

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

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.6592/Del/2015
Assessment Year: 2011-12

DCIT, Circle-25(2), C.R. Building, New Delhi	Vs.	M/s. Tilda Riceland Pvt. Ltd., Eros Corporate Towers, Level-15, Nehru Place, New Delhi
PAN :AAACU0649N		
(Appellant)		(Respondent)

And

C.O. No.77/Del/2016
[Arising out of ITA No.6592/Del/2015]
Assessment Year: 2011-12

M/s. Tilda Riceland Pvt. Ltd.(now known as TRL Riceland Pvt. Ltd.), Eros Corporate Towers, Level-15, Nehru Place, New Delhi	Vs.	DCIT, Circle-25(2), C.R. Building, New Delhi
PAN :AAACU0649N		
(Appellant)		(Respondent)

Department by	Shri H.K. Choudhary, CIT(DR)
Assessee by	Shri Nageshwar Rao, Advocate

Date of hearing	13.02.2019
Date of pronouncement	04.04.2019

ORDER**PER O.P. KANT, A.M.:**

This appeal by the Revenue and cross objection by the assessee are directed against order dated 21/10/2015 passed by the Deputy Commissioner of income tax, Circle 25(2), New Delhi (in short 'the Assessing Officer') for assessment year 2011-12, pursuant to the direction of the Ld. Dispute Resolution Panel (DRP). The grounds of appeal raised in the appeal and the cross objection are reproduced as under:

Grounds raised by the Revenue:

1. *"On the facts and in the circumstances of the case, the DRP-2 erred in directing AO to complete the assessment as per observation made by DRP in the order which resulting in reduction of the addition of Rs.17,23,27,781/- on account of proposed addition of arm's length price of the international transaction with its associated enterprises."*
2. *"On the facts and in the circumstances of the case, the directions of DRP-2 for considering forex gain/loss to be considered as operating in nature is not acceptable as it is bad in both law and facts of the case."*
3. *"On the facts and in the circumstances of the case, as per DRP's direction the comparable namely KRBL Ltd includes forex gain/loss in its sale but DRP has failed to quantify the amount of adjustment which is made in the sale of that comparable on account of forex fluctuation. Also DRP failed to provide whether the KRBL Ltd had forex gain or forex loss adjustment in its sale."*
4. *"The appellant craves, leave or reserving the right to amend modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."*

Cross objections raised by the assessee:

1. *The DRP has erred in concurring with the findings of the AO/TPO and disregarding the economic analysis undertaken by the respondent for establishing the arm's length price of the international transactions without appropriate justification and mechanically relying on the order under section 92CA(3) of the Act passed by the TPO.*
2. *The AO/TPO / DRP, erred on facts and in law in ignoring the decision of Hon'ble ITAT in the Respondent's own case (ITA No. 6279/Del/2012), for use of Comparable Uncontrolled Price Method (CUP) as the Most Appropriate Method (MAM) for determining the arm's length price of the impugned transaction of the respondent.*
3. *The TPO / AO / DRP have erred in law and on facts of the case in rejecting Comparable Uncontrolled Price Method (CUP) as the Most Appropriate method and subsequently applying Transactional Net Margin Method (TNMM) as the MAM over the CUP Method as adopted by the respondent for the purpose of benchmarking its international transactions with its associated enterprises.*
4. *Without prejudice to above,*
 - a) *The TPO / AO have further erred in law and on facts of the case in applying, and DRP has erred in confirming, an export turnover filter of 25% while applying TNMM as the MAM, as against 50% proposed by the respondent, without providing any cogent reasons for the same.*
 - b) *The TPO / AO have erred in law and facts of the case in excluding, and DRP has erred in confirming and excluding miscellaneous income of INR 2,260,000 while computing the operating margin of the respondent without appreciating that the same is intrinsically linked to the business operation of the respondent and hence should be considered as part of the operating income.*
 - c) *The TPO/AO/DRP have erred in law and on facts of the case in not allowing appropriate adjustments for granting the adjustment for difference in the capacity utilization of the respondent vis-a-vis the comparable companies.*
 - d) *The TPO / AO have erred in law and on facts of the case in not following the directions of DRP and considering gain/loss on foreign exchange fluctuation as non-operating for computing the operating margin of the respondent.*

The above grounds are without prejudice to each other.

The Respondent craves leave to alter, amend or withdraw all or any of the Grounds of Cross- Objection contained herein or add any further grounds as may be considered necessary either before or during the hearing.

2. Briefly stated facts of the case are that the assessee company was engaged in the business of manufacturing, processing and trading of Rice. For the year under consideration, the assessee filed return of income on 29/09/2011 declaring nil income, however paid taxes on book profit of Rs.6,35,36,916/- under section 115JB of the Income-tax Act, 1961 (in short 'the Act'). The case was selected for scrutiny and notice under section 143(2) of Act that was issued and complied with. In view of the International transactions of sale of Rice and other products along with purchase and reimbursement of expenses carried out by the assessee with its Associated Enterprises (AEs), the Ld. Assessing Officer, referred the matter of determination of arm's length price of those transactions to the Ld. Transfer Pricing Officer(TPO). The Ld. TPO rejected the comparable uncontrolled price (CUP) method adopted for determining ALP of the transaction of sale of Basmati/Non-basmati rice. The Ld. TPO chosen the transactional net margin method (TNMM) as the most appropriate method and compared the profit level indicator (OP/OC) of the assessee with the working capital adjusted margin of the four comparables. The average adjusted margin of the comparable was found to be 6.82% as against assessee's margin of 1.30%. The learned TPO accordingly, proposed adjustment of

Rs.17,23,27,781/- to the income of the assessee. The Assessing Officer in draft assessment order passed under section 09/03/2015, included the proposed transfer pricing adjustment along with the other disallowances. Aggrieved with the draft assessment order, the assessee filed objection before the Ld. DRP.

2.1 The learned DRP vide order dated 14/09/2015 issued direction to the Ld. AO/TPO allowing part of the objections of the assessee. The Ld. DRP has issued one of the direction of considering forex gain/loss as operating in nature while working out the margin of the comparable as well as of the assessee. The Ld. AO after taking into account the direction of the learned DRP, passed the final assessment order on 21/10/2015.

2.2 Aggrieved with the order, both the Revenue and the assessee are before the Tribunal raising the respective ground in the appeal and the cross objection filed.

3. At the outset, the Ld. counsel of the assessee submitted that assessee is not pressing the cross objection as the transfer pricing adjustment in the year under consideration has been reduced to Nil, and but want to reserve its right to challenge the issue of most appropriate method in subsequent years, if so required.

4. The grounds, raised in the appeal of the Revenue, relate to the issue of considering forex gain/loss as operating in nature.

4.1 The Ld. DR submitted that forex gain/loss is an non-operating for the purpose of computing ALP and even in the safe harbour rules the income or expenses arising from foreign exchange fluctuation has been excluded from operating revenue or expense. The Ld. DR submitted that the learned DRP has failed to quantify the forex gain/loss adjustment and sale of comparable

M/s KRBL Ltd. On the other hand, the Ld. counsel of the assessee relied on the order of the Ld. DRP.

4.2 We have heard the rival submissions and perused the relevant material on record. One of the objection taken by the assessee before the learned DRP was that foreign exchange gain/loss has been consistently allowed to the assessee as operating. The learned DRP after considering the submission directed the Ld. AO/TPO as under:

“The a' also raised a ground with regard to treatment of foreign exchange gain / loss. The a' contended that foreign exchange gain/loss should be consistently applied for both the a' and the comparables. It was submitted by the a' that KBRL (one of the selected comparables) clarified in its Notes to Accounts regarding its Revenue Recognition Policy. As per its Revenue Recognition Policy sales were accounted net of discounts, sales tax, excise duty and returns but include exchange fluctuations on exports realised during the year and also the effect of trade receivables in foreign exchange as at the year end (appearing on Page No 783 of the Paperbook). Further, the turnover also included gain / loss on corresponding forward contracts. Since the operating revenue and the operating profits of KBRL included the impact of foreign exchange gain / loss and the fact that foreign exchange gain / loss in case of this comparable was considered operating in nature, by principle of consistency, foreign exchange gain / loss of this company needs to be considered as operating in nature. The TPO is directed to compute the operating margins considering foreign exchange gain / loss as operating in nature in respect of this company. For all the other comparables the existence of the above conditions may be verified by the AO. If the other comparables also accounted for the foreign exchange gain / loss in a similar fashion, the same line of action as followed in the case of KBRL may be taken. This ground is partly allowed.”

4.3 We find that the learned DRP directed the Ld.AO/TPO to include the foreign exchange gain/loss as part of operating revenue on the basis of the financial statement of one of the

comparable M/s KBRL Ltd. In the order (letter) dated 05/10/2015 of learned TPO, wherein he has given effect to the order of the learned DRP and computed the average margin of comparables at 5.81%, which being in the plus minus 5% of margin of the assessee, he revised the transfer pricing adjustment at Nil. We find that the Ld. DRP observed foreign exchange gain/loss as pertaining to the operations of sale transactions, and thus directed to adopt a uniform approach to include foreign exchange gain/loss in operating revenue of both the assessee as well as the comparables. The safe harbour rules cited by the learned DRP cannot be applied while working out the appropriate margin of the tested party as well as the comparables. Even the OECD transfer pricing guidelines provide for inclusion of foreign exchange gain/loss in TNMM to a transaction in which foreign exchange risk is borne by the tested party. The Ld. counsel also referred before us the page No. 782 of the paper book volume III, and submitted that the fact of exchange fluctuation included in the operating revenue of M/s. KBRL Ltd., was evident from the Schedule 22 of significant accounting policies mentioned in the Annual Report of M/s KBRL Ltd. The Ld. DR could not controvert this submission of the learned counsel of the assessee. In our opinion, the finding of the learned DRP on the issue in dispute is well reasoned and we do not find any error in the same. Accordingly, we uphold the same.

5. The grounds of the appeal of the Revenue are accordingly dismissed.

6. As regards the cross objections filed by the assessee, since the appeal of the Revenue has been dismissed, the cross

objections of the assessee are rendered only academic and do not survive and accordingly, the same are dismissed.

7. In the result, both the appeal of the Revenue and the cross objections of the assessee are dismissed.

Order is pronounced in the open court on 4th April, 2019.

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER

Sd/-
[O.P. KANT]
ACCOUNTANT MEMBER

Dated: 4th April, 2019.

RK/-[d.t.d.s]

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi