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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.08.2021

CORAM

The Honourable Mr. Justice T.S. SIVAGNANAM

and

The Honourable Mr. Justice SATHI KUMAR SUKUMARA KURUP

T.C.A.No.776 of 2014

Commissioner of Income Tax,
Chennai.

...Appellant/Appellant

-vs-

M/s.SSL-TTK Ltd.,
No.6, Cathedral Road,
Chennai-600 086.

...Respondent/Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order dated 15.02.2012 made in I.T.A.No.544/Mds/2011 on the file of the Income Tax Appellate Tribunal 'D' Bench, Chennai for the assessment year 2006-07.

Against the order of the Commissioner of Income Tax (Appeals)V, Chennai 600 034 dated 19.01.2011 in I.T.A.No.371/2009-2010 in the Assessment year 2006-2007.

Against the order of the Assistant Commissioner of Income Tax, Company Circle VI(1) Chennai 34 dated 21.12.2009 GIR No./PAN S-141/AAFCS5498E in the Assessment year 2006-2007.

For Appellant : Mr.J.Narayanaswamy,
Senior Standing Counsel

For Respondent : Mr.R.Vijayaraghavan

JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This appeal, filed by the appellant/Revenue, under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") is directed against the order dated 15.02.2012, made in I.T.A.No.544/Mds/2011 on the file of the Income Tax Appellate Tribunal 'D' Bench, Chennai (for brevity "the Tribunal") for the assessment year 2006-07.

2.The appeal was admitted on 13.07.2015, on the following substantial question of law:-



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"Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in upholding the order of the CIT(A) directing the Assessing Officer to delete the penalty levied under Section 271G of the Income Tax Act, 1961?"

3.The assessee is a Public Limited Company engaged in the manufacture of foot care and footwear products to the domestic and export markets. It is a joint venture between a UK Company and an Indian Company. For the assessment year under consideration 2006-07, the assessee filed its return of income admitting total loss. The case referred to the Transfer Pricing Officer (TPO) under Section 92CA of the Act for computing the Arms Length Price. The TPO held that there is no need for adjustment and the Assessing Officer, in his order, accepted the total income/loss returned by the assessee. The Assessing Officer initiated penalty proceedings under Section 271G of the Act on the ground that the assessee-company did not comply with the letter issued by the TPO requiring the assessee to furnish information in terms of Section 92D and Section 92E of the Act and proceeded to levy penalty at 2% of the value of international transaction.

4.The assessee filed appeal before the Commissioner of Income Tax (Appeals)-V, Chennai (for brevity "the CIT(A)"), who by order dated 19.01.2011, allowed the appeal. Aggrieved by the same, the Revenue preferred appeal before the Tribunal, which was dismissed. Challenging the said order, the Revenue is before us raising the aforementioned substantial question of law for consideration.

5.We have elaborately heard Mr.J.Narayanaswamy, learned Senior Standing Counsel appearing for the appellant/Revenue and Mr.R.Vijayaraghavan, learned counsel for the respondent/assessee.

6.The crucial fact, which we have to note at the very outset, is that though the Assessing Officer made a reference to the TPO, the TPO, on going through the documents filed by the assessee, was satisfied and passed an order stating that no addition was required to be made and this was accepted and the total income/loss returned by the assessee was accepted and the assessment was completed. It is thereafter, the Assessing Officer proposed to levy penalty by invoking his power under Section 271G of the Act.

7.In terms of Section 92D of the Act, which deals with maintenance, keeping and furnishing of information and document by such person, the Assessing Officer or the Commissioner (Appeals) is empowered to require any person referred to in sub-



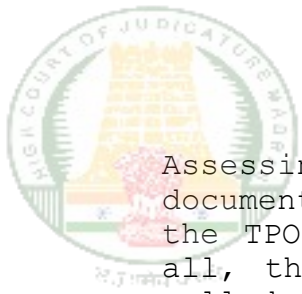
section (1) of Section 92D to furnish any information or document referred therein within a period thirty days from the date of receipt of a notice by exercising power under sub-section (3) of Section 92D of the Act.

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8.If the assessee fails to furnish the information called for, Section 271G provides for penalty. The said provision states that if any person who has entered into an international transaction or specified domestic transaction, fails to furnish any such information or document as required under sub-section (3) of Section 92D, the Assessing Officer or the TPO, as referred to in Section 92CA, or the Commissioner (Appeals) 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 or specified domestic transaction for each such failure. Thus, to invoke the power under Section 271G, the authority, viz., the Assessing Officer or the TPO or the Commissioner (Appeals) has to render a finding that the assessee has failed to furnish information called for under Section 92D (3) of the Act.

9.The TPO, during the course of the proceedings before him, sent a communication dated 25.11.2008 along with a questionnaire informing the assessee that his case has been referred to him under Section 92CA and the assessee was requested to furnish certain information in terms of Section 92D and Section 92E of the Act as given in the enclosed questionnaire. These details were directed to be furnished by 24.12.2008 and also sent copies of the annual reports for the three years and also copy of the computation of total income. The assessee argued before the Tribunal that the TPO's communication dated 25.11.2008 cannot be considered as a notice under Section 92D(3) of the Act. Though the Tribunal states that the question to be decided is whether the letter issued by the TPO, as mentioned above dated 25.11.2008, is a notice under Section 92D(3) or not, it does not render any finding. In our considered view, the TPO's notice dated 25.11.2008, undoubtedly, is a notice under Section 92D(3) of the Act. It is not necessary for the authority to verbatim repeat the statutory provision. Sub-section (3) of Section 92D empowers the Assessing Officer or the Commissioner (Appeals) to require any person who has entered into an international transaction to furnish any information or document, as may be prescribed under sub-section (1) within a period of thirty days.

10.On going through the TPO's notice dated 25.11.2008, all the ingredients required to be satisfied for a notice to be validly treated as a notice under Section 92D(3), are contained in the TPO's notice. Therefore, we find that there is no defect in the notice. Nevertheless, the TPO did not initiate penalty proceedings. It is the Assessing Officer, who did so. The



Assessing Officer did not dispute the fact that out of 16 documents/items, which the assessee was called upon to comply by the TPO, 12 of them have been complied by the assessee. Above all, the TPO was satisfied that whatever documents, which were called for, were produced by the assessee at a later point of time and ordered that no addition is required to be made. The explanation given by the assessee dated 15.12.2009 is by stating that the company had no experience relating to transfer pricing regulations, as it was the first transaction, which was referred to the TPO.

11. We are not convinced with the said explanation for more than one reason. Firstly, the assessee is a Public Limited Company. Secondly, it is a joint venture company between a UK Company and an Indian Company and the nature of product manufactured by them was an international popular brand of foot care and footwear products.

12. Be that as it may, it is not a case of total failure, but it may be a case of belated compliance. The learned Senior Standing Counsel appearing for the respondent submitted that no leniency is required to be extended to the assessee and in fact, on an individual assessee, the High Court of Kerala did not show any indulgence with regard to the penalty, which was imposed under Section 271C and Section 273B of the Act in the case of CIT v. Thomas Muthoot reported in (2015) 61 taxmann.com 76 (Kerala). The assessee pleaded that he was under the bonafide belief that under Section 194A, they were not liable to deduct tax at source on the interest paid by a partner to the firm and thus, pleaded ignorance of the statutory liability to deduct tax. This plea was held to be not acceptable and not bonafide. We find, factually the case cannot be compared with that of the case on hand, where there are several distinguishing factual features, which would go to justify the decision taken by the Tribunal affirming the order passed by the CIT(A). Though we have held that the explanation offered by the assessee stating that they are a novice to transfer pricing transactions, which is not prima facie acceptable, but the conduct of the assessee in complying with 12 items out of 16 items as called for by the TPO can be considered to be reasonable and the act cannot be held to be an unreasonable act, but can be considered as a reasonable act of an organization acting with prudence under normal circumstances without negligence or inaction or want of bonafides. There is no finding recorded by the Assessing Officer that the conduct of the assessee lacks bonafide or there was supine indifference on the part of the assessee in not producing the records called for by the TPO, despite notice and despite fixing time frame and not furnishing all the details was on account of inaction leading to failure on the part of the assessee to invoke Section 271G of the Act. Therefore, we are



of the view that on facts, the Tribunal rightly held in favour of the assessee by affirming the order passed by the CIT(A).

13.Mr.R.Vijayaraghavan, learned counsel for the assessee submitted that the notice issued was defective and did not comply with the provisions of Section 92D(3) of the Act and in support of such contention, reliance was placed on the decision in the case of CIT vs. Leroy Somer & Controls reported in (2014) 360 ITR 0532 (Delhi). We find that there is a slight factual difference in the said case and in any event, on perusal of the notice and the wordings contained therein, we are satisfied that it is in full compliance of the statutory provision, viz., Section 92D(3) of the Act.

14.For the above reasons, this tax case appeal, by the Revenue, is dismissed and the substantial question of law is answered against the Revenue. No costs.

s/d-
Assistant Registrar(CS-V)

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Sub-Assistant Registrar

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To

1.The Assistant Registrar
Income Tax Appellate Tribunal 'D' Bench,
Rajaji Bhavan, Besant Nagar, Chennai.

2.The Commissioner of Income Tax (Appeals-V)
Chennai 600 034.

3.The Assistant Commissioner of Income Tax
Company Circle VI(1)
Chennai 600 034

+1 CC to Mr.J.Narayanaswamy, Advocate sr 38938.

T.C.A.No.776 of 2014

MG(CO)
SP(28/10/2021)