

IN THE INCOME TAX APPELLATE TRIBUNAL
Delhi BENCH "D"

₹Before SHRI C.L.SETHI, JM & SHRI A N PAHUJA, AM

ITA No.1330/Del/2011
(Assessment Year:-2005-06)

Deputy Commissioner of Income-tax, Circle-4(1), Room no. 407, CR Building, IP Estate, New Delhi	V/s	Ms.Leroy Somer & Controls (India) (P) Ltd., 222, Okhla Indl. Area, New Delhi-20
PAN: AAACA 2665 C		
[Appellant]		[Respondent]

Assessee by :-	None
Revenue by:-	Shri N.K. Chand, DR

Date of hearing	29-09-2011
Date of pronouncement	30-09-2011

ORDER

A N Pahuja: This appeal filed on 15.3.2011 by the Revenue against an order dated 31-01-2011 of the Id. CIT(Appeals)-XX, New Delhi, for the Assessment Year 2005-06, raises the following grounds:-

- 1 *"The order of the learned CIT(A) is erroneous and contrary to facts and law.*
- 2 *On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in deleting the penalty of ₹22,20,100/- levied by the Assessing Officer u/s 271G of the Income-tax Act.*
 - 2.1 *The learned CIT(A) has ignored the finding recorded by the Assessing Officer and the fact that the assessee did not maintain the necessary documents prescribed under Rule 10D read with section 92D(3) of the Income-tax Act.*
- 3 *The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time of or before hearing of the appeal."*

2. Adverting to ground nos. 2 & 2.1 in the appeal, facts in brief, as per relevant orders are that return declaring income of ₹3,85,66,522/- filed on 31st October, 2005 by the assessee, manufacturing alternators, after being processed u/s 143(1) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), was selected for scrutiny with the service of a notice u/s 143(2) of the Act issued on 25th October, 2006 . The assessment in this case was completed with the disallowance of ₹2,50,000/- on account of cash discount. Through a reference was made to Transfer Pricing Officer [TPO] u/s 92CA of the Act, no adverse inference was drawn. However, on the recommendation of TPO, the Assessing Officer [AO in short] initiated penalty proceedings u/s 271G of the Act for delay in submission of some documentation. In response to a show cause notice dated 22nd June, 2009 before levy of penalty, the assessee replied that TPO had already reviewed the transfer pricing documentation maintained by the assessee and concluded that no adverse inference need be drawn. However, the AO did not accept the submissions of the assessee and imposed a penalty of ₹22,20,100/- @2% of the value of international transactions, amounting to ₹11,10,04,980/-.

3. On appeal, the learned CIT(A) cancelled the penalty in the following terms:-

"A perusal of the order of the TPO indicates very clearly that he had no grievance or objections in regard to furnishing of any information or document as required by sub-section (3) of section 92D. As a matter of fact he has accepted the Transfer Pricing Report of the assessee company.

The provisions of section 271G read as under:

"271G. If any person who has entered in to an international transaction fails to furnished any such information or document as required by sub-section (3) of section 92D, the Assessing Officer or the CIT(A) may direct that such person shall pay, by way of penalty, a sum equal to two per

cent of the value of the international transaction for each such failure.”

The Assessing Officer has not explained the grievance as to the filing of documents. The TPO has not mentioned any grievance in his order in regard to filing of documents. The action of the Assessing Officer in levying penalty is uncalled for. Reference is invited to the decision of Cargil India Private Ltd. 300 ITR (AT) 223 (Del.). The Hon’ble Bench has stated that the Assessing Officer can not levy penalty a bland statement without explaining the default in detail.

Finding

After considering the above facts the action of the Assessing Officer in levying the penalty of Rs.22,20,100/- is uncalled for and is not in accordance with the facts and law and above all it is contrary to what the TPO has stated in his order.

Hence, the penalty imposed u/s 271G is deleted.”

4. The Revenue is now in appeal before us against the aforesaid findings of learned CIT(A). The learned DR while referring to notice dated 13.12.2007[incorrectly mentioned as 13.12.2008] supported the order of the AO, levying penalty and further contended that the assessee delayed filing of necessary documentation as observed by the TPO. On the other hand, the learned AR on behalf of the assessee supported the findings of learned CIT(A) and contended that penalty has been imposed merely on technical grounds.

5. We have heard both the parties and gone through the facts of the case.. The issue before us relates to validity of levy of penalty of ₹22,20,100/- imposed u/s 271G of the Act for not furnishing information and documents within the time specified in notice u/s 92D(3) of the Act. Before proceeding further, we may have a look at the relevant provisions governing maintenance of information and documents and their submission before the Revenue authorities for determining the ALP. The AO/TPO requires certain information and

documents on controlled and uncontrolled international transactions and other relevant evidence. In this connection relevant Rule 10D of Income-tax Rules,1962 lays down as under:

Rule 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:-
 when information is to be furnished as per clause.

No.1	No.2
(a) a description of the ownership structure of the assessee enterprise with details of shares or other ownership interest held therein by other enterprises;	(a) In the audit report on form 3CEB.
(b) a profile of the multinational group of which the assessee enterprise is a part along with the name, address, legal status and country to 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;	(b) – same –
(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;	(c) – same –
<i>the nature and terms (including prices) of international transactions entered into with each associated enterprise, details of property</i>	(d) In Form 3CEB in the audit report or u/s 92D(3) or u/s

<i>transferred or services provided and the quantum and the value of each such transaction or class of such transaction;</i>	92CA(2)
<i>a description of the functions performed, risks assumed and assets employed or to be employed by the assessee and by the associated interprises involved in the international transaction;</i>	(e) – same –
<i>(d) 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;</i>	(f) – same –
<i>(e) a record of uncontrolled transactions taken into account for analyzing 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;</i>	(g) – same –
<i>(f) a record of the analysis performed to evaluate comparability of uncontrolled transactions with the relevant international transaction;</i>	(h) – same –
<i>(g) 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;</i>	(i) – same –
<i>(h) 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</i>	(j) – same –

<i>comparable uncontrolled transactions, or between the enterprises entering into such transactions;</i>	
<i>(i) the assumptions, policies and price negotiations, if any, which have critically affected the determination of the arm's length price;</i>	(k) – same –
<i>(j) 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;</i>	(l) – same –
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.	(m) – same –

(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."

5.1 As is evident from the aforesaid Rule 10D, documents and information prescribed thereunder are voluminous and it would only be in rare cases that all the clauses of aforesaid sub-rules would be attracted. It would all depend upon the facts and circumstances of the case, more particularly the nature of international transactions carried or services involved. Likewise supporting documents, official publications, reports, market research studies, technical publications of Government or other institute of national or international repute, and all the documents mentioned in Rule 10D(3) may not be necessary in case of every assessee. Application of one or more clauses of sub-rule (3) would depend upon facts & circumstances involved in the international transactions. Apparently, the assessee and the tax authorities have to apply their mind to see as to what information and documents prescribed in sub-rules of Rule 10D and which particular clause are relevant and therefore, necessary for determining ALP. The consideration of these aspects is material before issuing notice u/s

92D(3) of the Act, if it is to serve its purpose. In fact, the initial information relating to international transactions is gathered from the assessee in the prescribed audit report in Form 3CEB in terms of provisions of sec. 92E of the Act. On the basis of form 3CEB, AO determines the question as to whether total value of the transactions is more or less than Rs 5 crore (now enhanced to Rs 15 crore) to consider the question whether or not determination of ALP is to be referred to the Transfer Pricing Officer (TPO). If the total value exceeds the prescribed limits, the AO has to refer the matter to the TPO. Since the information prescribed under Rule 10D in different columns is voluminous & alternative, it has to be examined as to what information, from which clause, is required on the facts of the given case. Armed with the prescribed initial information and in the light of details of international transactions undertaken by the assessee and the method employed to determine the ALP of transactions, further proceedings are conducted towards determination of ALP in terms of provisions of sec. 92C, 92CA & 92D of the Act. Sec. 271AA stipulates penalty for failure to keep and maintain information and document in respect of international transaction while sec. 271G provides for penalty for failure to furnish information or document under section 92D of the Act. However, sec. 273B of the Act provides that penalty under these provisions shall not be imposable if the assessee establishes reasonable cause.

5.2 In the instant case, we are concerned with levy of penalty u/s 271G of the Act for failure to furnish information / documents required by sub-section (3) of Section 92D, which stipulates that the said provision can be applied in the following circumstances:

- (i) in the course of the proceedings under the Act before the Assessing Officer or the Commissioner (Appeals).

(ii) Any documents or information prescribed under sub-section (1) may be required.

(iii) required to be furnished under sub-section (3) within 30 days (as extended by another 30 days) from the receipt of notice issued in this regard.

5.2.1 In terms of provisions of sec. 92D(3) of the Act, the AO may require (from any person) any information or document as may be prescribed. The word 'any' information or document does not mean 'all' the documents prescribed under rule 10D of the IT Rules, 1962. The word 'required' is important as it rules out option with the assessee and makes it obligatory to furnish the requisite information. After having a report in form no. 3CEB in the first instance, next step is to issue notice u/s 92CA(2) of the Act to the assessee to produce evidence in support of ALP. Under sub-section (2) of Section 92CA of the Act, evidence in support of ALP may include information and documents referred to in sub-section (3) of section 92D, which are prescribed in various clauses of rule 10D(1) as aforesaid. If on consideration of evidence produced by the assessee, the TPO is satisfied that ALP has been properly and correctly determined by the assessee, it is the end of the matter. However, if complete information is not furnished, or otherwise, TPO is of the view that more information on specified points is required from the taxpayer, the TPO can issue notice under sub-section (3) of section 92D. TPO can also issue notice u/s 92CA(3) of the Act, depending upon the facts of the case and the information needed. Only in the event of failure of the assessee to support its ALP by filing necessary evidence, question of requiring assessee to furnish prescribed information would arise. There is no rationality in requiring information or documents from the assessee first under section 92D(3) and thereafter, provide opportunity to the assessee to support its ALP, as observed in Cargil India Private

Ltd.(supra) Moreover, having regard to purpose of the regulations, the notice u/s 92D(3) must require specific information or documents which the assessee failed to furnish u/s 92CA(2) of the Act but which according to the TPO are necessary for determination of ALP of international transactions. Therefore, notice u/s 92D(3) cannot be vague but must require specific information and has to be confined to the furnishing of information or document as may be "prescribed". Further, there is no restriction of furnishing prescribed information in response to a notice u/s 92CA(2) of the Act to support the computation of ALP by the assessee. However, there is no authority u/s 92D(3) with the T.P.O. to require the assessee to furnish non-specified information or such information or document already filed by the assessee or use of the provision, without asking the assessee to support first its ALP of International transactions. In nutshell, application of mind to ascertain and consideration of material on record and to see what further information on specific points is required, is essential before issuing notice u/s 92D(3) of the Act to the assessee. It is not a routine notice, which can be casually issued calling for any information or all prescribed information. Where the assessee has "option" to select relevant information, it is not a notice u/s 92D(3) as "option" and word "require" do not go together.

5.3 In the instant case, the TPO issued first notice on December 13, 2007 u/s 92CA(2) and 92D(3) of the Act, seeking information and evidence by 10.1.2008. The date of service of this notice is not known nor it is evident as to whether or not time to submit information was extended. The TPO mentioned in an office note that transfer pricing report was filed on 26.2.2008. There is no finding in the order of the TPO or the AO as to whether or not the said report was filed with the extended time stipulated ,if any ,in the notice .In any case, in first para of the notice, the TPO asked the assessee to support and substantiate the computation of ALP in international transactions as required by

section 92CA(2) of the Act. In next para, the T.P.O. further required to furnish information including the balance sheet, profit and loss account, statement of computation of income, audit report, tax report and also, "information and documents maintained as prescribed u/s 92D of Income-tax Act, 1961 read with Rule 10D of Income-tax Rules" without specifying any particular information under any of the clause of Rule 10D of the IT Rules,1962. The aforesaid notice was a notice u/s 92CA(2) of the Act but the TPO by asking further information made it a notice u/s 92CA(3). Only under above sub-section, TPO can call for information like balance sheet, P&L account, and audit report, which already stood filed and which are un-prescribed. Such unspecific information could not be required u/s 92D(3). Why and how information already furnished and could be obtained from AO was required or needed, is not clear from the notice or other material available on record. Apparently, the notice was issued in a casual manner, without examining records of the assessee nor even nature or details of International transactions. Thus, there was total lack of application of mind as to what information was required in this case. It was a omnibus notice without any regard to unwarranted heavy burden it was likely to place on the assessee, not authorized u/s 92D(3) of the Act. It was an unintelligible notice where all the information and documents maintained under Rule 10D of Income-tax Rules,1962 were required in addition to the information referred to above. There is nothing to suggest as to whether any other notice was also issued. In any case, the TPO observed that

"The documentation prescribed under Rule 10D of the Income tax Rules was submitted and placed on record."

5.31 After referring to the international transactions , the TPO further observed

4. The Transfer Pricing documentation which contains the functional and economic analysis of comparables and of assessee, has been examined and placed on record.

5. In view of the functional and economic analysis of the assessee and of comparables, no adverse inference is drawn of the international transactions undertaken by the assessee during the FY 2004-05”

5.4 . In the light of aforesaid findings of the TPO, the Id. CIT(A) concluded that penalty is uncalled for. In the penalty order passed by the AO, there is nothing to suggest as to which particular information or document was submitted by the assessee belatedly nor the exact nature of default has been brought out. In these circumstances, we are of the opinion that above mentioned notice cannot be treated as valid and legal to justify application of provision u/s 271G of the Act and levy of penalty of ₹22,20,100/-. The omnibus notice issued without application of mind and without considering documents already placed by the assessee and without considering as to which specific clause of sub-rule (1) or other sub rules was attracted or which relevant information was needed in this case, cannot be treated as a valid notice for the purpose of sec. 271G of the Act. Under section 92D(3) of the Act, A.O. or CIT (Appeals) is authorized to require prescribed information but here both prescribed and un-prescribed information like balance sheet, profit and loss account, computation of income etc was also required to be furnished from the assessee before the assessee could file evidence under section 92CA(2) of the Act. Not only primary documents necessary to support the computation of ALP of the assessee but also supporting documents detailed in sub-rule (3) of Rule 10D were required to be furnished without considering which supporting documents out of several mentioned in various clauses of the said sub-rule were available with the assessee. The above notice

issued without application of mind and without considering relevancy and requirement of all the prescribed information and documents under Rule 10D vitiated the legality of the notice. Without any basis of any default, no adequate reply could be furnished by the assessee. The failure, therefore, of the assessee to comply such notices in time cannot justify levy of penalty. In the absence of any basis leading to default in submitting documents and information within the prescribed time to attract provisions of section 271G of the Income-tax Act, on facts, we find no justification in the levy of penalty in question.

5.5 In view of the foregoing and in the light of view taken in Cargil India Private Ltd (supra), especially when the Revenue have not placed before us any material controverting the aforesaid findings of learned CIT(A) so as to enable us to take a different view in the matter, we are not inclined to interfere. Therefore, ground nos.2 and 2.1 in the appeal are dismissed.

6. Ground no.1 in the appeal being general in nature nor any submissions having been made before us on this ground, does not require separate adjudication while no additional ground has been raised before us in terms of residuary ground no.3 in the appeal, accordingly, this ground is dismissed.

7. In result, appeal is dismissed.

Order pronounced in Open Court

Sd/-

Sd/-

(C.L.SETHI) JUDICIAL MEMBER	(A N PAHUJA) ACCOUNTANT MEMBER
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Copy of the order forwarded to:

1.	M/s Leroy Somer & Controls (India) (P) Ltd., 222, Okhla Industrial Area, New Delhi-20
2.	Deputy Commissioner of Income-tax, Circle-4(1), Room no. 407,CR Building,IP Estate.New Delhi.
3.	CIT concerned
4.	CIT(A)-XX, New Delhi
5.	DR, ITAT, Delhi Bench-D, New Delhi
6.	Guard File

BY ORDER

Deputy Registrar
Assistant Registrar
ITAT, New Delhi