

IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "L",
MUMBAI

BEFORE SHRI R.S.SYAL (A.M) & SHRI N.V.VASUDEVAN(J.M)

ITA NO.5779/MUM/07(A.Y.2003-04)

The ACIT, Range 8(3),
Room No.204, 2nd Floor,
Aaykay Bhavan, M.K.Road,
Mumbai – 400 020.
(Appellant)

M/s. Smith & Newpew
Healthcare (P) Ltd.
Vs. 323/B, Chintamani Plaza,
Andheri Kurla Road,
Andheri (E), Mumbai -99
PAN:AAACS 8136N
(Respondent)

Appellant by : Shri Jitendra Yadav
Respondent by : Shri Arvind Sonde &
Shri Niraj Sheth

ORDER

PER N.V.VASUDEVAN, J.M,

This is an appeal by the Revenue against the order dated 12.06.2007 of CIT(A)-XXIX, Mumbai, relating to AY 03-04. The Ground of appeal of the revenue reads as follows:

“On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the penalty of Rs.13,57,720/- levied u/s. 271AA for non-compliance of provision of sec. 92D without appreciating the provisions of sec. 92D/92D(3)”

2. In this appeal the Revenue has challenged the action of the CIT(A) in canceling the penalty imposed on the Assessee u/s.271AA of the Income Tax Act, 1961 (Act). Sec.271AA of the Act provides as follows:

271AA. Penalty for failure to keep and maintain information and document in respect of international transaction.—Without prejudice to the provisions of section 271, if any person fails to keep and maintain any such information and document as required by sub-

section (1) or sub-section (2) of section 92D, the Assessing Officer or Commissioner (Appeals) may direct that such person shall pay, by way of penalty, a sum equal to two per cent. of the value of each international transaction entered into by such person.

The provisions of Sec.271AA were introduced by the Finance Act, 2001, w.e.f. 1-4-2002.

Sec.92D provides as follows:

“Sec.92D: Maintenance, keeping of information and document by persons entering into an international transaction.—

(1) Every person who has entered into an international transaction shall keep and maintain such information and document in respect thereof, as may be prescribed.

(2) Without prejudice to the provisions contained in sub-section (1), the Board may prescribe the period for which the information and document shall be kept and maintained under that sub-section”

Rule 10D of the Income Tax Rules, 1962 prescribes the information and documents required to be maintained by every person who has entered into an international transaction. The same reads as follows:

“10D. Information and documents to be kept and maintained under section 92D.—(1) Every person who has entered into an international transaction shall keep and maintain the following information and documents, namely :—

(a) a description of the ownership structure of the assessee enterprise with details of shares or other ownership interest held therein by other enterprises ;

(b) a profile of the multinational group of which the assessee enterprise is a part along with the name, address, legal status and country of tax residence of each of the enterprises comprised in the group with whom international transactions have been entered into by the assessee, and ownership linkages among them ;

(c) a broad description of the business of the assessee and the industry in which the assessee operates, and of the business of the associated enterprises with whom the assessee has transacted ;

(d) the nature and terms (including prices) of international transactions entered into with each associated enterprise, details of property transferred or services provided and the quantum and the value of each such transaction or class of such transaction ;

(e) a description of the functions performed, risks assumed and assets employed or to be employed by the assessee and by the associated enterprises involved in the international transaction ;

- (f) a record of the economic and market analyses, forecasts, budgets or any other financial estimates prepared by the assessee for the business as a whole and for each division or product separately, which may have a bearing on the international transactions entered into by the assessee ;
 - (g) a record of uncontrolled transactions taken into account for analysing their comparability with the international transactions entered into, including a record of the nature, terms and conditions relating to any uncontrolled transaction with third parties which may be of relevance to the pricing of the international transactions ;
 - (h) a record of the analysis performed to evaluate comparability of uncontrolled transactions with the relevant international transaction ;
 - (i) a description of the methods considered for determining the arm's length price in relation to each international transaction or class of transaction, the method selected as the most appropriate method along with explanations as to why such method was so selected, and how such method was applied in each case ;
 - (j) a record of the actual working carried out for determining the arm's length price, including details of the comparable data and financial information used in applying the most appropriate method, and adjustments, if any, which were made to account for differences between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions ;
 - (k) the assumptions, policies and price negotiations, if any, which have critically affected the determination of the arm's length price ;
 - (l) details of the adjustments, if any, made to transfer prices to align them with arm's length prices determined under these rules and consequent adjustment made to the total income for tax purposes ;
 - (m) any other information, data or document, including information or data relating to the associated enterprise, which may be relevant for determination of the arm's length price.
- (2) Nothing contained in sub-rule (1) shall apply in a case where the aggregate value, as recorded in the books of account, of international transactions entered into by the assessee does not exceed one crore rupees :

Provided that the assessee shall be required to substantiate, on the basis of material available with him, that income arising from international transactions entered into by him has been computed in accordance with section 92.

- (3) The information specified in sub-rule (1) shall be supported by authentic documents, which may include the following :
- (a) official publications, reports, studies and data bases from the Government of the country of residence of the associated enterprise, or of any other country ;

- (b) reports of market research studies carried out and technical publications brought out by institutions of national or international repute ;
 - (c) price publications including stock exchange and commodity market quotations ;
 - (d) published accounts and financial statements relating to the business affairs of the associated enterprises ;
 - (e) agreements and contracts entered into with associated enterprises or with unrelated enterprises in respect of transactions similar to the international transactions ;
 - (f) letters and other correspondence documenting any terms negotiated between the assessee and the associated enterprise ;
 - (g) documents normally issued in connection with various transactions under the accounting practices followed.
- (4) The information and documents specified under sub-rules (1) and (2), should, as far as possible, be contemporaneous and should exist latest by the specified date referred to in clause (iv) of section 92F :

Provided that where an international transaction continues to have effect over more than one previous year, fresh documentation need not be maintained separately in respect of each previous year, unless there is any significant change in the nature or terms of the international transaction, in the assumptions made, or in any other factor which could influence the transfer price, and in the case of such significant change, fresh documentation as may be necessary under sub-rules (1) and (2) shall be maintained bringing out the impact of the change on the pricing of the international transaction.

(5) The information and documents specified in sub-rules (1) and (2) shall be kept and maintained for a period of eight years from the end of the relevant assessment year.”

Rule 10-D of the IT Rules, 1962 were introduced by Income Tax (21st Amend.) Rules, 2001, wef. 21-8-2001.

3. The Assessee is a company engaged in the business of manufacturing and distributing non-pharmaceutical healthcare products. They include all kinds of surgical dressings, bandages, wound closures/dressings, varieties of surgical instruments, casting materials, supports, rehabilitation equipment, all kinds of orthopedic implements, plates, screws, nails and all types of material and equipment for arthroscopic and minimally invasive surgery. The Assessee during the previous year relevant to AY 03-04 had

entered into international transactions with its Associate Enterprises(AE) and therefore in terms of Sec.92 of the Act, income from such transactions has to be computed having regard to the Arm's Length Price. The Assessee did not file report of an Accountant in Form No.3CEB as required by Sec.92E of the Act in respect of the international transaction entered into by it with its AE. The Assessee had paid penalty for such default u/s.271BA of the Act. In the course of assessment proceedings, the Assessee filed a Transfer Pricing Report in respect of International transactions with its AE on 3.1.2006. Thereafter the AO called upon the Assessee to furnish information and documents relating to the International Transaction with AE. The following were the relevant record of proceedings before AO:

Date	Details of proceedings.
03/01/2006	<p>Mr.Heman Asher, CA attended and produced the Transfer Pricing Study Report which examined and following issues emerged.</p> <ol style="list-style-type: none"> 1) No chart of transaction given with Associate Enterprise. 2) How, the arm's length price of transaction is not mentioned. 3) As per sales and purchase details total transactions is Rs.6,78,86,119/- but no report u/s. 92E in Form No.3CEB is filed. 4) File the transaction method applied with associate concern. <p>The case is fixed for 10/01/2006 at 11.00 AM</p>
10/1/2006	<p>Mr. Asher, CA and Mr. Mehul attended and filed the details. They are asked to file.</p> <ol style="list-style-type: none"> i) The complete chart of import and export. ii) File the supporting to show that the margin as shown by are correct. iii) Produce the relevant import and export invoice. <p>The case is fixed for 16/01/2006 at 11.30 AM</p>
16/01/2006	<p>Mr. Vijay Eshwaran, CA and Mr. Mehul, CA attended and filed the details in part. Further, asked to file the balance details.</p> <p>Case is fixed for 20/01/2006 at 10.00 AM</p>
20/01/2006	<p>Mr. Eric Mehta, Ca and Mr. Vijay Eashwaran, CA attended and filed the details of International transaction, and asked to</p>

	produce the vouchers showing the product and sale price. Case is fixed for 27/01/2006 at 11.00 AM
30/01/2006	Order u/s. 143(3) passed

4. In the order of assessment, the AO accepted the International Transaction with AE as at Arm's Length Price and no adjustment whatsoever was made. The relevant observations of the AO in the order of assessment is as follows:

11. Non maintenance of information and document in respect of international transactions.

During the course of assessment proceedings, it is observed that assessee has total international transaction at Rs.6,78,86,119/-, but the assessee company is not maintain information and documents in respect of these transactions as required by Sub-Clause(1) and Sub-Clause(2) of Sec.92D of IT Act, 1961. Since the assessee failed to maintain the books of accounts for international transactions, penalty u/s.271AA is initiated separately.”

5. In response to the show cause notice before imposing penalty u/s.271AA of the Act, the Assessee submitted that it had maintained all such information and documentation as prescribed by Rule-10D of the Rules and had produced the same before the AO from time to time as and when required by the learned Assessing Officer. It was submitted that these information and documents are only required to be maintained by the Assessee and there is no statutory requirement that they should be filed along with the return of income. The AO however held that the Assessee failed to maintain information and documents as prescribed by Rule 10D of the Rules and imposed penalty u/s.271AA of the Act.

6. Before CIT(A), the Assessee pointed out that it had filed a Transfer Pricing Study Report before the AO which contained all the details as are required by Rule 10D of the Rules. It was also pointed out that the Assessee in its submission dated January 10, 2006, filed the following details in

respect of the international transactions entered into by it during the financial year ended March 31, 2003:

- Key international transactions entered into by the Assessee with associated enterprises; and
- Details of the methods used by the Assessee to determine the arm's length nature of the international transactions

Further, the fact that the Assessee had duly maintained the prescribed documentation as per Rule 10D of the Rules, was clearly stated by the Assessee in clause 3 of the submission dated January 10, 2006. The fact that these details were taken on record by the learned Assessing Officer without disputing their correctness was also highlighted. It was further brought to the notice of the CIT(A) by submission dated January 16, 2006, the Assessee provided calculations of the margins earned by the Assessee from its international transactions. It was further submitted that by submission dated January 20, 2006, details of all exports and imports made by the Assessee during the financial year ended March 31, 2003, were provided. The invoices in respect of imports and exports made by the Assessee during the financial year ended March 31, 2003, were also provided. Based on the above, the Assessee submitted that it had duly maintained all the information and documentation prescribed in Rule 10D of the Rules. It was reiterated that documentation have been produced before the learned Assessing Officer from time to time as and when requested. It was highlighted that there was no evidence to prove that appropriate documentation has not been maintained by the Assessee.

7. The CIT(A) was of the view that the relevant provisions of law casts an obligation on an Assessee who has entered into International Transaction with an AE shall "Keep and Maintain" information and documents. Thus these documents need only to be produced as and when demanded by the AO. He held that the Assessee has produced before the AO all information and documents demanded by the AO. He also found that the AO has

accepted that the price adopted in respect of the international transaction with the AE was at Arm's Length and no addition was made. He held that there is no material on record brought out either in the order of assessment or in the order imposing penalty as to what information or documents the Assessee did not maintain. The CIT(A) was therefore of the view that the penalty imposed by the AO was without any basis and cancelled imposition of penalty. Aggrieved by the order of the CIT(A), the revenue has filed the present appeal before the Tribunal.

8. Before us the learned D.R. relied on the order of the AO. The learned Counsel for the Assessee relied on the order of the CIT(A).

9. We have considered the rival contentions and are of the view that the order of the CIT(A) does not call for any interference. As rightly held by the CIT(A), the requirement of law is that the Assessee has to "keep and maintain" information and documents in respect of international transaction entered into with AE. Rule 10D(4) of the Rules envisages that the information and documents specified under sub-rules (1) and (2) should, as far as possible, be contemporaneous and should exist latest by the specified date referred to in clause (iv) of section 92F, which is due date for filing return of income u/s.139(1) of the Act. The Assessment order and the order imposing penalty u/s.271AA of the Act, does not specify what was the failure on the part of the Assessee under Sec.92D read with Rule 10D of the Rules. The Assessee has in the course of assessment proceedings furnished all details required by the AO and the international transaction with the AE has been accepted to be one confirming to the Arm's Length Price. No addition whatsoever was made by the AO in the order of assessment in respect of the international transaction with AE. Thus the AO has found no difficulty in examining the correctness of the price adopted by the Assessee in respect of International Transaction with the AE. In other words the AO was not handicapped in examining the price of the international transaction

between the Assessee with its AE having regard to Arm's Length Price. In such circumstances, we are of the view that there is no justification for imposition of penalty. For the reasons given above, we confirm the order of the CIT(A) and dismiss the appeal by the Revenue.

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

Order pronounced in the open court on the 9th day of Nov., 2011.

Sd/-

(R.S.SYAL)
ACCOUNTANT MEMBER

Sd/-

(N.V.VASUDEVAN)
JUDICIAL MEMBER

Mumbai, Dated. 9th Nov .2011

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R”L” Bench.

(True copy)

By Order

Asst. Registrar, ITAT, Mumbai Benches
MUMBAI.

Vm.

	Details	Date	Initials	Designation
1	Draft dictated on	8/11/11		Sr.PS/PS
2	Draft Placed before author	8/11/11		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			