

**IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI**

BEFORE SHRI VIKAS AWASTHY, JM AND SHRI PRASHANT MAHARISHI, AM

**ITA No. 1971/Mum/2017**

(Assessment Year 2011-12)

The Asst. Commissioner of Income Tax-19(1), 2 <sup>nd</sup> Floor, Matru Mandir, Tardeo Road, Mumbai-400 007	Vs.	M/s DA Jhaveri, C Tower, C.C 5073, Bharat Diamond Bourse, Bandra (E), Mumbai-400 051
<b>(Appellant)</b>		<b>(Respondent)</b>
<b>PAN No. AAAFD0295J</b>		

**CO No. 120/Mum/2017**

(Arising out of ITA No. 1971/Mum/2017 for  
Assessment Year 2011-12)

M/s DA Jhaveri, C Tower, C.C 5073, Bharat Diamond Bourse, Bandra (E), Mumbai-400 051	Vs.	The Asst. Commissioner of Income Tax-19(1), 2 <sup>nd</sup> Floor, Matru Mandir, Tardeo Road, Mumbai-400 007
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Appellant by</b>	:	Shri Hiro Rai, AR
<b>Respondent by</b>	:	Shri Satya Pinisetty, DR

<b>Date of hearing:</b>	17.02.2022
<b>Date of pronouncement :</b>	22.02.2022

**ORDER**

**PER PRASHANT MAHARISHI, AM:**

01. ITA No.1971/Mum/2017 is filed by the Asst. Commissioner of income-tax, 19(1), Mumbai (The learned Assessing Officer) against the order passed by CIT (A)-5, Mumbai

(the learned CIT (A)) dated 03.11.2016, wherein he has deleted the penalty levied by the learned Assessing Officer under section 271G of The Income-Tax Act, 1961 (hereinafter referred to as 'Act') amounting to ₹2,71,91,127/-.

02. The learned Assessing Officer has raised the following ground of appeal: -

*"1. Whether CIT(A) was correct in deleting the penalty levied u/s 271G by holding that the assessee had made substantial compliance, failing to note that under TNMM adopted by the assessee, the profit of the international transaction has to be furnished, whereas the assessee has only furnished the entity level margins which consists of overall profits on AE and significant non-AE transactions.*

*2. Whether the decision of the CIT(A) is not vitiated for the reason that the CIT(A) has not given any finding on how the assessee has complied with clause (d), (g), (h) and (m) of Rule 10D(1), that have been specifically invoked by the TPO.*

*3. Whether the CIT(A) was not incorrect in stating that the TPO should have asked for copies of profit and loss accounts and balance sheets of AE's to make an overall comparison with the gross profitability levels of the assessee with AE's to ascertain diversion of profits, if any ignoring the finding of the ITAT in the case of Aztec software Technology Services Ltd vs. ACIT (ITA No 584/Bang/2006), in which it has been held that there is no legal requirement for the AO to prime facie demonstrate tax avoidance before invoking the provisions of section 92 and 92CA of the Act.*

*4. The Ld. CIT(A) erred in holding that there was reasonable cause for non-compliance of Sec. 920 r/w Rule 100(1) without specifying the cause of such noncompliance or demonstrating how the same was*



*reasonable. The Ld. CIT(A) erred in deleting the penalty for the reason that no adjustment was made to the ALP, failing to note that by not producing the material documents necessary to determine the ALP under any of the prescribed methods u/s 92C(1), the assessee effectively prevented the TPO to make any determination as recorded by the Transfer Pricing Officer in para 6 of the order under section 91CA(3).*

*6. The appellant prays that the order of the Ld. CIT(A) on the above ground grounds be set aside and that of the Assessing Officer be resorted."*

03. Assessee has also filed a cross objection raising which challenges applicability of transfer pricing provisions and supports the order of the Id CIT (A).
04. The Brief facts of the case shows that the assessee is a partnership firm engaged in the business of cutting and polishing of diamonds. It has entered into international transaction of purchases of rough diamonds and export of rough and polished diamonds. The assessee filed return of income and filed form No. 3CEB. The reference was made to the Transfer Pricing Officer to determine the arms length price of those international transactions. The learned Transfer Pricing Officer asked assessee to furnish the details and documents in respect of Transactional Net Margin Method (TNMM) to workout profitability of associate enterprises and non-associated enterprises. The assessee expressed his inability to submit the same in view of the practical difficulties between bifurcating the stock price and cost. Therefore, the LD Transfer Pricing Officer held that assessee has not maintained the relevant



documentation under Rule 10D (1) of The Income-Tax Rules, 1962 (hereinafter referred to as 'Rules'). Thus, penalty proceeding was initiated under section 271G of the Act. The assessee filed his reply on 18.06.2015, it was rejected by Transfer Pricing Officer and levied the penalty of ₹2,71,93,127/- under section 271G of the Act at the rate of 2% of the international transaction by passing an order dated 24.07.2015.

05. Assessee aggrieved with the order preferred the appeal before the learned CIT (A), who after considering the facts of the case, the peculiar facts prevailing in the diamond industries and the nature of failure and lack of information in public domain about the manufacturer of diamond trade except general information, he deleted the penalty. Therefore, the learned Assessing Officer is aggrieved with that and has preferred this appeal.
06. The learned Departmental Representative supported the order of the learned Assessing Officer and submitted that despite assessee not maintaining the specified detail, the learned CIT(A) has deleted the penalty. Therefore, he submitted that the order of the learned CIT (A) is not sustainable.
07. The learned Authorised Representative appearing on the behalf of the assessee submitted case law paper book stating that on identical facts and circumstances as of the case of the assessee, in so many cases, penalty is



deleted. He otherwise stated that the penalty could not be levied for technical or venial default. He submitted that no adjustment has been made by the learned Transfer Pricing Officer to the international transaction entered into by the assessee, in view of this he submitted that penalty has been correctly deleted by the learned Commissioner of income-tax (Appeals).

08. The learned Authorised Representative further stated that if the order of the learned CIT (A) is upheld, the cross objection of the assessee become infructuous.
09. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly, the assessee at the time of filing of its return of income has filed form No. 3CEB, saying international transactions. The assessee has a total turnover of ₹342 crores, out of which export is ₹291 crores. The sale to the associate enterprises are ₹9.44 crores. The total purchase of the assessee is ₹ 332 crores out of which rough diamond purchases are of ₹180 crores out of which purchases from associated enterprises of ₹126.5 crores. In TP study report, the assessee followed Transactional Net Margin Method adopting profit level indicator of operating profit/operating sales. Entity level margin of the assessee was 3.47% and margin of comparable companies was taken at 3.15% and thus, submitted that its international transactions are at arm's length. Naturally, the entity



level margins of the assessee included transactions with Associated Enterprises as well as with non-Associated Enterprises. The learned Transfer Pricing Officer asked the assessee to give bifurcation of profit derived from transactions with Associated Enterprises and non Associated Enterprises. Assessee expressed its inability in view of peculiar trade transactions and non availability of information in public domain. The learned Transfer Pricing Officer was of the view that net profit is required to be computed only with respect to transactions with associated parties for Transactional Net Margin Method. Then only it can be said that whether transactions are at arm' length or not. For this proposition, the assessee must have cost incurred and sales affected with Associated Enterprises separately along with other cost to determine the profit margin. The Transfer Pricing Officer stated that entity level margins is also included the losses in Associated Enterprises transaction which can be set off with profit of non Associated Enterprises transactions. This detail was not filed and therefore, penalty notice under section 271G was issued. The Transfer Pricing Officer was of the view that assessee has failed to maintain the information as per Rule 10D (1) (d), (g), (h) and (m) of Income Tax Rules. In reply to the show cause notice, assessee submitted that transfer pricing provisions do not apply to the assessee there are no entities controlled by the assessee and therefore there is no international



transaction in absence of any AE. It submitted that the firm in Belgium which is showing transaction as associated enterprises in fact is non associated enterprise and therefore, transfer pricing provision do not apply. Assessee further stated that considering the nature of trade it is not possible for it to bifurcate the purchase, sales, cost overhead, and stock value between Associated Enterprises and non Associated Enterprises. It is submitted that rough diamond is cut and polished into various pieces and sold separately. The dust and wastage is also sold separately and therefore, it is not possible to determine the actual processing expenses. The learned Transfer Pricing Officer rejected the contention and stated that the relevant details are called for by him which are essential for benchmarking the international transactions, same should have been provided by the assessee within 30 days, the assessee did not furnish the same, assessee also did not provide any alternate method of benchmarking and therefore the Transfer Pricing Officer was forced to accept the transactions at arm's length. Therefore, he levied the penalty at the rate of 2% of international transactions. The learned CIT (A) deleted the above penalty. He held that the Transfer Pricing Officer was not prevented and was not forced to accept the ALP methodology adopted by the assessee. He has not made use of the details submitted by the assessee, which were lot wise details of exported cut and polished diamonds.



The CIT (A) further held that the type of details asked by the Transfer Pricing Officer from assessee is also not available in case of comparables in public domain and therefore, he should have utilised the details and documents made available to arrive at a fair and reasonable opinion regarding ALP of the international transactions. It was further held that the profit and loss account and the annual accounts of the Associated Enterprises would have revealed the gross profit margin earned by them for comparisons. The learned CIT (A) further held that on the identical facts and circumstances for Assessment Year 2011-12, the benchmarking of the assessee was accepted on identical facts. Therefore, the requisite detail asked during the Assessment Year 2011-12 were not required for earlier years and no adjustment was made. Therefore, the details asked for by the learned Transfer Pricing Officer may be relevant for determination of Arm's Length price. But was asked for the first time, not question by Id TPO in past TP Assessments, therefore, assessee has a belief that such information is not required as well as not available, therefore, the assessee has 'reasonable cause' under section 273B of the Act for not maintaining the same. For failure as envisaged subject to penalty u/s 271G, if such failure is because of reasonable cause, no penalty can be levied. Thus, we find no infirmity in the order of the learned CIT (A) in deleting the penalty. The various judicial precedents stated before





us are also to the same effect. The decision of the co-ordinate bench in 187 taxmann.com 306 is the lead matter, which has been followed in other judicial precedents cited before us. In view of this, we find that there is a 'reasonable cause' for failure on the part of the assessee, which saves assessee from levy of penalty under, section 271G of the Act. In the Result, we dismiss the appeal of the learned Assessing Officer.

010. In view of our decision in appeal of the learned Assessing Officer, the appeal of assessee becomes infructuous and hence dismissed.

011. In the result, the appeal of Assessing Officer and CO of assessee is dismissed.

Order pronounced in the open court on 22.02.2022.

Sd/-  
(VIKAS AWASTHY)  
(JUDICIAL MEMBER)

Sd/-  
( PRASHANT MAHARISHI)  
(ACCOUNTANT MEMBER)

Mumbai, Dated: 22.02.2022

*Sudip Sarkar, Sr.PS*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//



Sr. Private Secretary/ Asst. Registrar  
Income Tax Appellate Tribunal, Mumbai