

THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 1105/Mum/2019 (Assessment Year 2012-13)
I.T.A. No. 1106/Mum/2019 (Assessment Year 2013-14)
I.T.A. No. 1107/Mum/2019 (Assessment Year 2014-15)

Procter & Gamble Hygiene and Health Care Limited P&G Plaza, Cardinal Gracias Road Chakala, Andheri(E) Mumbai-400 099. PAN : AAACP6332M (Appellant)	Vs.	DCIT 3(3)(1) Mumbai. (Respondent)
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Assessee by	Ms. Hirali Desai
Department by	Shri V. Sreekar
Date of Hearing	17.08.2020
Date of Pronouncement	27.08.2020

ORDER

1. These appeals by assessee are arising out of the common order of Commissioner of Income Tax (Appeals)-17, Mumbai in Appeal No. CIT(A)-17 wherein penalties u/s. 271G were confirmed for A.Ys. 2012-13, 2013-13 & 2014-15.

2. In these cases by common order learned CIT(A) confirmed the levy of penalty by the AO under section 271G of the Act for the reason that the assessee has entered into an international transactions with its AE and has failed to furnish documents or information as required under section 92D(3) of the Act. For this assessee has raised the identically worded grounds in all three years and facts and circumstances are also identical. Hence, we will take the facts from AY 2012-13 and will decide the issue. The common ground raised reads as under :-

“1. General

On the facts and circumstances of the case, and in law, the order passed by Hon’ble Commissioner of Income-tax (appeals) [‘CIT(A)'] is a vitiated order, as the Hon’ble CIT(A) erred both on facts and in law in confirming the penalty under section 271G levied by the Ld. Transfer Pricing Officer (“TPO”) to the appellant’s income.

2. On the facts and in the circumstances of the case and in law, the Ld. TPO/ CIT(A) erred in not appreciating that:

a) There was no failure on the part of the Appellant keep and maintain any information required by sub-section (1) of section 92D of the Act r.w. Rule 10D of the Income-tax Rules, 1962 (‘the Rules’);

b) The appellant was not required to maintain the following information/ documents called for under section 92D(3) of the Act:

-Information vis-à-vis the audited segmental account for AE and non-AEs transactions undertaken as the Appellant had select the foreign AE as the tested party in its TP study benchmarking analysis;

-Information vis-à-vis the audited segmental accounts for its manufacturing and distribution segment as it operated as an entrepreneur in the Indian market and therefore, does not have such segmental bifurcation.

c) Notice under section 92D(3) of the Act can be issued, only if after application of mind, the Ld. TPO requires more information for determination of the Arm’s Length price.

d) Notice under section 92D(3) of the Act cannot be vague or casualty issued, but must require furnishing of specific information or documents which the taxpayer failed to furnish under section 92CA(2) of the Act.

3. On the facts and circumstances of the case and in law, the Ld. TPO/ CIT(A) erred in not taking cognizance of section 92C(3), 92CA(2) and 92CA(3) of the Act, which requires:

a) the appellant to furnish evidence in support of its own determination of the arm’s length price wherein the same has been maintained by the Appellant in good faith in terms of above mentioned section; and

b) The Id. TPO to determine arm's length price on the basis of material available with him, if the Id. TPO is of the opinion that the material maintained by the Appellant does not fulfil the requirement of law.

4. Without prejudice to the above, on the facts and circumstances of the case and in law, the Id. TPO erred in not taking cognizance of the fact that, in terms of section 273B of the Act, penalty under section 271G of the Act can be imposed only if default of the Appellant is held to be proved without reasonable cause."

3. The assessee is in the business of Fast-Moving Consumer Goods in the segment of health care and feminine care and is a licensed manufacturer in the Indian market wherein it manufactures and also gets goods manufactured from its Associated Enterprises (AEs) in India. In the Transfer Pricing study report, for computing the arms' length price for the international transaction of import of raw material and finished goods, the AEs have been considered as the tested party, since they are the least complex/low risk manufacturing entities as compared to the Appellant who is performing the role of an entrepreneur for the Indian market. During the TP assessment proceedings, the Appellant submitted various documents/information to justify and support the benchmarking approach adopted in the TP study analysis.

4. However, the TPO rejected the benchmarking approach of the Appellant and determined the arms' length price by selecting the Appellant as the tested party and consequently made that T.P adjustment.

5. Separately, the TPO also initiated penalty proceedings under section 271G of the Act for non-furnishing of certain TP documentation with respect to the aforesaid international transactions of import of raw material and finished goods and export of finished goods. The Ld.CIT(A) upheld the order of the TPO on the following grounds:-

- (a) Non-furnishing of AE and non-AE audited segmental accounts;
- (b) Non-furnishing of manufacturing and distribution audited segmental accounts;

- (c) Non-furnishing of documents regarding choice of foreign AE as tested parts and
- (d) Non-furnishing of documents regarding applicability of TNMM as MAM

6. Aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before us.

7. At the Outset the learned counsel of the assessee Ms. Hirali Desai contended that the issue is squarely covered by ITAT order in the group concern case namely **Procter & Gamble Home Products Private Limited in ITA No 1095 to 1097/Mum/2019, A.Y 2012-13, 2013-14 and 2014-15 order dated 09.09.2019**, wherein on identical facts and similar learned CIT(appeals) order ITAT has deleted the addition levied under section 271G. She submitted that as in that case the notice with reference to which penalty has been levied was similarly worded. She submitted that the said notice was also general and casual and the assessee did maintain and supply the documents and information which it was required to maintain as per the law and rules. She referred that the documents which were noted by the tribunal to have been submitted by the assessee in that case, which were considered adequate, are also similarly maintained and submitted in this case.

8. On the other learned counsel of the Department relied upon the orders of the learned CIT(appeals).

9. Upon careful consideration we find that the submissions of the learned counsel of the assessee are cogent. The fact of the present case are identical to the one dealt with by the tribunal in assessee group concern referred by her. In that case also similar general notice was issued. The tribunal noted the submission that assessee has submitted following documents

Sr. No.	Submission	Information/ document provided
1.	Submission dated 8 April 2015	-Transfer pricing study report; -Copy of Form 3 ECB

		-financial statements of the Petitioner -computation of Income and Tax Audit report; and -All relevant agreements with its Associated Enterprises (AE's)
2.	Submission dated 12 October 2015	-Copy of ledger account of the AEs in petitioner's books -Details of international transactions benchmarked using Transactional net margin method (TNMM) considering the overseas AEs as tested parties.
3.	Submission dated 2 November 2015	Responses to Annexures issued by the Ld. Transfer Pricing Officer seeking details on Import of raw material, Export of finished goods and Importer of finished goods.
4.	Submission dated 16 December 2015	Response to Annexure dated 18 November 2015 regarding the following details -Product wise segmental profitability given under Note 38 to the financial statements of the Petitioner
5.	Submission dated 22 December 2012	Response to Annexure dated 10 November, 18 November and 10 December 2015 providing Policy of the petitioner group
6.	Submission dated 7 January 2016	Submission on benchmarking of royalty paid to the AE.
7.	Submission dated 7 January 2016	Submission on selection of overseas AEs as tested party and benchmarking the international transactions accordingly.
8.	Submission dated 12 January 2016	-Sample invoices of import of raw materials and finished goods.

In this case also the learned CIT appeals has noted that assessee has maintained following documents

S. No.	Submission	Information/ document provided
1.	Submission dated 8 April 2015	Transfer Pricing Study report, copy of Form 3CEB, the financial statements of the Assessee, Computation of Income, Tax Audit report and the relevant agreements with its Associated Enterprises (AEs).

2.	Submission dated 12 October 2015	The copy of ledger account of the AEs in Assessee's books, details of international transactions benchmarked using Transactional Net Margin Method ('TNMM') considering the overseas AEs as tested parties, details of payment of royalty and payment for intra group services.
3.	Submission dated 2 November 2015	Responses to Annexures issued by your goodself seeking details on Import of raw material, Export of finished goods and Import of finished goods.
4.	Submission dated 16 December 2015	Response to Annexure dated 18 November 2015 regarding details about the AMP expenses incurred by the Assessee and product wise segmental profitability given under Note 38 to the financial statements of the Assessee.
5.	Submission dated 22 December 2015	Response to Annexure dated 10 November, 18 November and 10 December 2015 providing details the break-up of AMP expenditure incurred by the Assessee, Global Transfer Pricing Policy of the Assessee group, Valuation report in respect of import of fixed assets from AEs and sample dealer distribution agreements
6.	Submission dated 7 January 2016	Submission on benchmarking of royalty paid to the AE.
7.	Submission dated 7 January 2016	Submission on selection of overseas AEs as tested party and benchmarking the international transactions accordingly.
8.	Submission dated 12 January 2016	Evidence of receipt of intra group services, sample invoices towards reimbursement of expenses and sample invoices of import of raw materials and finished goods.
9.	Submission dated 12 January 2016	Submission on benchmarking of business support services rendered by the Assessee
10.	Submission dated 22 January 2016	Invoices pertaining to purchase of fixed assets from AEs.
11.	Submission dated 25 January 2016	Response to notice issued on 24 January 2016 furnishing all the details requested for.
12.	Submission dated 28 January 2016	Reconciliation of royalty paid on net sales.

10. We find that the upon the facts circumstances it is abundantly clear that on similar notice and on similar documents maintained, the ITAT has deleted

the penalty levied under section 271G in a group concerns are referred above, by following conclusion.

“11. We have heard rival contentions and gone through the facts and circumstances of the case. From the above, we noted that the main allegation of the revenue is that of non-furnishing of audited AE and non AE segmental as well as documents regarding choice of foreign entity as tested party. We also noted that any other reason for levy of penalty is for non-furnishing of audited manufacturing and distribution of segmental accounts. Further, reason for levy of penalty is non-furnishing of documents on applicability of TNMM as per Rule 10D. We noted from the arguments of the learned Counsel for the assessee as noted above in detail and the details submission made by the assessee is to support its transfer pricing study report and international transaction entered into with its AE that the assessee has completely complied with Rule 10D(i) of the Rules. We noted that from the letter issued by revenue dated 07.09.2015 i.e. notice under section 92CA(2) read with section 92D(3) of the Act requiring information to be furnished in connection with the TP proceedings that a general notice is issued by the Assessing Officer. We noted that this issue has been considered by Hon’ble Delhi High Court in the case of CIT vs. Leory Somer & Controls (India) (P) Ltd. (2014) 360 ITR 532 (Del), wherein it is held that when there is a general notice and no specific information of document which is required to be submitted by the assessee under section 92D(3) of the Act, is asked for, the penalty levied under section 271G cannot be sustained. We noted that the assessee in the present case has made substantive compliance of the provisions of rule 10D, it is sufficient. The Legislature was conscious of this fact and, therefore, had specifically stipulated in section 92D(3) that the Assessing Officer or the Commissioner (Appeals) may require a person to furnish any information or document in respect thereof and on failure of the said person to furnish the documentation within the specified time, penalty under section 271G can be imposed. Thus, for imposing penalty the Revenue must first mention the document and information, which was required to be furnished but was not

furnished by the assessee within the specified time. The documentation or information should be one specified in rule 10D, which has been formulated in terms of section 92D(1). We noted that this has been clarified this issue in Para 11 to 14 by Hon'ble Delhi High Court by interpreting the provisions as under: -

"11. Rule 10D(1) consists of clauses (a) to (m). Clause (m) states any other information, data or document, including information or data relating to the associated enterprises, which may be relevant for determination of arm's length price. A bare perusal of sub-clauses (a) to (m) would indicate that some of the information and details pertain to the assessee and the associated enterprise, their ownership, structure, address, name, broad description of business etc. The assessees are also required to maintain details like, nature and terms of international transaction, property or services provided and quantum and value of each transaction etc. However, some of the clauses are very broad and wide like clause (m) mentioned above. These clauses relate to record of economic and market analysis, forecasts, budget and other financial estimates prepared by an assessee, record of uncontrolled transactions for realising their comparability with international transactions including record of nature, terms and conditions relating to uncontrolled transactions with third parties, record of analysis performed to evaluate comparability of uncontrolled transactions. These are general clauses relating to data, details etc. of third parties etc. These details, data, information etc. can be voluminous, fluctuating and otherwise capacious.

12. Sub-rule (3) to Rule 10D states that information specified in Rule 1 shall be supported by authentic documents, which may include the documents mentioned in sub-clauses (a) to (g). These include official publication report, status and data bases of Government of countries of residents of associated enterprises or other countries, market research studies, price publications including stock exchange and commodity market quotations, agreement contracts with unrelated enterprises etc. The word used in sub-section (3) to Rule 10D is "may".

13. It is clear from the reading of Section 10D (sic) that it will include almost anything and everything relating to international transactions, including data bases, reports, publications, data bases from Governments or bodies outside India. Some other stipulations are assessee specific and not general, broad or heterogeneous.

14. Sub-rule (4) further states that the documents specified in sub-rules (1) and (2), as far as possible, be contemporaneous and should be latest by the specified date referred to in Section 92F(iv), i.e., due date in Explanation 2 below Section 139(1). Thus, indicating the

documentation/information may be floating, transient and changeable. Constant assimilation may be required. Besides, data/information can also vary. The tribunal has rightly concluded that with such a broad rule, which requires documentation and information voluminous and virtually unlimited, Section 271G has to be interpreted reasonably and in a rational manner. Information or documentation, which is assessee specific or specific to the associated enterprises, should be readily available, whereas other documentation or information relates to data bases or transactions entered into by third parties may require collation/collection from time to time. There cannot be any end or limit to the documentation or information relating to data bases or third parties. When there is general and substantive compliance of the provisions of Rule 10D, it is sufficient. The Legislature was conscious of this fact and, therefore, had specifically stipulated in Section 92D(3) that the Assessing Officer or Commissioner (Appeals) may require a person to furnish any information or document in respect thereof and on failure of the said person to furnish the documentation within the specified time, penalty under Section 271G can be imposed. Thus, for imposing penalty the Revenue must first mention the document and information, which was required to be furnished but was not furnished by the assessee within the specified time. The documentation or information should be one specified in Rule 10D, which has been formulated in terms of Section 92D(1) of the Act. Looking from any quarter and angle, the appeal of the Revenue is misconceived, totally lacking in merits and is, therefore, dismissed.”

12. Similarly, Jaipur Tribunal in assessee's sister concern case in the case of *Gillette India Ltd (supra)* has considered this issue and Hon'ble High court of Rajasthan High Court in the case of *CIT v. Gillette India Ltd.* has finally held as under: -

“8. Copy of the notice dated 23.03.2011 issued by the Assessing Officer has not been filed on record by the Revenue along with the present grounds of appeal. We do not know what was requisitioned and asked for by the said notice and which/what documents and details were supplied. We also do not know whether any extension of time was prayed for or granted by the Transfer Pricing Officer and whether any hearing was fixed by the Transfer Pricing Officer pursuant to notice dated 12.03.2007. It appears that the Transfer Pricing Officer had asked for specific details and documents vide letter dated 12.06.2008 and these details were fully complied with on 25.06.2008 and 23.07.2008. Compliance of the letter dated 12.06.2008 was made within period of 30 days on 25.06.2008 and then subsequently on 23.07.2008. The date 23.07.2008 is within 60 days of issue of

notice/letter dated 12.06.2008. We do not know the documents filed on 25.06.2008 and which documents or details were subsequently filed on 23.07.2008. There is no discussion on the said aspect in the order passed by the Assessing Officer, imposing penalty. In these circumstances, we do not find any merit in the present appeal and the same is dismissed."

13. *In view of the above factual aspects and case laws of Hon'ble Delhi High Court in the case of Leroy Somer & Controls (India) (P) Ltd (supra), we are of the view that the assessee has sufficiently complied with the requirement of Rule 10D(i) of the Rules and moreover the AO has not raised any specific issue which specific documents is not produced under section 92D(3), hence, we conclude that the assessee has furnished all the informations as asked for by the AO and unless and until a specific defect is pointed out in the submissions of documents, penalty under section 271G of the Act cannot be levied. We delete the penalty and allow the appeal of the assessee.*

14. We note that facts before us are similar to the one dealt by tribunal hereinabove. No contrary decision has been brought to notice. This is also not the case that honourable jurisdictional High Court has reversed the said decision. Accordingly respectfully following the precedent we set aside the order of learned CIT appeals and decide the issue in favour of assessee.

15. In the result assessee's appeals stand allowed.

16. On Order pronounced under ITAT rules 34(4).

Sd/-

(AMRJIT SINGH)
JUDICIAL MEMBER

Sd/-

(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 27/08/2020

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.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai