

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.1780/Del/2015  
(Assessment Year: 2010-11)

Bramco WLL, C-104, Defence Colony, New Delhi PAN: AADCB5969R	Vs.	DCIT, Circle-1(1)(2), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri DC Agarwal, Adv
Revenue by:	Shri Sandeep Kr. Mishra, Sr. DR
Date of Hearing	11/02/2019
Date of pronouncement	25/03/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the Id Deputy Commissioner of Income Tax, Circle 1 (1) (2), International Taxation, New Delhi (The Learned AO) dated 11.02.2015 for the Assessment Year 2009-10 determining the total income of the assessee at INR 57600740/- incorporating therein the adjustment u/s 92CA of the Income tax Act [ the Act] as proposed by the learned Additional Commissioner of Income tax , Transfer pricing Officer -1 (1) , New Delhi [ The Ld Transfer Pricing Officer/ TPO ] as per the order dated 14/01/2015 which was subjected to the objection before the learned Dispute Resolution Panel – 1, New Delhi [ the Ld DRP] who passed the direction on 29/12/2014 under section 144C (5) of The Income Tax Act [ The Act].
2. The assessee has raised the following grounds of appeal:-
  - “1. That the order of the Ld. Transfer Pricing Officer is bad in law and on the facts of the case.
  2. That the order of the Hon'ble Dispute Resolution Panel-1 is bad in law and on the facts of the case.
  3. On the facts and circumstances of the case and in law Ld. TPO erred in proposing ALP adjustment by disallowing part of expenditure in this year as revenue cannot be permitted to take a different approach in two

*different assessment years because in the subsequent assessment year, on the basis of same TP Study, for the same project, the ALP shown by the assessee on CUP method was accepted without any ALP adjustment.*

**Without prejudice—**

4. *In the facts and circumstances of the case and in law, the Id. TPO and Id. DRP erred in determining arm's length price on estimate basis, that too, by entertaining doubts with regard to business expediency of payment.*
  5. *In the facts and circumstances of the case and in law, the Id. TPO and Id. DRP erred in rejecting CUP method followed by the tax payer for ALP adjustment as the most appropriate method without assigning any reason.*
  6. *In the facts and circumstances of the case and in law, the Id. TPO DRP erred in estimating ALP adjustment without following any of the prescribed methods u/s 92C(1) and rules made there under.*
  7. *In the facts and circumstances of the case and in law, the Id. TPO DRP erred in not making apportionment, between assessee (BWLL) and its AE (BWLL-DPO), of expenditure incurred on the projector of income earned therefrom, rather preferring to disallow claim of expenditure in the manner laid down u/s 37(1) r.w.s. 144 of the IT Act.*
  8. *In the facts and circumstances of the case and in law, the Id. TPO and Id. DRP erred in making ALP adjustment without the support of comparable companies.”*
3. Brief facts of the case shows that assessee is a foreign company incorporated in Baharin and it has entered into an agreement with Larsen Toubro Ltd for the laying and fixing of granite stone at Delhi International Airport terminal, New Delhi. Assessee has a project office in India. It filed its return of income for assessment year 2010 – 11 declaring total income of INR 275680/- on 23/3/2011.
4. The assessee entered into following international transactions

Sr No	Transactions	AE	Rs.
1	Allocation of cost	Bramco Company WLL Bahrain	396642048
2	Allocation of cost	Bramco India Pvt td	4946253
3	Purchase of support services	Do	126272570
4	Reimbursement of expenses	Do	803294
5	Third party payments	Do	5145188
6	Third Party payments	Do	3472251
7	Third party payments	Shri V K Dewan	40000

5. As per the transfer pricing study prepared by the assessee, international Transactions were benchmarked the transactions under dispute adopting CUP as the most appropriate method . The learned TPO disturbed the first transaction of allocation of costs amounting to INR 396642048, which is an allocation of costs related to the laying of floor tiles at in the international airport T – 3 (DIAL) projects that has been incurred by the head office and allocated to the assessee’s project office as certified by its external auditors. All these payments are stated to be third party invoices and have been allocated to the project office on cost-to-cost basis with no markup. As it is cost-to-cost basis charge, the assessee stated in its transfer pricing study report adopting the CUP method as the most appropriate method benchmarking the above international transactions and stated it to be at arm’s-length.
6. The above international transactions were referred to the learned transfer-pricing officer by the learned AO for determination of arm’s-length price. The learned TPO did not agree with the assessee’s submission with respect to the allocation of cost and therefore he applied the principles of benefit test determined the arm’s-length price of the international transaction of allocation of cost of Rs. 296536179/- against the total international transaction of INR 396642048 and thus an adjustment was made of INR 1 00103869/-. Subsequently the above adjustment was modified because of certain errors to Rs. 112964452/-. The learned TPO passed an order u/s 92CA (3) of the act on 27/1/2014. There is no dispute with respect to any other international transaction and its arm’s-length price. Consequently draft assessment order was passed on 24/3/2014 wherein the total taxable income of the assessee was determined at INR 1 00379549/- against the returned income of INR 2 75680/-.
7. The assessee preferred its objection before the learned Dispute Resolution Panel and based on the direction of the learned Dispute Resolution Panel the total adjustment u/s 92CA was made of INR 57325060/- against the original adjustment proposed of rupees 112964452/-. Consequently the assessment order u/s 143 (3) read with section 144C (13) of The Act was passed on 11/2/2015 by the learned Deputy Commissioner Of Income Tax,

Circle 1 (1) (2), International Taxation, New Delhi (The Learned AO) determining total income of the assessee at INR 57600740/-.Therefore the assessee is aggrieved with the order of the Learned Assessing Officer has preferred an appeal before us on the above grounds.

8. The learned authorised representative firstly submitted that the above project was completed in the financial year 2010 – 11 relevant to the assessment year 2011 – 12. For that assessment year the assessee filed return declaring a loss of Rs. 25962076/- which was revised to INR 30611358/- and the matter was referred to the TPO and no adverse inference was drawn in respect of the international transactions undertaken by the assessee in that year. Therefore, it is found that on the identical facts and circumstances of the case the learned TPO has accepted the methodology of benchmarking the above transaction in subsequent year. He therefore submitted that when the identical method on identical facts and circumstances of the case when the allocation of the cost has been accepted by the learned transfer pricing officer in subsequent years, there is no reason, that he should have disturbed the ALP of the international transaction in this year. He referred to the paper book wherein at page number 66 – 67, the order of the transfer-pricing officer for assessment year 2011 – 12 is placed wherein on the identical facts and circumstances the learned TPO has accepted the ALP. He therefore stated that on the issue of acceptance of the method by the learned TPO in subsequent year itself, above adjustment should not have been made and is required to be struck of.
9. He further stated that the CUP method has been accepted by the learned AO and learned TPO as the most appropriate method. He submitted that when the transaction of the purchase of goods from third party is transferred to the assessee on the same cost, there is no reason to disturb the CUP method. It was further stated that only one of the methods prescribed u/s 92C (1) is required to be adopted by the learned AO/TPO. He further stated that the benefit test is not the criteria on which the ALP of the transaction can be determined at nil. He further stated that the allocation of expenditure has been done based on the auditor's report which is one of the reputed auditors of the international standing, such certificate cannot be

rejected without pointing out any latent, patent, glaring defect in it. It was further stated that there is no provision under the act to determine the arm's-length price on estimated basis, which has been done by the learned Dispute Resolution Panel. For this proposition, he referred to the decision of the coordinate bench in 101 taxmann.com 388 wherein as per paragraph number 20 identical estimated adjustments to the international transaction was held to be not sustainable. He also placed on record the written submissions. He submitted that merely for the reason of 44AD and no tax jurisdiction of Bahrain, assessee could not be taxed on hypothetical basis.

10. The learned departmental representative vehemently stated that assessee has a project office in India, has a huge contract, however files minuscule return and shown a minuscule profit of INR 19950/- in subsequent year and in this year. He submitted that the learned transfer-pricing officer has correctly determined the ALP of the international transaction making an adjustment of INR 50,000,000. He stated that the cost allocation shown by the assessee is based on the certification of a chartered accountant. Such basis did not have any sanctity for the allocation of the cost. He further stated that what are the allocation keys adopted by the auditor is also not certain. He therefore stated that assessee has failed to prove the rendition test, the benefit test, the need test and further duplication test. Therefore, the ALP has been correctly determined by the learned TPO and the learned Dispute Resolution Panel. It further stated that there is an attempt by the assessee by allocating cost to the project office by shifting of the profit to the foreign jurisdiction and showing losses in the Indian jurisdiction. He also referred to the various paragraphs of the order of the Learned Transfer-Pricing Officer and The Learned Dispute Resolution Panel to justify the adjustment.
11. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly, in this case for assessment year 2011 – 12 the assessee has also entered into an identical transaction and applied CUP method for determination of ALP of reimbursement of expenses as third-party cost, material cost, and allocation of the cost. The learned transfer-pricing officer for assessment year 2011 – 12 on identical facts and circumstances of the case accepted the CUP method adopted by the

assessee as the most appropriate method and has accepted the international transaction at arm's-length. Therefore, it is now an established fact that in subsequent years, the methodology of determining the arm's-length price of the same international transaction has been accepted by the revenue but in the impugned year, it is not acceptable to revenue. We see no reason, if the facts in the subsequent years show that on identical facts and circumstances, TPO has accepted the stand of the assessee, then such a stand in previous years should not be upheld.

12. Even otherwise on the facts and circumstances of the case, on the issue of the total depreciation claimed by the assessee, the Learned Dispute Resolution Panel has noted that since the plant and machinery is required for cutting and polishing et cetera for the granite to be laid at the airport and as its entire process was done at the foreign office of the assessee and not in India, therefore the prima facie the depreciation claim is to be allowed. However, it noted that, as the allocation has been certificate certified by the auditor, which can be accepted as correct certification and further the foreign tax jurisdiction in the present case is having no tax, therefore, it allowed only 75% of the taxpayer's claim. Therefore, in principle it was accepted that the depreciation is allowable to the assessee but because of the said certification and Bahrain, being no tax jurisdiction the learned Dispute Resolution Panel disallowed 25% of the depreciation on ad hoc estimated basis. With respect to the custom clearing and freight expenses, the learned DRP allowed only 95.34% of the total expenses and proposed the adjustment of just 4% on ad hoc basis. With respect to the material & expenditure, it allowed hundred percent and did not uphold any adjustment because of the third party bills. With respect to the other expenditure of 192769 BD, the panel upheld 20% of the adjustment on the same reasoning. With respect to the equipment related, cost it upheld 50% of the adjustment. With respect to the other expenditure, it upheld 20% adjustment. Further in para number 6.4.2 of its direction, the learned DRP also stated that as the assessee has offered income of only INR 19950 on receipt from dial of approximately Rs. 100 crores which works out to just 0.001% and in the ordinary course, such project should have yielded the profit of 5 – 10% , and even otherwise the provisions of section 44AD of

the act provides for a profit rate of 8% , therefore, the adjustment made by the learned DRP will result in profit of approximately INR 56,200,000 on receipt of approximately Rs 100 crores giving profit rate of only 5.60 percentage which cannot be said to be unreasonable by any yardstick.

13. On careful analysis of the order of the learned DRP 1 which has given a direction to the assessing officer/transfer pricing officer to uphold the adjustment to the arm's-length price of the international transaction with a sole objective of making the profit of 5.60 percentage of the total project to reach near to the profit rate of 8% as provided under the provisions of section 44AD of the act. The second sole reason was that Bahrain jurisdiction is no tax jurisdiction and therefore adjustment is required to be made. Both these reasons are not provided in the income tax act while determining ALP of the international transactions. The arm's-length price of the international transaction cannot be determined based on the estimates an adhocism.
14. We have further verified the certificate issued by the BDO placed at page number 61 – 65 of the paper book filed by the assessee. The certificate dated 06/02/2011 submitted show that the allocation has been made by the auditor based on the audited financial statements of the company. Further, the appendices also reflect the total direct material cost and administrative expenses incurred by the marble division of the company on the New Delhi International Airport project. Further, merely because of the reason that the certificate has been given by an auditor of the company it can be brushed aside, as self-certification. It would have been the duty of the learned transfer-pricing officer/ Learned dispute resolution panel to examine the above certificate and show that there are infirmities in the said document furnished by the assessee. Unless that is shown, a certificate issued by a firm of chartered accountants cannot be rejected at the threshold.
15. In view of this, we do not inclined to uphold the adjustment proposed by the learned transfer-pricing officer to the international transaction entered into by the assessee. Accordingly the adjustment proposed of INR 5 7325060/- incorporated in the assessment order dated 11/2/2015 made by the learned assessing officer based on the order of the transfer pricing officer

incorporating the adjustment directed by the learned dispute resolution panel deserves to be deleted. Accordingly, the AO is directed to delete the above addition.

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

Order pronounced in the open court on 25/03/2019.

-Sd/-

(H.S.SIDHU)  
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 25/03/2019

A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR  
ITAT, New Delhi