IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.(TP)A. No.447/Coch/2016
Assessment Year : 2012-13

Torry Harris Sea Foods Pvt. Ltd., 9/572, Thirumala Ward, Chungam, C.C.S.B. Road, Alappuzha-688 010. [PAN: AAACT 7603H]	**Vs.**	The Assistant Commissioner of Income-tax, Circle-1, Alappuzha
(Assessee-Appellant)		**(Revenue-Respondent)**

Assessee by	Shri R. Srinivasan, CA
Revenue by	Shri A. Dhanaraj, Sr. DR

Date of hearing	03/07/2018
Date of pronouncement	05/07/2018

O R D E R

Per CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the assessment order passed u/s. 143(3) r.w.s. 92CA(3) of the I.T. Act dated 27/01/2016, consequent to the direction of the DRP u/s. 144C(5) of the Act dated 25/08/2016. The relevant assessment year is 2012-13.

2. The assessee has raised the following grounds of appeal:

> 1. The Dispute Resolution Panel, Bangalore is not justified in rejecting the claim of the appellant for the Glazing Loss in the commodity exported.

2. The Dispute Resolution Panel, Bangalore did not properly appreciated the fact that your appellant company is mainly exporting the products ranging to 25% glaze, whereas the rate quoted by MPEDA is only 10-20% glaze.

3. The Dispute Resolution Panel, Bangalore also did not consider the submissions of the appellant to the effect that with regard to 25% glaze products the water content will be more than 10-20% glaze products. So much so, the net yield would be less and considerable reduction in Selling Price.

4. The Dispute Resolution Panel, Bangalore did not also recognize the above aspect which has not been considered by the Transfer Pricing Officer, so much so the issue should have been send back to TPO for consideration.

5. The officers below were also not justified in disallowing EIA Monitoring fee paid to Export Inspection Agency, for non deduction of tax. Since EIA is an organization established by the Central government under the Export Quality Control and Inspection Act of 1963 and the provisions of TDS are not applicable.

6. For the above reasons and other reasons as may be adduced at the time of hearing the appellant prays that the above grounds may be considered for allowance.

3. The facts of the case with regard to Ground Nos. 2 to 4 are that the assessee in its Transfer Pricing study had concluded that CUP method was the most appropriate for benchmarking international transactions in the seafood industry. According to the TPO, the assessee had used the export rates published by MPEDA i.e. the Marine Products Export Development Authority as a comparable in its CUP analysis. According to the TPO, the MPEDA was constituted under the Marine Products Export development Authority Act, 1992 and MPEDA is a quasi-government body monitoring seafood exports and its prices. MPEDA data released on a biweekly basis gives input of the types of the

products and this was taken as per benchmark for arriving at Arm's Length Pricing. The TPO observed that the asessee was required to produce the detailed comparison under CUP method. On verification of the details produced, it was seen that there were instances where the assessee had exported the products to its AE at a price lower than the one published by MPEDA for the corresponding period and for similar products. According to the assessee, the adjustment at 3% was made to the sale price in each sale made to its AE so as to bring it under Arm's Length Price. However, according to the TPO no evidence was produced to substantiate this adjustment claimed. Hence, a showcause was issued by TPO to the assessee on 10.12.2015 proposing to reject the arbitrary weightage claimed and to compute Arm's Length Price accordingly. The relevant portion of the showcause notice is reproduced below:-

> *"As per the Transfer Pricing (TP) document furnished for the A. Y. 2012-13, the taxpayer company has* sold products to Associated Enterprises (AEsJ *of* Rs.79,50,26,341/-. While going through the *Transfer Pricing study submitted by you for A. Y 2012-13, it is seen that you have adopted Comparable Uncontrolled Price Method as the most appropriate method while benchmarking the international transactions undertaken with Associated Enterprises. You have compared your AE sale price with the rates published by The Marine Products Export Development weekly data released by MPEDA based on the type of the product is seen taken as the benchmark for arriving at arm's length price.*
>
> *However, you have claimed adjustments @3% to the sale price in each sale made to AE so as to bring it within the Arm's length price. However this is not in accordance with the transfer pricing provisions. You have claimed uniform adjustments @ 3% in all cases, without providing any clear rationale for the same. Adjustments have been claimed in an arbitrary manner without any factual and scientific basis being given. 'You have not submitted the quantification process adopted by you to arrive at the adjustments, claimed. The fact is that 3% adjustment was claimed on all transactions, without*

specifying the factors that affected the price as well as proper quantification of adjustment.

In the above circumstances, it is proposed that the arbitrary adjustments claimed by you without supporting rationale and proof be rejected. Hence TPO proceeds to compare the sale price to AE with the MPEDA data for the. corresponding period and for the corresponding product and country, without granting any adjustment. Whenever the corresponding MPEDA rate is higher than the rate at which sale is made to Associated Enterprise, MPEDA rate will be taken as Arm's Length Price and based on the same, upward adjustments will be made to the income of the assesses. *Objections, if any, may be furnished on or before 18.12.2015."*

3.1 Before the TPO, the assessee vide letter dated 22.12.2015 explained the reason for adopting the 3 % weightage. The assessee submitted that certain grades U/ 1 and 1/2 of Cuttlefish is processed and packed with 25% glaze (glaze indicates the extent of water or ice per Kg of product), whereas the price indicated in MPEDA website is for products with 20 % glaze. Hence, the assessee had claimed a weightage of 3% to account for such differences. After analyzing the assessee's claim, the TPO found to have no merit. The assessee claimed that Cuttlefish exported by them to the AE was of 25 % glaze. However while going through the export invoices of the assessee, it was seen that the assessee was exporting to its AE Cuttlefish of various glazes ranging from 15 % to 25%, the 15 % glaze product was having lesser water content and hence should fetch higher price than the 20% glazed product. Hence, it was submitted that any loss that the assessee suffers by way of comparison of their 25 % glaze product with price of 20 % glazed product published by MPEDA should be duly compensated. It was also found that many of the invoices of the assessee was not mentioning

any details of the glaze of the product. Also, the assessee had not produced any basis as to how the differences in glaze leads to a uniform 3 % adjustment on all invoices. Hence, the assessee's arbitrary claim for 3 % weightage on their export price to AE was rejected and ALP was determined accordingly.

4. On examination of the claims of the assessee, the PRIME rate sheets and other documents produced by the assessee and the order of the TPO, the DRP observed that the assessee could not controvert the findings of the TPO with evidence that it is exporting to its AE Cuttlefish of various glazes ranging from 15% to 25%. It was also observed that the assessee could not controvert the findings of the TPO that any loss that the assessee suffers by way of comparison of their 25% glaze product (with price of 20% glazed product published by MPEDA) will be duly compensated by the comparison of their 15% glaze produce (with price of 20% glazed product published by MPEDA). The DRP observed that the assessee could not give reasons why many of the invoices do not mention any details of the glaze of the product. Also, it was observed that the assessee had not produced any basis as to how the differences in glaze leads to a uniform 3% adjustment on all invoices. Further, the assessee could not give evidence as to higher glazing necessarily means lower price. According to the DRP, TPO had made adjustments as per each invoice and the assessee had not made any argument on how adjustment on any invoice is incorrect. The assessee did not controvert the entry wise adjustment details and only lump sum

adjustment was sought by the assessee. In view of the above findings, the DRP upheld the order of the TPO and rejected the objections of the assessee.

5. Against this the assessee is in appeal before us. The Ld. AR submitted that having relied on CUP method as the most appropriate method for bench marking international transactions, they have relied on export rates published by MPEDA, which is a quasi govt. Body and the data released on a weekly basis gave input of the types of products and this was taken as benchmark for arriving at Arms Length Pricing. According to the Ld. AR, the main products exported by the assessee are cuttlefish, squids and Octopus of various sizes/grades with different glaze percentages. The Ld. AR submitted that Glaze represents the percentage of water content in the product. For instance 1kg of Cuttlefish grade U/1 with 25% glaze, will effectively have only 750 gms of cuttlefish and 250 gms of water. Similarly, it was submitted that one kg of squid U/5 with 15% glaze will have 850 gms of Squid and 150 gms of water. The glazes of different products exported by the company to Associates are as follows:

CUTTLEFISH:

1. 25% Glaze or
2. 20% Glaze

SQUID:

3. 20%
4. 15%
5. 10%

OCTOPUS

6. 20%

7. 15%

5. It was submitted that while comparing CUTTLEFISH in MPEDA data release, MPEDA data gave the price of Cuttlefish with 10%, 20% and price without glaze. It was submitted that MPEDA did not list the price of Cuttlefish with 25% glaze and this product with 25% glaze is one of the main glazed products which they export which meant that the price of product with 25% glaze needs to be adjusted by 5% (i.e. 25% less 20%) in order to have a fair comparison with a product of 20% glaze listed in MPEDA data. It was submitted that 25% glazed Cuttlefish product would be cheaper by 5% than the same product with 20% glaze. It was submitted while comparing SQUID PRICE in MPEDA data,. MPEDA data gives the price of SQUID without glaze only. It was submitted that MPEDA did not list the price of Squid with 10%, 15% and 20% glazes. It was submitted that the assessee was exporting squid products with 10% glaze, 15% glaze and 20% glaze which meant that the price of Squid products with 10%, 15% and 20% glaze need to be adjusted in order to have a fair comparison with a squid product listed in MPEDA data without any glaze. It was submitted that the squid products on an average should be priced much lesser due to the glazes as compared to the squid price listed in MPEDA which do not show any glaze. To sum up, it was submitted that cuttlefish and squid products exported have this reduction in price due to glaze varying between 5% to 20%. Hence, according to the Ld. AR, it was only reasonable to claim an average reduction in prices,

that too at a very nominal percentage of 3% in order to compensate for the glaze difference in the assessee's products and those listed in MPEDA data.

6. On the other hand, the Ld. DR relied on the orders of the lower authorities.

7. We have heard the rival submissions and perused the record. The TPO made adjustment after examining the invoice produced by the assessee that it has exported products having glazes ranging from 15% to 25%. The product of the assessee is having various glazes ranging from 15% to 25%, as such, the assessee's product could be compared with the price list published by MPEDA which is for 20% glaze after making suitable adjustment which the TPO has done. Further, the assessee has not brought on any evidence to show that the assessee's product is having 25% glazes so that it cannot be compared with the price list published by MPEDA. Being so, we do not find any merit in the argument of the Ld. AR and the same is rejected. Thus, Ground Nos. 2 to 4 of the assessee are dismissed.

8. The next ground, Ground No. 5 is with regard to disallowance of EIA Monitoring fee paid to Export Inspection Agency, for non deduction of tax.

9. The facts of the case are that the *assessee* had paid Rs.18,02,939/- as EIA monitoring fee to Export Inspection Agency. The assessee had not deducted tax at source on this payment. Since the Export Inspection Agencies are autonomous

bodies established by the Central Government under the (Export Quality Control &Inspection) Act, 1963 (22 of 1963), as the field organizations for implementing the policies of the Central Government with respect to Quality Control and/or shipment and inspection of Export Commodities from India as such TDS u/s 194] will be attracted in this case for the payment paid to autonomous bodies and non-deduction of tax will attract provisions of 40a(i)(a) of the Income Tax Act, 1961. Hence an amount of Rs.18,02,930/- was disallowed u/s 40a(i)(a).

10. The assessee submitted a copy of the e-mail (unsigned], the relevant potion of which is as under:

"1. It is true, as mentioned by Mr. Norbert Karikkasserry on the matter of TDS deduction and the corresponding credits in the exporter's passbook on GIA Monitoring fees, has been discussed with the Director, EIC division, decision arrived at but not implemented. Though not put in writing, the matter has also been discussed with Jt. Secretary, MOC.

2. However, as per the last discussion I had with the Director, EIC on 4th March, 2016 at Delhi, 1 have to place the following position, as mentioned by the Director, EIC.

1. A circular is being issued by the Ministry of Finance clarifying that EIC and EIA, being a part of the government are not taxable entities. This circular will be issued by the Regional tax authorities to the regional EIA offices. This process will take about a fortnight.

2. Till the issue of this Circular, all those exporters who have deducted TDS from the monitoring fees paid to EIA, will be given credit in their passbook by the respective regional EIA office, immediately on receipt of such information from the individual exporter. I mentioned that this was promised earlier, but the Director, EIC emphatically said that this will be complied with immediate effect.

Implementing the above, I would request

a) Each member to submit the details of TDS deductions made by their company on such monitoring fees to enable us to follow up with the Director, EIC and his team on giving credits, in the EIA passbooks with immediate effect, as promised.
b) I would also request all the members to inform about any disallowances having taken place in their assessment by IT Authorities for not deducting such TDS from the EIA fees.

I had written letters previously to all the members advising them to deduct TDS on payment of EIA monitoring fees. 1 got no response from any of the members. This gives a feeling that almost all the members barring a few are having no issue in their assessment with the IT authorities for not deducting TDS from EIA fees.. This may be so, but the fact remains that this matter can be brought up by IT authorities, any time.

Having said this. I request all the Regional Presidents to prevail on the respective members to submit the details urgently, for us to take the appropriate action without any delay. This submission may not have priority with majority of the members but I still maintain that every member should pay serious attention to this issue as some of our members have been disallowed EIA fee as expenditure in their income tax assessment."

11. On appeal, the DRP found that from the para 1 of this e-mail also it was clear that even as late as 7.3.2016 no circular has been issued by the Govt. of India exempting EIC/ EIA from Income tax. Further, no other document was submitted by the assessee showing that the income of the assessee is exempt. Further, it was found that no certificate for non-deduction of TDS was produced before AO or even before the DRP. Therefore, the DRP upheld the action of the AO and the objection was rejected.

12. We have heard the rival submissions and perused the record. Before us also the Ld. AR was not able to show that the payment to Export Inspection Agency is not liable for deduction of TDS so as to attract the provisions of section 40(a)(ia) of the Act. In view of this, we do not find any merit in the argument of the Ld. AR and uphold the order of the lower authorities. Thus, this ground of appeal of the assessee is dismissed.

13. In the result, the appeal filed by the assessee is dismissed

Order pronounced in the open Court on this 5th July, 2018.

sd/-	sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place:
Dated: 5th July, 2018
GJ
Copy to:
1. Torry Harris Sea Foods Pvt. Ltd., 9/572, Thirumala Ward, Chungam, C.C.S.B. Road, Alappuzha-688 010.
2. The Assistant Commissioner of Income Tax, Circle-1, Alappuzha.
3. The Pr. Commissioner of Income-tax, Kottayam.
4. D.R., I.T.A.T., Cochin Bench, Cochin.
5. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin