

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai**

**Before Shri Shailendra Kumar Yadav, Judicial Member
and Shri Jason P. Boaz, Accountant Member**

ITA No. 6962/Mum/2014
(Assessment Year: 2002-03)

M/s. Clestra Life Sciences P. Ltd. (Formerly as Brahma Drugs P. Ltd.) 'A' Wing. 604 Delphi Orchid Avenue, Hiranandani Business Park, Powai, Mumbai 400076	ITO, Ward 10(3)(1) 4 th Floor, Aayakar Bhavan Vs. M.K. Road, Mumbai 400020
PAN - AAACB5795L	

Appellant

Respondent

Appellant by:	Shri Jitendra Sanghvi & Shri Amit Khatiwala
Respondent by:	Shri Sher Singh

Date of Hearing:	01.09.2016
Date of Pronouncement:	02.09.2016

ORDER

Per Jason P. Boaz, A.M.

This appeal by the assessee is directed against the order of the CIT(A)-15, Mumbai dated 22.08.2014 for A.Y. 2002-03 upholding the penalty of ₹2,30,146/- levied under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act').

2. The facts of the case, briefly, are as under: -

2.1 The assessee-company, engaged in the business of export of pharmaceutical products, filed its return of income for A.Y. 2002-03 on 31.10.2002 declaring NIL income, after claiming deduction of ₹55,11,088/- under section 80HHC of the Act. The assessment was completed under section 143(3) of the Act vide order dated 28.02.2005, wherein the income of the assessee was determined at ₹57,42,830/- in view of, inter alia, the following disallowances: -

(i) Proportionate interest	₹2,57,859/-
(ii) TP adjustment	₹3,86,810/-

Simultaneously penalty proceedings were initiated in the order of assessment by issue of notice under section 274 r.w.s. 271(1)(c) of the Act dated 28.02.2005 to the assessee for furnishing of inaccurate particulars leading to concealment of income. No appeal was preferred by the assessee against this order of assessment for A.Y. 2002-03.

2.2 In penalty proceedings, the Assessing Officer (AO) obtained the assessee's explanation as to the show cause notice as to why penalty under section 271(1)(c) of the Act be not levied in respect of the issues involved.

(i) In respect of the disallowances of interest, the AO observed that the assessee-company had diverted its interest bearing funds as interest free loans/advances/deposits to its sister concerns for non business purposes, therefore proportionate interest of ₹2,57,855/- was disallowed.

(ii) In respect of the TP adjustment under section 92CA(2) of the Act vide order dated 25.01.2005 the AO observed that it was found that in respect of export sales to Trigram GMBH, Switzerland, the ALP was computed at ₹6,78,71,791/- as against the declared transactional value of ₹6,74,84,981/- thereby leading to an addition/adjustment of ₹3,86,810/- (viz. 6,78,71,791 less 6,74,84,981). In this view of the matter, the AO concluded that the assessee had furnished inaccurate particulars and concealed income to the extent of proportionate interest disallowed of ₹2,57,859/- and the TP adjustment of ₹3,86,810/- and holding this to be a fit case for levy of penalty under section 271(1)(c) of the Act proceeded to levy penalty of ₹2,30,146/- thereunder vide order dated 15.03.2007 @ minimum rate of 100% of tax sought to be avoided.

2.3 Aggrieved by the order dated 15.03.2007 levying penalty of ₹2,30,146/- under section 271(1)(c) of the Act, for A.Y. 2002-03, the assessee preferred an appeal before the CIT(A)-15, Mumbai. The learned CIT(A) disposed off the appeal vide order dated 22.08.2014 allowing the assessee partial relief. In this impugned order, the learned CIT(A) deleted the penalty levied under section 271(1)(c) of the Act with reference to the disallowance of proportionate interest of ₹2,57,859/-; the learned CIT(A),

however, proceeded to uphold the levy of penalty under section 271(1)(c) of the Act in respect of the adjustment of ₹3,86,810/- made on the basis of TP provisions holding as under at para 4.4(ii) of the impugned order: -

“4.4 I have considered the facts of the case, submission of the appellant as against the findings/observations of the AO in his order u/s 271(1)(c) of the I.T. Act. The contentions and submissions of the appellant are being discussed and decided here in under:

- i.*
- ii. With reference to penalty imposed on account of adjustment of Rs.3,86,810/- made on the basis of transfer pricing provisions it was stated that entire international transactions were accepted by TPO except for one minor adjustment of Rs.3,86,810/-. In this regard, it is mentioned that as per the facts mentioned in the order of TPO dated 25.01.2005, he had made adjustment observing that the appellant company has sold cold flu tablets at a price of 1.807\$ to its AEs whereas Yatan Pharmaceuticals Pvt. Ltd. had sold the same tablets to Trigram Ltd. Cypress @ 1,95\$ per unit. Thus difference of ₹3,86,810/- was computed as adjustment on the basis of CUP method. The appellant was well aware of this despite which it preferred not to enhance its income voluntarily in the return of income filed. Further during the course of assessment proceedings also the appellant continued to agitate the issue and did not agree for the adjustment. Even during the course of present appellate proceedings it is stated that no appeal was preferred to due to smallness of quantum involved. This means that the quantum been higher, the appellant might have further agitated the matter before appellate forums. Thus the price charged by the appellant in the international transactions has not been computed in accordance with the provisions contained in section 92C in the manner prescribed under that section in good faith with due diligence. Accordingly, the provisions of explanation 7 to section 271(1)(c) are clearly applicable to the facts of the appellant's case. The case laws relied upon by the appellant are not with reference to explanation 7 to section 271(1)(c) and hence not relevant. In view of these facts penalty imposed with reference to transfer pricing adjustment of Rs.3,86,810/- is **upheld**.*

3.1 Aggrieved by the order of the CIT(A)-15, Mumbai dated 22.08.2014 for A.Y. 2002-03 the assessee has preferred this appeal raising the following grounds: -

- “1. The learned Commissioner of Income Tax (Appeals) - 15, Mumbai [CIT(A)] erred in confirming the order of the learned ITO, Ward 10(3)(1), Mumbai (Assessing Officer) levying penalty u/s.271(1)(c)*

of the Act with respect to adjustment made on the basis of transfer pricing provisions.

Your appellant submits that the order u/s.271(1)(c) is illegal, bad-in-law and the same ought to be cancelled.

2. *The learned CIT(A) erred in confirming the order of the Assessing Officer levying penalty u/s.271(1)(c) of the Act amounting to Rs.1,38,091 in respect of addition of Rs.3,86,810 made to the total income on account of adjustment of Rs.3,86,810 made on the basis of transfer pricing provisions.*

Your appellant submits that the penalty of Rs.1,38,091 is wrongly levied and the same ought to be cancelled.

3. *Your appellant craves leave to addto, alter, amend or vary all or any of the aforesaid ground(s) of appeal as they/their representative may deem fit.”*

3.2 The learned A.R. for the assessee was heard in support of the grounds raised and reiterated the submissions put forth before the authorities below. In support of the assessee's plea for cancellation of the penalty levied under section 271(1)(c) of the Act, on the adjustment made in transfer pricing audit, the assessee placed reliance on the decision of the Coordinate Bench of the ITAT - Delhi in the case of Mitsui Prime Advanced Composite India (P.) Ltd. vs. DCIT (2016) 178 TTJ 490 (Delhi-Trib).

3.3.1 Per contra, the learned D.R. for Revenue placed strong reliance on the decision of the learned CIT(A) in the impugned order in sustaining the levy of penalty under section 271(1)(c) of the Act on the transfer pricing adjustment of ALP at ₹3,86,810/-. According to the learned D.R., as per the facts of the case on hand, both the assessee and the TPO used CUP method for benchmarking the international transactions. The AO made the adjustment observing that the assessee-company had sold cold flu tablets at a price of \$1.807 per unit to its AEs whereas Yatan Pharmaceuticals sold the tablets to Trigram Ltd., Cypress @\$1.95 per unit. This difference of ₹3,86,810/- was computed under the CUP method itself. The learned D.R. contends that though the assessee did not file any appeal in this regard, on an appreciation of the facts on record on this issue, the learned CIT(A) rendered the finding that the provisions of Explanation 7 to section 271(1)(c) of the Act were clearly attracted in the case since the price

charged by the assessee in international transactions was not in conformity with the provisions of section 92C of the Act; neither in the manner prescribed thereunder nor in good faith or with due diligence.

3.3.2 In respect of the case cited by the learned A.R. for the assessee, i.e. Mitsui Prime Advanced Composites India (P.) Ltd. (supra), the learned D.R. submitted that the said case would not come to the rescue of the assessee and it is distinguishable on facts. The learned D.R. submits that in the cited case the assessee adopted TNMM to benchmark its international transactions to demonstrate that they were at ALP but the TPO rejected TNMM, adopted CUP method and made these adjustments without bringing on record any comparable instance. On appeal, the assessee was able to demonstrate that its international transactions were computed in accordance with section 92C, in the manner prescribed, in good faith and with due diligence and therefore the penalty was deleted. The learned D.R. contends that the facts of this case shows that the TPO did not change the CUP method adopted by the assessee for benchmarking international transactions; rather on examination thereof, found that the price charged by the assessee in international transactions was not in conformity with the provisions of section 92C neither in the manner prescribed nor in good faith or due diligence and was constrained to make the transfer pricing adjustment on the differences in prices charged to AEs and others in its international transactions. The learned D.R. submitted that in view of the above, the penalty levied/sustained by the authorities below under section 271(1)(c) of the Act on the transfer pricing adjustment of ₹3,86,810/- be upheld.

3.4.1 We have heard the rival contentions of both the parties and perused and carefully considered the material on record. On an appreciation of the facts on record, it is seen that the assessee adopted the CUP method for demonstrating that its international transactions were at ALP. The TPO on examination thereof accepted CUP method adopted by the assessee as the most appropriate method (MAM), but observed that the assessee had sold cold flu tablets to its AEs at \$1.807 per unit, whereas the same were sold

to non-AEs @\$1.95 per unit. This led to a difference of ₹3,86,810/- (i.e. ₹6,78,71,791/p less ₹6,74,84,891/-) under the CUP method and the transfer pricing adjustment to that extent was made. Though this factual discrepancy was detected, the assessee did not voluntarily revise its income and challenged the same in assessment proceedings, but, however, did not prefer any quantum appeal, due to the smallness of the amount involved.

3.4.2 Explanation 7 to section 271(1)(c) of the Act 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”

A reading of the provisions of Explanation-7 to section 271(1)(c) of the Act (supra), provide that where in the case of an assessee who has entered into an international transaction, defined in section 92B, any amount added or disallowed in computing the total income under section 92C(4), then for the purposes of section 271(1)(c) of the Act, such addition or disallowance is deemed to represent income in respect of which particulars have been concealed or inaccurate particulars have been furnished. In our view the facts of the case on hand would clearly attract the application of Explanation-7 for levy of penalty under section 271(1)(c) of the Act for furnishing of inaccurate particulars by the assessee leading to concealment of income. Explanation-7 to section 271(1)(c) further provides that the penalty thereunder is to be levied, unless the assessee proves to the satisfaction of the authorities below that the price charged in such transactions was computed in the manner prescribed, in good faith and with due diligence. In the case on hand, we concur with the finding

rendered by the learned CIT(A) in the impugned order, that the price charged by the assessee in international transactions referred to in this order (supra), have not been computed in accordance with the provisions contained in section 92C of the Act, nor in the manner provided thereunder or in good faith and with due diligence. With due respect, we have perused the judicial pronouncement in the case of Mitsui Prime Advanced Composites India (P.) Ltd. (supra) relied on by the assessee, and are inclined to agree with the contentions of the learned D.R. at para 3.3.2 of this order (supra) that the said decision would not come to the rescue of the assessee in the case on hand as it is factually and circumstantially different. In this factual and legal matrix of this case, as discussed above, we uphold the levy of penalty under section 271(1)(c) of the Act by the learned CIT(A). Consequently, the assessee's grounds 1 to 3 are dismissed.

4. In the result, the assessee's appeal for A.Y. 2002-03 is dismissed.

Order pronounced in the open court on 2nd September, 2016.

Sd/-
(Shailendra Kumar Yadav)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 2nd September, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -15, Mumbai*
4. *The CIT - IV, Mumbai*
5. *The DR, "C" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.