

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-2', NEW DELHI**

**BEFORE SH. R. K. PANDA, ACCOUNTANT MEMBER
AND
SH. KULDIP SINGH, JUDICIAL MEMBER**

ITA No.4237/Del/2011
Assessment Year: 2007-08

M/s. Bucher Hydraulics Pvt. Ltd.35, Pace City-I, Sector-37, Gurgaon PAN No. AAEC55991H	Vs	Assistant Commissioner of Income Tax, Circle . 3 (1), New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Pradip Dinodia, Advocate
Respondent by	Smt. Namita Pandey, CIT DR

ITA No.5690/Del/2012
Assessment Year: 2008-09

M/s. Bucher Hydraulics Pvt. Ltd.35, Pace City-I, Sector-37, Gurgaon PAN No. AAEC55991H	Vs	Deputy Commissioner of Income Tax, Circle . 3 (1), New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Pradip Dinodia, Advocate
Respondent by	Smt. Namita Pandey, CIT DR

Date of hearing:	03/07/2018
Date of Pronouncement:	06/07/2018

ORDER**PER R.K. PANDA, AM:**

The above two appeals filed by the assessee are directed against the separate orders passed u/s 143 (3) r/w 144 C of the IT Act for A. Y. 2007-08 and 2008-09 respectively. Since identical grounds have been taken by the assessee in both the appeals, therefore, these were heard together and are being disposed of by this common order for the sake of convenience.

ITA No. 4237/Del/2011 (A. Y. 2007-08)

2. Facts of the case, in brief, are that the assessee company is a wholly owned subsidiary of Bucher Industries AG. The assessee company is engaged in Hydraulic and Control Systems. It filed its return of income on 06.11.2007 declaring loss of Rs.97,93,643/-. Since the assessee company had entered into international transactions with its AE, the Assessing Officer referred the case to the TPO for determination of the ALP of the international transaction entered into by it u/s 92 CA (1) of the I. T. Act, 1961. Rejecting the various explanations given by the assessee, the TPO proposed upward adjustment of Rs.55,42,782/- being the difference in the ALP of the international transaction. Thereafter the Assessing Officer made the addition of Rs.55,42,782/- to the total income of the assessee on account of the ALP of the international transaction entered into by it with its AE. The Assessing Officer in the draft assessment order also made addition of Rs.39,010,- by restricting the depreciation to 15% on computer accessories and peripheral as against 60% claimed by the assessee.

3. The assessee approached the DRP who deleted the disallowance on account of depreciation. However, so far as the addition on account of ALP of the international transaction is concerned they upheld the action of the Assessing Officer/ TPO.

4. Aggrieved with such order of the Assessing Officer/ TPO/ DRP, the assessee is in appeal before the Tribunal by raising following grounds of appeal :-

1. *That the learned Assessing Officer has erred in law and on facts in converting the returned loss of Rs.97,93,643/- into assessed loss of Rs.42,11,851/- thereby making net addition of Rs.55,81,782/- on wholly illegal, erroneous and untenable grounds.*
2. *The order of assessment is bad in law.*
3. *That the learned AO has erred in law, on facts and in the circumstances of the case in making addition on account of arms' length price under section 92CA(3) of the Income-tax Act amounting to Rs.55,42,782/- on wholly illegal, erroneous and untenable grounds.*
4. *The learned AO's order based on the findings of the learned Transfer Pricing Officer and the directions of the learned Dispute Resolution Panel u/s.144C(5) of the Income-tax, is erroneous, untenable in law and on facts for the various reasons and not limited to the following: -*
 - a) *The TPO as well as the DRP and consequently the AO has erred in law and on facts and in the circumstances of the case in erroneously rejecting the comparable companies selected under these search driven process followed by a detailed FAR Analysis (functions performed, assets utilized and risk assumed) undertaken by the assessee.*
 - b) *The TPO as well as the DRP and consequently the AO has erred in law and on facts and in the circumstances of the case in erroneously applying a defective FAR analysis and selecting and retaining non-comparable companies with obviously different customers/products and thereby arriving at an incorrect arms' length price.*
 - c) *The TPO as well as the DRP and consequently the AO has erred in law and on facts and in the circumstances of the case in erroneously rejecting the Profit*

Level Indicator (PLI) of operating loss/ total assets ignoring the fact that the assessee is a start-up in the financial year of business and therefore, selecting erroneously the PLI of operating profit/total sales as the appropriate PLI.

d) *The TPO as well as the DRP and consequently the AO has erred in law and on facts and in the circumstances of the case in erroneously rejecting the assessee's claim of adjustment on account of underutilization of installed capacity while analyzing and comparing the net margin of the assessee company with that of the comparables to eliminate material difference in consonance with the provisions of Rule 10B(3) of the Income-tax Rules.*

e) *The TPO as well as the DRP and consequently the AO has erred in law and on facts and in the circumstances of the case in erroneously rejecting the assessee's claim of adjustment in the comparables on account of excise and custom duty while analyzing and comparing net margin of the assessee and that of the comparable companies to eliminate material difference in consonance with the provisions of Rule 10B(3) of the Income-tax Rules.*

f) *The TPO as well as the DRP and consequently the AO has erred in law and on facts and in the circumstances of the case in erroneously holding that no accurate adjustments can be made inspite of relevant data and information being made available to them.*

g) *The TPO as well as the DRP and consequently the AO has erred in law and on facts and in the circumstances of the case in considering in the ratio analysis as acceptable comparable companies even those previously rejected by the TPO i.e. Jaya Hind Industries and Instrumentation Ltd. while adjudicating upon the issue of allowing adjustments for the underutilization of installed capacity to the assessee.*

5) *The learned AO based on the recommendation of the TPO/DRP has made an arms' length adjustment, even though, admittedly there is no shifting of profits from India to another low tax jurisdiction, as admittedly even after adjustment as proposed by the TPO/DRP/AO, it still results in computation of loss for the year*

under consideration.

- 6) *That the adjustment made by the AO to the total income of the assessee on the ground of disallowance of depreciation on computer's peripherals @ 60% were erroneous, factually incorrect, and not maintainable in law and is prayed not to be confirmed.*
- 7) *That each ground is independent of and without prejudice to the other grounds raised herein.*

5. The assessee has also raised the following additional ground of appeal :-

"The reference to the Transfer Pricing Officer u/s 92 CA of the Income Tax Act, 1961 by the Assessing Officer was illegal contrary to (i) the binding Instruction No.3/2003, (ii) the provisions of Section 92CA and the binding decision of the Special Bench in the case of Aztec Software and Technology Services Ltd. [107 ITD 141 (Bang) (S B) / 2007 -TIOL-210-ITAT-BANG-Special Bench]

6. Referring to the decision of the Hon'ble Supreme Court in the case of NTPC Limited Vs. CIT reported in 229 ITR 383, the Ld. Counsel for the assessee submitted that since all the facts pertaining to the above ground are already on record and the assessee had inadvertently failed to raise the above ground of appeal due to oversight, therefore, the additional ground may be admitted for adjudication.

7. After hearing both the sides and considering the fact that the additional ground raised by the assessee is a legal one and all facts necessary for adjudication of the ground are already on record and no new facts are required to be investigated, therefore, the additional ground raised by the assessee is admitted for adjudication.

8. The Ld. Counsel for the assessee at the outset submitted that since the turnover of the assessee is Rs.3 crores for the financial year

2006-07 and the AE transaction is of Rs.1.90 crores which is below the limits set for referring the case to the TPO for TP audit, therefore, the reference by the Assessing Officer to the TPO is invalid as per CBDT instruction No.3/2003 which is binding on the Ld. AO. Consequently, the assessment order passed by the AO is barred by limitation since it should have been passed on or before 31st December, 2009. However, even the draft assessment order was passed on 29th October, 2010. Accordingly, he submitted that the orders of the Ld. AO and TPO should be quashed on this preliminary legal ground alone.

9. Referring to the decision of Delhi Bench of the Tribunal in case of Calance Software Pvt Ltd Vs. DCIT vide order dated 23.03.2018 for A. Y. 2006-07, he submitted that the Tribunal under identical circumstances has held that the reference to the TPO is not sustainable since the quantum of international transaction is below the monetary limit of Rs.5 crores and the Assessing Officer should have passed the order within the prescribed time provided under the statute. Since the assessment has become time barred the additional ground raised by the assessee was decided in favour of the assessee. He accordingly submitted that since the reference in the instant case to the TPO by the Assessing Officer is invalid as the international transaction is below the monetary limit of Rs.5 crores and since the time limit for the issue of the order in case of no TPO reference u/s 153 (1) of the IT Act has got expired on 31.12.2009, therefore, the order of the Assessing Officer should be held as void-ab-initio. He also invited the attention of the Bench to the chronological sequence of orders passed by the Revenue Department which is as under :-

Particulars	Date of Order	Reference in Covering Letter to Form No.36B (Appeals Papers)
Order of the Transfer Pricing Officer ('TPO') u/s 92CA (3) of the Income Tax Act, 1961 ('the Act')	04/10/2010	S. No.7 (Pages 52-63)
Draft Order of the Assessing Officer u/s 143 (3) r.w.s. 144 C of the Act	29/10/2010	S. No.6 (Pages 47-51)
Order passed by Dispute Resolution Panel ('DRP') u/s 144 C (5) of the Act	10/08/2011	S. No.4 (Pages 15-20)
Final Order of the Assessing Officer u/s 143 (3) r.w.s. 144 C of the Act	24/08/2011	S. No.3 (Pages 6-14)
Timeline for issue of order by the Assessing Officer in case of no TPO reference u/s 153 (1) of the Act i.e. 21 months from the end of relevant assessment year	31/12/2009	

10. The Ld. DR on the other hand submitted that reference to the TPO by the Assessing Officer will not invalidate the assessment and the matter may be restored to the file of the Assessing Officer for deciding the issue afresh.

11. We have considered the rival arguments made by both the sides and perused the material available on record. It is an admitted fact that the quantum of international transaction in the instant case is below the monetary limit of Rs.5 crores. Therefore, we find merit in the arguments of

the Ld. Counsel for the assessee that the Assessing Officer instead of referring the matter to the TPO for determining the ALP of the international transaction should have decided himself the issue of such ALP of the international transaction.

12. We find identical issue had come up before the Tribunal in the case of Calance Software Private Limited (supra) to which one of us (AM) is a party. The relevant observations of the Tribunal read as under :-

13. *We have heard both the parties and perused the material available on record. At the time of hearing the Ld. AR has taken a ground which is on legal point that as per the Instruction **No. 3/2003** issued by the CBDT, the Assessing Officer should have decided the issue of international transaction himself instead of referring it to Transfer Pricing Officer as the quantum of International Transaction is below the monetary limit of Rs.5 crore. Prima facie, it appears that the contention of the Ld. AR is supported by the Instruction No.3/2003. Therefore, we have to verify whether that Instruction has a binding force or it is just an administrative Instruction within the Departments day to day activities. The Circular has been considered by the Andhra Pradesh High Court in case of **CIT Vs. Nayana P Dedhia 270 ITR 572** wherein it is held that the authorities responsible for administration of the Act shall observe and follow any such orders, instructions and directions of the board. This is actually reiterated from the decision of the Hon'ble Apex Court in case of **UCO Bank Vs. CIT 237 ITR 889 = 2002-TIQL-697-SC-IT-LB** . But at the same time the Hon'ble Supreme Court also held that the Circulars can be adverse to the IT Department but still are binding on the authorities of the Income Tax Departments but cannot be binding on the assessee if they are adverse to the assessee. These ratio laid down by the Apex Court has an impact on the argument of the Ld. AR regarding the Board's Instruction to be followed. The Special Bench of this Tribunal also in case of Aztec Software & Technology Services Ltd. vs. ACIT held that CBDT directions are mandatory and binding on the Assessing Officer and CIT. Further the Jurisdictional High Court in case of CIT vs. SPL's Siddhartha Ltd. (supra) held that "Section 116 of the Act also defines the income-tax authorities as different and distinct authorities. Such different and distinct authorities have to exercise their powers in accordance with law as per the powers given to them in specified circumstances. If powers*

conferred on a particular authority are arrogated by other authority without mandate of law, it will create chaos in the administration of law and hierarchy of administration will mean nothing. Satisfaction of one authority cannot be substituted by the satisfaction of the other authority. It is trite that when a statute requires, a thing to be done in a certain manner, it shall be done in that manner alone and the court would not expect its being done in some other manner." Therefore, the additional Ground of the assessee is allowed. At this juncture, the assessment has become time barred as the reference made to TPO itself is not sustainable and the Assessing Officer should have passed Assessment Order at the prescribed time provided under the statute. We are not deciding on the merit of the case as the additional ground is decided in favour of the assessee.

14. *In result, appeal of the assessee is allowed."*

13. Since the facts of the instant case are identical to the facts of the case decided by the Tribunal in the case of Calance Software Pvt. Ltd. (Supra) and since the time limit for issue of the order by the Assessing Officer in case of the TPO reference u/s 153 (1) of the IT Act expired on 31.12.2009, therefore, we hold that impugned assessment order is bad in law and is barred by limitation. The additional ground raised by the assessee is accordingly allowed. Since the assessee succeeds on this additional ground the other grounds raised by the assessee become academic in nature and therefore are not being adjudicated. The appeal filed by the assessee is accordingly allowed.

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14. The grounds raised by the assessee are as under :-

- 1) *That the learned Assessing Officer has erred in law and on facts in making an assessment of the assessee's loss at Rs. 51,87,140/- against the loss as returned by assessee at Rs. 1,44,16,476/- and thus making additions of Rs. Rs.92,29,336/- on wholly illegal, erroneous and untenable grounds.*
- 2) *The order of assessment is bad in law.*

3) That the learned AO has erred in law, on facts and in the circumstances of the case in making addition on account of arms' length price under section 92CA(3) of the Income-tax Act amounting to Rs. 92,29,339/- on wholly illegal, erroneous and untenable grounds.

4) The learned AO's order based on the findings of the learned Transfer Pricing Officer and the directions of the learned Dispute Resolution Panel U/s. 144C(5) of the Income-tax, is erroneous, untenable in law and on facts for the various reasons and not limited to the following: -

a) The TPO as well as the DRP and consequently the AO has erred in law and on facts and in the circumstances of the case in erroneously rejecting the comparable company i.e. **Adarsh Plant Protect Limited** selected under the search driven process followed by a detailed FAR Analysis (functions performed, assets utilized and risk assumed) undertaken by the assessee.

b) The TPO as well as the DRP and consequently the AO has erred in law and on facts and in the circumstances of the case in erroneously rejecting the assessee's claim of adjustment on account of underutilization of installed capacity while analyzing and comparing the net margin of the assessee company with that of the comparables to eliminate material difference in consonance with the provisions of Rule 10B (3) of the Income-tax Rules.

c) The TPO as well as the DRP and consequently the AO has erred in law and on facts and in the circumstances of the case in erroneously rejecting the assessee's claim of adjustment in the comparables on account of excise and custom duty while analyzing and comparing net margin of the assessee and that of the comparable companies to eliminate material difference in consonance with the provisions of Rule 10B(3) of the Income-tax Rules.

d) The TPO as well as the DRP and consequently the AO has erred in law and on facts and in the circumstances of the case in erroneously holding that no accurate adjustments can be made inspite of relevant data and information being made available to them.

- e) *The TPO as well as the DRP and consequently AO have erred in calculating the profit margins of fresh comparables.*
- f) *The DRP and consequently AO have erred in calculating the wrong profit margins of Roto Pumps Limited (comparable as selected by the assessee).*
- g) *The TPO as well as DRP and consequently AO have grossly erred in law in choosing a set of comparables although none of these comparables were to be selected on detailed FAR analysis.*
- h) *Without prejudice to the above, the TPO as well as DRP and consequently AO grossly erred in rejecting the correct PLI of the comparables as was clarified to the DRP/AO.*
- i) *The TPO as well as DRP and consequently AO failed to adjudicate on the various detailed submissions made by the assessee during the proceedings before each one of them and TPO rejected the same on non TP considerations.*
- 5) *That each ground is independent of and without prejudice to the other grounds raised herein.*

15. The assessee has also raised the following additional ground of appeal :-

“The reference to the Transfer Pricing Officer u/s 92 CA of the Income Tax Act, 1961 by the Assessing Officer was illegal contrary to (i) the binding Instruction No.3/2003, (ii) the provisions of Section 92CA and the binding decision of the Special Bench in the case of Aztec Software and Technology Services Ltd. [107 ITD 141 (Bang) (S B) / 2007 –TIOL-210-ITAT-BANG-Special Bench]

16. After hearing both the sides and following our observation in ITA No.4237/Del/2011, the additional ground raised by the assessee is allowed.

17. After hearing both the sides, we find the turnover of the assessee for the impugned assessment year is Rs.4.77 crores and the AE transaction being Rs.3.80 crores is below the limit of Rs.5 crores prescribed for referring the case to the TPO. Therefore, following our finding in ITA No.4237/Del/2011, the assessment order passed by the Assessing Officer is held to be bad in law and barred by limitation. The additional ground is accordingly allowed. Since the assessee succeeds on this additional ground, the other grounds become academic in nature and therefore are not being adjudicated.

18. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the open court on 06.07.2018.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

NEHA

Date:- 06.07.2018

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	05.07.2018
Date on which the typed draft is placed before the dictating Member	05.07.2018
Date on which the typed draft is placed before the Other member	06.07.2018
Date on which the approved draft comes to the Sr.PS/PS	06.07.2018
Date on which the fair order is placed before the Dictating Member for Pronouncement	06.07.2018
Date on which the fair order comes back to the Sr. PS/ PS	06.07.2018
Date on which the final order is uploaded on the website of ITAT	06.07.2018
Date on which the file goes to the Bench Clerk	06.07.2018
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	

