

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

IT(TP)A Nos. 323/Bang/2017 & 449/Bang/2016
Assessment years : 2012-13 & 2011-12

Unibic Foods India Pvt. Ltd., (formerly Unibic Biscuits India Pvt. Ltd.), No.1134, 5 th Floor, Shreeram Nivas, 100 Ft. Road, HAL 2 nd Stage, Indira Nagar, Bangalore – 560 037. PAN: AAACU 6928L	Vs.	The Deputy Commissioner of Income Tax, Circle 7(1)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Ajay Rotti, CA
Respondent by	:	Shri C.H. Sundar Rao, CIT(DR-I), ITAT, Bangalore.

Date of hearing	:	22.07.2019
Date of Pronouncement	:	31.07.2019

ORDER

Per N V Vasudevan, Vice President

Both these appeals by the assessee are directed against the final orders of assessment dated 27.01.2016 and 26.12.2016 passed by the DCIT, Circle 7(1)(1), Bangalore passed u/s. 143(3) r.w.s. 144C(13) of the Income-Tax Act, 1961 [“the Act”] in relation to assessment years 2011-12 and 2012-13 respectively. Since common issues arising out of identical facts and circumstances are involved in both these appeals, they were heard together. We deem it appropriate to pass a common order.

IT(TP)A No.449/Bang/2016 (AY 2011-12)

2. The grounds which were argued and pressed for adjudication in this appeal is ground No.2 with regard to addition of Rs.9,91,86,369 being a Transfer Pricing (TP) adjustment in relation to an alleged international of Advertisement, Marketing & Sales Promotion (AMP) expenses incurred by the assessee. The second issue raised in Gr.No.3 is with regard to correctness of determination of Arm's Length Price (ALP) in respect of a trading transaction of sale of cookies by the assessee to its Associated Enterprise (AE) of a sum of Rs.39,99,056 consequent to determination of ALP.

3. The factual details with regard to the aforesaid two issues are that the assessee is a company engaged in the business of manufacturing of wide variety of products including biscuits and related bakery products and confectionaries. During the previous year, the assessee had entered into a transaction of sale of cookies manufactured by it in India to Unibic Australia which was an Associated Enterprise (AE). Since the transaction of sale of cookies was an international transaction, the price at which the Assessee sells cookies to its AE has to be at Arm's Length as laid down under the provisions of Sec.92 of the Act. In terms of Sec.92CA of the Act, the Assessing Officer (AO) referred to the Transfer Pricing Officer (TPO) the question of determination of ALP in respect of the aforesaid international transaction. The TPO called upon the assessee to file TP study and report in Form 3CEB. The assessee did not file the same and also failed to provide required details. Since the proceedings of determination of ALP was getting barred by limitation, the TPO proceeded to determine the ALP on sale of cookies as follows:-

“6 Taxpayer has not searched for any comparable and has not maintained its analysis of arms length nature of its international transactions pertaining to sale of cookies of Rs. 1,38,82,560/-. A fresh search was conducted for FY 2010-11 by the undersigned using keywords bakery and biscuits on Capitaline Database. The following filters were used:

- A. Companies with incomplete or no data in FY 2010-11 were rejected
 - B. Functionally different companies were rejected
 - C. An upper turnover filter of Rs. 400 Crs was placed, after making an industry analysis
 - D. A lower turnover filter of 1 Crs was placed
7. Companies found by the undersigned are as under:

Sl	Company name	Op. Sales (OS) in Cr	Op. Cost (OC) in Cr	Op. Profit (OP) in Cr	OP/OC
1	Anmol Biscuits Ltd	258.12	245.56	12.56	5.11%
2	Cremica Agro Foods Ltd	16.81	16.29	0.52	3.19%
3	International Bakery Products Ltd	13.79	13.76	0.03	0.22%
4	Shah Foods Ltd	2.19	2.17	0.02	0.92%
5	J B Mangharam Foods Pvt Ltd	21.18	20.27	0.91	4.49%
	MEAN MARGIN				2.79%

8 Adjustment proposed on sale of cookies to AE is as under:

Sales to AE	Rs. 1,38,82,560/-
Equivalent amount of cost	Rs. 1,73,96,260/-
Arms length price of sales @ 102.79% of cost	Rs. 1,78,81,616/-
Adjustment	Rs. 39,99,056/-

4. The TPO also noticed that there was an agreement between the assessee and Unibic Licensing Co. Pvt. Ltd., an Australian company, whereby the assessee was granted license to exclusively use the trademarks and associated property in relation to product viz., Chocolate Chip Biscuits in the territory of India. The rights so granted was a right to use the name, image and/or likeness of Sir Donald Bradman and right to use the name or logo of the foundation. The TPO also noticed that the assessee had incurred Rs.10,11,83,218 on account of AMP expenses as per following details:-

Sales travelling	Rs. 1,16,28,911/-
Intensive Market Coverage	Rs. 30,10,510/-
Advertisement	Rs. 93,62,626/-
Display	Rs. 57,56,680/-
Discounts & trade schemes	Rs.6,38,89,612/-
Inshop promotion	Rs. 15,10,356/-
Sampling	Rs. 17,11,432/-
Sales Promotion	Rs. 43,13,091/-
Total	Rs.10,11,83,218/-
AMP as percentage of net sales	18.22%

5. As can be seen from the above table, the percentage of AMP expenses to Net Sales was 18.22%. We have already seen that the assessee did not furnish any details with regard to the international transaction for the purpose of determining the ALP. In the course of proceedings before the TPO, he called upon the assessee to explain the reasons for incurring such huge AMP expenses and by doing to the assessee was indirectly promoting the brand of AE. In the TPO's order, there is a reference to the assessee increasing the brand value of Unibic licensing Co.Ltd., which belonged to AE and thereby increasing the goodwill of the AE. The TPO was of the view that incurring of such AMP expenses was an international transaction and the ALP in respect of such

transaction had to be determined u/s. 92 of the Act. Thereafter, the TPO adopted Bright Line test for determining the ALP. The Bright Line test is a test by which similar AMP expenses incurred by comparable companies are compared with the expenses incurred by the Assessee and to the extent expenses incurred by assessee are excessive, the same is considered as promoting the goodwill of the AE and added to the total income as adjustment on account of determination of ALP. TPO accordingly suggested an addition of RS.9,91,86,369 by applying the Bright Line test as follows:-

S1	Company name	Net sales (Cr)	AMP expenses (Cr)	% of AMP to sales
1	Anmol Biscuits Ltd	258.12	4.85	1.88%
2	Cre mica Agro Foods Ltd	16.81	0	0
3	International Bakery Products Ltd	13.79	0	0
4	Shah Foods Ltd	2.19	0	0
5	J B Mangharam Foods Pvt Ltd	21.18	0	0
	MEAN MARGIN		0.36%	

11.4 Therefore adjustments to be made is calculated as under:

AMP expenses borne by taxpayer	Rs. 10,11,83,218/-
Net sales of taxpayer	Rs. 55,46,80,311/-
AMP expenses at arms length @ 0.36% of net sales	Rs. 19,96,849/-
Adjustment on AMP expenditure	Rs. 9,91,86,369/-

12 Summary of adjustments made is as under:

Adjustment on sale of cookies to AE	Rs. 39,99,056/-
Adjustment on AMP Expenditure incurred on behalf of AE	Rs. 9,91,86,369/-
TOTAL ADJUSTMENTS	Rs. 10,31,85,425/-

6. Against the aforesaid two additions made by the AO on the order of the TPO in the draft order of assessment, the assessee preferred

objections before the Dispute Resolution Panel (DRP). Before the DRP, the assessee filed a TP report insofar as it relates to the international transactions of sale of cookies of Unibic Australia. The assessee submitted that similar transactions of sale of cookies were carried out by the assessee with unrelated parties. The Assessee claimed that in respect of sale of cookies to Unibic Australia, the net margin on cost of goods sold was 98.35% whereas exports to unrelated parties profit margin was only 8.44%. Therefore, the sale of cookies at greater margin to related parties should not be viewed adversely as tax base of the country does not suffer and more profits are earned on related party transactions. It was also submitted that Transactional Net Margin Method (TNMM) was used for the purpose of comparison and the margins in TNMN in respect of sale transaction between related party and unrelated party was compared and it was suggested that the transaction with the related party yielded more profits and therefore there should not be any adjustment on account of determination of ALP. Computation of margin filed by the Assessee before DRP is given as Annexure-1 to this order. The AP analysis done was filed on 20.4.2015 before the DRP and the same is available at pages 158 to 223 of assessee's PB. Despite such submissions, the DRP confirmed the order of AO which incorporate the directions of TPO observing as follows:-

“2.1 The assessee has objected to the TP adjustment of Rs.39,99,056/- on its sales to AE. The taxpayer did not furnish any document to the TPO though requested for the same a number of times. The TPO has recorded a date wise summary of non-compliance in his order at Pare 3. In view of non-compliance by the assessee the TPO proceeded to complete TP analysis on the basis of material on record. As a result of fresh search the TPO selected 5 comparables as under:

Anmol Biscuits Ltd.
Cremica Agro Foods Ltd.
International Bakery Products Ltd.

Shah Foods Ltd.
JB Mangharam Foods Pvt. Ltd.

The PLI (OP/OC) of these comparables was worked out at 2.79%. Consequently, the TPO worked out the ALP on sales of Rs.138,82,560/- to AE at Rs.178,81,616/-. Thus, TP adjustment of Rs.39,99,056/- was made.

2.2 Thus it is found that the TPO has followed due procedure to conduct TP studies for benchmarking in the sales segment to the AE as assessee had not carried out any TP documentation. The action of TPO is considered justified and the adjustment is reasonable which is upheld. The objection of the assessee is considered without merit and rejected.”

7. In respect of incurring of AMP expenses, the DRP confirmed the order of TPO observing as follows:-

“3. The assessee has raised another objection for treating AMP expenditure as International Transaction :

The assessee in his submission (objection) has basically challenged the action of TPO to treat AMP expenditure incurred by assessee as international transaction and make TP adjustment on the same.

3.1 The TPO has discussed the issue in detail from Page 4 to Page 10 of his order. The Trademark "Unibic" is not owned by assessee. Assessee pays royalty to the AE Unibic Licencing Company Pty. Ltd. as per the trademark agreement. Payment of royalty for trademark is an expenditure by assessee towards the brand. Apart from this the taxpayer has incurred an expenses of Rs.10,11,83,218/-towards 'AMP'. The TPO has observed that the taxpayer is a loss making company for past few years. The huge AMP expenses is 18.22% of the total sales of Rs.55.46 Crores of the assessee. Though part of AMP expenses will be useful to increase sales, major part of these expenses is used towards building on brand value of `Unibic' for which taxpayer already paying royalty to its AE. On this premises the TPO has analysed the various aspects in his order justifying calculation of ALP of AMP expenses incurred at Rs.10,11,83,218/-. For calculation of

ALP the TPO has applied Bright Lime concept and has justified the same quoting the favourable decision of Hon'ble ITAT Chennai in the case of Ascendas (India) Pvt. Ltd. in ITA No. 1736/Mds/2011. The TPO has calculated the percentage of AMP expenses to sells for the comparables and arrived at the mean margin of 0.36%. Accordingly, the AMP expenses adjustment has been worked out at Rs.9,91,86,369/-.

3.2 We have considered the submission / objection of the assessee very carefully. In view of Detailed discussion and justification given by TPO, the approach of the TPO cannot be faulted with. Therefore, the objection of the assessee is rejected.”

8. Aggrieved by the aforesaid addition sustained by the DRP, the assessee has filed the present appeal before the Tribunal. We have heard the rival submissions. It is clear from a reading of the order of DRP and the submissions made by the assessee before the DRP vide letter dated 17.4.2015 (copy of which is at page 158 of PB) that the TP analysis filed by the assessee before the DRP has not been considered. The reasons for not filing the TP analysis before the TPO was that the consultant could not complete the assignment in due time. In our opinion, the DRP ought to have considered the TP study filed by the assessee before it and considered the objections of assessee. We are also of the view that in the light of the fact that net margins on cost of goods sold to unrelated parties being less than the net margins on sale of related parties, the transactions with AE has to regarded as at arm's length. In other words, the internal TNMM adopted by the assessee would show that the price charged in the international transaction on sale of cookies to Unibic, Australia was at arm's length. Since the TPO did not have an occasion to examine this report, we deem it fit and appropriate to set aside the order of the Id. DRP on this issue and remand the question of determination of ALP in respect of transaction on sale of cookies to Unibic, Australia for fresh consideration by the AO/TPO keeping in mind the observations made in this order and also

taking note of the TP study and other details filed by the assessee and referred to in this order.

9. As far as transaction of incurring AMP expenses is concerned, it is clear from a reading of the TPO's order that the expenses were considered as promoting brand value of Unibic. The Id. counsel for the assessee brought to our notice that the brand 'Unibic' was never owned by any AE, but was owned by the assessee. A copy of the computer generated trademarks certificate report from Govt. of India, Ministry of Commerce & Industry, Department of Industrial Policy & Promotion, Controller of Patents, Designs & Trademarks Website, was filed before us to demonstrate the fact that the trademark 'Unibic' is owned by assessee and application for grant of registration of this trademark was made by the assessee as early as on 23.09.2009. In our view, this fact is very vital. If the trademark is owned by assessee, AMP expenses cannot be disallowed consequent to determination of ALP because those expenses would be in the nature of business expenses of assessee. The Id. counsel for the assessee also filed before us sample advertisements to demonstrate that whatever advertisements were carried out in India were India-specific and by no stretch of imagination said to promote the brand of owned by the AE. It was also submitted before us that licensing agreement whereby Unibic Licencing Co. P. Ltd., Australia dated 21.8.2007 granted licence to the assessee was a trademark license to use the trademark 'Bradman' and this is clear from the Schedule-I of Agreement which reads as follows:-

SCHEDULE I

<i>S. No.</i>	<i>Trade Mark</i>	<i>Class.</i>	<i>Registration No. & Date</i>	<i>Goods</i>
<i>I.</i>	BRADMAN	30	1316731 October 21, 2004	Goods in Class 30

2.	DON BRADMAN Signature	30	1316727 October 21, 2004	Goods in Class 30
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10. No product under this brandname was ever sold during the previous year and therefore the conclusions of the TPO based on licensing agreement dated 21.8.2007 are unsustainable.

11. All the submissions made above are not borne out of the record of AO/TPO/DRP. In these circumstances, we deem it fit and proper to remand this issue also to the TPO/AO for fresh consideration in the light of submissions made by the assessee before us. The TPO will determine the ALP afresh keeping in mind the submissions as made above. We make it clear that in the event of assessee being held to be the owner of Unibic trademark, there can be no addition on account of any deemed international transaction of incurring of AMP expenses. We also make it clear that the issue whether incurring of AMP expenses can be considered as international transaction in the facts and circumstances of the present case is left open for consideration, if the adjudication of that issue becomes necessary. With these observations, we allow the appeal of assessee in IT(TP)A No.449/Bang/2016 for AY 2011-12 for statistical purposes.

IT(TP)A No.323/Bang/2017 (AY 2012-13)

12. The only issue for consideration in this appeal is with regard to AMP expenses. The facts and circumstances of the case in AY 2012-13 are identical to the facts and circumstances of the case in AY 2011-12 and orders of the revenue authorities are also identical. We therefore deem it fit and appropriate to remit this issue of determination of ALP for AY 2012-13 also for fresh consideration by the TPO/AO in the light of directions contained in the order for AY 2011-12. Accordingly, this appeal is treated as allowed for statistical purposes.

13. In the result, both the appeals of assessee are allowed for statistical purposes.

Pronounced in the open court on this 31st day of July, 2019.

Sd/-

(JASON P. BOAZ)
Accountant Member

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 31st July, 2019.
/ Desai Smurthy /

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.

Annexure – I

Net Margin calculation for the Financial Year 2010-11

Particulars	Domestic	Exports to Associated Enterprise	Exports to Unrelated Parties	Total Exports	Total
Sales - (A)	47,13,01,954	1,38,82,560	5,87,55,133	7,26,37,693	54,39,39,647
Materials Cost	30,88,57,287	45,10,335	3,85,02,590	4,30,12,924	35,18,70,211
Manufacturing cost	2,39,69,709	5,18,524	67,56,751	72,75,275	3,12,44,984
Increase/Decrease in Stock	(1,07,34,995)				(1,07,34,995)
Cenvat on Despatches	2,29,89,311				2,29,89,311
Total Variable cost - (B)	34,50,81,312	50,28,858	4,52,59,341	5,02,88,199	39,53,69,511
Gross Profit (C) = (A) - (B)	12,62,20,641	88,53,701	1,34,95,793	2,23,49,494	14,85,70,135
Gross Profit / Sales	26.8%	63.8%	23.0%	30.8%	27.3%
Administration Overheads	2,85,33,762	8,40,484	35,57,178	43,97,662	3,29,31,424
Exchange variance		(9,69,159)	(41,01,768)	(50,70,927)	(50,70,927)
Personal expenses	5,77,24,461	2,01,088	8,51,065	10,52,153	5,87,76,614
Selling and Distribution expenses	16,48,57,656	7,19,312	36,30,168	43,49,480	16,92,07,136
Financial Charges	1,38,04,398	4,06,619	17,20,933	21,27,553	1,59,31,951
Depreciation	2,75,05,214	8,10,187	34,28,954	42,39,141	3,17,44,355
Loss on Sale of Asset	11,165				11,165
Miscellaneous income	(14,33,299)	(38,540)	(1,63,113)	(2,01,653)	(16,34,952)
Total Administration & other cost - (D)	29,10,03,358	19,69,991	89,23,416	1,08,93,408	30,18,96,766
Total cost of goods sold (E) = (B) +(D)	63,60,84,671	69,98,850	5,41,82,757	6,11,81,607	69,72,66,277
NET PROFIT /(LOSS)	(16,47,82,717)	68,83,710	45,72,376	1,14,56,086	(15,33,26,631)
Net Margin on Cost of Goods Sold	-25.90%	98.35%	8.44%	18.72%	-22%