

आयकर अपीलिय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE
श्री अनिल चतुर्वेदी, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI ANIL CHATURVEDI, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No. 337/PUN/2014

निर्धारण वर्ष / Assessment Year : 2009-10

Tasty Bite Eatables Limited.
204, Mayfair Towers,
Wakdewadi, Shivajinagar,
Pune-411 005.
PAN : AAAC2317A

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,
Circle-7, Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Arvind Sonde
Revenue by : Shri Sandeep Garg

सुनवाई की तारीख / Date of Hearing : 14.03.2018
घोषणा की तारीख / Date of Pronouncement : 11.06.2018

आदेश / ORDER

PER VIKAS AWASTHY, JM

This appeal by the assessee is directed against the assessment order dated 17.01.2014 passed u/s.143(3) r.w.s. 144C 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 engaged in the business of manufacturing and sale of Ready -to-serve (in short 'RTS') food products. The assessee-company is a part of Preferred Brands International Inc., USA. During the period relevant to assessment year under appeal, the assessee entered into various international transactions with its Associated Enterprises (AEs) i.e. Preferred Brands International Inc. USA and Preferred Brands Australia Pty. Ltd. The details of international transactions undertaken by the assessee with its AEs during the relevant period in respect of RTS food segment are as under:

<i>Sr. No.</i>	<i>Description of transaction</i>	<i>Amounts (Rs.)</i>	<i>Name of the AE</i>
1.	<i>Sale of ready to serve foods</i>	30,07,10,326	<i>Preferred Brands International Inc. USA</i>
		5,37,35,302	<i>Preferred Brands Australia Pty Ltd., Australia</i>
	Total	35,44,45,628	

The assessee applied Transactional Net Margin Method (TNMM) to benchmark its international transactions with respect to RTS food segment and the same was duly accepted by the Transfer Pricing Officer (TPO). The assessee selected ten comparables having arithmetic mean of 5.87% in its TP study report to determine the arm's length price (ALP) of the RTS food segment transactions. Profit Level Indicator (PLI) of the assessee was computed at 15.73%. The TPO applied export filter of 75% and rejected all the companies selected by the assessee as comparables except ADF Foods Ltd. The TPO finally made upward adjustment of Rs.3,41,94,575/- in the international transactions with its AEs during financial year 2008-09. Based on the order of TPO dated 17.09.2012, the Assessing Officer passed

draft assessment order on 13.03.2013. Aggrieved with the adjustment made by the TPO, the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP vide directions dated 18.12.2013 rejected the objections of the assessee and confirmed the addition. The Assessing Officer in line with the directions of DRP passed final assessment order making addition of Rs. 3.41 Crores.

3. Against the addition made, the assessee is in appeal before the Tribunal by raising following grounds of appeal:

- 1. The learned DCIT pursuant to the direction of Hon'ble DRP erred in law and on the facts and in circumstances of the case in not excluding non-operating expenses i.e. foreign exchange loss while calculating the profit level indicator ("PLI") i.e. Operating Margin to Operating Cost of the Appellant.*
- 2. The learned DCIT pursuant to the direction of Hon'ble DRP erred in law and on the facts and in circumstances of the case in considering the entire ready to serve foods ("RTS") segment for calculation of PLI of the Appellant.*
- 3. The learned DCIT pursuant to the direction of Hon'ble DRP erred in law and on the facts and in circumstances of the case in making an adjustment to the entire RTS segment which is against the provisions of the Act and not restricting it to the value of international transaction only.*
- 4. The learned DCIT, pursuant to the directions of the Hon'ble DRP has erred in law and on the facts and in circumstances of the case in rejecting the comparables selected by the Appellant except ADF Foods Limited.*
- 5. The learned DCIT pursuant to the direction of Hon'ble DRP erred on the facts and in circumstances of the case in considering the incorrect operating margin of a comparable company i.e. ADF Foods Limited.*
- 6. The learned DCIT pursuant to the directions of Hon'ble DRP has erred in law and on the facts and in circumstances of the case in not granting the benefit of +/-5 percent as per proviso to section 92C(2) of the Act.*
- 7. The learned DCIT has erred on the facts and in law by levying interest under section 234B of the Act, on account of the unanticipated adjustments made by the learned Transfer Pricing Officer.*
- 8. The learned DCIT erred on the facts and in law in proposing to initiate penalty proceedings section 271(1) read with section 274 of the Act, without considering the facts of the case.*
- 9. Each one of the above grounds of appeal is without prejudice to the other.*
- 10. The appellant reserves the right to amend, alter or add to the grounds of appeal."*

4. Shri Arvind Sonde appearing on behalf of assessee submitted that in TP study, assessee excluded non-operating expenses on account of foreign exchange loss from total cost to arrive at the Operating Cost. However, TPO took a view that foreign exchange loss is operating expenses and included the said amount while arriving at operating margin. The DRP upheld the findings of TPO by observing that assessee has not made any submissions with respect to treatment to be given to foreign exchange loss. It is an admitted fact that in preceding assessment years, the assessee had treated foreign exchange loss as operating in nature. However, in the assessment year under appeal, the assessee treated foreign exchange loss as 'non-operating expenditure' in line with various decisions of the Tribunal. To support his contention, the ld. AR placed reliance on the following decisions:

i) BNY Mellon International Operating (India) Pvt. Ltd Vs. ACIT, in ITA No.2380/PN/2012, for assessment year 2008-09, decided on 10.10.2014.

ii) M/s. DHL Express (India) Private Limited Vs. ACIT, in ITA No.7360/Mum/2010, for assessment year 2006-07, decided on 27.04.2011.

4.1 The ld. AR pointed out that the Tribunal in the above mentioned decisions has held foreign exchange gain/loss as 'non-operating expenditure'. The ld. AR further submitted that in the subsequent assessment years i.e. assessment year 2012-13 and 2013-14, the DRP accepted foreign currency fluctuations are to be treated as non-operating item.

5. In respect of ground No. 2 & 3, the ld. AR submitted that similar adjustments were made by the Revenue in assessment year 2008-09. The assessee carried the matter in appeal in ITA No.335/PN/2013 before the

Tribunal. The Tribunal vide order dated 16.03.2016 accepted the contentions of assessee and held that transfer pricing adjustment has to be made with respect to international transaction only and not on entire sales of RTS segment. The Tribunal finally remitted the issue back to the file of Assessing Officer/ TPO with a direction to re-compute the adjustment. The ld. AR for the assessee submitted that similar directions may be given to Assessing Officer/TPO in the assessment year under appeal, as well.

6. In respect of ground No.4, the ld. AR submitted that assessee had selected ten comparables. The TPO rejected all the comparables selected by the assessee except ADF Foods Ltd. by applying export turnover filter of 75%. The TPO had applied this filter for the first time in assessment year 2009-10. In earlier years and in the subsequent assessment years, no such filter was applied. The ld. AR pointed that in assessee's own case for assessment years 2011-12, 2012-13, 2013-14 & 2014-15, the DRP accepted two companies i.e. M/s. Haldiram Bhujawala Ltd. and M/s. Capital Foods Ltd. as functionally comparables. However, in the assessment year under appeal, both the companies have been rejected by applying export turnover filter. The only company, on the basis of which TPO has determined ALP, is ADF Foods Ltd. The ld. AR prayed that TPO may be directed to consider at least Haldiram Bhujawala Ltd. and Capital Foods Ltd in the list of comparables for determining ALP. The ld. AR placed reliance on the following decisions to contend that the Tribunal accepted comparable companies that were selected by the DRP/TPO in the subsequent years:

i) Bobst India Private Limited Vs. DCIT, in ITA No. 1380/PN/2010, for assessment year 2006-07 decided on 29.01.2018.

ii) Jacobs Engineering India Private Limited Vs. DCIT, in ITA No.7194/Mum/2012 for assessment year 2008-09, decided on 17.05.2017.

iii) Tamasek Holdings Advisors India P. Ltd. Vs. DCIT, in ITA No.776/Mum/2015, for assessment year 2010-11, decided on 25.02.2016.

7. In respect of ground No. 5, the ld. AR submitted that TPO erred in computing operating margin of ADF Foods Ltd. The correct operating margin of ADF Foods Ltd. for assessment year 2009-10 is 10.31%; whereas TPO has computed the same as 13.83%. While computing margin, TPO has erred in not excluding sale of import license of Rs.258.05 lacs from the segment results though he has excluded the same from segment revenue. The assessee filed rectification application in this regard; however, the TPO has disregarded the same. The DRP in its directions dated 18.12.2013, has directed the TPO to recheck the material on record and remove the arithmetical error. However, TPO vide order dated 17.01.2014 erroneously considering the PLI as 13.83% instead of 10.31%.

8. In respect of ground No.6, the ld. AR submitted that benefit of $\pm 5\%$ variation in accordance with the proviso to section 92C(2) of the Act should be granted to the assessee. The TPO has failed to grant the benefit of $\pm 5\%$ variation despite the directions of DRP.

9. Per contra, Shri Sandeep Garg representing the Department vehemently defended the assessment order and the directions of DRP in confirming additions proposed by the TPO. Controverting the submissions of assessee, the ld. DR submitted that assessee in the past has considered foreign exchange fluctuations as 'operating in nature'. It is for the first time in assessment year under appeal; the assessee changed its method of accounting and has treated foreign exchange fluctuations as 'non-operating in nature'. The assessee could not be allowed to change the method unless assessee is able to show bona-fide reasons/intention. In support of his

submissions, the ld. DR placed reliance on the decisions of Hon'ble Bombay High Court in the case of Bajaj Auto Ltd. Vs. CIT in Income Tax Reference No.192 of 1999 decided on 08.09.2016. The ld. DR further referred to Schedule-13 of assessee's P & L account for the Financial Year ended on 31st March, 2007 to contend that assessee treated gain/loss on exchange rate fluctuations as part of operating income.

9.1 In respect of ground Nos. 2 & 3, the ld. DR fairly admitted that identical issue has been adjudicated by the Tribunal in assessee's own case in assessment year 2008-09.

9.2 In respect of ground No. 4, the ld. DR vehemently supporting the order of DRP submitted that the TPO applied export turnover filter of 75% and none of the companies selected by assessee could qualify the filter except ADF Foods Ltd. Accordingly, the TPO selected ADF Foods Ltd. as functionally comparable and determined ALP of the international transaction of the assessee with its AEs.

10. We have heard the submissions made by representatives of rival sides and have perused the orders of Authorities below. We have also considered the decisions on which both the sides have placed reliance in support of their contentions.

11. In ground No.1 of appeal, the assessee has assailed the directions of DRP in not accepting gain/loss arising from foreign exchange fluctuations as non-operating in nature. It is an undisputed fact that in the past assessee has been treating foreign exchange fluctuation as operating expenditure. However, in the assessment year under appeal, the assessee shifted his stand and treated foreign exchange loss as non operating expenses. The contention of assessee is that the change has been made in

treating foreign exchange fluctuations as non operating expenditure in line with various orders of the Tribunal. We find that the Co-ordinate Bench of Tribunal in the case of BNY Mellon International Operations (India) Pvt. Ltd. Vs. ACIT (supra.) held foreign exchange gain as non operating income. Similar view has been expressed by Mumbai Bench of the Tribunal in the case of M/s. DHL Express (India) Private Limited Vs. ACIT (supra.). It was further pointed to the Bench that DRP in assessment years 2012-13 and 2013-14 has accepted the stand of assessee in treating foreign currency fluctuation as non operating item. This fact has not been controverted by the ld. DR. In so far as reason for accepting change in the method of accounting is concerned, we are satisfied that the change has been made by assessee for the bona-fide reasons. The assessee has changed the method of accounting of foreign exchange fluctuations as non-operating item in line with the judicial pronouncements. The assessee after the change of method in assessment year 2009-10, has been regularly treating foreign exchange fluctuations as non operating item. Therefore, objection raised by the ld. DR against change of treatment given by assessee to foreign exchange fluctuations in the past as operating and now shifting its stand to treat the same as non operating item without any bona-fide reason, is not sustainable. We are of consider view that the assessee has changed method of treating foreign exchange fluctuation as non-operating item for bona-fide reasons. Hence, **ground No. 1 raised in appeal by assessee is allowed.**

12. The ground Nos. 2 & 3 of the appeal are against considering the entire RTS segment for calculation of PLI. The assessee has prayed for restricting the adjustment on the basis of value of international transactions only. It has been brought to our notice that identical grounds were raised in the appeal for assessment year 2008-09. The Co-ordinate

Bench of Tribunal in assessee's own appeal in ITA No.335/PN/2013 (supra.) remitted the issue back to the file of Assessing Officer for re-computation. The Tribunal in principle accepted that transfer pricing adjustment has to be made with respect to international transaction only and not on the entire sale of RTS segment. The relevant extract of the order of Tribunal reads as under:

“21. The issue arising vide grounds of appeal No.2 and 3 is identical to the issue before the Tribunal in assessment year 2007-08 vide ground of appeal No. 3 and following the same parity of reasoning, we hold that transfer pricing adjustment has to be made with respect to international transaction only and not on the entire sales of RTS segment. However, since a verification exercise is required to be carried out, we remit this issue back to the file of Assessing Officer/TPO with a direction to re-compute the adjustment, if any, in line with directions given by the Tribunal in assessment year 2007-08. The Assessing Officer /TPO shall afford a reasonable opportunity of hearing to the assessee. The grounds of appeal No. 2 and 3 raised by the assessee are thus, allowed for statistical purposes.”

Thus, in view of the above decision of the Co-ordinate Bench, we remit the issue back to the file of Assessing Officer/TPO to decide the issue de-novo on similar lines. Accordingly, **ground Nos. 2 & 3 raised in appeal by the assessee are allowed for statistical purpose.**

13. In ground No. 4 of appeal, the assessee has assailed rejection of all comparables by TPO by applying export turnover filter. The ld. AR contended before us that export turnover filter of 75% has been applied by the TPO for the first time in the assessment year under appeal. Neither the filter was applied in earlier assessment years nor it is applied in the subsequent assessment year. We observe that after applying export turnover filter of 75%, out of total ten comparables selected by assessee in TP study, nine comparables have been rejected by the TPO. The TPO has not selected any other company as comparables while determining ALP. The TPO determined ALP by considering ADF Foods Ltd. as only comparable. The Assessing Officer in the first instance should not have

applied a filter to select/reject comparables that was neither used in the past nor in the subsequent years. 'Rule of consistency' demands that uniform filters should be applied to bench mark the international transactions, if there is no material difference in the facts of different assessment years. Our this view is supported by the decision of Chandigarh Bench of the Tribunal in the case of DSM Anti Injectives India Ltd. Vs. DCIT reported as 145 ITD 454 (Chd.). The decision of the Tribunal has been affirmed by the Hon'ble Punjab & Haryana High Court in appeal filed by the Department reported as 233 Taxman 257 (P&H). The ld. AR pointed that in the subsequent assessment years i.e. assessment years 2011-12, 2012-13 and 2013-14, the DRP has directed to include M/s. Haldiram Bhujawala Ltd. and M/s. Capital Foods Ltd. being functionally comparable. Reliance has been placed on various cases by the assessee to contend that the Tribunal accepted comparable companies that were selected by the DRP/TPO in subsequent years. The Co-ordinate Bench of the Tribunal in the case of Bobst India Private Limited Vs. DCIT (supra.) directed the TPO to include a company in the list of comparables as the said company was found to be comparable entity in the later assessment year. The relevant extract of the findings of Tribunal reads as under:

“4.3 We are aware that every year is independent, but the decision taking in similar set of circumstances has strong persuasive value of other years. In A.Y.2009-10, the DRP has directed to take industrial machine segment of Stovec Industries Limited for comparability. There is nothing on record to suggest that there is functional difference in the case of Stovec Industrial Limited for the year under consideration i.e. A.Y. 2006-07 with that of A.Y. 2009-10, so the TPO is directed to take industrial machinery segment of Stovec Industries Limited for comparability. He has directed accordingly.”

Taking into consideration the un-rebutted facts and the decisions of the Tribunal discussed above, we remit this issue back to the file of Assessing Officer/TPO to consider M/s.Haldiram Bhujawala Ltd. and

M/s.Capital Foods Ltd. as comparables along with ADF Foods Ltd and thereafter, determine ALP of the international transactions entered into by assessee with its AEs. Accordingly, **ground No. 4 raised in appeal by assessee is allowed for statistical purpose.**

14. In ground No. 5 of the appeal, the assessee has assailed incorrect computation of operating margin of ADF Foods Ltd. It has been pointed that the correct operating margin of ADF Foods Ltd is 10.31%, whereas the TPO computed the same as 13.83%. This issue requires verification of the calculations. Accordingly, we remit this issue back to the file of Assessing Officer/TPO to correctly compute the operating margin of the said company before applying the same for determining ALP. Accordingly, **ground No. 5 raised in appeal by assessee is allowed for statistical purpose.**

15. In ground No. 6 of appeal, the assessee has prayed for granting benefit of $\pm 5\%$ variation. The Assessing Officer/TPO is directed to allow benefit of $\pm 5\%$ tolerance to the assessee in accordance with law. Thus, **ground No. 6 raised in appeal by assessee is allowed.**

16. In ground No. 7 of appeal, the assessee has assailed charging of interest u/s. 234B of the Act. The charging of interest u/s. 234B is mandatory and consequential; hence, **ground No.7 raised in appeal is dismissed.**

17. In ground No. 8 of appeal, the assessee has assailed initiation of penalty proceedings u/s. 271(1)(c) of the Act. The challenge to penalty proceedings at this stage is premature. Hence, **ground No. 8 raised in appeal is dismissed.**

18. The grounds No. 9 & 10 raised of the appeal are general in nature and hence, require no adjudication.

19. In the result, appeal of the assessee is partly allowed in the terms aforesaid.

Order pronounced on Monday, the 11th day of June, 2018

Sd/-
(अनिल चतुर्वेदी /ANIL CHATURVEDI)
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-
(विकास अवस्थी /Vikas Awasthy)
न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 11th June, 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, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

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