**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"J" BENCH, MUMBAI**

**BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND**

**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no. 2595/Mum./2014**
(Assessment Year : 2009–10)

Dy. Commissioner of Income Tax
Circle–8(3), Mumbai ..... Appellant

v/s

M/s. Sitel India Limited
501, Wing–A & B, Boomerang
Chandivali Farm Road, Chandivali
Andheri (East), Mumbai 400 072
PAN – AAFCS1297M .....Respondent

Assessee by : Shri Ajit Jain a/w
Shri Siddesh Chaugule
Revenue by : Shri Tejinder Pal Singh

| Date of Hearing – 18/05/2022 | Date of Order – 19/07/2022 |
|---|---|

**O R D E R**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the Revenue challenging the impugned order dated 21/01/2014, passed under section 250 of the Income Tax Act, 1961, ('*the Act*') by the learned Commissioner of Income Tax (Appeals)–11, Mumbai, ['*learned CIT(A)*'], for the assessment year 2005–06.

2. In this appeal, Revenue has raised following grounds:

*"1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the penalty of Rs.57,37,070/- imposed u/s.271(1)(c) of the Act in respect of Transfer Pricing adjustment of Rs.1,56,78,265/- made with regard to the transactions of the assessee-company with its Associated Enterprises.*

*2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in holding that at no stage in the proceedings before the TPO or the assessment or CIT(A), was the methodology used by the assessee and the appropriateness of the comparable companies selected for benchmarking, were questioned.*

*3. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not appreciating that not only various defects / anomalies in the TP study report of the assessee were pointed out by the TPO but also a categorical finding was given by the Transfer Pricing Officer that the assessee's claim of profitability for the year being not impacted by its transactions with its AES but was attributable to certain extraneous factors beyond the control of the assessee remained unsubstantiated.*

*4. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not appreciating that even considering the additional evidences filed during the course of the appellate proceedings, the transactions entered into by the assessee with its AEs were still found to be not at arm's length which by itself tantamounts to furnishing of inaccurate particulars of income by the assessee thereby leading to concealment further confirmed by the fact that assessee had not preferred any further appeal against these findings of the CIT(A).*

*5. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not appreciating that the price charged by the assessee in respect of the international transactions entered into with the associate concerns was neither computed in accordance in the manner prescribed under section 92C, nor in 'good faith and with 'due diligence'. Hence, penalty u/s. 271(1)(c) read with Explanation (7) is clearly leviable on this issue.*

*6. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the A.O. be restored."*

2. The only grievance of the Revenue in the present appeal is against deletion of penalty of Rs. 57,37,070 levied under section 271(1)(c) of the Act.

3. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is engaged in business of call centre

and IT enabled services. For the year under consideration, assessee filed its return of income on 31/10/2005 declaring total income at Rs. Nil. The assessee is 50:50 joint venture between Systems Integrated Telemarketing, Netherlands and the TATA group. In respect of international transaction pertaining to 'Provision of Contact Centre Services', the assessee provide eCRM services, using voice, web chat and email to the customers of SITEL Corp, USA and SITEL UK Ltd. (i.e. its AEs), as it is not capable of directly marketing its services. For benchmarking this transaction, the assessee adopted the Transactional Net Margin Method ('TNMM'). The assessee earned an adjusted net cost plus mark–up of 12.83%, as against the net cost plus mark–up earned by the broadly comparable independent companies at 9.95%. Accordingly, it was claimed that the international transaction of 'Provision of Contact Centre Services' is at arm's length price ('ALP').

4. The Assessing Officer made reference to Transfer Pricing Officer ('TPO') for determination of ALP of the aforesaid international transaction. During the course of transfer pricing assessment proceedings, the assessee also furnished standalone margin for the year under consideration at 9.73%. The assessee was also asked to explain as to why the idle capacity adjustment should not be allowed to be added to its operating profit. In reply, assessee, inter-alia, submitted that the assessee's profitability for the year ended 31/03/2005 was adversely impacted due to significant reduction in revenue from one of its key

customers, who contributed to almost 77% of the total revenue of the assessee during financial year 2003−04, which fell down to 7% during the relevant financial year. The assessee further submitted that during the year under consideration it experienced an abnormally high employee turnover. The assessee submitted that in case of comparable companies, the average percentage of personnel expenses to total revenue works out to approximately 27%, whereas the same works out at 56% for the assessee. The TPO vide order dated 31/10/2008, passed under section 92CA(3) of the Act did not agree with the submissions of the assessee and further selected certain comparables having average margin of 27.80%. By applying the arm's length margin, the TPO, proposed an upward adjustment of Rs. 8,54,35,703 in respect of international transaction of '*Provision of Contact Centre Services*'.

5. Pursuant to the order passed by the TPO, Assessing Officer vide order dated 24/12/2008 passed under section 143(3) of the Act, inter-alia, computed the total income of the assessee at Rs. 6,42,38,970. Simultaneously, notice under section 274 read with section 271(1)(c) of the Act was issued to the assessee. In quantum appeal, against the order passed under section 143 (3) of the Act, the learned CIT(A) restricted the transfer pricing adjustment to Rs. 1,56,78,265. Accordingly, vide order dated 30/03/2012, passed under section 271(1)(c) of the Act, the Assessing Officer levied penalty of Rs 57,37,070.

6. In appeal, learned CIT(A) vide impugned order dated 21/01/2014 allowed the appeal filed by the assessee and directed deletion of penalty levied by the Assessing Officer under section 271(1)(c) of the Act, on account of transfer pricing adjustment made by the TPO, by observing as under:

> *"9. As correctly pointed out by the assessee company, Explanation 7 to section 271(1)(c) is the specific clause relevant to the application of concealment penalty provisions relatable to TP adjustments on account of intemational transactions. It specifies that the transfer pricing adjustment shall be deemed to represent the income in respect of which particulars had been concealed or inaccurate particulars had been furnished. The only exception provided in the relevant statute is that of a case where the assessee proves to the satisfaction of the Departmental authorities that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C of the Act and in the manner prescribed under that section, in good faith and with due diligence.*
>
> *10. In the facts of the present case, it is not disputed that the assessee had carried out its contemporaneous transfer pricing study in the manner prescribed under section 92C of the Act. It had treated the assessee company as the tested party and it used the TNMM method as the most appropriate method to determine the arm's length nature of its transactions. At no stage in the proceedings before the TPO or the AO or even the CIT(A), was the methodology used by the assessee or even the appropriateness of the comparable companies selected for benchmarking were questioned. The TPO ignored the assessee's TP study without pointing out any specific defect with it and proceeded to determine the ALP on the basis of the standard set of comparables used in transfer pricing benchmarking in the BPO/TTES segment by the Department.*
>
> *11. It is also seen that at least five of the comparables used by the TPO were such that their financials were not even available in the public domain at the point of time when the assessee had carried out its transfer pricing study. It is true that data available at the time of assessment is to be used in determining the ALP but the assessee on such facts cannot be visited with penal consequences for not using data that was not available in the public domain at the time of its statutorily mandated transfer pricing study.*
>
> *12. Even before the CIT(A), the change of the tested party from the assessee company to its AEs was made on the basis of additional submissions made by the assessee itself before the CIT(A). It is true that the assessee did not file any further appeal against the transfer pricing adjustment retained by the order of the CIT(A) but while deciding not to file any further appeal the assessee submitted in writing before the AO*

*that it did not wish to pursue the matter in further appellate proceedings considering the quantum of the addition retained, even though it did not agree with the decision rendered by the CIT(A).*

*13. On the above facts, the assessee having carried out its transfer pricing study in accordance with section 92C of the Act and that no specific defect with such TP study having been pointed out by any of the Departmental authorities it cannot be said that such TP study was not prepared in good faith or that the TP study had not been carried out by the assessee and its auditors with due diligence. In terms of Explanation 7 to section 271(1)(c) of the Act no penalty would be leviable on the facts of the present case. Penalty levied by the AO in this case is hereby directed to be deleted."*

Being aggrieved, the Revenue is in appeal before us.

7. During the course of hearing, learned Departmental Representative vehemently relied upon the order passed by the Assessing Officer levying penalty in the present case. On the other hand, learned Authorised Representative placed reliance upon the order passed by the learned CIT(A).

8. We have considered the rival submissions and perused the material available on record. Under section 271(1)(c) of the Act, penalty is levied for concealing the particulars of income or furnishing inaccurate particulars of income by the assessee. It is also pertinent to note the provisions of Explanation 7 to section 271(1)(c) of the Act, which deals with penalty levied in respect of transfer pricing adjustment and the same reads as under:

*"Explanation 7.—Where in the case of an assessee who has entered into an international transaction, 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."*

9. Thus, as per the provision of this explanation, any addition on account of transfer pricing adjustment shall be deemed to represent income in respect of which particulars have been concealed or inaccurate particulars have been furnished by the assessee as per section 271(1)(c) of the Act, which will result in imposition of penalty under the said section. The Explanation further provides an exception, where no penalty will be imposed pursuant to aforesaid addition, if assessee proves to the satisfaction of the authority that the price charged or paid in such a transaction was computed in accordance with provisions contained in section 92C and such price was computed as per the manner prescribed under that section in good faith and with due diligence.

10. The term '*good faith'* and '*due diligence*' in Explanation 7 to section 271(1)(c) of the Act were analysed by the Co–ordinate Bench of Tribunal in DCIT v/s RBS Equities India Ltd., [2011] 133 ITD 77 (Mum.), wherein the Co–ordinate Bench observed as under:

> "9. ..... *As to the scope of connotations of expression in good faith appearing in Explanation 7, we find guidance from section 3(22) of General Clauses Act which states that "a thing shall be deemed to be done in 'good faith' where it is in fact done honesty, whether it is done negligently or not. A thing done in good faith is a thing done honestly, and, therefore, it is not even necessary whether in doing that thing the assessee has been negligent or not. There is no way that an assessee can prove his honesty, because honesty, in practical terms, only implies lack*

*of dishonesty, and proving not being dishonest is essentially proving a negative, which, as Hon'ble Supreme Court has observed in the case of KP Varghese v. ITO 119811 131 ITR 597/7 Taxman 13, is almost impossible. However, as the expression good faith is used alongwith 'due diligence, which refers to 'proper care, it is also essential that not only the action of the assessee should be in good faith, e, honestly, but also with proper care. An act done with due diligence, in our humble understanding, would mean an act done with as much as care as a prudent person would take in such circumstances. In view of these discussions, in our considered view, as long as no dishonesty is found in the conduct of the assessee and as long as he has done what a reasonable man would have done in his circumstances, to ensure that the ALP was determined in accordance with the scheme of section 92C, deeming fiction under Explanation 7 cannot be invoked."*

11. Section 92C of the Act deals with computation of ALP and enlists the methods to be followed for same. In the present case, assessee applied TNMM as the most appropriate method, which is also prescribed under section 92C of the Act. As noted above, there is no dispute regarding the selection of most appropriate method in the present case. In the present case, the assessee has conducted and maintained contemporaneous transfer pricing documentation as per the provisions of section 92D of the Act read with Rule 10D of the Income Tax Rules. The assessee, in its transfer pricing report had conducted a detailed function, assets and risk analysis of its international transaction. It is also not the case, wherein, the transfer pricing documentations filed by the assessee were rejected by the TPO. Thus, applying the analysis of the term 'good faith' and 'due diligence' as laid down by the coordinate bench of the Tribunal in the aforesaid decision, we are of the considered view that in the present case the assessee has computed the ALP in respect of the international transaction in good faith and with due diligence. Accordingly, we find no

infirmity in the impugned order passed by the learned CIT(A) directing deletion of penalty levied under section 271(1)(c) of the Act. As a result, grounds raised in Revenue's appeal are dismissed.

12. In the result, appeal by the Revenue is dismissed.

Order pronounced in the open court on 19/07/2022

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **PRAMOD KUMAR** | **SANDEEP SINGH KARHAIL** |
| **VICE PRESIDENT** | **JUDICIAL MEMBER** |

**MUMBAI, DATED: 19/07/2022**

*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.*

True Copy
By Order

*Pradeep J. Chowdhury*
*Sr. Private Secretary*

Assistant Registrar
ITAT, Mumbai