

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "J", MUMBAI**

BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 6342/MUM/2017
Assessment Year: 2013-14**

Safilo India Private Limited, 1201/02/03, Meridian Business Centre, Plot No. 27, Sector-30-A, Opposite Sanpada Railway Station, Vashi, Navi Mumbai – 400705 PAN: AAFCS4638G	Vs.	The Deputy Commissioner of Income Tax-Circle 15(3)(2), Room No. 473, 4 th Floor, Aaykar Bhawan, New Marine Lines, Mumbai - 400020
(Appellant)		(Respondent)

Assessee by : Shri Aliasger Rampurawala (AR)

Revenue by : Shri Ganesh Base (DR)

Date of Hearing: 14/01/2019
Date of Pronouncement: 28/01/2019

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the directions dated 29.06.2017 passed by the Ld. Dispute Resolution Panel-2 (for short 'DRP'), Mumbai, for the assessment year 2013-14, whereby the DRP has rejected the grounds of objection of the assessee company filed against the draft assessment order passed by the Dy. Commissioner of Income Tax 15(3)(2), Mumbai u/s 143 (3) read with section 144C of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee company a subsidiary of Safilo International B.V., holding 88.50% of the shares of Safilo India engaged in manufacturing, marketing and distribution of spectacles frames and sun glasses etc. e-filed its return of income declaring the total income at Rs.

2,09,82,050/-. In response to the notices u/s 143 (2) and 142 (1), the authorized representative of the assessee attended the proceedings from time to time and made submissions as called for. It was noticed that the assessee had entered into international transaction with its associate enterprise (AE). Accordingly, the AO made reference to the Transfer Pricing Officer (TPO) for determining the arm's length price of the said transaction. The TPO made an upward adjustment of Rs. 23,40,826/- with respect to the international transaction of the assessee. Accordingly, the AO issued draft assessment order to the assessee which was challenged before the DRP. The DRP issued directions confirming the upward transfer pricing adjustment of Rs. 23,40,826/- to the income of the assessee in respect of provision of support services and market information. On the basis of the DRP directions, the AO passed the assessment order determining the total income of the assessee at Rs. 2,33,22,880/- under the normal provisions of the Act. Against the said findings of the Ld. DRP, the assessee is in appeal before the Tribunal.

3. The assessee has preferred the present appeal by raising the following effective grounds:

"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 an erroneous order, as the DRP erred both on facts and in law in confirming the addition made by the Deputy Commissioner of Income Tax, Range 15(3)(2) ('Assessing Officer or 'AO') to the appellant's income (Transfer Pricing adjustments.)*

Ground No. 2:

1. *On the facts and in the circumstances of the case and in law, the AO/TPO/DRP erred in confirming the upward transfer pricing adjustment of Rs. 23,40,826/- 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 operating income 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 10B.*

The Appellant prays that the addition of Rs. 23,40,826 be deleted.”

4. At the outset, the Ld. counsel for the assessee submitted that the issue involved in the present case is covered in favour of the assessee by the decisions of the ITAT, Mumbai rendered in the assessee's own case for the A.Ys. 2010-11, 2011-12 and 2012-13. Since, the Tribunal has decided the identical issue in favour of the assessee, the order passed by the AO in terms of the DRP directions is liable to be set aside.

5. On the other hand, the Ld. Departmental Representative (DR) relied on the order passed by the authorities below.

6. We have heard the rival submissions and also perused the material on record including the orders passed by the coordinate Benches in the assessee's own case for the A.Ys. 2010-11, 2011-12 and 2012-13. As pointed out by the Ld. counsel for the assessee the coordinate Bench vide order dated 05.07.2018 has decided the identical issue in favour of the assessee in assessee's own case ITA No. 7561/Mum/2016 pertaining to the A.Y. 2012-13, by following the decision of the coordinate Bench in the assessee's own case ITA No. 588

/Mum/2015 for the A.Ys. 2010-11 and ITA No. 4940/Mum/2015 for the AY 2011-12. The coordinate Bench has decided the identical issue in favour of the assessee in the assessee's appeal for the A.Ys. 2010-11 and 2011-12 holding as under:-

“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 :-

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(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.”

7. Since, the coordinate Bench has decided the identical issue in favour of the assessee in the assessee’s own case for the A.Y. 2012-13 (supra) by following the decision of the coordinate Bench rendered in the assessee’s own case pertaining to the earlier years, we do not find any reason to take a different view on the identical issue in the identical set of facts. Hence, respectfully following the decision of the coordinate Bench in the assessee’s own case pertaining to the A.Y. 2012-13 (supra), we allow the appeal of the

assessee and direct the AO to delete the addition of Rs. 23,40,826/- made by the AO in terms of directions of the Ld. DRP.

In the result, appeal filed by the assessee for assessment year 2013-14 is allowed.

Order pronounced in the open court on 28th January, 2019.

Sd/-

(SHAMIM YAHYA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 28/01/2019

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

Alindra, PS

आदेश प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai