

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: "I-1", NEW DELHI**

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.2571/Del/2014
Assessment Year: 2009-10

M/s. Brown Forman Worldwide LLC-India Branch Office, 148, Centrum Plaza, 1 st Floor Golf Course Road (Opposite Sun City Complex), Gurgaon	Vs.	DDIT, Circle-3(2), International Taxation, New Delhi
PAN :AACCB2012A		
(Appellant)		(Respondent)

Appellant by	S/shri Himanshu Sinha & Bhuwan Dhoopar, Adv. and Ms. Rina Garg, CA
Respondent by	Shri Sanjay I. Bara, CIT(DR)

Date of hearing	09.04.2019
Date of pronouncement	12.04.2019

ORDER

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

This appeal by the assessee is directed against final assessment order dated 17/02/2014 passed by the Ld. Dy. Director of Income-tax, Circle-3(2), International Taxation, New Delhi [hereinafter referred to as 'the Assessing Officer'], in pursuant to the direction dated 27/12/2013 of the learned Dispute Resolution Panel (in short 'the learned DRP') for

assessment year 2009-10. The grounds of the appeal are reproduced as under:

1. *That on the facts and in the circumstances of the case and in law, the order passed by the Deputy Director of Income Tax, Circle 3(2), International Taxation, New Delhi (“Learned Assessing Officer” or “Ld. AO”) is bad in law and void ab-initio.*
2. *That on facts and circumstances of the case and in law, the Ld. AO/ Deputy Director of Income Tax, Transfer Pricing Officer - 1(4), New Delhi (Ld. TPO) Learned Dispute Resolution Panel -1 (“Ld. DRP”) erred in re-computing the arm’s length price (“ALP”) of the Appellant’s international transaction at Rs. 91,360,882 as against Rs. 79,280,797 determined by the Appellant and thereby making an addition of Rs. 12,080,085 on that account to the Appellant’s income.*
3. *That on facts and circumstances of the case and in law, the Ld. AO/ Ld. TPO/Ld. DRP erred while making an aforesaid addition of Rs. 12,080,085 to the value of international transactions by:*
 - (i) rejecting the Transfer pricing documentation (and the search process adopted therein) required to be maintained u/s 92D(1) of the Act read with Rule 10D of the Income Tax Rules, 1962 (“the Rule”) and performing a fresh search without any cogent reason;*
 - (ii) rejecting all the comparable companies (Except Excellent Insurance Broking Services Ltd.) selected by the Appellant in its transfer pricing documentation;*
 - (iii) selecting “Global Procurement Consultants Limited” and “TSR Darashaw” as companies comparable to the Appellant by disregarding the functional dissimilarities between the Appellant and these companies;*
 - (iv) resorting to cherry picking by proposing KITCO Ltd. as comparable and subsequently in the TP Order rejecting the same without appreciating the functional profile of KITCO Ltd. as well as other comparable companies proposed by Ld. TPO; and*
 - (v) rejecting additional comparable companies proposed by the Appellant based on the comparable set proposed by Ld. TPO.*
4. *That on facts and in law the Ld. AO/TPO erred in not granting relief under proviso to section 92C (2) of the Act.*
5. *That on facts and in law the Ld. AO erred in proposing to charge interest u/s 234B of the Income Tax Act.*

6. *That on the facts and circumstances of the case and in law, the Ld. DRP erred in not examining the validity of initiation of penalty proceedings u/s 271(1)(c) of the Act.*

The Appellant craves leave to add, amend, alter, delete, rescind, forgo or withdraw any of the above grounds of appeal either before or during the hearing before the Hon'ble Tribunal. The aforesaid grounds are mutually exclusive and without prejudice to each other.

2. Briefly stated facts of the case are that the assessee before us is a branch office in India of M/s Brown-Forman Worldwide LLC (BFWBO). The Brown-Forman (BF) group is engaged in the “Wine” and “spirit” business and also diversified producer and marketer of fine quality consumer product. The beverages segment include various “Kentucky whiskey”; “Kentucky Bourbon”; “California sparkling wine” etc. During the year under consideration, the branch was primarily engaged in providing marketing support services and other auxiliary sales support/assistance services to its group companies. The assessee filed its return of income on 30/09/2009 declaring total income of Rs.84,39,560/-. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short ‘the Act’) was issued and complied with. During assessment proceeding, the Ld. Assessing Officer noted International transaction of market support services of Rs.7,92,80,797/- and therefore, referred the matter of determination of the arm’s length price (ALP) of the said international transaction to the learned Transfer Pricing Officer (TPO). The learned TPO proposed adjustment of Rs.1,91,30,582/- to the income of the assessee. The learned Assessing Officer in the draft assessment order dated 06/03/2013, included the above transfer pricing adjustment.

Aggrieved, the assessee filed objection before the learned DRP. The learned DRP issued directions to the Ld. AO/TPO for excluding one of the comparable and also allow the working capital adjustment. Pursuant to the direction of the learned DRP the learned TPO recomputed the adjustment to Rs.1,20,80,085/-. The assessee, being aggrieved with the above adjustment, has filed appeal before the Tribunal raising the grounds as reproduced above.

3. The sole addition in dispute is in respect of the transfer pricing adjustment to the International transaction of marketing support services.

3.1 The facts qua the issue in dispute are that the learned TPO, noted the agreement between the assessee and AE in respect of the following services and characterized the assessee as limited risk-taking service provider:

“BFWBO will provide Marketing support services and other similar auxiliary sales support services in respect of BFC products. BFWBO shall use its best effort to support BFC, identify and predict market trends, analyze customers needs, improve customer relation and facilities the information flow between BFC and its customers.”

3.2 The assessee used Transactional Net Margin Method (TNMM) and Operating Profit/Operating Cost (OP/OC) as the profit level indicator. The assessee chosen 19 companies as comparable with average margin of 5.32% using multiple year data. The assessee worked out own margin at 9.97% and submitted that the margin of the assessee being more than the comparables, international transaction was at arm's length.

3.3 The learned TPO accepted the TNMM method applied by the assessee for computing arms length price of the transaction. In the show cause notice issued, he used certain filters and made qualitative analysis of the comparable's proposed by the assessee and accepted only one comparable, namely, "M/s. Excellent Insurance Broking Service Ltd.", out of the 19 comparables selected by the assessee. In the show cause notice, the learned TPO proposed four (4) new comparables in addition to the one comparable out of the set of 19 comparables of the assessee. After taking into account submission of the assessee, the learned TPO considered following 3 comparables having average margin of 36.51% and computed the adjustment of Rs.1,91,30,582/-:

Sl. No.	Name	OP/OC
1.	<i>Basiz Fund Service</i>	46.75
2.	<i>Global Procurement Consultants Ltd.</i>	35.89
3.	<i>TSR Darashaw</i>	26.89
	<i>Average</i>	36.51%

3.4 The learned DRP noted that the comparable M/s Excellent Insurance Broking Service Ltd. though accepted by the learned TPO in show cause notice, however, omitted in the final computation.

3.5 The learned DRP considered the objections of the assessee challenging the use of current year data, various filters applied, working capital adjustment etc. On the issue of current year data versus multiple year data, the Ld. DRP, upheld the action of the learned TPO. The objection of the assessee against filters : (a) rejecting companies who service activity are less than 75% of the

total revenue; (b) use of RPT threshold of 25%; (c) turnover filter of Rs. 1 crore; (c) upper turnover filter/super profit; (e) rejecting comparable selling different accounting year, (f) rejecting companies with diminishing revenue/persistent losses etc., were rejected. The learned DRP, after considering submission of the assessee directed the learned TPO, to retain M/s global procurement consultant Ltd and M/s TSR DARASHAW Ltd. as comparable but directed to exclude M/s Basiz fund services Private Limited.

3.6 The learned DRP also rejected the request of the assessee for considering the comparables chosen by the assessee and directed the learned TPO to compute the adjustment as under:

“7.4 As per the agreement, the taxpayer is providing marketing support services and other similar auxiliary sales support services in respect of BFC products. BFWBO shall use its best efforts to support BFC, identify and predict market trends, analyze customers needs, improve customer relations and facilities the information flow between BFC and its customers. Since all of the following comparable companies are exclusively involved in providing cargo handling, courier activities, travel agency business and logistic business, therefore, this DRP agrees with the TPO that following companies are not functionally comparable, hence, he has rightly rejected the same.

S.No.	Name of the company	Major business activity
1 .	Delhi Assam Roadway Corp. Ltd.	Cargo handling
2.	Malabar Coast Marine Services P. Ltd.	Stevedoring activities
3.	On-Dot Couriers & Cargo Ltd.	Courier activities
4.	PL Shipping & Logistics Ltd.	Freight forwarding
5.	Prime Air Global Ltd.	Travel Management services
6.	Shree Raj Travels and Tours Ltd.	Travel and Tourism
7.	Sical Logistics Ltd.	Logistics Services
8.	Sindhu Cargo Services Ltd.	Logistics Services
9.	Crown Tours Ltd.	Travel Agency
10.	Overnite Express Ltd.	Courier Activities
11.	TVS Logistics Ltd.	Logistics services

Subject to the above observation, we are of the view that the other comparables which have been rejected by the TPO while applying various filters and on functionality are correct.

7.4 The taxpayer during the course of hearing has pointed out that while working out the margins there are some factual mistakes, in this regard, taxpayer is directed to provide all the necessary details of the financials with proper backup documents to the TPO. And TPO is directed to make the calculation a fresh, on the basis of financials data available and calculate the margins, as per the guidelines provided by the Safe harbour notification dated 18th September, 2013 relating to the items to be considered as operating expenses and operating income and make the calculations available to the taxpayer also.”

3.7 The learned DRP also directed the learned TPO to allow working capital adjustment while working out the average margins of the comparables.

3.8 Pursuant to the direction of the learned DRP, the learned TPO, given effect of the order of the learned DRP and computed the average margin of the comparables at 26.73 as under:

Sl. No.	Company Name	Adjusted PBIT/Cost (%)
1.	Global Procurement Consultants Ltd.	27.03
2.	TSR Darashaw	25.5
3.	Excellent Insurance Broking Services Ltd.	27.66
	Average	26.73

3.9 The learned TPO in view of the observation of the learned DRP in respect of M/s excellence insurance broking services Ltd, included the comparable in the final set of the comparables.

4. Before us, the learned counsel sought to exclude the 3 comparables chosen in the in the final assessment order . He submitted that if all the 3 comparables in the final list of the comparables chosen by the AO/TPO are excluded, then it will be a case of no comparables left. He submitted that in such circumstances, the matter may be required to send back to the

Ld. AO/TPO for considering the 18 comparables out of the 19 comparables selected by the assessee, for inclusion in the set of the comparables. The learned counsel also submitted that in assessment year 2008-09, the Tribunal directed the learned AO/TPO to retain following 5 comparables:

Sl. No.	Name of the Comparable Companies	OP/TC (%) after working capital adjustment
1.	Best Mulyankayan Consultants Ltd.	1.24
2.	ICRA Management Consulting Services India Pvt. Ltd.	-2.83
3.	IDC (India) Ltd.	13.02
4.	Indus Technical and Financial Consultants	12.07
5.	Technicom-Chemie (India) Ltd.	3.20
	Average	5.34%

4.1 The learned counsel submitted that if matter is remitted back to the Ld. AO/TPO then above 5 comparables may also be considered for inclusion.

4.2 In respect of the company **M/s Global Procurement Consultant Ltd.**, the learned counsel submitted that it was engaged in providing procurement services for various government organization and thus functionally dissimilar to the assessee. The learned counsel referred to page 4 to 24 of the annual report of the company and submitted that the company earns income by way of consultancy charges and the project undertaken includes procurement review, procurement advice and management, procurement governance, bid support services, performance review, valuation and Finance services, whereas the assessee is engaged into rendering of marketing support services,

which are nowhere similar to consultancy or engineering project where high-end technical advice/reports are provided.

4.3 The learned DR, on the other hand, relied on the finding of the learned DRP and submitted that the main services provided by the company are of document management services to government department and their project evaluation agencies. According to him, the procurement services being in the nature of business services, the company has been correctly selected as comparable.

4.4 We have heard the rival submission on the exclusion of the company sought by the assessee. There is no dispute on the activity of consultancy of procurement services carried out by the company. In our opinion, the consultancy related to procurement services and project review etc cannot be compared with the marketing support services carried out by the assessee. The company cannot be compared only on the ground that it is in the business of providing services. The company being functionally dissimilar, we direct the learned AO/TPO to exclude from the final set of the comparables.

5. In respect of **M/s TSR Darashaw Ltd.**, the learned counsel submitted that the company is engaged in the services relating to registrar and transfer agent activities, record management activity and payroll and trust fund activities and thus being functionally dissimilar to the assessee, the company need to be excluded. On the other hand, the learned DR relied on the finding of the learned DRP.

5.1 We have heard the submission of the parties on the exclusion of the company. On the perusal of the schedule forming part of the financial statement for year ending 31/03/2009,

available on Page 100 of the paper book filed by the assessee, we find that income has been shown from share registry and transfer services, depository services, record management payroll and provided fund management, corporate and fixed deposit management etc. The services rendered by the company are entirely different nature as compared to the services of marketing support rendered by the assessee to its AE. In our opinion, the company is functionally dissimilar to the assessee, accordingly we direct the Ld. AO/TPO to exclude the company from the final set of the comparables.

6. In respect of **M/s Excellent Insurance Broking Services Ltd.**, the learned counsel submitted that this company is one of the company, selected by the assessee as a comparable and in the show cause notice, the learned TPO accepted the company as comparable. However, in the final set of the comparable, the learned TPO did not include this company as comparable. Thus according to him, this company was rejected finally by the learned TPO. He also submitted that learned DRP though mentioned the fact of omission of the company as comparable, however, no direction has been issued by the Ld. DRP to include this company into the final set of comparables and therefore the learned TPO/AO is not justified in including this company while giving effect to the direction of the learned DRP.

The Ld. DR on the other hand submitted that the learned DRP noted the fact of the omission of the company and thus this being a apparent mistake, the learned TPO selected the company in final set of the comparables, while giving effect to the direction of the learned DRP. According to him, the action of the learned TPO is justified.

6.1 We have heard the rival submission of the parties on the issue of exclusion of the company. On perusal of the order of the learned DRP, we find that the DRP has the mentioned that the comparable was missed from including in the proposed order of the learned TPO, though it was accepted as a comparable by him. We find from the order of the learned DRP that no express direction has been given to retain or include this comparable in the final set of the comparable. Accordingly, we accept the contention of the Ld. Counsel that learned TPO was not justified in including the company in the final set of comparables, without any specific direction of the learned DRP.

7. We find that all the three companies selected for comparison in the final assessment order have been excluded leaving no comparable. In the circumstances, fresh search of the comparables is required. The learned counsel of the assessee has submitted that the 18 comparables out of the 19 comparable selected by the assessee might be considered afresh for comparison. The learned counsel has also submitted that 5 comparables retained by the Tribunal in the case of the assessee for assessment year 2008-09 may also be considered for inclusion as comparables. On the other hand, the learned DR has submitted that the comparable M/s Excellent Insurance Broking Service Ltd. may also be considered afresh as same was selected by the assessee and accepted by the learned TPO in first round of the proceedings.

8. We have heard submission of the both the parties on the issue of making a fresh search of the comparable. We are of the opinion that all the 19 companies selected by the assessee, including the company M/s Excellent Insurance Broking Service

Ltd. should be considered afresh by the learned TPO along with 5 comparables which have been retained by the Tribunal in the case of the assessee for assessment year 2008-09, in the light of the filters applied by the TPO. We further direct that, in case, no companies found to be comparable out of the 19 companies and 5 companies are mentioned respectively above, the learned TPO may carry out a fresh search on the database applying the filters already upheld by the learned DRP.

9. The grounds of the appeal of the assessee are accordingly allowed for statistical purposes.

10. In the result, the appeal of the assessee is allowed for statistical purposes.

Order is pronounced in the open court on 12th April, 2019.

Sd/-
[H.S. SIDHU]
JUDICIAL MEMBER

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

Dated: 12th 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