

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.468/PUN/2015

निर्धारण वर्ष / Assessment Year : 2010-11

M/s. Rieter India Pvt. Ltd.,
Gat No.768/2, Village Wing,
Shindewadi-Bhor Road,
Taluka – Khandala, Satara,
Dist. Pune – 412801

.... अपीलार्थी/Appellant

PAN: AAACR3556P

Vs.

The Dy. Commissioner of Income Tax,
Circle 5, Pune

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.755/PUN/2017

निर्धारण वर्ष / Assessment Year : 2009-10

M/s. Rieter India Pvt. Ltd.,
Gat No.768/2, Village Wing,
Shindewadi-Bhor Road,
Taluka – Khandala, Satara,
Dist. Pune – 412801

.... अपीलार्थी/Appellant

PAN: AAACR3556P

Vs.

The Dy. Commissioner of Income Tax,
Circle 5, Pune

.... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Rajendra Agiwal
प्रत्यर्थी की ओर से / Respondent by : Shri S.B. Prasad, CIT

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| सुनवाई की तारीख / Date of Hearing : 01.11.2018 | घोषणा की तारीख / Date of Pronouncement: 25.01.2019 |
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

Both the appeals filed by assessee are against separate orders of DCIT, Circle 5, Pune, dated 12.02.2015 and DCIT, Circle 15(1), New Delhi, dated 15.04.2013 relating to assessment years 2010-11 & 2009-10 passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (in short 'the Act').

2. Both the appeals relating to the same assessee were heard together and are being disposed of by this consolidated order for the sake of convenience. However, in order to adjudicate the issues, reference is being made to the facts and issues in ITA No.468/PUN/2015, relating to assessment year 2010-11.

3. The assessee in ITA No.468/PUN/2015, relating to assessment year 2010-11 has raised the following grounds of appeal:-

Grounds pertaining to transfer pricing issues:

1. ***Inappropriate transfer pricing adjustment amounting to Rs.4,63,36,341 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.4,63,36,341 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 FY 2009-10.

2. ***Inappropriate rejection of the approach adopted by the Appellant in its transfer pricing study report for AY 2010-11***

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.

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. Not considering any economic adjustments to the transaction considered as comparable

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 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 Kirloskar Toyoda and the international transaction of the Appellant pertaining to rendering of marketing support services to AEs.

7. 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.

Other grounds:

8. 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.

4. The learned Authorized Representative for the assessee pointed out that the issue raised in both the appeals is squarely covered by the order of Tribunal in earlier years.

5. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the orders of authorities below.

6. First, we shall take up the appeal in ITA No.468/PUN/2015, relating to assessment year 2010-11. The assessee has raised various grounds of appeal but all the grounds of appeal raised by assessee are against transfer pricing adjustment made in the hands of assessee of ₹ 4,63,36,341/-.

7. Briefly, in the facts of the case, the assessee company was engaged in the manufacturing of textile machinery and equipment and for the year under consideration, the assessee had entered into international transactions with its associated enterprises to the tune of ₹ 57.87 crores. The Assessing Officer made reference to the Transfer Pricing Officer (TPO), who made an upward adjustment of ₹ 4,83,28,979/-. In the draft assessment order, the said upward adjustment made was confronted to the assessee, who filed objections to the

Dispute Resolution Panel (DRP). Consequent to the directions of DRP, final TP adjustment made in the hands of assessee was ₹ 4,63,36,341/-.

8. The assessee is in appeal against the orders of authorities below.

9. First ground of appeal raised by assessee is general in nature. Further, the assessee has not pressed ground of appeal No.4 and the same is dismissed as not pressed. The ground of appeal No.8 against initiation of penalty proceedings is premature, hence the same is also dismissed.

10. The first issue which is raised by assessee is against application of CUP method as the most appropriate method. The learned Authorized Representative for the assessee pointed out that while applying CUP method, M/s. Kirloskar Toyoda Textile Machinery Private Limited (in short 'Kirloskar Toyoda') was taken as comparable but the Tribunal in assessee's own case relating to assessment year 2008-09 in ITA No.1551/PUN/2014, vide order dated 17.10.2018 has rejected the said comparable and consequent thereto, there would be no comparable transaction under the CUP method and hence, the plea of assessee was to be allowed. The learned Authorized Representative for the assessee during the course of hearing pointed out that the TPO in this year had called for data from two concerns i.e. M/s.Laxmi Machine Works Ltd. (LMW) and Kirloskar Toyoda but in the final analysis, the TPO used only margins of Kirloskar Toyoda as no information was received from LMW. He thus, stated that in case following the earlier year, rates of commission of Kirloskar Toyoda are not to be applied, then nothing remains in the order of TPO. He fairly submitted that in the preceding year the rates of

commission of LMW were compared while applying CUP method. The Tribunal while deciding the issue in assessment year 2008-09 by referring to earlier decisions of Tribunal in assessment years 2002-03 to 2005-06 and thereafter in assessment year 2006-07, held that by applying effective commission rate of 5.37% declared by assessee, the same is to be compared with comparable LMW since the assessee had earned higher rate and hence, no adjustment was to be made on this count.

11. The second part of the issue was whether commission paid by Kirloskar Toyoda to its agents was to be applied to benchmark international transactions of assessee and it was held that the rate of commission paid by Kirloskar Toyoda 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. The Tribunal further observed that only one comparable was left i.e. LMW and since the rate of commission of assessee was higher than the rate of commission of said concern, then there was no merit in making any adjustment on account of arm's length price of international transactions in the hands of assessee. The relevant findings of Tribunal are in paras 10 to 12, which read as under:-

"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 Reiter 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."*

12. Applying the parity of reasoning to the issue raised in the present appeal, we hold that though CUP method is to be applied but Kirloskar Toyoda cannot be taken as comparable. The other concern which was held to be functionally comparable with the business module of assessee in the preceding year was LMW. The TPO during initial proceedings had called for the results of said concern but in the final analysis had only applied margins of Kirloskar Toyoda. In such circumstances, we direct the Assessing Officer/TPO to apply CUP method and compare commission rate charged by LMW with the commission rates charged by the assessee during the year under consideration and compute arm's length price of international transactions undertaken by assessee.

13. Before parting, we may also state that CUP method has to be applied and not internal TNMM method as the transactions with associated enterprises were to the extent of 97% and with non-associated enterprises were to the extent of 3% and since the transactions with non-associated enterprises were minuscule, internal TNMM method cannot be applied.

14. The Assessing Officer / TPO shall afford reasonable opportunity of hearing to the assessee. It may be kept in mind that commission earned by assessee in addition to the commission income includes charges for installation, commissioning and warranty support services and the said commission in total is to be applied to work out the rate in the hands of assessee and the same is to be compared with commission rate charged by LMW. Reasonable opportunity of hearing shall be given to the assessee in this regard. The grounds of appeal raised by assessee are thus, partly allowed.

15. Though the grounds of appeal differently numbered but the issue raised in assessment year 2009-10 is similar to the issue raised in assessment year 2010-11 and our decision in assessment year 2010-11 would apply *mutatis mutandis* to assessment year 2009-10.

16. In the result, both the appeals of assessee are partly allowed.

Order pronounced on this 25th day of January, 2019.

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

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 25th January, 2019.

GCVSR

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

1. The Appellant;
2. The Respondent;
3. The DRP, Pune;
4. The DIT (TP/IT), Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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