

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

Before Ms. Sushma Chowla, Vice President

Dr. B. R. R. Kumar, Accountant Member

ITA No. 2967/Del/2015 : Asstt. Year: 2006-07

Income Tax Officer, War-25(3), New Delhi	Vs	M/s Tianjin Tianshi India Pvt. Ltd., 10, Community Centre, Basant Lok, New Delhi-110057
(APPELLANT)		(RESPONDENT)
PAN No. AABCT5611J		

Assessee by : Sh. Upvan Gupta, Adv.

Revenue by : Sh. H. K. Choudhary, CIT DR

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Date of Hearing: 30.01.2020	Date of Pronouncement: 09.03.2020
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the revenue against the orders of the Id. CIT(A)-44, New Delhi dated 12.02.2015.

2. Facts taken from the order of the Id. CIT (A).

History and Background:

3. The assessee is one of the group companies of China based TIENS Group of Companies. The business of the assessee, is Trading/Distribution of Food Supplements and Health Care Equipments. The products dealt with by the Company are basically products manufactured at China or other places by Group concerns. Another Group Entity Tianjin Tianshi Biological Development Company Limited, incorporated at China has established a Foreign Branch Office in India. This is a Foreign

Company with Non-Resident Status falling under the category of an "Associate Enterprise" (AE) of the assessee, while the Indian Branch Office of this company specifically fall under the category of "Permanent Establishment" (PE).

International Transactions:

TPO

4. The assessee had purchased Transactions aggregating to Rs.17,49,72,636/- from the Indian Branch Office of M/s Tianjin Tianshi Biological Development Company Limited (PE). The Assessing Officer made a reference to the TPO for determination of Arm's Length Price Under Section 92CA(3) in respect of this Purchase transactions and the TPO has determined the TP adjustment of Rs. 2,78,76,273/-.

CIT(A) on TP adjustment:

5. The assessee filed appeal before the Id. CIT (A) who while deciding the quantum appeal, held that ".....The wording "to allocate profit in different jurisdiction by controlling prices" are very clear about the different jurisdiction (at least two tax jurisdictions of different countries) and emphasis on "Profits should not be unduly transferred out of India". In the instant case both the element are absent."

6. Accordingly, the Id. CIT(A) has deleted the addition of Rs. 2,78,76,273/- in the quantum appeal. The Department had filed an appeal before the ITAT against the said assessee order passed by the Id. CIT(A).

ITAT on TP adjustment:

7. Vide order dated 27.05.2011 the ITAT has held

"(i) the CIT(A) has erred in observing that since no cross border transaction is involved, the transfer pricing provisions are not attracted. Once the transactions involved are international transactions within the meaning of section 92B(1) of the Act, the Transfer Pricing Provisions have rightly been involved. (ii) In view of the clear provisions of sections 92B(1) and section 92(1), there is no requirement to prove any motive to shift profits outside India or to evade taxes in India in the related party transactions and the CIT(A) has also erred in placing reliance on the fact that no such finding was recorded by the AO. The issue is as to whether the transfer pricing provisions have been rightly held to be not applicable."

8. In conclusion, the ITAT held that the transactions attract the Transfer Pricing provisions. Owing to the direction of the ITAT, Transfer Pricing Adjustment has been made. Subsequently, the penalty u/s 271(1)(c) has been levied by the Assessing Officer and the penalty order has been passed on 21.03.2012.

CIT(A) on Penalty:

9. While deleting the penalty, the Id. CIT (A) held that the assessee was under belief that the purchase from the PE of the foreign AE would not attract the transfer pricing provisions. It was held that the Id. CIT (A) has also held the same view and deleted the addition vide the appellate order dated 29.06.2010 in the quantum appeal. It was held that the provisions of Explanation 7 to Section 271(1)(c) are not attracted in this case and deleted the penalty.

Arguments of the Id. DR:

10. He strongly relied on the Explanation 7 to Section 271(1)(c) and on the judgments in the case of Dharmendra Textile Processors 295 ITR 244, Zoom Communication Pvt. Ltd. 327 ITR 510 and Judgment of Hon'ble Apex Court in the case of MAK Data Pvt. Ltd. 358 ITR 593. He filed written submissions detailing the provisions of the Act and ratio of the judgments.

Arguments of the Id. AR:

11. It was argued that the order of the ITAT dated 27.05.2011 has been received in the office of the CIT on 25.07.2011 and hence the penalty order passed on 21.03.2012 is beyond the period of six months from the end of the month in which the order was received by the CIT. It was argued that a period of six months expired on 31.01.2012 as per the provisions of Section 275(1)(a).

12. Further, it was argued that since one of the appellate authorities in quantum proceedings are favourable, it proves that the issue is debatable and hence no penalty can be leviable. He also argued that the penalty is not leviable as there is a bonafide claim and the revenue has not proved any case of furnishing of inaccurate particulars of income or concealment.

Perusal of the Facts and decision thereof:

13. On going back to the core issue of adjustment of ALP, it reveals that the assessee has applied TNMM as the most appropriate method and used NP/TC as PLI. Its margins in the food supplements and health equipment are 4.2% and 4.2%

respectively. In the first segment the assessee has selected 18 comparables whose average NP/TC margin is 4.1% and in the second segment, the assessee has selected 5 comparables whose average margin is 4.45%. In the TP study, the assessee, has used multiple year data for computing the average margin of the comparables while the TPO has used the current year data for calculating the average margin of the comparables. In the TP study the assessee has used NP/TC as PLI while the TPO has used OP/Sales as PLI. Accordingly, the TPO has computed the adjustment of Rs. 91,37,476/- in the Health Equipment segment. In the Food Supplement Segment, the assessee has selected 18 comparables and computed the average margin (NP/TC) of these comparables at 4.1, The TPO has chosen only 2 comparables out of 18 comparables from the list of assessee and computed the average margin (OP/Sales) at 17% based on current year data. Accordingly, the TPO has computed the adjustment of Rs 1,87,38,797/- in the Food Supplement Segment and subsequently levied penalty.

14. In this background, the provisions of Explanation 7 of Section 271(1)(c) are examined. The same reads as under:

"Explanation 7 - Where in the case of an assessee who has entered into an international 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 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."

15. We find that during the earlier period of transfer pricing adjustment, it was not even clear whether the transactions are indeed international transactions or not/or whether the transactions are a subject matter of TP study or not. In the case of Verizon Communication India (P) Ltd. Vs DCIT, the ITAT Delhi has held that when the assessee filed its return of income, the assessee adopting multiple year data for arriving at arm's length price is a bonafide exercise. It was held that under such circumstances the penalty levied cannot be sustained.

16. In the instant case, the adjustment arose due to exclusion of some comparables and the use of current year data by the revenue instead of multiple year data by the assessee and also taking OP/sales instead of NP/TC as PLI. The issue of applicability of current year data or multiple year data has not been attained finality at that point of time.

17. The case law of Dharmendra Textile Processors relied by the Id. DR deals with willful concealment versus civil liability. The instant case, doesn't deal with any issue of concealment but adjustment. The case of Zoom Communication Pvt. Ltd. dealt with the claim of the assessee which is ex-facie non-allowable, the facts of which are different from the facts of the present case so far the present case deals with adjustment and determination of ALP. Similarly, the case of MAK Data which deals with voluntarily disclosure versus concealment, hence the ratio is not applicable to the case before us. Further, the provisions of Explanation 7 accords a benefit to the assesseees to prove that the price charged are paid in such transactions was computed in accordance with the provisions of Section 92C

in good faith and due diligence. In the instant case, all the facts have been submitted before the revenue authorities while the assessee sued NP/TC, the revenue used OP/Sales. This amounts to determination of ALP from a different angle, say at most from the angle of the revenue. It cannot be said that there was any surreptitious mechanism embarked upon by the assessee nor it can be said that the assessee failed to exercise their transactions with all the due diligence. In the present case the assessee has prepared its TP report in good faith and with due care. There is nothing on record to disprove the good faith and the due diligence discharged by the assessee in determining the ALP of transactions in the TP report submitted by the assessee.

18. Hence, we hereby hold that Explanation 7 to section 271(1)(c) is not attracted in the present case, and hence, it is not a fit case for levying the penalty u/s 271(1)(c). Accordingly, the penalty imposed u/s 271(1)(c) is hereby ordered to be deleted.

19. In the result, the appeal of the revenue is dismissed.
Order Pronounced in the Open Court on 09/03/2020.

Sd/-

(Sushma Chowla)
Vice President

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 09/03/2020

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR