

आयकर अपीलीय अधिकरण "K" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./ I.T.A. No. 4703/Mum/2013

(निर्धारण वर्ष / Assessment Year: 2009-10)

Bericap India Pvt. Ltd. Plot No. A-6, MIDC Talegaon, Taluka Maval, Dist Pune 410507	बनाम/ v.	ACIT CIR 6(1) Aayakar Bhavan, Mumbai 400020
स्थायी लेखा सं./PAN :AABCB5894K		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Girish Dave
Revenue by :	Shri Jayant Kumar

सुनवाई की तारीख /**Date of Hearing** : 22-11-2017

घोषणा की तारीख /**Date of Pronouncement** : 27.11.2017

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 4703/Mum/2013 for assessment year 2009-10, is directed against the appellate order dated 25-04-2013 passed by learned Commissioner of Income Tax (Appeals)-15, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2009-10, appellate proceedings had arisen before learned CIT(A) from the assessment order dated 29.12.2011 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

“The appellant objects to the appellate order dated 25 April 2013 passed by the Commissioner of Income tax (Appeals) - 15, Mumbai [‘learned CIT(A)’] under section 250 of the Income Tax Act, 1961 (‘the Act’) and received on 6 May 2013 for the aforesaid assessment year on the following grounds:

1. Erroneous upward adjustment of INR 132,882,442 to the arm's length price determined by the appellant is bad in law

1.1. The orders passed by the Asst. Commissioner of Income Tax - Circle 6(1), Assessing Officer ('AO'), under section 143(3) of the Act and by the learned CIT(A) under section 250 of the Act are bad in law and on facts.

1.2. The learned CIT(A) erred in upholding the order of learned AO in making an addition of INR 132,882,442 to the total income of the appellant by applying the Transactional Net Margin Method (‘TNMM’) in respect of the international transactions entered with its associated enterprises (‘AEs’).

2. Adjustment to entire business instead of international transactions only

2.1 The learned CIT(A) erred in confirming the addition made by the learned AO to the entire turnover of the appellant instead of limiting it to the value of international transactions only.

2.2 The learned AO / learned CIT (A) grossly erred in applying the adjustment beyond the value of international transactions and in not appreciating the fact that Chapter X authorizes Transfer Pricing Officer to determine arm's length price of an international transactions entered by a taxpayer with its AEs and not for all the transactions of the taxpayer.

Erroneous comparability analysis

3.1 The learned AO / learned CIT(A) erred in law and facts in disregarding the comparability factors specified under rule 10B (2) of the Income Tax Rules, 1962 (‘Rules’).

3.2 The learned CIT(A) erred in not considering the fact that the learned AO has selected comparables with high related party transactions, which is against the well accepted norms of comparability as stipulated by OECD.

3.3 The learned AO / learned CIT(A) erred in not considering the adjustment for capacity utilisation with that of the comparables which is against the well accepted norms of comparability as stipulated by OECD.

4. Others

4.1 The learned AO / learned CIT(A) has erred in not appreciating the evidence in support of most appropriate methods adopted by the appellant and disregarding the arm's length price as determined by the

appellant in accordance with the provisions of the Act, read with the Rules.

4.2 *Without prejudice to the aforesaid grounds, the learned AO / learned CIT(A) has erred in not granting the benefit of the variation / reduction of 5 percent from the arithmetic mean as provided in proviso to Section 92C(2) of the Act, while determining the arm's length price for the adjustments made to the international transactions of the Appellant.*

4.3 *The learned AO erred in initiating penalty proceedings under section 271(1)(c) of the Act.*

4.4 *The appellant submits that each grounds of appeal is without prejudice to one another.*

4.5 *The appellant craves leave to add, alter, amend, substitute and / or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.*

3. The assessee has also raised additional grounds before the tribunal as under:-

1) *On the facts and circumstances of the case and in law, the assessment order passed by the Assistant Commissioner of Income Tax-6(1) ("AO") under section 143(3) of the Income Tax Act, 1961 (the Act) dated 29 December, 2011 is contrary to the provisions of law and void ab initio and therefore, is liable to be quashed.*

The A.O erred in passing assessment order u/s. 143(3) of the Act without adhering to the provision of section 144C of the Act. The appellant submits that the provisions of section 144C are mandatory in respect of every assessment order passed on or after 01.10.2009, wherein any variation is proposed as a consequence of the order of Transfer Pricing Officer under section 92CA(3) of the Act.

2) *On the facts and the circumstances of the case and in law, the AO erred in not making a reference to the Transfer Pricing Officer (TPO) u/s. 92CA of the Act.*

The appellant craves leave to add, to amend, alter, vary, omit or substitute the aforesaid grounds of appeal or add a new grounds or grounds of appeal at any time before or at the time of hearing of the appeal as they may be advised."

The learned counsel for the assessee prayed that additional grounds raised by the assessee are legal grounds which does not require any investigation of new facts which are not part of the record before the tribunal and goes to the root of the matter and should be admitted in the interest of substantial justice. The learned CIT-DR did not raise any objection to the admission of these additional grounds. After hearing both the parties, we are directing for the admission of the aforesaid additional grounds in the interest of justice to

be adjudicated on merits in accordance with law. We order accordingly.

4. The brief facts of the case are that the assessee company is engaged in the business of Manufacturing of Plastic Closures.

At the outset Ld. Counsel for the assessee submitted that A.O. has made Transfer Pricing additions of Rs. 13,28,82,442/- without referring the matter to Transfer Pricing Officer(TPO) as is required under the provisions of Section 92CA . It was submitted by learned counsel for the assessee that this ground of appeal of non referring the matter to Transfer Pricing Officer before making any TP additions by computing arms length price was raised before learned CIT(A) who has not adjudicated this ground of appeal on the grounds that the assessee has stated that this ground may be dismissed being general in nature. It was submitted that even if the assessee had acquiescence before learned CIT(A) but still there could not be waiver of the legal rights. He drew our attention to ground no. 3 and 7 raised before learned CIT(A). It was submitted that if ground no. 2 as raised as additional ground of appeal is adjudicated , the controversy between rival parties can be set right. The learned counsel for the assessee submitted and conceded that keeping in view peculiar factual matrix of the case, issue's arising out of this appeal need to be set aside and restored to the file of the A.O for denovo determination of the issue on merits in accordance with law which will sub-serve the interest of justice .

Ld. CIT-DR on the other hand submitted that several opportunities were given to the assessee by the AO vide notices issued u/s. 143(2) dated 06.09.2010 along with notice u/s. 142(1) dated 06.09.2010 and also further notices dated 02.02.2011 and 19.07.2011 were also issued but the assessee did not co-operated with the AO and dragged the matter to the last stage when the assessment was getting time barred. The learned CIT-DR drew our attention to the various notices which are placed in paper book/ page no. 34 to 42 and it was submitted that detailed questionnaire were issued by the AO to the assessee but the assessee failed to give reply in time which led to the matter being dragged to the fag end when the assessment was getting time barred due to the limitation period , wherein the A.O was left with no time to refer the matter to TPO before framing the assessment. It was

submitted that the AO has merely followed the TPO order for AY 2007-08 while computing arm's length price. It was submitted by the Ld. CIT-DR from the appellate order of the learned CIT(A) that assessee itself conceded that legal ground with regard to non reference of computation of ALP to TPO is general in nature and need not be adjudicated separately by learned CIT(A) which led learned CIT(A) to dismiss this ground. It was fairly submitted by learned CIT-DR that the matter can be restored back to the file of the AO for fresh determination of the issues arising out of this appeal on merits in accordance with law including making reference to TPO before framing de-novo assessment.

In rejoinder , the Ld. Counsel for the assessee submitted that there cannot be any waiver of legal rights and even if the assessee has waived his legal rights before learned CIT(A) that doesn't mean that the assessee has conceded to the same . The learned counsel for the assessee relied upon the decision of the Hon'ble Madras High Court in the case of Carrier Race Technologies P. Ltd. v. ITO (2016) 380 ITR 483(Mad. HC) and submitted that under the similar circumstances , the Hon'ble Madras High Court have remanded the matter back to the file of the A.O for fresh disposal. Our attention was also drawn to the notices issued dated 08.12.2011 by the AO wherein the questionnaire was issued by the AO regarding transactions with Associated Enterprises(AE's) based upon Form no. 3CEB and the matter was not referred to TPO. The assessee submitted that assessee duly replied to this notice dated 08.12.2011 vide reply dated 16.12.2011. It was conceded by the Ld. Counsel for the assessee that fault lies at the both hands i.e. assessee as well Revenue and the best course of action under these circumstances shall be to restore the matter back to the file of the A.O for denovo determination of the issues by the A.O. on merits in accordance with law, in the interest of substantial justice. It was submitted that AO can make reference to TPO in set aside proceedings for computation of ALP of transactions with AE's. The Ld. CIT-DR also agreed that keeping in view entire factual matrix of the case , the best course of action is to set aside the matter back to the file of the A.O for denovo determination of the issue's in this appeal on merits including making reference to TPO for determination of the ALP of the transactions with AE's.

5. We have considered rival contentions and have perused the material on record including orders of the authorities below and the cited case laws. We have observed that the assessee is engaged in the business of Manufacturing of Plastic Closures. We have observed that the A.O had passed an assessment order dated 29.12.2011 u/s. 143(3) wherein TP adjustments to the tune of Rs. 13,28,82,442/- has been made by the AO without referring the matter to TPO . The AO has however followed the TPO order for AY 2007-08 as a base for making TP additions for the impugned assessment year. We have observed that during the course of assessment proceedings u/s. 143(3) r.w.s 143(2) , the A.O has issued notices u/s. 143(2) dated 06.09.2010 along with notices u/s. 142(1) dated 06.09.2010. Further notices u/s 142(1) were also issued on 02.02.2011 and 19.07.2011 . We have observed that the assessee has not given any reply to these notices which led to the dragging of the assessment proceedings close to the limitation period for framing assessment wherein the assessment was getting time barred on 31-12-2011. The AO finally issued questionnaire dated 08.12.2011 w.r.t. transactions with AE as are reported in form no. 3CEB which was at the fag-end when the matter was getting time-barred on 31.12.2011 . The assessee has duly replied to the notices vide reply dated 16.12.2011. The AO did not made any reference to TPO which is a mandatory requirement, however while making additions , the AO has drawn references from TPO order for AY 2007-08 for making TP additions . During first appellate stage, the assessee conceded that the ground challenging the framing of assessment without taking recourse to prescribed procedure as is raised before learned CIT(A) is general in nature which should be dismissed. The learned CIT(A) dismissed this ground on the prayer of the assessee. Under the similar circumstances , Hon'ble Madras High Court in the case of Carrier Race Technologies P. Ltd. (supra) has restored the matter back to the file of the A.O for denovo determination of the issue's on merits . Before us both the parties have conceded that the matter in the instance case also need to be restored back to the file of the A.O for denovo determination of the issue on merits in accordance with law including making reference to TPO for ALP determination of the transactions with AE's.Thus keeping in view factual matrix of the case , we are inclined to set aside and restored the matter back to the file of the A.O for denovo determination of the issue's on merits in accordance with law. Needless to say the AO shall grant proper and

adequate opportunity of being heard to assessee in denovo proceedings in accordance with principles of nature justice in accordance with law. We order accordingly.

6. In the result appeal of the assessee in I.T.A. No. 4703/Mum/2013 for assessment year 2009-10 is allowed for statistical purposes.

Order pronounced in the open court on 27 .11.2017

आदेश की घोषणा खुले न्यायालय में दिनांक: 27.11.2017 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 27.11.2017

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

// Tue copy//

Nishant Verma
Sr. Private Secretary

BY ORDER
DY/ASSTT. REGISTRAR
ITAT, MUMBAI