

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव,लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No. 277/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

The Deputy Commissioner of Income Tax,
Circle-1(1),
Pune.

.....अपीलार्थी / Appellant

बनाम / V/s.

Bobst India Pvt. Ltd.
Plot No. 82, 126-132,
Village- Kasar Amboli,
Post: Ambadvet,
Ghotavade Road,
Tal : Mulshi,
Pune-412108

PAN : AAACB7295F

.....प्रत्यर्थी / Respondent

Revenue by : Shri Rajeev Kumar, CIT
Assessee by : Shri Rajendra Agiwal

सुनवाई की तारीख / Date of Hearing : 25.01.2018

घोषणा की तारीख / Date of Pronouncement : 29.01.2018

आदेश / ORDER

PER VIKAS AWASTHY, JM

This appeal by department is directed against the assessment order dated 29.12.2015 passed under section 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act).

2. The brief facts of the case as emanating from records are: The assessee company is 100% subsidiary of the Bobst Group SA, Lausanne, Switzerland. The assessee company is handling sales, service and technical functions of the parent company in India, Sri Lanka and Nepal. The assessee is providing wide range of support services to customers which includes installation, breakdown (customer support service) etc on behalf of Bobst Group Entities. The assessee has also set up an Export Oriented Undertaking (EOU) which is engaged in manufacturing of machine modules required for Printing, Packaging and ancillary to Packaging Industry. During the assessment year under appeal, the assessee entered into following international transaction with its Associated Enterprises (AEs):

<i>Sr. No.</i>	<i>Description of transaction</i>	<i>Amount</i>
1	<i>Purchase of components for manufacturing machines</i>	<i>15,70,47,251</i>
2	<i>Sale of finished goods</i>	<i>43,64,46,595</i>
3	<i>Payment of royalty and trademark charges</i>	<i>86,52,571</i>
4	<i>Recovery of freight & Clearing charges</i>	<i>16,33,444</i>
5	<i>Allocation of information technology charges</i>	<i>24,81,385</i>
6	<i>Import of spares for trading</i>	<i>2,92,33,577</i>
7	<i>Rendering of drawing and designing services to Bobst SA</i>	<i>31,10,250</i>
8	<i>Receipt in respect of Customer Support Services provided on behalf of AE-Bobst Gp.</i>	<i>78,52,011</i>
9	<i>Receipt of commission for marketing the machine and spares manufactured by Bobst group entities.</i>	<i>10,58,04,512</i>
10	<i>Export of spares to AEs</i>	<i>44,160</i>
11	<i>Rendering of installation services on behalf of Bobst Group</i>	<i>67,65,168</i>
12	<i>Allocation of information technology charges</i>	<i>7,45,456</i>

13	<i>Amount received from Bobst group entities for supply of warranty spares to third party customers</i>	55,445
14	<i>Recovery of exhibition related costs from Bobst group entities</i>	33,15,127
15	<i>Reimbursement of exhibition related cost to Bobst SA</i>	2,46,883
16	<i>Receipt of reimbursement from AEs for cost incurred by Indian Company</i>	44,73,754
17	<i>Payment of reimbursement by Indian Company for cost incurred by AEs</i>	1,05,83,244
	Total	77,84,90,833

The international transactions undertaken by assessee are partly divided in two segment i.e.

- (1) Transactions relating to EOU operations which cover transactions from Sr. No. 1 to 5 in the above table.
- (2) Transactions relating to Domestic Tarriff Area (DTA) operations at Sr. No. 6 to 15 of the above table.

A reference u/s. 92CA(1) of the Act was made to Transfer Pricing Officer (TPO) for computing Arm's Length Price (ALP) in relation to international transactions. The assessee applied Transactional Net Margin Method (TNMM) to benchmark its transactions in both segments. During TP proceedings, the TPO applied CUP to benchmark international transactions with respect to DTA operations which includes commission received by assessee on sale of spares and machines. The case of assessee is that it receives commission on sale of machine @ 5% and commission @18% on sale of spares. The TPO applied uniform rate of 18% on sale of machine and spares and made adjustment of Rs.17,73,65,641/-.

3. Aggrieved by the adjustments made by the TPO, the assessee filed objections before the DRP (Dispute Resolution Panel). The DRP vide directions dated 23.11.2015 deleted the adjustments made by the TPO in international transactions carried out by assessee. While deleting the addition, the DRP followed the order of Tribunal in assessee's own case for assessment year 2007-08 and directions of DRP in assessment year 2010-11. On the basis of directions of DRP, the Assessing Officer vide order dated 29.12.2015 deleted the transfer pricing adjustment of Rs. 17,73,65,641/- as proposed by the TPO. Now, the Department is in appeal against the said assessment order. The Revenue has raised following grounds of appeal:

“1. The Ld. Dispute Resolution Panel has erred on the facts and in the circumstances of the case , in rejecting the transaction by transaction benchmarking of the international transaction related to commission income rate pertaining to marketing of machines of Associated Enterprise vis a vis commission income rate received on marketing of spare parts, adopted by the Assessing Officer even when these transactions were distinct different and distinguishable in nature and scope and not close inter related.

2. The Ld. Dispute Resolution Panel erred on the facts and in the circumstances of the case, in rejecting the transaction approach of two distinct streams of commission earned by similar functions employing common assets and assuming similar risks.

3. The Ld. Dispute Resolution Panel erred on the facts and in the circumstances of the case and in law in rejecting the benchmarking of receipt of commission from marketing of machine vis a vis controlled transaction when the OECD guidelines suggests such benchmarking after investigation.

4. The appellant craves leave to add, alter or amend any or all the grounds of appeal.”

4. Shri Rajendra Agiwal appearing on behalf of assessee submitted that similar type of adjustments were made by the TPO in earlier assessment years. The matter travelled up to the Tribunal. In assessment year 2007-08 in ITA No.1295/PN/2011 appeal by assessee, the Tribunal vide order dated 28.02.2013 deleted the adjustment on this count holding that the rate of commission to be applied on spares and machines are not to be aggregated.

Thereafter, the Tribunal in assessment year 2006-07, 2008-09 and 2009-10 maintained the consistency and deleted adjustment made for similar reasons. The ld. AR filed copy of following orders of Tribunal in assessee's own case:

- i) ITA No. 1295/PN/2011 in assessment year 2007-08 decided on 28.02.2013.
- ii) ITA No. 1380/PN/2010 in assessment year 2006-07 decided on 09.10.2014
- iii) ITA No. 2090/PUN/2012 in assessment year 2008-09 decided on 03.02.2017
- iv) ITA No. 2231/PUN/2013 in assessment year 2009-10 decided on 24.05.2017.

The ld. AR fairly admitted that Department has carried the matter in appeal before the Hon'ble Bombay High Court for assessment year 2007-08. The Hon'ble High Court has admitted the appeal of Revenue. The ld. AR pointed that the substantial question of law formulated by the Hon'ble High Court is at page No. 94 of the paper book.

5. On the other hand, Shri Rajeev Kumar representing the Department vehemently defended the adjustments made by the TPO and prayed for setting aside the impugned assessment order.

6. We have heard the submissions made by representatives of rival sides and have perused the orders of Authorities below. The Revenue in appeal has raised solitary issue relating to benchmarking of international transactions in respect of rate of commission on spare parts and marketing of machines.

We find the adjustment was made for similar reasons in assessment year 2009-10. The uniform rate of commission was applied on marketing of machines and spares. Before the Tribunal, in ITA No. 2231/PUN/2013, the assessee had raised following ground:

“11. Erroneous comparison of commission from marketing of machines with the commission from marketing of spares

Erred by comparing the international transaction pertaining to receipt of commission from marketing of machines of AEs with the international transaction pertaining to receipt of commission from marketing of spares i.e. controlled transaction of the Appellant itself.”

The Tribunal decided the issue in favour of the assessee by observing as under :

“12. In ground No. 11 the assessee has impugned the findings of Commissioner of Income Tax (Appeals) in making erroneous comparison of commission from marketing of machines” with the commission from marketing of spares”. We find that similar ground was raised by the assessee before the Tribunal in its appeal for assessment year 2008-09. The Tribunal decided this issue by following the decision in ITA No. 1295/PN/2011 for the assessment year 2007-08 decided on 28-02-2013 in assessee’s own case. The relevant extract of the findings of Tribunal are as under :

“59. After hearing both sides we find identical ground was raised by the assessee in its own case for A.Y. 2007-08 which reads as under :

“5. Erroneous comparison of commission on marketing of machines and commission on marketing of spares.

Erred in comparing the international transaction pertaining to receipt of commission for marketing of Bobst Group machines with the international transaction pertaining to receipt of commission for marketing of spares, i.e. controlled transactions of the Appellant itself.”

60. We find the Tribunal in ITA No.1295/PN/2011 order dated 28- 02- 2013 for A.Y. 2007-08 has discussed the issue from Para 7.3 onwards and has observed as under :

“7.3 TPO/AO observed that assessee is receiving commission at the rate of 15% from the AEs for marketing of spares in India while the rate of commission for marketing the machineries of AEs, the stands at @ 5%. In the instant case when the aggregated approach of benchmarking as done by the assessee has not been found to be acceptable and when the stand alone profitability from this international transaction has not been able to be worked out for the reason that the related costs are not identifiable by the assessee and further there cannot be any reliable uncontrolled transaction available in the public domain, it compelled TPO to look into the data and information that is available. Under the circumstances, DRP held that TPO was justified in comparing the international transaction of Bobst India with a controlled transaction of Bobst India itself.

7.4 Before us Ld. AR reiterated the submission raised before TPO/DRP and also raised additional contention to oppose the finding of DRP on issue while on other hand supported the order of TPO which was upheld by DRP. All these rival contentions of both the parties on the issue at hand are being dealt in succeeding sub para.

7.5 The stand of assessee has been that it is inappropriate to use controlled transactions for bench marking. Based on the Indian TP regulations including Rule 10A(a), Rule 10B(1), Rule 10B(2), Rule 10B (3) and Rule 10B(4), following points need consideration:

A. Transactions entered into by tested party should be compared with uncontrolled transactions; and

B. Uncontrolled transactions do not include transactions between associated enterprises.

Indian TP regulations prescribe that most appropriate method has to be identified for benchmarking an international transaction and comparison has to be done with uncontrolled transactions and not controlled transactions to arrive at the arm's length price. Accordingly, the approach of benchmarking the transaction pertaining to receipt of commission from marketing of machines by comparing the same with controlled transaction of Appellant itself does not fall under any of the methods prescribed under the provisions of section 92C of the Act. It is contrary to Indian TP regulations and not acceptable under the Indian TP regulations. Similar view has been taken by ITAT in case of Skoda Auto India Pvt. Ltd. Vs. ACIT (122 ITJ 699), M.S.S. India Pvt. Ltd. (123 ITJ 657) and Bechtel India Pvt. Ltd. Vs. DCIT (136 ITJ 212). ITAT in the above mentioned decisions view was taken that for determining the arm's length price and benchmarking international transactions of an assessee, reference should be made only to uncontrolled transactions. Hence, benchmarking the international transaction pertaining to receipt of commission using international transaction of Appellant itself for comparison is not valid as per the Indian transfer pricing regulations. As per Para 2.3 and 2.6 of OECD TP guidelines it is obvious that for application of any TP method for benchmarking international transactions, comparison has to be with uncontrolled transactions. According to us TPO was not justified to not to take this aspect into consideration while dealing issue at hand.

7.7 Next argument on behalf of assessee is that functions involved in marketing of spares are more than functions involved in marketing of machines for sale of machines, the number of transactions and number of negotiations are less as compared to sale of spares where significant efforts are required to be taken on a day to day basis. It is difficult to convince the customers to keep safety stock of spare parts as it involves carrying cost and blockage of funds. The customers have tendency to procure the spares purchased through local suppliers/ fabricators etc as it saves a lot of time as compared to importing these parts and is also cost effective and therefore continuous monitoring / follow-up / liaisoning with the customers is required for sale of spares, according to assessee, the machines of Bobst group are sold in the market by its brand name and quality that it provides. However, in case of spares, customers have an option to purchase spares locally of totally different brand. Further, due to paucity of time the customers prefer taking spares from local suppliers and they also do not prefer to maintain a safety stock even after continuous suggestions by the Appellant regarding the same. According to us TPO / AO have not looked into this practical/particular aspect of assessee's business while dealing issue at hand which is not justified.

7.8 Next argument of assessee is that Bobst Group entities sale spares on credit basis to customers in India whereas machines are sold only when letter of credit is opened by the customers. Accordingly, for earning commission income vide marketing of spares, the Appellant is

required to incur additional recovery costs for assisting Bobst Group entities in recovering the payments from customers; this activity is not involved in case of earning commission income from marketing of machines as the payments are received in advance. The parameters demonstrating the fact that functions involved in sale of spares are much more arduous as compared to the functions involved in sale of machines. Accordingly, commission on sale of spares should be higher than the commission on sale of machines. This objective aspect has been ignored by TPO/AO. Moreover, the quantum of sale of machines and sale of spare parts also been ignored. In view of the above, we found that the functions involved in marketing of spares are much more arduous as compared to functions involved in marketing of machines and accordingly, higher commission on marketing of spares as compared to the commission in marketing of machines is justified.

7.9 Next argument of assessee is that market research studies and technical publications suggest the general industry trend that commission on marketing of spares is higher as compared to commission on marketing of machines. We do not accept this argument of assessee in isolation. This is subjective aspect which has to be appreciated in its facts and circumstances. Without prejudice to above we find that according to TPO/AO has not given cogent reasoning for rejecting TNMM identified by the Appellant as the most appropriate method for benchmarking its international transactions pertaining to domestic operations. The approach adopted by the TPO i.e. using controlled transaction of the Appellant itself (receipt of commission on marketing of spares) for benchmarking the international transaction pertaining to receipt of commission for marketing of machines is not appropriate as per the Indian TP regulations. Accordingly international transaction of the appellant pertaining to receipt of commission for marketing of machines benchmarked by assessee by aggregating the same with other international transactions pertaining to domestic operations using TNMM should not be rejected. We hold so.

61. Since the Tribunal has already decided the issue in favour of the assessee on this issue, therefore, in absence of any contrary material brought before us by the Ld. Departmental Representative, ground raised by the assessee on this issue is allowed.”

Since, no change in facts and circumstances have been pointed by the ld. DR during assessment year 2009-10, we see no reason to take a contrary view. Following the order of Tribunal in earlier assessment years, we allow ground NO. 11 raised in the appeal by the assessee.”

This issue is recurring since assessment year 2006-07. In assessment years 2006-07 to 2009-10, the assessee got relief from Tribunal. In assessment year 2010-11, the DRP following the decision of Tribunal in assessee's own case for assessment year 2007-08, granted relief to the assessee. The ld. AR pointed that against the findings of DRP, the Department did not file any appeal. This fact has not been controverted by the ld. DR. Since the issue involved in the present appeal is identical to the one which has been adjudicated by co-ordinate Benches of Tribunal, we find

no reason to take a contrary view. Following the decision of co-ordinate Bench, we uphold the findings of DRP and impugned assessment order. No material has been placed before us to show any change in the facts or nature of international transactions. Accordingly, appeal of Revenue is dismissed being devoid of any merit.

7. In the result, appeal of Revenue is dismissed.

Order pronounced on Monday, the 29th day of January, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव / D. KARUNAKARA RAO)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 29th January, 2018.

SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-13, Pune.
4. The CIT- IT/TP, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.