

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

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1551/PUN/2014
निर्धारण वर्ष / Assessment Year : 2008-09

Rieter India Private Limited,
Gat No.134/1, Vadhu Road,
Off Pune Nagar Road,
Koregaon Bhima, Tal: Shirur,
Pune-412207

.... अपीलार्थी/Appellant

PAN: AAACR3556P

Vs.

The Deputy Commissioner of Income-tax,
Circle 1(2), Pune

.... प्रत्यर्थी / Respondent

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

सुनवाई की तारीख / Date of Hearing : 06.08.2018	घोषणा की तारीख / Date of Pronouncement: 17.10.2018
--	--

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by the assessee is against order of CIT(A)-XX, New Delhi, dated 05.05.2014 relating to assessment year 2008-09 against order passed under section 143(3) r.w.s. 144C(4) of the Income Tax Act, 1961 (in short 'the Act').

2. The assessee has filed amended grounds of appeal which read as under:-

On the facts and in circumstances of the case and in law, Hon'ble CIT(A) has erred as under:

Grounds pertaining to transfer pricing issues:

1. *Inappropriate transfer pricing adjustment amounting to Rs.11,03,20,490 even though all international transactions of the Appellant are at arm's length*

Erred on the facts and in circumstances of the case and in law to propose an upward adjustment amounting to Rs.11,03,20,490 to the international transaction of the Appellant pertaining to rendering of marketing support services to its associated enterprises ('AEs') even though the Appellant had earned more than arm's length operating margins during AY 2008-09.

2. *Inappropriate rejection of the approach adopted by the Appellant in its transfer pricing study report for AY 2008-09*

Erred on the facts and in circumstances of the case in not considering the approach adopted by the Appellant in its transfer pricing study report in relation to benchmarking the international transaction pertaining to rendering of marketing support services to its AEs even though the same transfer pricing benchmarking approach adopted during AY 2007-08 has been accepted by the learned transfer pricing officer.

3. *Inappropriate use of CUP as the most appropriate method*

Without prejudice to the above grounds of objections, erred on the facts and in circumstances of the case by inappropriately considering comparable uncontrolled price ('CUP') as the most appropriate method for benchmarking the international transaction pertaining to rendering of marketing support services to its AEs.

4. *Inappropriate use of secret data (not available in public domain) obtained under section 133(6) of the Act on selective basis (cherry picking)*

Erred on the facts and in circumstances of the case and in law by inappropriately cherry picking and using secret data (not available in public domain) obtained under section 133(6) of the Act for inappropriately benchmarking the international transactions pertaining to rendering of marketing support services to its AEs.

5. *Inappropriate selection of functionally different transactions as comparable*

Erred on the facts and in circumstances of the case and in law by selecting transactions which are functionally different to the Appellant in terms of the functional and risk profile of the Appellant whereas CUP requires strict comparability.

6. *Non consideration of effective commission rate earned by the Appellant*
Erred on the facts and in circumstances of the case by not considering the effective commission rate earned by the Appellant i.e., including income received for providing installation and commission services while comparing with the commission rate considered by the TPO to determine the arm's length nature of international transaction of the Appellant pertaining to rendering of marketing support services to its AEs.

7. *Not considering any economic adjustments to the comparable transactions*

Without prejudice to the above grounds of objections, erred on the facts and in law by comparing the international transaction of the Appellant pertaining to rendering of marketing support services with the commission rates obtained under section 133(6) of the Act from Laxmi Mittal Works Limited ('LMW') and Kirloskar Toyoda Textile Machinery Private Limited ('Kirloskar Toyoda') and without carrying out a detailed comparability analysis and without making any economic adjustment to account for the differences between the information obtained from LMW and Kirloskar Toyoda and the international transaction of the Appellant pertaining to rendering of marketing support services to AEs.

8. *Not granting of 5% benefit as per proviso to section 92C(2) of the Act*

Without prejudice to the above grounds of objections, erred by computing the arm's length price without granting the benefit of 5% under proviso to section 92C(2) of the Act.

Grounds pertaining to corporate tax issues:

9. *Incorrect computation of book profits under section 115JB of the Act*

Erred in not reducing the book profits by the lower of unabsorbed depreciation or brought forward losses, i.e. Rs.25,78,04,000, as required by clause (iii) of Explanation 1 to sub - section 2 of section 115JB of the Act while working out the book profit under section 115JB of the Act.

Other grounds:

10. *Inappropriate initiation of penalty proceedings under section 271(1)(c) of the Act*

Erred on the facts and in law by proposing to initiate penalty proceedings under Section 274 of the Act read with Section 271(1)(c) of the Act, without considering the fact that, adjustment to transfer price is just on account of difference of opinion on the computation of arm's length price as determined by the learned TPO vis-a-vis as determined by the Appellant.

3. The learned Authorized Representative for the assessee at the outset pointed out that grounds of appeal No.2, 3, 4 and 7 are not pressed; hence the same are dismissed as not pressed. The issue raised vide ground of appeal No.1 is general in nature. The issue raised in grounds of appeal No.5, 6 and 8 is against transfer pricing adjustment made in the hands of assessee. The ground of appeal No.9 is against corporate tax issue of computation of book profits under section 115JB of the Act. The ground of appeal No.10 against initiation of penalty proceedings is premature and hence, the same is dismissed.

4. Briefly, in the facts of the case, the assessee had furnished return of income declaring Nil income. However, the assessee paid taxes on income determined under section 115JB of the Act at ₹ 14,31,52,916/-. The case of assessee was selected under CASS. The assessee was engaged in the business of providing marketing support services for the sale of textile machinery, components and equipments manufactured by Rieter Group. During the year, Suessen Asia Pvt. Ltd. (SAPL), another Rieter group company was merged with the assessee company as per the scheme of rehabilitation and merger, as approved by the Board and Industrial and Financial Reconstruction vide its order dated 23.12.2008 and the merger was made effective from 01.04.2007. During financial year 2007-08 relevant to assessment year 2008-09, Rieter India Pvt. Ltd. and SAPL were two separate companies and it is only due to the retrospective merger of these companies, the merged entity file the revised return considering the taxable income/loss of SAPL. The assessee had entered into various international transactions with its associated enterprises. The Assessing Officer made reference to Transfer Pricing Offer (TPO) under section 92CA(1) of the Act. The TPO noted that the assessee had divided its international transactions into two classes based on the functions performed. Export of textile components, import of spare parts, provision of marketing support services, installation commissioning and warranty support services were in class – 1 transactions which were benchmarked using TNMM method. However, cost recharges to group companies were benchmarked by applying CUP method. The TPO did not accept TNMM method applied by assessee, in view of OECD guidelines and was of the view that CUP method was the most appropriate method to be applied. The TPO further noted that in the preceding years i.e. assessment years 2002-03 to 2006-07, CUP method was applied for examining arm's length nature of international transactions. The TPO thus,

issued show cause notice to the assessee regarding rate of commission paid by M/s. Laxmi Machine Works Ltd. (LMW), M/s. Trumac Engineering Co. Pvt. Ltd. and M/s. Kirloskar Toyoda Textile Machinery Pvt. Ltd. (Kirloskar) to their respective market agents. As per information received from the companies, the rate of commission paid by LMW to its agents was 3.80%, by M/s. Kirloskar to its agents was 8.44%. This information was confronted to the assessee. The assessee objected to the approach of TPO and was of the view that TNMM method was most appropriate method and the assessee also objected to the application of CUP method. It was pointed out that transactions between LMW, Voltas and Super Sales were more comparable to that between Kirloskar and its agents. It was also pointed out that Kirloskar had made only 12% of total sales through commission agents as against the assessee being exclusive marketing service provider for Reiter Group in India and was entitled to a stable revenue stream. In respect of commission agents of LMW, it was pointed out that they carried out 96% of sales of LMW, hence business models and functions of operations of comparable do not compare with the assessee. The TPO held that basic function in all the cases was that of selling agents and he applied average commission rate of two concerns at 6.12% as against commission rate of 4.88% received by the assessee. The Assessing Officer computed arm's length price of international transactions from provision of market support services, warranty, commissioning and installation and proposed an upward adjustment of ₹ 11,03,20,490/-. The draft assessment order was communicated to the assessee, who in turn, intimated that he does not propose to file objections to the Dispute Resolution Panel (DRP), hence final assessment order was passed. The Assessing Officer in addition to the arm's length price of international transactions undertaken by the assessee, also proposed similar adjustments in respect of merged company SAPL as it had also entered into similar international

transactions with similar parties with whom Reiter India Pvt. Ltd. had entered into. Accordingly, an upward adjustment of ₹ 2,18,37,628/-. Hence an adjustment of ₹ 13,21,58,118/- was made on account of arm's length price of international transactions. The Assessing Officer further allowed brought forward losses of SAPL to be adjusted against income determined in the hands of assessee and the taxable income was determined at Nil. However, the assessee had offered book profits under section 115JB of the Act, which was accepted as such.

5. In appeal before the CIT(A), the assessee challenged the approach adopted by TPO as followed in earlier assessment proceedings. In respect of international transactions relating to marketing commission on sale of machinery, the CIT(A) applying the decision of his predecessor in assessee's own case on similar issue upheld the upward TP adjustment made of ₹ 11,03,20,490/-. Another issue which was raised before the CIT(A) was that profits as per Profit and Loss Account had to be reduced by lower of unabsorbed depreciation or brought forward losses as required by clause (iii) of Explanation (1) to sub-section (2) of section 115JB of the Act. The assessee had not made the aforesaid claim in its revised return of income. The CIT(A) applying the proposition laid down by the Hon'ble Supreme Court in the case of Geotze India Ltd. Vs. CIT reported in 284 ITR 323 (SC) held that any claim of assessee could be made through filing revised return of income. Since the assessee had not made the said claim in the return of income before the Assessing Officer, same could not be entertained at the appellate stage.

6. The assessee is in appeal against both the issues before us.

7. The learned Authorized Representative for the assessee pointed out that the issue raised in the present appeal stands covered by the consolidated order of Tribunal for assessment years 2002-03 to 2005-06 and also separate order relating to assessment year 2006-07. He further pointed out that no TP adjustment was made in assessment year 2007-08. The learned Authorized Representative for the assessee thus, pointed out that the issue raised vide ground of appeal No.6 stands covered by the deliberations of Tribunal in paras 29 to 33 of Tribunal's order, which are placed at pages 1 to 24 of Paper Book. He further pointed out that in the year under consideration, the TPO has also applied commission rates paid by Kirloskar to its agents and benchmarked the international transactions of assessee, wherein the assessee was receiving commission from Reiter group for providing services to the said group. On the other hand, Kirloskar was paying commission to its agents which was only taking care of part of sales of network of the said concern. He referred to the order of TPO and pointed out that according to him, the assessee should have remunerated at higher commission rate. Our attention was invited to pages 201 and 202 of Paper Book i.e. reply given by Kirloskar concern to the TPO. He referred to the commission paid by the said concern which was paid per spindle, wherein the rate differed between from 800 to 30, hence there was not a constant commission at which the same was paid. In the second table, it was provided that commission was paid @ 5% of FOB and in third table, it was paid at 4% to the same agent. He stressed that where the commission rates varies from transaction to transaction with same trader itself, then it is a situation where commission rates vary case to case basis and hence, the same cannot be applied to benchmark the international transactions of assessee. He then, referred to reply of assessee before the TPO, wherein all these aspects were pointed out which have not been considered by TPO. He also pointed out that

there was volatility in average commission rates paid by Kirloskar to its agents i.e. in financial year 2005-06, it was 3.86%, in financial year 2006-07, it was 6.08% and in financial year 2007-08 at 8.45% and he also referred to the charts, wherein commission was paid varying between 0.8% to 17.6% in financial year 2007-08 alone. The learned Authorized Representative for the assessee thus, pointed out that CUP method was not applicable in the case and the second contention was that Kirloskar is to be excluded for benchmarking international transactions of assessee.

8. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the provisions of Rule 10B(2) of the Income Tax Rules, 1962 (in short 'the Rules') and the orders of authorities below.

9. We have heard the rival contentions and perused the record. The issue raised in the present appeal is the transfer pricing adjustment made by the Assessing Officer/TPO, upheld by CIT(A) by selecting external CUP method.

10. We find that similar issue of transfer pricing adjustment, selection of external CUP method as the most appropriate method and comparison with external concerns picked up, arose before the Tribunal in assessment years 2002-03 to 2005-06 and thereafter in assessment year 2006-07, but no TP adjustment was made in assessment year 2007-08. However, we refer to the findings of Tribunal in assessment year 2006-07 at page 25 in ITA No.5410/DEL/2010, order dated 23.03.2018, wherein it was held as under:-

"7. We have heard the rival contentions and perused the record. The first issue which arises in the present appeal is transfer pricing adjustment made in the hands of assessee by the Assessing Officer/DRP/TPO by selecting external CUP method as most appropriate method. The assessee was engaged in providing marketing support services for the sales of its holding company M/s. Rieter Holding AG, Switzerland. The assessee in addition to commission received on sale of machines also received separate charges for services

provided in the field of installation and commissioning of said machines. The marketing support services were provided to three associated enterprises. The assessee had charged commission for providing aforesaid marketing support services. In addition, the assessee was remunerated separately for installation and commissioning of machines sold by Rieter group and also for providing warranty support services. The TPO had applied CUP method as the most appropriate method and had picked up three comparables ATE Marketing (P.) Ltd., M/s. Super Sales India Ltd. and Voltas Ltd. to benchmark international transactions of assessee. There is no dispute between the assessee and the Assessing Officer/DRP/TPO vis-à-vis the selection of method to be applied.

8. *Similar issue of benchmarking the international transactions of assessee arose before the Tribunal in assessment years 2002-03 to 2005-06 and the Tribunal vide consolidated order dated 20.09.2017 with lead order in Cross Appeals in ITA No.114/Del/2008 and in ITA No.125/Del/2008, held that CUP method was the most appropriate method and international transactions of assessee had to be benchmarked by taking external concerns as comparables in different years which arose before the Tribunal; different concerns were picked up by the TPO as being comparable. We find that CIT(A) in earlier years had rejected the transaction of LMW with Super Sales Agency and TECPL with ATE Marketing (P.) Ltd. having controlled transaction and hence, not comparable. The Tribunal upheld the findings of CIT(A) in assessment years 2003-04 to 2005-06. After the said concerns were rejected, the only concern which remained was M/s. Voltas Ltd. The Tribunal in turn, relying on the decision of Delhi Bench of Tribunal in M/s. Vedaris Technology (P) Ltd. Vs. ACIT in ITA No.4372(Del)/2009 and CO No.35(Del)/2010, relating to assessment year 2002-03, vide order dated 31.03.2010 had held that for determining the arm's length, margin of one comparable can be applied under the transfer pricing provisions. The Tribunal thus, upheld the order of CIT(A) in applying M/s. Voltas Ltd. as comparable and appeal of Revenue was rejected.*

9. *The issue before us is similar to the issue before the Tribunal in earlier years and following the same parity of reasoning, we hold that international transactions undertaken by the assessee of providing marketing support services to its associated enterprises and also earning service charges on installation and commissioning of machines and is to be aggregated and the margin is to be compared to the margin earned by other concern i.e. M/s. Voltas Ltd., which is also performing functions of providing marketing support services to its associated enterprises and also receiving service commission on commissioning and installation services provided by it.*

10. *Now, coming to the margins shown by the assessee. During the course of TP proceedings, the assessee had computed its margins at 3.6%. However, during the course of hearing, the assessee has furnished computation of revised effective commission rates, wherein it has pointed out that earlier it had made an error in reporting total commission and service income of machines and revised effective working and as per the revised effective working of commission rates, the margins of assessee i.e. total income earned by the assessee as percentage of total value of machines installed by Rieter India is 5.26%. The rate charged by M/s. Voltas Ltd. to LMW was 4%. Since the margins shown by the assessee were more than margins earned by M/s. Voltas Ltd., then no adjustment on account of arm's length price of international transactions is to be made in the hands of assessee. We have gone through details furnished by the assessee and in view of assessee declaring margins of 5.26% as against margins of M/s. Voltas Ltd. for the year at 4%, we hold that international transaction undertaken by the assessee is at arm's length and no adjustment is to be made to the same. Accordingly, we allow the claim of assessee in entirety and effective grounds of appeal No.8, 9 and 10 are thus, allowed. All other grounds of appeal raised by the assessee in this regard would become academic.*

11. In the facts of present case, working commission rates, margins of assessee i.e. total income earned from sale of machines as percentage to total value of machines installed by Reiter India was 5.37%. The rate charged by Voltas Ltd. to LMW was 3.80%. However, in the year under consideration, the TPO had also picked up another concern i.e. Kirloskar, wherein average rate of commission paid by Kirloskar to its agent was 8.45% and the TPO had adopted 6.13% i.e. average commission percentage to benchmark international transactions undertaken by assessee.

12. The first issue before us undoubtedly, is covered by earlier order of Tribunal, wherein the effective commission rate of 5.37% of assessee is to be compared with comparables vis-à-vis LMW and Voltas. The assessee has earned higher rate and hence, no adjustment is to be made. However, the issue which needs adjudication is whether the rate of commission paid by Kirloskar to its agents is to be applied to benchmark international transactions of assessee. In the first instance, the assessee was the recipient of commission, whereas Kirloskar is paying commission to its agents. The case of TPO is that the assessee should have been remunerated at higher commission rate with which we do not agree. In any case, the commission paid by Kirloskar to various parties varied from party to party. As pointed out, it varied in assessment year 2007-08 itself, from 0.8% to 17.6%. Further, only 12% of sales of Kirloskar are through its agents. In such scenario, while applying external CUP method, endeavour should be made to select the concern which is engaged in similar transactions as that of tested party. However, it cannot be held that the activities undertaken by Kirloskar in paying varying rates of commission to its agents and that also for 12% of its volume as against the assessee providing services only to Reiter India and receiving commission therefrom, can be compared.

Accordingly, we hold that rate of commission paid by Kirloskar cannot be used to benchmark arm's length price of international transactions of assessee receiving commission income including charges for installation, commissioning and warranty support services. This leads to only one comparable remaining i.e. LMW and the margins of assessee are higher than margins earned by the said comparable and hence, there is no merit in making any adjustment on account of arm's length price in the hands of assessee. Hence, grounds of appeal No.5 and 6 are allowed.

13. The issue in ground of appeal No.8 is against application of range of 5%. This becomes academic.

14. Coming to the corporate issue raised vide ground of appeal No.9, wherein the assessee has raised the issue of computation of book profits under section 115JB of the Act.

15. The assessee is aggrieved by the order of CIT(A) in not allowing its claim of reducing book profits by lower of unabsorbed depreciation or brought forward losses i.e. 25,78,04,000/- as required by clause (iii) of Explanation 1 to sub-section 2 of section 115JB of the Act, while working out the book profits under section 115JB of the Act. Admittedly, the assessee had not made the aforesaid claim in the revised return of income filed before the Assessing Officer. The CIT(A) thus, applying the ratio laid down by the Hon'ble Supreme Court in *Geotze India Ltd. Vs. CIT (supra)* did not admit the plea of assessee. However, we note that the Hon'ble Supreme Court had laid down the said proposition only with regard to fresh claim made before the Assessing Officer, which now has been enlarged by the Hon'ble Bombay High Court in *CIT Vs. Pruthvi Brokers &*

Shareholders (2012) 23 taxmann.com 23 (Bom), wherein it has been held that the assessee is entitled to raise additional ground of appeal by way of additional claim not made in return of income filed by it. Applying the said proposition, we hold that the assessee is entitled to claim deduction to the book profits by lower of unabsorbed depreciation or brought forward losses as propounded in clause (iii) of Explanation 1 to section 115JB(2) of the Act. The Assessing Officer shall verify the claim of assessee after affording reasonable opportunity of hearing to the assessee and re-compute the book profits in the hands of assessee. The grounds of appeal raised by the assessee are thus, partly allowed.

16. In the result, appeal of assessee is partly allowed.

Order pronounced on this 17th day of October, 2018.

Sd/-
(ANIL CHATURVEDI)

लेखा सदस्य / **ACCOUNTANT MEMBER**

Sd/-
(SUSHMA CHOWLA)

न्यायिक सदस्य / **JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 17th October, 2018.

GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-XX, New Delhi;
4. The CIT, Delhi-V, New Delhi;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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