

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

**BEFORE SHRI B.R. MITTAL, J.M. AND SHRI RAJENDRA SINGH, A.M.**

**ITA No.1552/Mum/2012**

Assessment Year : 2004-05

Agility Logistics Private Limited Polaris, A-501/502/503, B-501/503, Fifth Floor, C.S.T. No.604a/3, Off Marol Maroshi Road, Marol, Andheri (E) Mumbai-400 059. <b>PAN No. AAACL 3717 A</b>	Vs.	Dy. Commissioner of Income tax -8(1) Mumbai.
(Appellant)		(Respondent)

Appellant by : Shri Raju Vakharia & Sunny  
Bilaney  
Respondent by : Shri V.V. Shastri

Date of hearing	:	21.5.2012
Date of Pronouncement	:	

**ORDER**

**PER RAJENDRA SINGH, AM:**

This appeal by the assessee is directed against the order dated 24.1.2012 of CIT(A) for the assessment year 2004-05. The only dispute raised by the assessee in this appeal is regarding levy of penalty of Rs.23,37,271/- under section 271(1)(c) of the Income tax Act.

2. The facts in brief are that the AO in the assessment order dated 22.12.2006 made under section 143(3) of the Act had made several additions running into crores which included addition of Rs.65,15,040/- on account of transfer pricing adjustment u/s. 92CA(3) in relation to professional fees and I.T. implementation fees. The AO had also initiated penalty proceedings under section 271(1)(c) of the Act. The AO noted that though the assessee had disputed the above addition in appeal, the ground was later withdrawn before CIT(A) and addition stood confirmed. The assessee during the penalty proceedings submitted that it had neither concealed any income nor filed inaccurate particulars of income. It was also submitted that mere withdrawal of the ground could not be considered as acceptance of addition by the assessee. The AO however did not accept the contentions raised. It was observed by him that as per Explanation – 7 to section 271(1)(c), any amount added or disallowed under section 92CA(2) shall be deemed to represent income in respect of which particulars have been concealed or inaccurate particulars have been filed unless assessee proves that price charged for such transfer was in accordance to provisions contained in section 92C and in the manner prescribed under that section. The AO further observed that, in this case, assessee neither during the course of assessment proceedings nor during the course of appellate proceedings proved that the

international transaction was computed in accordance with the provisions contained in section 92C, and accordingly he levied penalty at the minimum rate of 100% of tax sought to be evaded amounting to Rs.23,37,271/-

2.1 The assessee disputed the decision of AO and submitted before AO that the assessee had made all necessary disclosure relating to amount in dispute in the tax audit report as well as in the annual accounts. The AO had not found any information given as inaccurate or incorrect. The assessee during the proceedings before TPO, had filed a transfer pricing study report documenting in detail as to why arm's-length price in relation to transfer under reference should be taken to be the book value of the said transactions. There was no concealment of any particulars of income or furnishing of inaccurate particulars of income. The assessee had withdrawn the ground before CIT(A) to buy peace of mind and to avoid further litigation which should not be considered as acceptance of addition by the assessee. The assessee also placed reliance on the judgment of Hon'ble Supreme Court in the case of CIT vs. Reliance Petro Products (322 ITR 158). CIT(A) however did not accept the contentions raised . It was observed by him that the case of the assessee was covered by Explanation-7 to section 271(1)(c) as the assessee had not proved to the satisfaction of

the AO or CIT(A) that the price charged/paid was in accordance to provisions of section 92C. Accordingly CIT(A) confirmed the penalty levied aggrieved by which the assessee is in appeal before the Tribunal.

3. Before us, the Id. AR reiterated the submissions made before lower authorities that the assessee had made full disclosure and there was no concealment of income or any furnishing of inaccurate particulars of income. It was also submitted that mere withdrawing the ground of appeal before CIT(A) should not be considered as acceptance by the assessee. It was pointed out that the assessee had withdrawn the ground in peculiar circumstances of the case. The assessee had file appeal on 23.1.2007 which was pending for considerable length of time. There were huge demands outstanding. In the meantime, assessment for assessment year 2005-06 had also been completed which had resulted into further demand and department was pressing hard for recovery in both the years. The assessee therefore, had filed writ-petition before the Hon'ble High Court and the Hon'ble High Court had passed an order dated 12.2.2009 in which CIT(A) had been directed to dispose off the appeals for both the years within a period of 4 months from the date of order. The appeals however remained pending. CIT(A) had asked for remand report from AO on the detailed submissions made by the

assessee vide letter dated 5.8.2009 to be submitted within 15 days which resulted into further delay of the appeal. The disposal of appeal was held up because of non furnishing of remand report on the issue in relation to which penalty had been levied. Since there were other major additions and department was pressing for the recovery, the assessee had to withdraw these grounds on which remand was pending to expedite disposal of appeals. The order of CIT(A) was ultimately passed on 10.1.2010. The Id. AR also submitted that the assessee had made detailed submission before CIT(A) in relation to the professional services and I.T. implementation services and also detailed working had been given. The fact that CIT(A) had remanded the matter to the TPO shows that the issue requires fresh consideration in the light of the detailed submission and working given by the assessee. These were therefore required to be considered while deciding penalty which had not been done. Both the AO and CIT(A) had levied penalty without considering these aspects. The assessee had computed international transactions in accordance with the provisions contained in section 92C, detailed working of which had been given which had not been considered while levying penalty. The claim of the assessee in relation to international transactions was bonafide and therefore, no penalty should be levied. Ld. DR strongly

supported the orders of authorities below and placed reliance in the findings given in the respective orders.

4. We have perused the records and considered the rival contentions carefully. The dispute is regarding levy of penalty under section 271(1)(c) in relation to addition under section 92CA(3) in relation to international transactions. The assessee had paid huge amount on account of professional fees and IT implementation fee to associate enterprises out of which a sum of Rs.65,15,040/- had been added under section 92CA(3). The AO had also initiated and levied penalty under Explanation-7 to section 271(1)(c) and penalty has also been confirmed by CIT(A). Under the provisions of Explanation-7 to section 271(1)(c), any amount added or disallowed on account of international transactions is deemed to represent income in respect of which particulars are concealed or inaccurate particulars have been furnished unless the assessee proves to the satisfaction of AO or the CIT(A) that the price charged or paid in such transactions was computed in accordance with the provisions of section 92CA(3). Thus mere addition can not automatically lead to penalty. In case the assessee proves to the satisfaction of AO/CIT(A), that the transaction had been computed in accordance with the provisions of section 92C no penalty can be levied. Further, the satisfaction of AO/CIT(A) has to

be exercised after considering all the relevant facts and circumstances of the case in an objective manner. In this case the addition made by AO had been disputed by the assessee before CIT(A). Before CIT(A), assessee had filed detailed submission giving full details of cost for providing professional services and I.T. implementation services as well as the related working of the international transactions. The very fact that CIT(A) remanded the issue to the AO vide letter dated 5.8.2009 shows that CIT(A) was satisfied that the matter requires fresh examination and report by the AO.

4.1 A perusal of the remand report placed in the paper book shows that the CIT(A) himself in the said letter observed that it was not clear as to whether the amount of Rs.65,15,040/- was representative of ALP of the services was examined by TPO on merit. Remand report was not received even till the date of order of CT(A) i.e. dated 10.1.2010. This was despite the fact that the Hon'ble High Court vide order dated 12.2.2009 had directed the CIT(A) to dispose off the appeals for assessment years 2004-05 and 2005-06 within a period of 4 months. Under these circumstances claim of the assessee that it had to withdraw the ground relating to management fee and I.T. implementation fees for expeditious disposal of the appeal had to be considered as reasonable as huge demands were pending for which

department was pressing for recovery. Therefore, mere withdrawing the ground can not be considered as acceptance of addition by the assessee . The case of penalty is required to be examined on merit after carefully examining the various details, working and submission given by the assessee before CIT(A) which had been remanded to the AO. Though the appeal has been decided without remand report as ground has been withdrawn, the contentions raised in the submissions leading to remand of the issue is required to be examined objectively to make proper assessment of case of penalty. It is a settled legal position that penalty proceedings are different from assessment proceedings and finding given in the assessment though it may constitute good evidence, is not conclusive in penalty proceedings. CIT(A) has not examined the detailed contentions of the assessee in relation to arm's length price which is necessary to arrive at a fair conclusion in the matter. It has only been stated that the assessee has not proved to satisfaction that international transactions had been computed in accordance with the provisions of section 92C but no reasons have been given as to how the assessee had not proved and whether satisfaction had been arrived at objectively, after considering all relevant facts and circumstances of the case which were subject matter of remand proceedings before AO. Therefore, in our view, the matter requires fresh examination at the level of CIT(A). We therefore,



set aside the order of CIT(A) and restore the matter back to him for passing a fresh order after necessary examination in the light of observations made above and after allowing opportunity of hearing to the assessee .

5. In the result, appeal of the assessee is allowed for statistical purposes.

**Order pronounced in the open court on 6.6.2012.**

**Sd**

**sd**

**(B.R. MITTAL )**  
JUDICIAL MEMBER

**(RAJENDRA SINGH)**  
ACCOUNTANT MEMBER

Mumbai, Dated: 6.6.2012.  
Jv.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT(A) Concerned, Mumbai  
The DR " " Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.