

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

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.5989/Del/2016
Assessment Year: 2012-13

Bridal Jewellery Mfg. Co.,
2705, Basement, Bank Street,
Karol Bagh,
New Delhi.

Vs DCIT,
Circle-1,
Noida.

PAN: AADFB0557C

(Appellant)

(Respondent)

Assessee by	:	Ms Ananya Kapoor, Advocate
Revenue by	:	Shri Subha Kant Sahu, Sr. DR
Date of Hearing	:	09.10.2019
Date of Pronouncement	:	17.10.2019

ORDER

PER R.K. PANDA, AM:

The appeal filed by the assessee is directed against the order passed u/s 144C r.w.s. 144(3)/92CA of the IT Act, 1961 relating to assessment year 2012-13.

2. Facts of the case, in brief, are that the assessee is a company engaged in manufacturing and export of gold jewellery. The unit is making 100% exports and there is no local sale. It filed its return of income on 27.09.2012 declaring total income of Rs.82,43,327/-. Since the assessee has entered into international

transactions with associated enterprise M/s Siddhartha Jewellery (UK) Ltd., the Assessing Officer made reference to the TPO for determining the ALP of the international transactions. The Transfer Pricing Officer, during TP assessment proceedings, observed that the assessee has entered into the following international transactions:-

S.No.	Name of the associated enterprise	Nature of Transaction	Amount Received (INR)
1.	M/s Siddhartha Jewellery (UK) Ltd.	Export of Jewellery	948,567,232

3. The TPO noted that the assessee has provided interest free loans to its AE of GBP 2 lac in F.Y. 2004-05 and that loan is still pending. He, therefore, asked the company to explain the reasons for interest free loan granted to the AE. Rejecting the various explanations given by the assessee and relying on various decisions, the TPO proposed an adjustment of Rs.11,66,447/-. The TPO further noted that the assessee has realized the export proceeds after a period of 60 days. On being questioned by the Assessing Officer, it was explained that the export transaction is not loan transaction and the RBI guidelines allow remittance in 180 days and in case of SEZ units in 360 days. It was explained that the contract with AE is for 60 to 120 days of credit i.e., average 90 days. Further, no credit is given for advance payment received and payment received before due date. It was further submitted that if for calculation of overdue amount 90 days average sundry debtors are taken, no monthly outstanding amount is overdue and, therefore, no adjustment is called for.

3.1 However, the TPO was not satisfied with the arguments advanced by the assessee and proposed an adjustment of Rs.81,14,878/- being interest on unrealized export proceeds after considering 60 days loan credit facility given for interest free payment as acceptable and any delay in payment thereafter is chargeable to interest @12.65% per annum. The Assessing Officer accordingly made addition of the same in the draft order. The assessee approached the DRP who restricted the disallowance on account of interest on grant of loan to AE to AE at Rs.7,83,809/-. They restricted the interest on unrealized export proceeds to Rs.30,98,408/- as against Rs.81,14,878/- determined by the Assessing Officer.

4. Aggrieved with such order of the A.O./TPO/DRP, the assessee is in appeal before the Tribunal raising the following grounds:-

“1. That the assessment order U/s 143(3) r.w.s. 144C passed by the Assessing Officer ('AO') and addition/ disallowance made by the AO are illegal, bad in law and without jurisdiction.

2. That the additions/ disallowances made are illegal, unjust, highly excessive and are not based on any material on record. The total income of the Appellant has been wrongly and illegally computed by the Assessing Officer at Rs. 1,21,35,540/- as against income declared at Rs. 82,43,327/- thereby making total addition/ disallowance of Rs. 38,92,217/-.

3. That the reference made by the AO to TPO suffers from jurisdictional error as the AO has not recorded any reasons in the draft assessment order based on which he reached the conclusion that it was 'necessary or expedient' to refer the matter to the Transfer Pricing Officer ('TPO') for computation of the arm's length price ('ALP'), as is required under section 92CA(1) of the Income Tax Act, 1961('Act').

4. Regarding the addition/ disallowance of Rs.7,93,809/- on account of interest on grant of loan to AE

4.1 That the TPO/AO/DRP erred in view of facts and circumstances of case and in law in treating the loan to Associated Enterprise ('AEs) AE as a separate international transaction not realizing that the business of the appellant is heavily dependent on AE therefore, loan transaction is part and parcel of international transaction on account of export sale.

4.2 That the TPO/AO/DRP in view of facts and circumstances of the case has erred in law and on facts in attributing notional interest on loan to AE

4.3 That the TPO/AO/DRP erred in view of facts and circumstances of case and in law and on facts in not appreciating the underlying functional assets and risk analysis of the transaction of loan to AE

4.4 That the TPO/AO erred in facts and circumstances of case and in law in not appreciating that the loan is advanced on account of commercial expediency. The DRP erred on facts and in law in disregarding the claim of the appellant on the ground that appellant has failed to substantiate the "Commercial Expediency" of the transaction.

4.5 That the TPO/AO/DRP erred in facts and circumstances of case and in law in disregarding the agreement between the appellant and AE with respect to the fact that consideration towards loan advanced shall be embedded in the sale price of jewellery and no separate consideration shall be charged for it.

4.6 That the TPO/AO/DRP erred in law and on facts in not appreciating that interest on loan advanced embedded in sale price is at arm's length being within permissible +/- 5% range as provided in second proviso to sec 92C(2)

4.7 Without Prejudice, the AO/TPO erred in travelling beyond the directions of DRP and calculating the interest on loan with a new formula ignoring the clear direction of the DRP that GBP LIBOR rate should be applied, which is 4% + 0.50 Libor i.e. 4.50% instead of 4.83%, even 4% above Libor is also excessive.

4.8 That the AO/ TPO has failed to consider and appreciate that Bridal Jewellery was able to survive because of AE only. It has been never been the intention of the Department / Govt, of India to penalise the people who are moving forward for establishing offices/ businesses abroad to support manufacturing activity in India, give employment, bring foreign exchange, pay tax dues regularly and promptly as and when due.

This is the established fact that Bridal Jewellery was able to survive because of the timely formation of the A.E. : Loan of UKP/GBP 200000 was given to AE in foreign currency from EEFC a/c (which is having surplus fund in shape of USD) amounting to Rs 1,66,77,107/- The loan given is in foreign currency & returned by AE in june 2012 in foreign exchange. Only due to the AE, that

the assessee has been able to source regular orders for export and is able to survive at a time when other units are becoming sick.

5. Regarding the addition/ disallowance of Rs. 30,98,408 /- on account of interest on unrealized export proceeds

(There is no such case of Non Realization, all Export Invoices are realized, The TPO is not correct)

5.1 That TPO/ AO grossly erred in law and on facts, in attributing notional interest on unrealized export proceeds

5.2 That the TPO/AO erred in disregarding the fact that export proceeds are realized with the statutorily permitted time limits as prescribed by RBI.

5.3 As per Exchange Control Declaration Form (GR) as prescribed by Reserve Bank Of India and declaration under FEMA on every export shipment, The firm is declaring that full Invoice value shall be received for the Invoice within six months. The RBI circular No. RBI/2014-15/35 dated 01.04.2002 states that units in SEZ can repatriate full value of invoice to India within 12 months from the date of Export.

The Firm's Export proceeds are realised well below 100 days, Hence the Assessing Officers view that there is non- realization of Export proceeds, itself is wrong. Even in his opening remarks the TPO states that total receivables is Rs.1547.18 lacs against total sales of Rs. 9485.67 lacs represents 59 days average and no export invoice is outstanding more than six months, so the stand of TPO of NON REALIZATION is ILLEGAL.

5.4 That the TPO/AO/DRP has kept 60 days, we failed to understand from where 60 days are arrived.

5.5 As per contract with AE 60-120 days for repayment, hence 90 days average credit is permitted to AE as per contract and accordingly the export shipment were priced.

We failed to understand 60 days period taken by TPO for realization of Export proceeds. He insisted us to make charts and provides information based on 60 days otherwise he will do ex-partie.

That the approach, adopted by the TPO in determining arm's length price in making the adjustment of Rs. 81,14,878 /- in respect of interest on outstanding receivables from the AE's is not correct, since the interest cost has to be considered along with the cost of goods and hence such adjustment is uncalled for. Further this comes within the purview of five percent variation to associated enterprise. (Total Exports to AE is Rs.9485.67 Lacs, 5% variation comes to Rs.474.00 Lacs).

5.6 That the TPO/AO/DRP erred in facts and circumstances of case and in law in not appreciating that interest on outstanding receivables is not charged on account of commercial expediency. Such receivable are an outcome of an international transaction and hence are only incidental in nature.

5.7 That the TPO/AO/DRP erred in facts and circumstances of case and in law in disregarding the fact that consideration towards delay in realization of export proceeds is embedded in the sale price of jewellery and as agreed between parties no separate consideration shall be charged for it. The pricing with AE includes interest element up to 90 days.

5.8 That the TPO has failed to appreciate and consider that as per the contract with the A.E. minimum credit period allowed is 60-120 days (Avg. 90 days). Practically, the export realizations take much higher time period than 60 days and in some cases it may go beyond 6 months. The market conditions have not been kept in mind while developing and applying parameters.

5.9 The TPO/AO/DRP failed to consider the payments received before 60 days and also advance payments received from AE.

5.10 TPO considered 60 days for Export invoices, Then the principle of average 60 days must be considered, giving benefit of advance payments and payments received before 60 days. On such principle the benefit of Notional Interest on account of advance payments & invoices where payment received before 60 days comes to Rs. 16,95,138/- and notional interest on receipts beyond 60 days comes to Rs.19,24,477/-. Hence Net Interest of Rs. 2,29,339/- may be charged upon. Interest has been calculated by applying 3% Libor rate.

5.11 That the interest on outstanding receivables added/ adjusted by TPO/AO is exorbitant and totally misleading. Avg. sundry debtors for 60 days during F.Y. 2011-12 amount to Rs.15.59 Crs. (94.85 cr* 60/365). Balance outstanding from A.E. at the end of month April 2011(Rs. 14.77 cr.) is less than avg. sundry debtors of 60 days (i.e. Rs 15.59 cr. as per calculation above). Since there is no overdue amount above avg. 60 days sundry debtors, no interest is attracted. Further, balance outstanding from A.E. at the end of month May 2011 (Rs. 15.89 cr.) is in excess by Rs 3.01 lacs vis-a-vis 60 days avg. sundry debtors (Rs. 15.59 cr. as shown above). Hence interest of Rs. 7521 (as per calculation sheet enclosed) may be attracted & so on.

Total interest on the basis of 60 days avg. sundry debtors on monthly outstanding basis comes to Rs.246108/-. without prejudice the same may be charged upon.

5.12 That the TPO/AO/DRP erred in law and on facts in not appreciating that interest on outstanding receivables embedded in sale price is at arm s

length being within permissible +/-5% range as provided in second proviso to sec 92C(2)

5.13 That the AO/TPO/DRP erred in arbitrarily taken a period of 60 days. The same is illegal without any basis.

5.14 That the AO/TPO/DRP erred in not giving the assessee the benefit of averaging.

5.15 Without prejudice, the interest rate charged as directed by DRP should be 4.50%, instead of 4.83% (Libor + 4%). However even 4% rate is also excessive.

6. Without prejudice, the transactions are within the permissible limit of 5% as the alleged variation on account of extended credit period beyond 60 days is hardly significant considering value of export to AE and alleged interest from AE is hardly significant considering the value of exports to AE. Hence no addition is called for.

7. That without prejudice TPO/AO/DRP has failed to consider the advance amount received from AE. In any case, same should have been considered for working out the said disallowance and benefit for same should have been given to Assessee.

8. The TPO/AO has erred in not providing adequate opportunity of hearing to the Appellant to place the details on record to substantiate its claim before passing the order in pursuance to the directions of DRP.

9. The additions made and the observations made are unjust, unlawful and based on mere surmises and conjunctures. The additions made cannot be justified by any material on record and also excessive.

10. The explanation given in the evidence produced, material placed that has been made available on record has not been properly considered and judicially interpreted and the same do not justify the additions/ allowances made.

11. That interest U/s 234A, 234B and 234C of the Income Tax Act, 1961 has been wrongly and illegally charged and has been wrongly worked out.

12. The AO has erred in initiation of proceedings u/s 271(1)(c) of the Act.

The above grounds are without prejudice to each other.”

5. The ld. counsel for the assessee, at the outset, did not press ground of appeal No.4 for which the ld. DR has no objection. Accordingly ground of appeal No.4 is dismissed as not pressed.

6. So far as ground of appeal No.5 is concerned, the ld. counsel submitted that identical issued had come up before the Tribunal in assessee's own case for assessment year 2011-12 and the Tribunal, vide ITA No.873/Del/2016 by the Revenue and ITA No.804/Del/2016 by the assessee, order dated 28.02.2019, for assessment year 2011-12, has decided the issue in favour of the assessee. She accordingly submitted that in the light of the decision of the Tribunal in assessee's own case for the immediately preceding assessment year, suitable directions may be given to the TPO for determination of the TP adjustment of interest on receivables.

7. The ld. DR, on the other hand, while supporting the order of the A.O./TPO/DRP, fairly conceded that identical issue has been decided by the Tribunal in assessee's own case and the matter has been restored to the file of the TPO for computation of interest on receivables.

8. We have considered the rival arguments made by both the sides and perused the orders of the A.O./TPO/DRP and the paper book filed on behalf of the assessee. We have also gone through the various decisions relied on by the ld. counsel for the assessee in the paper book. We find the Assessing Officer, in the instant case, on the basis of the report of the TPO, made addition of Rs.81,14,875/-

being interest on unrealized export proceeds @ 12.65 per annum when the outstanding was received beyond a period of 60 days from the date of invoice. We find, the DRP restricted such disallowance to Rs.30,98,408/-. We find identical issue had come up before the Tribunal in assessee's own case for assessment year 2011-12. We find the Tribunal, after considering the arguments made by both the sides has held that the period of 90 days credit is reasonable in the trade of the assessee and accordingly it was restored to the file of the A.O./TPO to compute the transfer pricing adjustment of receivables having delay in receipt of payment of more than 90 days. The relevant portion of the order of the Tribunal reads as under:-

“20. As far as the issue of request of the Ld. Counsel for allowing credit of 90 days is concerned, we find that this period of 60 days adopted by the Ld. TPO or 90 days requested by the assessee depend on the prevalent business practice in the trade. The Ld. Counsel has pointed out before us that in assessment year 2015- 16 the Ld. TPO himself as considered the receivables beyond the period of 90 days for the purpose of transfer pricing adjustment. We have verified this fact from the order of the Ld. TPO for assessment year 2015-16 available on page 254 to 277 of the paper book. We find from the Annexure-1 to the order of the TPO that receivables beyond 90 days have been considered for transfer pricing adjustment. In view of the rule of consistency, the period of 90 days credit is found to be reasonable in the trade of the assessee and accordingly we direct the Ld.AO/TPO to compute the transfer pricing adjustment for receivables having delay in receipt of payment more than 90 days. Accordingly the ground of the appeal raised by the assessee in respect of transfer pricing adjustment for interest on receivables are partly allowed for statistical purposes.”

9. Respectfully following the decision of the coordinate Bench of the Tribunal in assessee's own case, we restore the issue to the file of A.O./TPO to compute the TP adjustment for receivables having delay in receipt of payment of

more than 90 days. The ground raised by the assessee is accordingly partly allowed for statistical purposes.

10. The other grounds were not argued by the ld. counsel for the assessee for which they are dismissed.

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

The decision was pronounced in the open court on 17.10.2019.

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 17th October, 2019

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Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi