

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I-2 : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

ITA No.1323/Del/2016
Assessment Year: 2011-12

SD Bio Standard Diagnostic Pvt. Ltd., Vs ACIT,
404, 4th Floor, BPTP Park Centra, NH- Circle-22(2),
8, Opposite 32nd Milestone, Gurgaon, New Delhi.
Haryana – 122001.
PAN: AAJCS7883F

ITA No.741/Del/2016
Assessment Year: 2011-12

ACIT, Vs. SD Bio Standard Diagnostic
Circle-22(2), Pvt. Ltd.,
New Delhi. 404, 4th Floor, BPTP Park Centra,
NH-8, Opposite 32nd Milestone,
Gurgaon,
Haryana – 122001.
PAN: AAJCS7883F

(Appellant)

(Respondent)

Assessee by : Shri Manoneet Dalal, Advocate
Shri Yishu Goel, AR &
Shri Jatin Chawla, AR
Revenue by : Shri Sarabjeet Singh, Sr. DR
Date of Hearing : 28.02.2019
Date of Pronouncement : 15.03.2019

ORDER

PER R.K. PANDA, AM:

These are cross appeals - the first one is filed by the assessee and the second one by the Revenue – and are directed against the order dated 16th December, 2015 passed by the Assessing Officer u/s 144C read with section 143(3) of the IT Act.

2. Facts of the case, in brief, are that the assessee is a company engaged in the business of production and trading of In-Vitro Diagnostic Kits for humans and animals, production of raw material, sub material and reagents for research purpose within India and outside India. It filed its return of income on 29th March, 2013 declaring total income of Rs.1,18,72,504/-. The Assessing Officer referred the matter to the TPO u/s 92CA for computation of the ALP of the international transactions carried out by it. The TPO, vide order dated 23rd December, 2014, proposed an upward adjustment of Rs.3,15,43,083/- to the total income of the assessee. The Assessing Officer accordingly made an adjustment of Rs.3,15,43,083/- in the draft assessment order being the difference between the ALP and the price shown in the books of account. The assessee approached the DRP, who, vide order dated 26th October, 2015, directed the Assessing Officer to verify the margin of the comparables in respect of the objection raised by the assessee during the proceedings before the DRP. After considering the direction of the DRP, the Assessing Officer determined the ALP of the international transaction at Rs.2,64,67,179/-. The DRP also directed the Assessing Officer/TPO to treat the foreign exchange gain as operating income in case of both tested party and comparables for the purpose of computing the profit margin. Aggrieved with such order of the DRP, the assessee as well as the Revenue are in appeal before the Tribunal by raising the following grounds:-

Assessee's Appeal (ITA No.1323/Del/2016)

"1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ('AO') is bad in law and void-ab-initio.

2. The Ld. AO/ Ld. Transfer Pricing Officer ('TPO') erred on facts and in law in making an adjustment to the arm's length price of the Appellant's international transactions and determining income of the Appellant at Rs. 38,339,683 in order u/s 143(3) read with section 144C of the Act dated 16.12.2015 as against income declared of Rs. 11,872,504.

Transfer Pricing Grounds

3. The Ld. AO/Ld. TPO/ Ld. Dispute Resolution Panel ('DRP') erred on facts and in law in making an upward adjustment of the arm's length price of the Appellant's international transactions with its associated enterprises ("AEs"):

3.1. Ld. TPO/AO/DRP erred in selecting the current year (i.e. financial year 2010-11) data for comparability despite the fact that the complete data for financial year 2010- 11 was not available within the public domain at the time of preparing contemporaneous document under Rule 10D of the Income Tax rules, 1962;

3.2. Ld. TPO/AO/DRP erred in treating miscellaneous expenses & extraordinary selling and distribution expenses as operating in nature while calculating margin of tested party;

3.3. Ld. TPO/AO/DRP erred in rejecting Morepen Laboratories as comparable selected by Appellant in the transfer pricing documentation on the basis of product dissimilarity between the Appellant and the Morepen Laboratories;

3.4. Ld. TPO/AO/DRP erred in not appreciating the business model and FAR profile of the Appellant and chose to reject two additional comparables selected by the appellant that would eventually strengthen the comparability analysis keeping in mind trading transactions of the Appellant and entity level testing approach adopted by the Appellant.

3.5. Ld. TPO/AO/DRP disregarded the contentions of the Appellant with respect to adjustment based on OP/Sales margin of comparable companies engaged in manufacturing activities should be restricted to raw material purchased for manufacturing and not to the trading transactions of the Appellant;

Direct Tax Grounds

4. The Ld. AO has erred on facts and in laws with respect to adjustment of Minimum Alternate Tax ('MAT') credit as per the provisions of section 115JAA of the Act:

4.1. Ld. AO erred in granting the MAT credit amounting INR 3,943,748 as against the enhanced income whereas a credit of INR 7,346,943 for the prior Assessment Year 2010-11 is available for adjustment.

5. That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 274 read with section 271(1) (c); 271AA and 271BA of the Act for furnishing inaccurate particulars without recording any adequate satisfaction for such initiation.

6. Ld. AO/DRP erred on facts and in law in charging and computing interest under section 234B, 234C and 234D of the Act;

The above grounds of appeal are mutually exclusive and without prejudice to each other.

The Appellant craves leave to add, alter, amend or vary any of the above grounds either before or at the time of hearing as we may be advised. The arguments taken hereinabove are without prejudice to each other.”

Revenue’s Appeal (ITA No.741/Del/2016)

“1. Whether on the facts and in circumstances of the case, the Hon'ble DRP has erred in directing the Assessing Officer/ Transfer pricing Officer (AO/TPO) to treat foreign exchange gain as operating income in case of both tested party and comparables for the purpose of computing profit margin as foreign exchange fluctuations has nothing to do with the business operations of the assessee and are determined by the markets, RBI, macro economic conditions, world markets. Hence gain or loss on foreign exchange fluctuations should not be considered as part of operating revenues or income.”

2. The appellant craves to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

Additional Ground

"Ground No. 7 - That the Assessee Company was operating at low capacity vis-à-vis comparable companies during the year. Therefore, adjustment on account of underutilization of capacity in determining the arm's length nature of the transaction should be granted."

3. Relying on various decisions including the decision of the Hon'ble Supreme Court in the case of *NTPC vs. CIT (1998) 229 ITR 383 (SC)*, and *Jute Corporation of*

India vs. CIT reported in 1991 AIR 241, the ld. counsel for the assessee submitted that the additional ground being purely a legal ground, the same should be admitted for adjudication.

4. After hearing both the sides and considering the fact that the grounds relating to capacity adjustment is a legal one, the additional ground raised by the assessee is admitted.

5. So far as the various grounds raised by the assessee in the grounds of appeal are concerned, the ld. counsel for the assessee did not press any of these grounds. In absence of any objection from the side of the ld. DR, the grounds raised by the assessee are dismissed as not pressed.

6. So far as the additional ground is concerned, the ld. counsel for the assessee, referring to various decisions including the decision of the coordinate Bench of the Tribunal in the case of DCIT vs. Class India Pvt. Ltd. and vice versa vide ITA No.1783/Del/2011 and CO No.179/Del/2011, order dated 12th August, 2015 for assessment year 2005-06, submitted that under identical circumstances the Tribunal has directed the Assessing Officer to work out the amount of capacity utilization adjustment. He accordingly submitted that he has no objection if the matter is restored to the file of the Assessing Officer/TPO/DRP for the limited purpose of calculating the capacity utilization adjustment.

7. The Id. DR, on the other hand, submitted that he has no objection if the matter is restored to the file of the TPO with a direction to determine the capacity utilization adjustment subject to substantiation of the same by the assessee before the A.O./TPO as to how it is eligible for such capacity utilization adjustment.

8. After hearing the rival arguments made by both the sides, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to give an opportunity to the assessee to substantiate with evidence to his satisfaction regarding the capacity utilization adjustment. Needless to say, the Assessing Officer shall give due opportunity of being heard to the assessee and decide the issue as per fact and law. We hold and direct accordingly. The additional ground raised by the assessee is accordingly allowed for statistical purposes.

Revenue's Appeal (ITA No.741/Del/2016)

9. So far as the ground raised by the Revenue is concerned, we find the Id. DRP at para 7 to 7.7 of the order has decided the issue by observing as under:-

“7.0 Ground 5:

7.1 The assessee has argued that foreign exchange gain should be treated as operating income as per various judicial decisions on the issue.

7.2 DRP, relying upon various judicial authorities on the issue, directs TPO/A.O. to treat foreign exchange gain as operating income in case of both tested party and comparables for the purpose of computing profit margin. The objection is accordingly allowed.”

10. From the above, it is clear that the order passed by the DRP on this issue is a very cryptic one. Neither the facts are coming out properly nor the decisions relied on

by the DRP are mentioned. Considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of DRP with a direction to pass a speaking order on this issue. The ground raised by the Revenue is accordingly allowed for statistical purposes.

11. In the result, the appeal filed by the assessee is partly allowed for statistical purposes and the appeal filed by the Revenue is allowed for statistical purposes.

The decision was pronounced in the open court on 15.03.2019.

Sd/-
(BEENA A. PILLAI)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 15th March, 2019

dk

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi