

आयकर अपीलीय अधिकरण "J" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No. 1095/Mum/2019

(निर्धारण वर्ष / Assessment Year 2012-13)

आयकर अपील सं./ ITA No. 1096/Mum/2019

(निर्धारण वर्ष / Assessment Year 2013-14)

आयकर अपील सं./ ITA No. 1097/Mum/2019

(निर्धारण वर्ष / Assessment Year 2014-15)

Procter & Gamble Home Products Private
Limited

P& G Plaza, Cardinal Gracias Road, Chakala,
Andheri (East), Mumbai-400 099

स्थायी लेखा सं./PAN - AAACP4072C

..... Appellant
/अपीलाथी

v/s

The Dy. Commissioner of Income Tax –
Circle 3(3)(1),
Mumbai

.....Respondent
/ प्रत्यर्था

अपीलाथी की ओर से / Appellant by	:	Shri Dhanesh Bafna Shri Hiralal Desai, ARs
प्रत्यर्था की ओर से / Respondent by	:	Shri Pavankumar Beerila, DR

सुनवाई की तारीख / Date of hearing:	09.09.2019
घोषणा की तारीख / Date of pronouncement :	09.09.2019



आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

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/ 10690, 10069, 10445/IT-385, 386, 387/2016-17, 2017-18, dated 24.12.2018. The Assessments were framed by the Dy. Commissioner of Income Tax- circle 10(3)(2), Mumbai (in short DCIT/ AO/TPO) for AYs 2013-14, 2014-15, 2014-15 vide dated 29.09.2017, 31.01.2017, 30.10.2018, under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The only common issue in these three appeals of assessee is against the common order of CIT(A) confirming 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 informations 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 assessee has raised the ground in AY 2012-13 in ITA No.1085/Mum/2019 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 Ld. 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. Brief facts of the case are that the assessee is in the business of first moving consumer goods in the business segment of health care and feminine care and licensed manufacturer in the Indian market, wherein the manufacturer also gets goods manufactured from its Associated Enterprises (AE) for sale in India. The petitioner operates in the business segment comprising of house hold care, beauty care, feminine care and other products in India, Nepal, Bhutan and other markets as agreed between the assessee and its AEs. The



assessee filed its returned income for the AY 2012-13 declaring total income at nil and the return of income was selected for scrutiny by issuing notice under section 143(2) of the Act. During the transfer pricing proceedings, the transfer pricing officer (TPO) disregarded the contention of the assessee and made Transfer Pricing adjustment amounting to ₹ 476,28,58,044/- vide his order dated 29.01.2016 under section 92CA(3) of the Act. The quantum adjustments made by TPO are now pending before the Tribunal in consequent appeal. In the meantime, the TPO issued notice under section 271G initiating the penalty proceedings vide notice dated 25.05.2016 providing the assessee an opportunity to show-cause as to why the penalty should not be levied. The Transfer Pricing Officer levied the penalty under section 271G of the Act vide order dated 29.07.2016 and CIT(A) upheld the order of the Transfer Pricing Officer on the following grounds: -

“Non-furnishing of AE and non-AE audited segmental accounts:

Non-furnishing of manufacturing of distribution audited segmental accounts;

Non-furnishing of documents regarding choice of foreign entity as tested party; and

Non furnishing of documents regarding applicability of Transactional Net Margin Method (TNMM) as Most appropriate method (MAM)”



4. Before us, the learned Counsel for the assessee stated that the Transfer Pricing Officer has initiated the penalty proceedings on International Transactions of import of raw material, import of spare of finished goods, export of raw materials and export of finished goods. The only allegation of the Transfer Pricing Officer is that the assessee has not maintained a sufficient document as prescribed under Rule 10D of the Income Tax Rules, 1962 (hereinafter the 'Rules'). It means that the short dispute before us is regarding levy of penalty under section 271G of the Act is for non-maintenance of audited segmental financial vis-à-vis the transactions of the associated enterprise and non-associate enterprise. The learned Counsel stated that the assessee has maintained following information as per Rule 10D, which has been submitted before the Transfer Pricing Officer and its transfer pricing study as under: -

"Analysis of the functions performed, risks assumed and assets employed by the petitioner;

Analysis of comparing the price of international transactions under consideration with comparable third party transactions;

Analysis of the industry in which the petitioner operates;



Selection of the most appropriate method and an analysis to conclude that the other methods are not appropriate.”

5. The Counsel also stated that the following information/ documents were provided: -

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	Submission on selection of overseas AEs



	January 2016	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.

6. The learned Counsel for the assessee also drew our attention to notice issued under section 92CA(2) read with section 92D(3) of the Act vide F No. 91/JT. CIT /TP-3(3)/TP Ref./2015-16/123 dated 07.09.2015, wherein general information was asked for and he particularly referred to Item No. 19 of the notice, wherein according to AO, the information provided is as regards to the CUP Method. According to the learned Counsel this information required under section 92CA(2) of the Act is very general information running into six pages. The learned Counsel for the assessee stated that the assessee has maintained and furnished the documents and information under Rule 10D of the Rules i.e. the description of the ownership structure of the assessee with details of shares and other ownership interest held therein by way of submitting financial statements, from 3 CEB and transfer pricing study Report. He stated that the relevant information is available on page 15 of the assessee's paper book before Tribunal. According to him, the assessee has duly comply with the requirement of Rule 10D(i)(a) of the Rules is regards to the profile of multi-national group. He stated that profile of the multinational group is forming part of TP study report and form No. 3CCB which were filed before the Transfer Pricing Officer as well as before CIT(A) and have been now before Tribunal which is enclosed at page Nos 13 to 16 of the assessee's paper book. Thereby, he contended that the assessee has duly complied with the



requirement of the Rule 10D(i)(b) of the Rules. Even a broad description of the assessee and the industry in which it operates is forming part of TP study report as well as form No. 3CEB submitted before the Transfer Pricing Officer as well as before CIT(A). This information is available now before the Tribunal in assessee's paper book at pages 10 of 22. He stated that this itself shows that the assessee has duly comply with the requirement of 10D(i)(c) of the Rules. He stated that as far as this information is concerned, there is no dispute or no allegation by the Transfer Pricing Officer. As regards to the nature and terms of international transaction (including prices) entered into with each of associated enterprises, detail of property transfer or services provided and the quantum and the value of each such transaction or clause of transactions were provide in TP study report, which were filed before Transfer Pricing Officer as well as before CIT(A) and even before Tribunal at page 87 of the Assessee's paper book. According to Transfer Pricing Officer, the allegation is that the assessee failed to provide the information. Whereas, the assessee has filed complete details of each class of transactions in TP study report and the terms of purchase as to who bear the risk credit risk, price risk, inventory risk, forex risk etc. is also stated in FAR analysis, which is enclosed at page 30 of assessee's paper book. It was contended that the information required to be maintained for transaction or class of transaction, the assessee has applied TNMM method and therefore, product wise information was not relevant. Even the Transfer Pricing Officer has not applied or proposed to apply the CUP method and therefore seeking such



product wise information is irrelevant. According to the learned Counsel, the assessee is duly comply with the Rule 10D(i)(d) of the Rules. The assessee as regards to the description of functions performed, risk assumed, assets employed, employees of the assessee, a record of economic and market analysis, 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 in the international transaction entered into by the assessee was completed in TP study report. According to the assessee, it has duly comply with the requirement of Rule 10(d)(i)c) and (f) of the Rules. Further, a record of uncontrolled transactions taken into account for analyzing their compatibility with the international transactions, the assessee applied external TNMM method and therefore, there was no requirement for it to maintain information with respect to sales made by AE to third parties and accordingly AE's account supplied similar finished goods to any third party in India. It was contended by the learned Counsel for the assessee before us that information under section 92(3) of the Act is required to be maintained with respect to method and analysis of debited by the assessee and not with respect to the method that could have been adopted according to the Transfer Pricing Officer, further clarified that in case, the description of the uncontrolled transactions considered by the assessee under external TNMM method is provided in assessee's paper book at page Nos 102 to 105 and 110 to 114. In regard to the analysis performed to evaluate the comparability of uncontrolled transactions with the relevant

international transactions i.e. search process is already given in the TP study report. Even the contention of the Transfer Pricing Officer that regional search is undertaken, he referred that countries which do not have similar market economy have been rejected and the details are given at pages 95, 107 and 115 of the assessee's paper book even the data base, whichever may be, as limitation including the Indian data base. Hence, according to the assessee same reliance has to be placed on the information in the data base. Hence, according to him, using foreign data base is better than testing the margin of entrepreneur which will be influenced by a number of external factors. He further contended that the application of RPT withdrawal, the assessee has used various global and regional data base such as OSIRIS, global symposium, AMADEUS and royalty STAT base. The assessee further submitted that it has already filed complete detail reasoning for selection of TNMM over the other methods as the most appropriate method in its study report, but the AO could not point out any reason to deviate from the same as to why any other method is to be applied. He stated that even the assessee has selected TNMM Method over the other methods, as the most appropriate method and hence, the documents maintained were in support of such benchmarking method. Even the Transfer Pricing Officer has not adopted the CUP method and there is no question of assessee adopting the same. Hence, no documentation is maintained as per CUP method. The assessee has also submitted confirmation letters from its AE stating the reason that the AEs had followed the global Transfer Pricing policy for pricing of goods and the

details of the components including the costs are filed in assessee's paper book at pages 288 to 289. Further, the AE's have been selected as the tested party based on FAR analysis and not based on any assessment. Accordingly, the learned Counsel for the assessee stated that all the requirements of Rule 10D(i) including Sub clause have been made with. The learned Counsel for the assessee relied on the following case laws: -

"DCIT vs. Leroy Somer & Controls (India) (P) Ltd. 143 TTJ 285 (Del ITAT)

CIT vs. Leroy Somer & Controls (India) (P) Ltd. 360 ITR 532 (Del HC)

ACIT vs. Gillette India Ltd. (Sister Concern) 168 TTJ 392 (Jp. ITAT)

CIT vs. Gillette India Ltd. (Sister Concern) 99 taxmann.com 230 (Raj HC)"

7. On the other hand, the learned Sr. Departmental Representative only stated that the assessee has not maintained audited segment financial results vis-à-vis transactions of the associate enterprises and non-associate enterprises and hence, the assessee has not maintain proper data for transfer pricing of international transactions. He only relied on the penalty order passed by the AO and further on the order of CIT(A) confirming the levy of penalty.

8. 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 assesseees 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."

9. 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."

10. 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.



11. Similar are the facts in AYs 2013-14 and 2014-15 in ITA Nos. 1096 & 1097/Mum/2019, hence taking a consistent view, we delete the penalty in these assessment years also.

12. In the Result, all the appeals of the assessee are allowed.

Order pronounced in the open court on 09.09.2019.

Sd/-

(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 09.09.2019

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai