

**IN THE INCOME TAX APPELLATE TRIBUNAL “K”  
BENCH, MUMBAI**

**BEFORE HON’BLE SH. SHAMIM YAHYA, AM &  
HON’BLE SH. SANDEEP GOSAIN, JM**

आयकरअपीलसं./ I.T.A. No. 7561/Mum/2016  
(निर्धारणवर्ष / Assessment Year: 2012-13)

Safilo India Pvt. Ltd. 1201/02/03 Meridian Business Centrem, Plot No. 27 ,Sector 30A, Opposite Sanpada Railway Station, Vashi, NaviMumbai-400705	<b>बनाम/ Vs.</b>	DCIT Cir15(3)(2) R. No. 473, 4 <sup>th</sup> floor Aayakar Bhavan, M. K. Road, Mumbai-400020
स्थायीलेखासं./जी आइ आरसं./PAN No. AAFCS4638G		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Aliasger, AR
प्रत्यर्थीकीओरसे/Respondentby	:	Shri Saurabh Deshpande, DR

सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	03/07/2018
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	05/07/2018

आदेश / ORDER

**Per Sandeep Gosain, Judicial Member:**

The present Appeal filed by the assessee is against the order of assessment dated 30.11.16 passed in pursuance of

direction of Ld. DRP-2, Mumbai dated 02.09.16 for AY 2012-13  
on the grounds mentioned herein below:-

*Ground No.1:*

*1. That on the facts and circumstances of the case, and in law, the Assessment Order passed in pursuance to the directions issued by the Dispute Resolution Panel ('DRP') is a vitiated order, as the DRP erred both on facts and in law in confirming and enhancing the addition made by the Deputy Commissioner of Income Tax, Range 15(3)(2) ('Assessing Officer' or 'AO') to the appellant's income.*

*Ground No. 2:*

*1. On the facts and in the circumstance of the case and in law, the AO/ TPO/ DRP erred in confirming the upward adjustment of Rs. 20,65,521 to the income of the Appellant, in respect of provision of support services and market information, by:*

*a. alleging that there exists an arrangement between the Appellant and Safilo Italy and thereby erred in contending that Safilo Italy needs to compensate the Appellant for provision of market information and support services;*

*b. arbitrarily deeming compensation of 0.5% of total turnover for provision of support services and market information; and*

*c. not following any of the methods prescribed under Section 92C(1) of the Act read with Rule ioB.*

*The Appellant prays that the addition of Rs. 20,65,521 be deleted.*

*The Appellant craves leave to add, omit or alter grounds of appeal before or during the hearing of aforesaid matter.*

2. The brief facts of the case are that the assessee company is a subsidiary of Safilo International B.V. ('Safilo B.V.') which holds 88.50% of the shares of Safilo India and the remaining 11.50% of the shares are held by Lion Holdings Ltd., Malta. It is a part of the Safilo Group with Safilo S.p.A, Italy. The parent company is engaged in manufacture, marketing and distribution of spectacle frames, sunglasses, etc. under its own brand name and is also licensed to sell spectacles, frames, sunglasses, etc. of other reputed brand names. The assessee is engaged in the distribution of Safilo products (spectacles, sunglasses, etc.) in

India as per the distribution agreement(DA)with Safilo S.p.A.Details of filing of returns of income returned incomes, assessed incomes, etc, can be summarised as under :-

A.Y.	ROI filed on	Returned Income	Asstt. dt.	Assessed Income
2012-13	19.11.12	5,82,45,133	30.11.16	6,03,10,654

During the assessment proceedings, the AO found that the assessee had entered into international transactions (IT.s)with its Associate Enterprise(AE).To determine the arm's length(ALP)of the transactions, he made a reference to the Transfer Pricing Officer(TPO). Vide his order dt. 03.12.15, the TPO proposed total adjustment of Rs. 20,65,521/- crores. Accordingly, the AO issued a draft assessment order to the assessee who challenged it before the DRP. The DRP issued directions on 02.09.16, giving part relief to the assessee. The AO passed the final order after receiving the directions of the DRP.

Aggrieved by the order of DRP, assessee has preferred the present appeal by raising the above grounds.

**Ground No. 1& 2.**

3. These grounds raised by the assessee are inter connected and inter related and relates to challenging the order of DRP in confirming and enhancing the addition made by the AO to the assessee's income, therefore we thought it fit to dispose of these grounds by this common order.

4. Ld. AR appearing on behalf of the assessee submitted before us that the present case is fully covered by the order of Hon'ble ITAT in ITA No. 588 & 4940/Mum/15 for AY 2010-11 & 2011-12 in assessee's own case, wherein the identical grounds raised in the present appeal have already been decided on merits.

5. On the other hand, Ld. DR did not dispute the legal position.

6. We have heard both the parties and we have also perused the material placed on record as well as the orders passed by revenue authorities.

We find that the identical ground has already been decided by the Coordinate Bench of Hon'ble ITAT in ITA No. 588 &

4940/Mum/15 for AY 2010-11 & 2011-12 in assessee's own case.

The operative portion of the order of Hon'ble ITAT contained in para no. 5.3 & 6, which is reproduced below:-

*5.3. We have heard the rival submissions and perused the material before us. We find that the TPO had held that the assessee was providing information to its AE, that it was not being compensated for such services, that he referred to the clause 11 of the DA in his support to hold that it was duty bound to provide MIS on quarterly basis, that he estimated the ALP of the said activity at 2% of the total turnover of the assessee, that the DRP reduced it to 0.5%. In our opinion there is nothing in the DA that leads to the conclusion that the assessee was required to furnish MIS to its AE. Even if, for the sake of argument it is accepted, then the AO/DRP had not followed the valid procedure for making the adjustment. As per the provisions of chapter X of the Act, the departmental authorities are required to follow one of the methods as envisaged by Rule 10 of the Rules. They cannot make ad-hoc disallowance. While making assessment under other sections of the Act ad hoc disallowance can be made e.g. rate of GP or expenses incurred for personal use of the partners etc. But, under section 92 it is not possible. It is a special section which prescribes strict rules for the assessee as well as the AO. Both of them*

*are supposed to adhere to the rules. Here, we would like to refer to the case of M/s. KODAK India Pvt.Ltd., decided by the Hon'ble Bombay High Court(supra) and it reads as under: “*

- 1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 30th April, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal ). The impugned order is in respect of Assessment Year 2007-08.*
- 2. Being aggrieved by the impugned order of the Tribunal, the Revenue has preferred the present appeal raising the following two questions for our consideration :-*

*Xxxxx*

*(3) The respondent assessee is an Indian subsidiary of M/s. Eastman Kodak Co. USA (EKC). During the previous year relevant to the assessment year the respondent assessee sold its imaging business to one M/s. Carestream Health India Pvt. Ltd, The buyer company i.e. M/s. Carestream Health India Pvt. Ltd. was a Indian subsidiary of M/s. Carestream Inc. an USA company. The case of the respondent assessee was that the transaction of sale of imaging business by the respondent assessee to M/s. Carestream Health India Pvt. Ltd. was a*

*transactions between the two domestic non Associated Enterprises. Hence 'the provision of Chapter X of the Act would have no application. Thus, not even declared this transaction in its 3 CEB report.*

*4. However the Transfer Pricing Officer (TPO) while examining another Transfer Pricing issue came across the impugned transaction. It held on the basis of Section/92B(2) of the Act that even if the transaction between Kodak\India Pvt. Ltd. ' and M/s. Carestream Health India Pvt. Ltd. was between two domestic non Associated Enterprises,yet it would still be considered to be an International Transaction and Chapter X of,the Act would be applicable.This on the basis that the Holding companies of both the respondent assessee as well as M/s. Carestream Health India Pvt. Ltd. had entered into a global agreement for sale of its business. This global agreement was prior in point of time to the sale of imaging business by the respondent assessee to M/s. Carestream Health India Pvt. Ltd. The Assessing Officer passed a draft Assessment Order under Section 144C of the Act on the basis of the order of the TPO.*

*5. Being aggrieved, the respondent assessee approached the Dispute Resolution Panel (DRP). However, the view of the TPO was upheld by the DRP.*

*6. On appeal, the Tribunal on interpretation of Section ;92B (2) of the Act, as in force during the subject assessment year concluded that the transaction would not be covered by the definition of International Transaction. This inter alia on the ground that the prior to amendment to Section 92B(2) of the Act w.e.f. 1st April, 2015 such a transaction was not deemed to be an International Transaction. Further, the impugned order also examined the issue on facts and held that even if the Revenue's interpretation is accepted, no addition on account of Arms Length Price..(ALP) is warranted. Moreover, it also held that the ALP was sought to be determined by a method not prescribed under Section 92C of the Act and the prayer for restoration to the TPO to apply the prescribed method was rejected.(emphasis by us).*

*7. The grievance of the Revenue as evident from the question formulated is only in respect of interpretation of Section 92B of the Act. On the interpretation put on it by the Revenue, the*

*impugned transaction would be covered by Chapter X of the Act.*

*8. The Revenue has not raised any grievance to the finding in the impugned order of the Tribunal, that even if one proceeds on the basis of theory of prior agreement, as provided in Sub-Section 2 of section 92B of the Act, yet the entire exercise of transfer of imaging business done by the Kodak India Pvt. Ltd. to M/s. Carestream Health India Pvt. Ltd. was independently done on its own terms and conditions. The global agreement arrived at between Its holding companies did not in any manner control the terms arrived at between the Kodak India Pvt. Ltd. and M/s. Carestream Health Pvt. Ltd. The aforesaid finding is not disputed by the Revenue before us.*

*9. Further, we find that the impugned order of the Tribunal rendered a finding of fact that the ALP for transfer of its imaging business, as determined by the respondent assessee was reasonable is not disputed. The impugned order notes that average gross profit was Rs.4.49 crores and respondent assessee had worked out gross profit at Rs,5.98 crores to work out the consideration receivable. Thus, quite reasonable. This finding of fact has also not been challenged by the Revenue.*

*10. We must also record the fact that the ALP was arrived at by the Transfer Pricing Officer (TPO) by not adopting any of the methods prescribed under Section 92C of the Act. The method to determine the ALP adopted was not one of the prescribed methods for computing the ALP. It was not even any method prescribed by the Board. At the relevant time, i.e. for A.Y. 2008-09 Section 92C of the Act did not provide for other method as provided in Section 92C(1)(f) of the Act. The impugned order of the Tribunal holds that the method adopted by the Revenue to determine the ALP was alien to the methods prescribed under Section 92C of the Act. In the above circumstances, the Tribunal declined to restore the issue to the Assessing Officer for re-determining the ALP by adopting one of the methods as listed out in Section 92C of the Act. This finding of the Tribunal has also not been challenged by the Revenue .*

*11. In view of the fact that the Revenue has accepted the order of the Tribunal on its finding on facts on the two issues as pointed out hereinabove as well as the refusal of the Tribunal to restore the issue of determination of ALP to the TPO by following one of the methods prescribed under Section 92C of the Act. Thus, the questions*

*as formulated for our consideration even if answered in favour of the Revenue would become academic in the present facts. Thus, we see no reason to entertain this appeal. However, we make it clear that the issues of law which has been raised in the present appeal are left open for consideration in an appropriate case.*

*Respectfully, following the above judgment of the Hon'ble Bombay High Court, we decide ground no.3 in favour of the assessee, as the DRP has approved the ad hoc adjustment with regard to an IT.*

*ITA/4940/Mum/2015, AY.2011-12:*

*6. Solitary ground of appeal is about adjustment made by the TPO and confirmed by the DPR under the head MIS. Following the order for the earlier AY., we allow the ground raised by the assessee for the year under appeal*

After having gone through the facts of the present case as well as considering the orders passed by revenue authorities and Hon'ble ITAT as mentioned above in assessee's own case, we find that the identical issues have already been decided by the Hon'ble ITAT in assessee's own case for AY 2010-11 & 2011-12 in ITA No. 588 & 4940/Mum/15. Therefore, respectfully

following the decision of the Coordinate Bench of Hon'ble ITAT and in order to maintain judicial consistency, we apply the same findings in the present case which are applicable *mutatis mutandis* in the present case. Therefore, we order accordingly.

7. In the net result, the appeal filed by the assessee stands **allowed.**

*Order pronounced in the open court on 5<sup>th</sup> July. 2018*

Sd/- (Shamim Yahya)	Sd/- (Sandeep Gosain)
लेखासदस्य / Accountant Member	न्यायिकसदस्य / Judicial Member
मुंबई Mumbai; दिनांक Dated : 05.07.2018	
Sr.PS. Dhananjay	

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायकपंजीकार**  
 (Dy./Asstt.Registrar)  
**आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai**