APPEAL NO. 757/2014**

Date of decision: 23rd December, 2014

THE COMMISSIONER OF INCOME TAX-II Appellant

Through Mr. Rohit Madan & Mr. Ruchir Bhatia,
Advocates.

versus

M/S JOHNSON MATTHEY INDIA P. LTD. Respondent

Through Mr. Vikas Srivastava & Ms. Varsha
Bhattacharya, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL):

CM No. 20423/2014

Learned counsel appearing for the respondent-assessee on advance notice states that he has no objection in case delay in re-filing of 395 days is condoned. The application is allowed in view of the said statement.

INCOME TAX APPEAL NO. 757/2014

This appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) impugns order dated 31st August, 2012 passed by the Income Tax Appellate Tribunal (Tribunal, for short) affirming the finding of the Commissioner of Income Tax (Appeals) that the Assessing Officer was not justified in imposing penalty of Rs.1,31,82,960/- under Section 271G of the

Act.

2. The finding of the two appellate forums is that the assessee had filed the relevant documents within two months from the date of issue of notice by the Transfer Pricing Officer. The said notice issued by the Transfer Pricing Officer is dated 19th March, 2007. The respondent-assessee thereafter had filed an application seeking adjournment on 11th April, 2007 and the proceedings were adjourned for 8th May, 2007 and then to 18th May, 2007. The Tribunal has accepted the finding of the Commissioner of Income Tax (Appeals) that the assessee had filed transfer pricing report along with Form No.3CEB on 16th May, 2007. Thus, the relevant documents and papers as per the mandate of Section 92D(3) of the Act were complied and filed within two months from the date of issue of notice. The Tribunal has also referred to Section 92D of the Act, which requires the assessee to furnish documents maintained under Section 92D(1) of the Act within a period of 30 days of service of notice, but the Assessing Officer had power to extend the said period by another 30 days. In this connection, request for adjournment made and allowed have been referred to. The documents have to be filed within a period of 60 days from the service of notice. Thus, the appellate forums have held that the statutory compliance was duly made.

3. The Assessing Officer in his order under Section 271G of the Act was unsure and uncertain about the relevant facts. The Assessing Officer

in the penalty order had accepted the factual position that the assessee had sought adjournment and the case was adjourned first to 8th May, 2007 and then to 18th May, 2007. The assessee in response to the show cause notice had asserted due compliance with the requirements by filing requisite Rule 10D documentations within a period of 60 days, as per extension of time allowed by the Transfer Pricing Officer. The Assessing Officer in view of the said reply had raised a query to the office of the Transfer Pricing Officer and the penalty order records and accepts that adjournment was allowed and granted upto 18th May, 2007. The Assessing Officer referring to the Transfer Pricing Officer's response, observed that the Transfer Pricing Officer had not mentioned whether the assessee had filed Rule 10D documentation within the stipulated time. The Assessing Officer nevertheless and still observed that the assessee's letter dated 16th May, 2007 addressed to the Transfer Pricing Officer, which was filed before him, had not been corroborated by the Transfer Pricing Officer. Silence on the part of the Transfer Pricing Officer was read in negative and against the assessee. The assumption drawn is not justified and a mere surmise. The exact reasoning given by the Assessing Officer to impose penalty is reproduced below:-

“Assessee's reply has been considered but found not convincing. On enquiry from the office of TPO, it is gathered that the assessee was allowed adjournment upto 18.5.2007 and on 18.5.200 a letter has been filed enclosing therewith return of income with audited

balance sheet & P&L account. Further perusal of TPO's reply revealed that there was no mention of assessee's filing of Rule 10D documentation within the stipulated time rather whether the assessee in fact filed the 10D documentation or not has not been mentioned in his letter. Assessee's letter dated 16.5.07 addressed to Addl.CIT, TPO, copy of which has been filed along with its reply has not been corroborated [sic, corroborated] by the TPO in his reply dated 26.6.2009. Under these circumstances, it is not clearly established that the assessee has filed 10D documentation within the prescribed time limit, therefore, it is liable for imposition of penalty u/s 271G of 1T Act, as recommended by the TPO. In view of the circumstances, the reply of the assessee is not found acceptable and as such the default u/s 271G established beyond doubt. It is also pertinent to mention here that it was on the TPO's recommendation only that penalty proceedings u/s 271G were initiated as it was noticed by him that the Rule 10D documentation were not filed within the stipulated time.”

(emphasis supplied)

4. It is interesting to note that the Transfer Pricing Officer did not interfere and make adjustment to the international transactions. The total value of the international transactions was Rs.65,91,48,060/-. This figure was not disturbed. It can be inferred that as per documentation filed, no addition was required. In spite of the Assessing Officer not being factually sure and certain, whether or not there was violation of Section 92D of the Act read with Rule 10D of the Rules, penalty @ 2% of the value of international transactions of Rs.1,31,82,960/- was imposed. Penalty cannot be imposed unless and until the Assessing Officer is sure and certain that there was a violation. Ambiguity or doubt in the mind of the Assessing Officer

does not justify imposition of penalty, when the *actus reas* itself is not proved and established. The penalty order is self contradictory.

5. It was in these circumstances that the Commissioner of Income Tax (Appeals) deleted the penalty, which order has been affirmed by the Tribunal. The Commissioner of Income Tax (Appeals) specifically recorded a finding that the documentation was filed by the assessee within the extended period of 30 days, i.e., within 60 days, and hence, no penalty was leviable.

6. In the grounds of appeal, Revenue has taken a different stand, which was possibly not taken before the Tribunal. It is stated that the documentation filed with the letter dated 16th May, 2007 did not enclose documentations to be maintained under Rule 10D of the Rules. It is clear that this was not the stand taken by the Revenue before the Tribunal and it was not the stand or ground taken by the Assessing Officer while imposing penalty.

7. In view of the aforesaid position and the findings of the Commissioner of Income Tax (Appeals) and the Tribunal, we do not find any merit in the present appeal and the same is dismissed.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

DECEMBER 23, 2014
VKR