IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "I-1" BENCH NEW DELHI)

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
&
SHRI AMIT SHUKLA, JUDICIAL MEMBER
ITA No. 3458/Del./2014
Assessment Year: 2007-08

JRK Auto Parts (P) Ltd. (Now known as M/s. Summit Auto Seats Industry (Delhi) Co. P. Ltd. C/o RRA Taxindia, D-28, South Extension, Part-1, New Delhi	**Vs.**	**ACIT Circle – Noida Noida**
(Applicant)		(Respondent)
(PAN: AABCJ5026B)		

Assessee by: Dr. Rakesh Gupta, Advocate,
Shri Somil Aggarwal, Advocate

Revenue by: Shri Neeraj Kumar Sharma, Sr. DR

Date of hearing	29/05/2017
Date of pronouncement	/05/2017

ORDER

PERAMIT SHUKLA, JUDICIAL MEMBER:

The aforesaid appeal has been filed by the assessee against impugned order dated 18.3.2014, passed by the ld. CIT (Appeals), Noida, in relation to penalty proceedings u/s 271(1)(c). In the grounds of appeal assessee has raised following grounds:-

"1. That having regard to the facts and circumstances of thecase, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in levying penalty of Rs.23,20,000/- u/s 271(l)(c) being illegal and void-ab-initio.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in levying the penalty of Rs.23,20,000/- u/s 271(l)(c) is bad in law and against the facts and circumstances of the case.

3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in levying penalty u/s 271(l)(c) on the following additions made in assessment order and more so when framing the such assessment order u/s 143(3)/144C dated 28-02-2011 is also contrary to law and facts.

- *On account of expenses of capital nature-Rs.5,00,000/-*
- *On account of transfer price adjustment-Rs.63,85,158/-*

4. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in confirming the action of Ld. AO in levying penalty u/s 271(l)(c) which is bad in law being beyond jurisdiction and barred by limitation and contrary to the principles of natural justice and has been passed by recording incorrect facts and findings and without giving adequate opportunity to the assessee and the same is not sustainable on various legal and factual grounds.

5. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in imposing a penalty ofRs.20,79,453/- that too without recording mandatory "satisfaction" as per law.

6. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in directing the assessing officer to revise/enhancing the quantum of penalty with respect to TP adjustment of Rs.60,23,024/- on account of raw material import and that too by recording incorrect facts and finding and by disregarding the principles of natural justice and without bringing anything contrary on record.

7. That the assessee craves the leave to add, alter or amend the grounds of appeal at any stage and all the grounds are without prejudice to each other."

2. Here in this case, the Assessing Officer had levied penalty of Rs. 23,20,000/- on an addition aggregating to Rs. 68,85,158/-, which was made on account of:-*firstly,* transfer pricing adjustment of Rs. 63,85,158/- in respect of purchase/import of capital goods from AE; and *secondly,* disallowance of Rs. 5,00,000/- paid as ROC fees for increase in authorized capital which has been treated as capital expenditure by the Assessing Officer. However, the Ld. CIT (Appeals) has enhanced the penalty on further addition of Rs. 60,23,024/- which was on account of transfer pricing adjustment in respect of purchase/import of raw materials from AE, though proposed by TPO, but not made by the AO.

3. The brief facts of the case qua the issue involved are that, the assessee company was engaged in the business of manufacturing of auto parts especially for interiors. It is subsidiary of M/s. Summit Auto Seats Industry Company Ltd. (SAS) Thailand, which held 82.50% of its share capital. In the quantum proceedings, the Ld. TPO to whom the matter was referred by the Assessing Officer to determine the arm's length of the international transactions entered with the assessee with SAS during the relevant assessment year had proposed certain adjustments to be made in arm's length price of the transactions. During the year under consideration as stated by the assessee in its T.P. study report, it has undertaken following international transactions:-

Sl. No.	Name of the A.E.	Description of transactions	Method applied	Value of transaction(Rs)
1	M/s Summit Auto Seats Industry co. Ltd. (SAS) .Thailand	Import of Raw Material	Cost Plus Method	6,23,18,131
2	M/s Summit Auto Seats Industry co. Ltd. (SAS) .Thailand	Import of capital Goods	Cost Plus Method	6,60,65,006
	Total			12,83,83,137

4. For computing its arm's length price of aforesaid international transactions, the assessee had adopted "Cost Plus Method" (CPM) and submitted that the AE charges the assessee company with markup of 10% of the total cost of purchase of the raw materials and capital goods, which meets the ALP requirement. The ld. TPO noted that the assessee while adopting CPM as MAM has not bench marked its ALP by carrying out any comparability analysis after identifying independent comparable. Therefore, in absence of assessee's failure to furnish suitable comparables, the ld. TPO held that CPM cannot be adopted as most appropriate method and held that TNMM should be taken as MAM for bench marking the ALP of the transaction. Since the assessee was incurring huge loses and sales have been made entirely to the AE, the TPO held that *"tested party"* should be foreign AE. After going through AE's financials, he noted that the operating margin of the AE has been stated to be 8.62% which has been worked out in the following manner:-

Sr.		Crores in terms of Thai Bhat
1.	Sales	721.45
2.	Cost	659.29
3.	Operating profit	62.16
4.	Operating profit upon sales	8.62%

The ld. TPO further observed that the AE has failed to take into account the "other income" of 44.10 Crore Thai Bhat (on the ground that details were not known), which according to him should be part of operating income and therefore, to be added to the operating profit. Accordingly, he determined the operating profits/sales at 14.73% in the following manner:-

a)	Sales	721.45
b)	Other Income	44.10(Details not known)
c)	Costs	659.29
d)	Operating profit	106.26
e)	Operating profit/Sales	14.73%

In this manner he has enhanced the operating margin of the 'tested party' (i.e., AE) at 14.73%, instead of 8.72% declared by the said AE in its financials.

5. Thereafter ld. TPO held that, since no comparative information regarding normal profit markup of AE is available, therefore, he chose to undertake the search process of the comparables on the Indian Prowess Data of the local Indian companies and after identifying 7 comparable companies, the arithmetic mean of whom where arrived at 5.94%, he held that same is to be treated as the actual margin of the A.E for determining the ALP. The lists of the comparables with their profit margin are as under:-

Company Name	OP/Sales %
Hanil Lear India Pvt.,Ltd.	5.95
Harita Seating Systems Ltd.	5.09
I F B Automotive Pvt. Ltd.	4.05
Krishna Maruti Ltd.	3.38
M4 L Industries Ltd.	11.28
S R M Energy Ltd.	5.04
Swaraj Automotives Ltd.	6.82
Arithmatic mean	5.94

After taking into account the enhanced operating margin of the A.E. vis-à-vis the average margin of comparables, (i.e.,14.73% - 5.94% =8.79%), TPO held that A.E. has earned excessive margin of 8.79% on the total sales made to the assessee. Thereafter, he computed the ALP of international transactions of purchase of raw materials in the following manner:-

Total Sales to Indian party		[In Rs.]
(Import of raw material)	:	6,23,18,131
Less: Margin 14.73%	:	91,79,461
Direct & Indirect Cost of production:		5,31,38,670
Add: Normal Markup @ 5.94%		31,56,437
Arm's Length Price		5,62,95,107
Total price charged by AE	:	6,23,18,131
Transfer price adjustment	:	**60,23,024**

6. As regards the computation of ALP in respect of purchase of capital goods, he made the ALP adjustment in the following manner:-

Total Sales to Indian party:		[In Rs.]
(Import of raw material)	:	66,06,5006
Less: Margin 14.73%	:	97,31,375
Direct & Indirect Cost of production:		5,63,33,631
Add: Normal Markup @ 5.94%		33,46,218
Arm's Length Price		5,96,79,848
Total price charged by AE	:	6,60,65,006
Transfer price adjustment	:	**63,85,158**

7. The aforesaid transfer pricing adjustment was proposed by the TPO to the Assessing Officer, however the ld. Assessing Officer in his order, had made addition in respect of ALP adjustment on import/

purchase of capital goods and did not made any adjustment in respect of import/purchase of raw materials by the assessee. Apart from the one TP adjustment, the ld. Assessing Officer has further added a sum of Rs. 5 lakhs which has been disallowed by him as capital expenditure on the ground that such an expense has been incurred towards filing fees to ROC on enhanced capital. Some further additions like disallowance on personal user of vehicles and telephone expenses were also made, which are not the subject matter of penalty, before us. Accordingly, the addition on which penalty was initiated and levied by the Assessing Officer was only in respect of TP adjustment of Rs. 63,85,138/- and Rs. 5,00,000/-, disallowed as capital expenditure. Against the said assessment order, the assessee did not prefer any appeal before the ld. CIT (A). In this manner, the additions made by the Assessing Officer in the assessment order had attained finality.

8. In the course of the penalty proceedings u/s 271(1)(c) initiated by the Assessing Officer in terms of the said assessment order, the Assessing Officer noted that as against the 'nil' income declared by the assessee, the assessment was completed at Rs. 69,76,510/- after making the following additions:-

i) Addition on a/c of personal use of vehicles: Rs.41,848/-
ii) Addition on a/c of personal use of telephone: Rs.49,520/-
iii) Addition on a/c of expenses of capital nature: Rs. 5,00,000/-
iv) Addition on a/c of transfer price adjustment: Rs.63,85,158/-

In the penalty proceedings, in response to the show cause notice, assessee made its elaborate submissions as to why penalty cannot be levied on such additions, however the Ld. Assessing

Officer has rejected the assessee's contention and levied the penalty at Rs. 23,20,000/- after observing and holding as under:-

> *"On the facts of the case as discussed above, it is held that assessee has furnished inaccurate particulars of income and thereby concealed true particulars of such income to the extent of Rs. 68,85,158/- and is liable for penalty u/s 271 (1)(c) of the Act. The minimum and maximum penalty in respect of which the inaccurate particulars of income have been furnished comes to Rs.23,17,545/- being 100% and Rs.69,52,635/- being 300% respectively. Considering the facts and circumstances of the case, I hereby impose penalty of Rs.23,20,000/- u/s 271(1)(c) of the Act and direct the assessee to pay the same."*

9. However the ld. CIT (Appeals) apart from confirming the penalty on the additions made by the Assessing Officer in the assessment order has further enhanced the penalty in respect of transfer pricing adjustment on the import/purchase of raw material of Rs. 60,23,024/- which was originally proposed by the TPO, but omitted to be added by the Assessing Officer. Such an enhancement has been made by the Learned CIT (Appeals) despite the fact that in the quantum proceedings the additions made by the Assessing Officer had attained finality, as neither any first appeal was filed by the assessee nor such an assessment order has been disturbed either under the revisionary jurisdiction u/s 263; nor u/s 148; and nor u/s 154. Thus from the stage of the Learned CIT (Appeals), not only the quantum of penalty has been confirmed which was levied by the Assessing Officer but it has also been enhanced on an amount of addition which was not made in the assessment order.

10. Before us the ld. Counsel, Dr. Rakesh Gupta after explaining the entire facts submitted that Ld. CIT (A) has exceeded his appellate jurisdiction by levying the penalty on an addition which has not been made in the quantum proceedings. He can only levy or enhance the penalty only to the extent of additions which has been made in the quantum proceedings. Thus, penalty enhanced by the Learned CIT (Appeals) here in this case is without jurisdiction and same should be deleted.

11. As regards the levy of penalty on account of transfer pricing adjustment in respect of import/purchase of capital goods, he submitted that first of all, the Learned TPO could not have increase the operating profit of the A.E. by considering the element of "other income" as part of operating sales, because the "other income" mostly consists of dividend income which has nothing to do with the sales. Therefore, such an increase of PLI as made by the TPO is unjustified in law and on facts. If the profit margin of 8.62% of the A.E. is taking into consideration and the arithmetic mean of comparable are taken at 5.49%, then such a margin will fall within the range of plus/minus 5% and in that situation no TP adjustment could have been made. In any case, it cannot be said that there is any case of furnishing of any inaccurate particulars of income. He further submitted that the Assessing Officer in the assessment order has initiated the penalty proceedings on both the charges, one for furnishing of inaccurate particulars and also for concealment of income. In the penalty proceedings the Assessing Officer has again levied the penalty on both the counts without specifying the charge. The Learned CIT (Appeals) too has confirmed the penalty under both the charges which cannot be sustained in law, because, the charge

for initiating the penalty proceedings and levy u/s 271(1)(c) should be very specific. In support, he relied upon the decision of Karnataka High Court in the cases of **CIT vs. Manjunatha Cotton and Ginning Factory & others (2013) 359 ITR 565 (Karnataka); New Sorathia Engineering Co. Vs. CIT 282 ITR 642 (Gujarat).** Apart from that, he submitted that the assessee has been incurring huge loses and there could not have been any benefit for evading any tax and therefore, in such circumstances also penalty cannot be confirmed. In support of this proposition also he has filed certain Tribunal decisions before us.

12. Regarding the addition of Rs. 5 lakhs fee paid to ROC, he submitted that the same was paid for increase of authorized capital which is not for any enduring benefit accrued to the assessee and it was claimed as revenue expenses, which has been charged to the profit of loss account. In any case all the particulars and facts in this regard were disclosed in the books of accounts and therefore, there cannot be a case for furnishing of inaccurate particulars. In support, he relied upon the decision of Hon'ble High Court of Delhi in case of **CIT vs. A&T Communication Services ITA No. 526/2011** judgment and order dated 19.1.2014, wherein on similar issue it was held that whether it is a capital or revenue is highly debatable issue on such debatable issue penalty cannot be levied.

13. On the other hand, the ld. Sr. CIT DR submitted that there was a clear cut adjustment proposed by the TPO in respect of import of raw materials and import of capital goods. The Assessing Officer by mistake had taken only one item the TP adjustment and omitted to make an addition in respect of import of raw material which was

proposed at Rs. 60,23,024/-. Since assessee had not preferred any appeal in the quantum proceedings, therefore, the Learned CIT (Appeals) in the penalty proceedings took note of this fact and also gave opportunity to the assessee as to why the penalty should not be levied on such an amount of addition. This addition was inadvertently left to be made by the Assessing Officer by mistake or through oversight, therefore, it has to be factored in for the purpose of penalty proceedings. Thus, the Ld. CIT (Appeals) is well within his power to levy penalty on such additions. He further submitted that the assessee is taking a new legal plea before this Tribunal by contesting that the Ld. CIT (Appeals) could not have made such an enhancement in penalty proceedings and therefore, either such a plea should not be entertained or the matter should be restored back to the file of the Learned CIT (Appeals). On the merits as regards the TP adjustment on account of import/purchase of capital goods, he submitted that the TPO has categorically rejected the CPM method adopted by the assessee for the reason that the assessee has not bench marked with any comparables and in absence of any comparability analysis with uncontrolled transactions, the bench marking analysis done by the assessee for determining his ALP is faulty and incorrect in law. Since under the CPM, assessee's ALP could not be determined, therefore, TPO was forced to adopt TNMM as most appropriate method and after carrying out the proper comparability analysis he has arrived at arithmetic mean of 5.94% and thereafter, he has made the adjustment in accordance with the law. As regards the element of "other income" as a part of operating profit, he submitted that the overall income has to be taken into consideration for determining the PLI. Thus, he strongly relied upon the order of the Learned CIT (Appeals).

14. In rejoinder the ld. counsel submitted that the assessee has taken a specific ground before this Tribunal challenging the validity of the enhancement of the Ld. CIT (Appeals) and after passing of the order of the Learned CIT (Appeals), only forum in which the assessee can raise this issue is before this Tribunal. Apart from that, he pointed out from the order of the Ld. CIT (Appeals) that this issue was specifically raised before the Ld. CIT (Appeals). Thus, he could not have made any enhancement of penalty on the addition which has not been made by the Assessing Officer.

15. We have heard the rival submissions and perused the relevant findings given in the impugned order as well as the material placed before us. We will first address the issue of enhancement of penalty made by the Ld. CIT (Appeals) on an addition which has not been made in the quantum proceedings. As discussed above, the ld TPO has proposed two TP adjustment; *first*, for sum of Rs. 63,85,158/- on account of import/purchase of capital goods from the A.E.; and *secondly,* for Rs. 60,23,024/- in respect of import/ purchase of raw materials. However, the ld. Assessing Officer in his assessment order passed u/s 143(3)/144C has made addition on account of TP adjustment of Rs. 63,85,158/- only which was in respect of import/purchase of capital goods. He did not make any addition in respect of other TP adjustment. Now such an assessment /addition has attained finality as it has not been revised or rectified u/s 263 or u/s 154 or has been reopened u/s 147/148. Once the addition has been made/confirmed in the quantum proceedings, then subject matter of penalty proceedings u/s 271(1)(c) is strictly circumscribed to such addition only. The penalty cannot be levied on an addition which has not been made in the assessment or in

quantum proceedings by any appellate authority and hence if no such addition has been made in assessment, then same cannot be roped in penalty proceedings either by the Assessing Officer or by Ld. CIT (Appeals) in terms of power enshrined under section 251. Here the Ld. CIT (Appeals) is absolutely unjustified in law and on facts to levy or enhance a penalty on an addition which is not arising out of assessment order or any appellate order in the quantum proceedings or from the penalty order passed by the Assessing Officer. Once the assessee had raised this issue before the Ld. CIT (Appeals), then the Ld. CIT (Appeals) should have given his elaborate reasons and justifications under the law as to how he can proceed to levy a penalty which was never a subject matter of addition by the Assessing Officer. If there was any bonafide mistake or omission of not making the addition, that mistake could only be rectified in the assessment proceedings or appellate proceedings in the quantum side or under any other provisions of the Act like, u/s 263 or u/s 148 or u/s 154. It has not been brought on record that Assessing Officer has rectified his mistake and has revised his assessment and demand by taking into account the aforesaid adjustment. In absence of such rectification or revision of the assessment order, we are of the opinion that the penalty levied u/s 271(1)(c) on addition of Rs. 60,23,024/- as done by the Ld. CIT (Appeals), is beyond his jurisdiction and the same is directed to be quashed. As a passing remark we would like to add that, the CIT (Appeals) as a first appellate authority though has vast powers under section 251, but he should not transgress his jurisdiction or exercise power beyond the mandate of law and if any such action is being done then the same should be justified within the ambit of the law or by taking any support from any judicial precedence. Here no judicial precedence or

any statutory provision has been brought to our notice that, Ld. CIT(A) can levy or enhance penalty u/s 271(1)(c) whence there is no addition in the quantum/assessment proceedings. Accordingly, we hold that penalty on addition of Rs. 60,23,024/- cannot be levied and the same is directed to be deleted.

16. Now coming to the levy of penalty of transfer pricing adjustment of Rs. 63,85,154/- as discussed in the earlier part of order, the same has been made in respect of purchase/import of capital goods by the assessee from its A.E. From the perusal of the TPO's order it is seen that he has rejected CPM method of the assessee on the ground that there is no proper bench marking exercise done by the assessee by comparing it from uncontrolled transaction with the third parties. Though such an observation of the Ld. TPO may be correct, but the manner in which he has proceeded to take A.E. (SAS Thailand) as "Tested Party" and then selecting the local comparables on Indian Data System to bench mark the margin of the A.E. which is a foreign entity cannot be appreciated or upheld at all. If A.E. has taken as "Tested Party", then market and economic factors in which A.E. is operating has to be taken into consideration for bench marking any kind of profit margin of the said A.E for the purpose of determining the ALP and not the comparables which are working under Indian economic and market conditions. The TPO cannot made foreign A.E. as a 'tested party' and compare it with the Indian comparables who are operating under different geographical, economical and market environment. Such an exercise by the TPO vitiates the entire exercise of determining the ALP of the transaction and transfer pricing adjustment made by him. Apart from that, it is also noted that the sales of the A.E. constitutes

its manufacturing of auto parts and for this purpose it imports raw materials and capital goods which is part of its direct operating cost. In such circumstances, the operating profit is to be based on income derived from sales and direct costs incurred on such sales of goods. Other incomes like "dividend income' cannot be reckoned as part of operating sales or operating profits. In this manner the tinkering of the PLI by including dividend income as part of operative income and operating profit by the TPO is again unjustified in law and facts. Thus, the PLI of 14.73% as determined by the TPO cannot be sustained on the facts of the present case. If the A.E. is operating profit is 8.62%, then in that case even if we take arithmetic profit margin of 5.92 % of the comparables which has been taken by the by the TPO, then such a margin will fall within the plus/minus range of 5%. On this count also, the transfer pricing assessment made by the TPO is unjustified in law and on facts. Thus, we hold that no penalty can be levied on such TP adjustment of Rs. 62,85,158/- made on account of purchase/import of capital goods and accordingly, same is directed to be deleted.

17. So far as the levy of Rs. 5 lakhs, we find that the assessee's case has been that it was on account of fee paid to ROC to increase the authorized capital which has been claimed as revenue. Nowhere from the records is it borne out that, whether such authorized capital was for either running of business or for any expansion of business or for setting up of new business. The treatment of such an expense whether it is for capital or revenue largely depends on the facts of the case and there is often very thin line demarcation between the expense which can be reckoned as capital or revenue. if the assessee had claimed to be a revenue expenditure stating that it

the authorized capital was for the purpose of its running of business, then, it cannot be held that the assessee has filed any inaccurate particulars of income, if such an expense is treated as capital expenditure for the purpose of levy of penalty u/s 271(1)(c). In any case whether the expenditure is revenue or capital is quite debatable issue and on such a claim, penalty u/s 271(1)(c) for furnishing of inaccurate particulars cannot be levied. Thus, we hold that on this addition also no penalty can be levied by the Assessing Officer or can be confirmed by the Ld. CIT (Appeals) and therefore, same is directed to be deleted.

18. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 31.05.2017.

Sd/-	**Sd/-**
(N.K. SAINI)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 31.05.2017

Narender

Copy forwarded to:

1) Appellant

2) Respondent

3) CIT

4) CIT (Appeals)

5) DR: ITAT

ASSISTANT REGISTRAR

	Date
Draft dictated on	29.05.2017
Draft placed before author	30.05.2017
Draft proposed & placed before the second member	
Draft discussed/approved by Second Member.	
Approved Draft comes to the Sr.PS/PS	31 .5.2017
Kept for pronouncement on	
File sent to the Bench Clerk	31.5.2017
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	