

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.1740/Del/2016
(Assessment Year: 2011-12)

ACIT, Circle-15(2), New Delhi	Vs.	Li & Fung (India) Pvt. Ltd, 202-206, Tolstoy House, 15, Tolstoy Marg, New Delhi PAN: AAACL1663M
(Appellant)		(Respondent)

Revenue by :	Shri Sanjay I Bara, CIT DR
Assessee by:	Shri Porus Kaka, Sr. Adv Shri Neeraj Jain, Adv Shri Manish Kanth, Adv
Date of Hearing	12/02/2019
Date of pronouncement	21/02/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the 1d ACIT, Circle-15(2), New Delhi [the 1d AO] against the direction of the 1d Dispute Resolution Panel -1, New Delhi [The Ld DRP] dated 23.12.2015 which is incorporated by the 1d AO in his assessment order dated 5/2/2016 passed u/s 143(3) read with section 144C of the Income Tax Act, 1961 [The Act] . The 1d AO has raised the following grounds of appeal:-

- “1. *That the directions of the Ld. DRP are erroneous & contrary to facts & law.*
2. *Whether on the facts and circumstances of the case the Ld. DRP has erred on facts and in law, in not appreciating the fact that the adjustment made by TPO on the issue of FOB value has been arrived at after considering the TP report and the facts and circumstances of the case.*
3. *Whether on the facts and circumstances of the case the Ld. DRP has erred on facts and in law, in not appreciating the fact that recurring and identical issue was involved in the assessee’s own case for the A. Y. 2006-07 and the order of Hon’ble Delhi High Court has already been challenged by revenue through appeal filed in the form of SLP before Hon’ble Supreme Court and lying admitted.*

4. *Whether on the facts and circumstances of the case the Ld. DRP has erred on facts and in law, in not appreciating the fact that the action of the TPO of including FOB provided that the net profit margin realized by the enterprise from an international transaction can be computed having regard to any other relevant base, the relevant base in this case is the FOB value that has been taken by the TPO to determine the arm's length price. Thus the Ld. DRP has erred in concluding that the adjustment by the TPO is not as per law. It is further submitted that the IT Rules 10B(2) & 10B(3) also provide for reasonable accurate adjustment to be made while comparison with uncontrolled transactions. In the light of these Rules the TPO has taken relevant base and has made appropriate adjustment as per the rules to determine the ALP of the international transaction in the case."*
2. The brief facts of the case shows that the assessee is a company engaged in the business of providing marketing services with respect to business of provision of third parties web based platform. The assessee filed its return on 30/11/2011 showing income of Rs. 13.34 crores . As assessee has entered into an international transaction of provision of buying services and therefore, the ld AO referred the matter to the ld TPO for determining its arms length price. Assessee has entered into an international transaction of provision of buying services amounting to Rs. 1262406387/- and same was benchmarked adopting the transactional net margin method as the most appropriate method adopting profit level indicator [PLI] of OP/TC selecting 19 companies as comparables whose PLI is 5.64% and claimed that its international transaction is at arm's length price as assessee is charging cost plus 8 % mark up.
3. The ld TPO made up ward adjustment of Rs. 85.18 crores as per the order passed u/s 92CA(3) dated 12.01.2015. In the same order the ld TPO also adopted the alternative approach vide Para No. 13 as under:-

"13. Alternative Approach

Regarding the alternative approach to compute the arm's length price in accordance with the order of the Hon'ble ITAT Delhi bench for Assessment Year 2006-07, it is felt that the said decision pertains to another assessment year and the principle of res judicata is not applicable in income tax proceedings. The Hon'ble High Court has ruled in favour of the assessee in the matter. However, the department has filed DLP against the decision and the same has been admitted. Therefore, the matter as such is yet to reach a finality. In order to keep the matter alive, the same line is taken during the year as well. In that year it has been the claim of the foreign AE(to whom the assessee claims the supplies are effected and even LCs are executed

by the suppliers in the name of foreign AE) that it also only received commission in the entire deal. This particular aspect is not clear because once the purchases are effected from Indian suppliers and even letter of credit are executed by the supplies in the name of the foreign AE of the assessee then how can the receipts on its subsequent transaction be commission. The suppliers have to be paid the value of their goods exported. Therefore, the alternative approach is not being adopted for this year.”

4. Incorporating the adjustment proposed by the Id TPO, the Id AO consequently passed the draft assessment order on 19.03.2015 determining the total income of the assessee at Rs. 98,52,30,620/-.
5. The assessee preferred the objections before the Id DRP. The Id DRP issued directions u/s 144C(5) on 13.12.2015 giving a direction to the Id AO vide para No. 6 considering the decision of the Hon'ble Delhi High Court in assessee's own case holding that the facts of this case are similar and also the terms of agreement with associated enterprises also remained the same, the order of the Hon'ble Delhi High Court was respectfully followed and to not to make any adjustment. In nutshell, AO was directed to compute the ALP in accordance with the decision of the Hon'ble Delhi High Court. Consequent to that direction the assessment order u/s 143(3) read with section 144C of the Act was passed on 05.02.2016 without making any adjustment to the ALP of the international transaction of the assessee. However, the Id AO aggrieved with the direction of the Id DRP to follow the decision of the Hon'ble Delhi High Court, AO has preferred this appeal.
6. The Id DR submitted that admittedly there is decision of the Hon'ble Delhi High Court in assessee's own case on similar facts and circumstances, however, the Id AO/ revenue has filed a special leave petition before the Hon'ble Supreme Court which is admitted and therefore, this appeal is preferred to keep the issue alive till the decision of Hon'ble Supreme Court.
7. The Id AR vehemently submitted that merely because the SLP is admitted before the Hon'ble Supreme Court, the Id TPO again take the view which is different from the decision of the Hon'ble Delhi High Court in assessee's case for earlier years. He further stated that for assessment year 2012-13 the Id TPO has passed an order u/s 92CA(3) dated 25.01.2016, wherein, the Id TPO has accepted the benchmark of the assessee of its international transactions which was on identical basis. He therefore, submitted that as

the ld TPO himself has accepted the issue in subsequent year, when in the earlier year the issue is decided in favour of the assessee by the Hon'ble Supreme Court, it does not sound good that this appeal is filed to keep the issue alive. He referred to the decision of Honourable Delhi high court and submitted that issue is squarely covered in favour of the assessee.

8. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The ld TPO in the present case has made adjustment to the arms length price only for the reason that the department has filed an SLP against the decision of the Hon'ble High Court before the Hon'ble Supreme Court, which is admitted and therefore, the matter has not reached finality. This approach as such is not acceptable. Even otherwise, the approach is found fallacious for the reasons that in subsequent year the ld TPO himself has accepted the methodology adopted by the assessee which is on identical facts and circumstances and no adjustment is made. Therefore, we do not find any merit in the appeal of the ld AO as it is squarely covered by the decision of the Hon'ble Delhi High Court in favour of the assessee. Hence, respectfully following the same the appeal of the ld AO is dismissed.

Order pronounced in the open court on 21/02/2019.

-Sd/-

(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:21/02/2019

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi