



IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT, AND

SHRI SAKTIJIT DEY, JUDICIAL MEMBER

IT(TP)A no.2608/Mum./2017
(Assessment Year :2011-12)

Dy. Commissioner of Income Tax
Circle-5(4), Mumbai
Erstwhile DCIT, CC-37, Mumbai

..... Appellant

v/s

Decent Dia jewels Pvt. Ltd.
103, Shreeji Chambers
Opera House, Mumbai 400 004
PAN - AADCD3620M

..... Respondent

Revenue by : Shri Ujjawal Kumar
Assessee by : Shri Madhur Agarwal

Date of Hearing – 17.02.2020

Date of Order – 13.03.2020

ORDER

PER SAKTIJIT DEY. J.M.

The Revenue has filed the present appeal challenging the order dated 3rd October 2016, passed by the learned Commissioner of Income Tax (Appeals)-55, Mumbai, deleting the penalty imposed of ₹ 55,30,187, under section 271G of the Income Tax Act, 1961 (for short "*the Act*").

2. Brief facts are, the assessee, a resident company, is engaged in the business of importing rough diamond, getting them cut & polished and thereafter exporting to various parties outside the Country including the Associated Enterprises (AEs) of the assessee situated abroad. In the transfer pricing study report, the assessee benchmarked the international transaction with the AEs relating to sale of polished diamond amounting to ₹ 27,65,09,328, adopting Transactional Net Margin Method (TNMM) as the most appropriate method with operating profit / sales as the profit level indicator (PLI). Since, the margin shown by the assessee @ 2.70% is within the tolerance range of the average margin of the comparables worked out @ 5.54%, the transaction with the AE was claimed to be at arm's length.

3. After perusing the transfer pricing study report, the Transfer Pricing Officer observed that the entity level margin of the assessee included its combined profit on the transactions with both the AE and the non-AE. Therefore, he called upon the assessee to furnish separate segmental result in respect of transactions with the AE and non-AE along with segmental profitability. In response to the query raised, the assessee vide letter dated 16th January 2014 expressed its inability to furnish the segmental profitability due to the volume and number of transactions which makes it difficult to provide such details.

Thus, after considering the submissions of the assessee the Transfer Pricing Officer alleged that due to lack of information furnished by the assessee, it is difficult to benchmark the transaction properly. Therefore, ultimately he accepted the benchmarking done by the assessee by holding that the transactions with the AE are at arm's length. However, alleging non-maintenance of specified documents, he initiated proceedings under section 271G of the Act and ultimately passed an order on 24th July 2015, imposing penalty of ₹ 55,30,187. The assessee challenged the penalty order by preferring an appeal before the first appellate authority.

4. After considering the submissions of the assessee in the context of facts and material on record, learned Commissioner (Appeals) observed that it is extremely difficult for a diamond trader / manufacturer to identify conversion of a particular rough diamond into a polished diamond. Therefore, it is very difficult for the assessee to identify each rough diamond piece-wise and equally difficult to identify each cut and polished diamond vis-a-vis the original rough diamond from which it was cut and polished. He observed, though, the Transfer Pricing Officer called for the segment-wise Profit & Loss account in respect of exported as well as all the diamond, however, ultimately, he accepted the arm's length price declared by the assessee. The learned Commissioner (Appeals) observed, the Transfer Pricing Officer could

have worked out the gross profit and net profit by averaging the purchase price and the expenditure in proportion of export sales of each one of the segments which he did not do. Thus, after considering all the aspects of the issue, learned Commissioner (Appeals) deleted the penalty imposed under section 271G of the Act.

5. The learned Departmental Representative strongly relying upon the observations of the Transfer Pricing Officer in the penalty order passed under section 271G of the Act submitted, due to non-maintenance of documents which the assessee is required to maintain under the statutory provisions, the Transfer Pricing Officer found it difficult to determine, the arm's length price of the transactions with the AE. Hence, he was compelled to accept the price charged by the assessee. Thus, he submitted, the penalty imposed under section 271G of the Act is justified.

6. The learned Authorised Representative submitted, the assessee has maintained all preliminary and basic documents and has also prepared a transfer pricing study report benchmarking the transaction with the AE. He submitted, due to the peculiar nature of assessee's business, it is difficult to maintain segmental profitability of AE and non-AE transactions, hence, the assessee could not furnish the information called for by the Transfer Pricing Officer. He submitted, the

Transfer Pricing Officer has ultimately accepted the transaction with the AE to be at arm's length. Therefore, there is no justification in imposing penalty under section 271G of the Act. In support of such contention, the learned Authorised Representative relied upon the following decisions:—

- i) PCIT v/s D. Navinchandra Exports Pvt. Ltd., R-Tax Appeal no.788/2018, dated 9th July 2018 (Guj.); and*
- ii) DCIT v/s Ankit Gems Pvt. Ltd., [2019] 106 taxmann.com 243 (Mum.).*

7. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. The material on record makes it clear that the assessee has maintained primary books of account / documents in respect of its business activity. The fact that the documents relating to transaction with the AE have also been maintained by the assessee is evident from the transfer pricing study report, wherein, the transaction with the AE has been benchmarked under TNMM. This shows that the assessee has maintained documents / books of account as required under the statute. It is also evident, in the course of proceedings before the Transfer Pricing Officer, the assessee has made substantial compliance by furnishing transfer pricing study report as well as many other documents. What the assessee has failed to furnish is, the segmental profitability of the AE

and non-AE transactions. The inability to furnish the aforesaid details was also well explained by the assessee before the Transfer Pricing Officer and learned Commissioner (Appeals) by demonstrating the practical difficulty in maintaining those details considering the nature of business carried on. Notably, though, the Transfer Pricing Officer has alleged that non-furnishing of segmental profitability makes it difficult for him to correctly ascertain the arm's length price, however, ultimately the Transfer Pricing Officer has accepted the transaction with the AE to be at arm's length. If the Transfer Pricing Officer was not satisfied with the benchmarking of the assessee under TNMM, nothing prevented him from rejecting assessee's benchmarking and determining the arm's length price of the transaction with the AE independently by applying any one of the prescribed methods. The blame for failure on the part of the Transfer Pricing Officer to determine the arm's length price cannot be fastened with the assessee. As could be seen, under identical facts and circumstances, the Tribunal in Ankit Gems Pvt. Ltd. (supra) observed as under: –

"5. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. On a careful reading of the penalty order passed under section 271G of the Act, it is evident, the Transfer Pricing Officer has proceeded to impose penalty under the aforesaid provision alleging that the assessee has failed to furnish certain information/documents which prevented him from determining the arm's length price properly. However, on a perusal of the orders passed by the Departmental Authorities as well as the material placed on record, it is noticed that the assessee has

maintained books of account and other information to benchmark the international transaction with AE by applying TNMM and the transfer pricing study report containing such benchmarking was furnished before the Transfer Pricing Officer along with various other details. However, the Transfer Pricing Officer was of the view that the international transaction with AE should be benchmarked by applying CUP method and called upon the assessee to furnish segment-wise details of AE and non-AE sales. It is observed, before the Transfer Pricing Officer the assessee has made submissions explaining why it is not possible for a person engaged in manufacturing and sale of diamond and diamond jewellery to maintain segment-wise details of sales made to the AE and non-AEs for the purpose of applying CUP method. It was explained by the assessee that CUP method could not be applied as invoice of sale of AE and non-AE include different types of goods sold at different price. It is further observed, in the preceding years also, the assessee had benchmarked international transaction with AE by applying TNMM which was accepted by the Revenue. It is relevant to observe, the Transfer Pricing Officer has ultimately accepted the benchmarking done by the assessee under TNMM method. On going through the provisions of section 92D and rule 10D, we find that the assessee is required to maintain certain information/documents which may be required by the Transfer Pricing Officer for determining arm's length price. In the present case, it is not a fact that the assessee has not maintained any information as required under section 92D(1) r/w rule 10D(1). The facts on record clearly indicate that the assessee indeed has maintained a number of information/documents as required under the statutory provisions. Further, the assessee has also explained why it is not possible to furnish certain information sought by the Transfer Pricing Officer qua applicability of CUP method. In this regard, detailed written submission has been filed by the assessee before the Transfer Pricing Officer which has been properly evaluated by the learned Commissioner (Appeals) and the difficulty in maintaining the information sought by the Transfer Pricing Officer has been well explained and analysed. It is also necessary to observe, ultimately the Transfer Pricing Officer had accepted the benchmarking done by the assessee under TNMM and no variation/adjustment was made by him to the arm's length price. Even, assuming that the assessee has not maintained documents as required or was unable to support the benchmarking done by it under TNMM, nothing prevented the Transfer Pricing Officer in discarding the benchmarking done by the assessee and determining the arm's length price of the international transaction with the AE independently by applying anyone of the prescribed method. When the statutory provisions confer enough power on the

Transfer Pricing Officer to benchmark the international transaction as per the provisions of the Act, the allegation of the Transfer Pricing Officer that by non-furnishing of documents by the assessee he was prevented from determining the arm's length price under CUP method is unacceptable. Therefore, when the Transfer Pricing Officer has accepted the benchmarking of the assessee, the imposition of penalty under section 271G of the Act is unsustainable. The decisions relied upon by the learned Authorised Representative dealing with identical issue of imposition of penalty under section 271G of the Act are squarely applicable to the facts of the present appeal. In view of the aforesaid, we do not find any infirmity in the order of learned Commissioner (Appeals) in deleting the penalty imposed under section 271G of the Act. Grounds are dismissed."

8. It is worth mentioning, while deciding similar nature of dispute, the Hon'ble Gujarat High Court in case of D. Navinchandra Exports Pvt. Ltd. (supra) has also uphold the deletion of penalty imposed under section 271G of the Act. In view of the aforesaid, we hold that learned Commissioner (Appeals) was justified in deleting the penalty imposed under section 271G of the Act. Grounds raised by the Revenue are dismissed.

9. In the result, appeal stands dismissed.

Order pronounced in the open Court on 13.03.2020

Sd/-
PRAMOD KUMAR
VICE PRESIDENT

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 13.03.2020

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai