

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.422/PUN/2017
निर्धारण वर्ष / Assessment Year : 2012-13

Rosemount Tank Gauging India Pvt. Ltd., 5 th Floor, Plot No.23, Rajiv Gandhi Infotech Park, Phase-II, Hinjewadi, Pune – 411 057 PAN : AADCS9297H	Vs.	DCIT, Circle-5 Pune
Appellant		Respondent

Assessee by Shri Aliasger Rampurwala &
Shri Pratik Shah
Revenue by Shri T. Vijaya Bhaskar Reddy
Date of hearing 05-12-2019
Date of pronouncement 09-12-2019

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee emanates from the final assessment order dated 16-12-2016 passed by the Assessing Officer (AO) u/s.143(3) r.w.s.144C(13) of the Income-tax Act, 1961 (hereinafter called 'the Act') in relation to the assessment year 2012-13.

2. The assessee has filed revised grounds, which have not been objected by the ld. DR. As such, we are proceeding with such revised grounds.

3. Succinctly, the factual matrix of the case is that the assessee is engaged in trading, installation and after-sales services of Tank Gauging Equipments. It filed return declaring total income of Rs.1,28,30,710/-. Certain international transactions were reported in Form No.3CEB. The AO made a reference to the Transfer Pricing Officer (TPO) for determining the Arm's Length price (ALP) of the international transactions. The TPO noticed the assessee to have adopted the Transactional Net Margin method (TNMM) for demonstrating that the international transactions were at ALP. He rejected the TNMM and applied the Resale Price Method (RPM) as the most appropriate method. In determining the ALP under this method, he selected four companies as comparable with their average gross profit margin at 32.81%. Applying the same, he proposed transfer pricing adjustment of Rs.6,14,21,652/-. No relief was allowed by the Dispute Resolution Panel (DRP). In the final assessment order dated 16-12-2016, the AO made the transfer pricing addition as proposed in the draft order. The assessee is aggrieved by the addition so made.

4. We have heard the rival submissions and gone through the relevant material on record. It is seen that the assessee applied the TNMM as the most appropriate method, which was replaced by the TPO with the RPM. The international transaction under consideration is Trading, installation and after-sales service of Tank Gauging Equipments, which is done without any value addition made to the import of goods from the AEs. When the goods purchased from the AE are resold as such without any further processing or making any value addition, the RPM is considered as the most appropriate method. The Id. AR was fair enough not to challenge the correctness of the application of the RPM as the most appropriate method.

5. The assail of the assessee in this appeal is two-fold. First is to the error in the computation of the transfer pricing addition by taking all the direct and indirect costs incurred by the assessee and second is to the inclusion of two comparables. We will deal with both the issues in seriatim.

6. Firstly, we espouse the issue regarding the consideration of all the direct and indirect costs incurred by the assessee in the computation of the ALP under the RPM. It is noticed that the TPO

adopted gross profit margin of the four comparable companies at 32.81%. Separate calculations of all the four companies' gross profit margins have been made at pages 11 onwards of the order of the TPO. Thereafter, he proceeded to compute the final adjustment as under:-

Col.	Description	Amount (Rs.)
A	Price charged (operating revenue of the assessee)	22,37,34,855
B	Operating Cost (OC)	21,17,49,102
C	Arms Length Mean Margin (OP/OR)	32.81
D	Arms Length Price (ALP) of the international transaction (A)- {(A)*(C)/100}	15,03,27,449
E	0.95% of International Transaction	20,11,61,646
F	Adjustment over operating income [D-A] (Shortfall being adjustment u/s.92CA)	6,14,21,652

7. We have gone through the Statement of Profit and loss account of the assessee, which is available at page 64 of the paper book. From there, it can be seen that the TPO has initially taken a figure of total revenue as 'Price charged' standing at Rs.22,37,34,855/-. Thereafter, he reduced 'Operating Cost' amounting to Rs.21,17,49,102/-, which is the figure of total expenses in the Profit and loss account. This figure of total expenses incurred by the assessee includes not only the purchase costs but also Employees' benefits, Depreciation and amortization

and Other expenses. On having a glance at the Profit and loss account of the assessee on one hand and the transfer pricing adjustment made by the TPO on the other, it is discernible that the TPO has considered all the direct and indirect expenses of the assessee for the purpose of exclusion from the total revenues. Thus, it can be seen that *por una parte* the TPO has considered gross profit margin of the comparables and *por otra parte* he took the net profit margin of the assessee. The claim of the Id. AR is that the figures involved in the determination of the ALP under the RPM concerning the assessee should also have been taken at gross level and not the net level.

8. In order to ascertain the correct position, it is pertinent to note the mechanism for determining the ALP under the RPM, enshrined in Rule 10B(1)(b), as under :-

“(b) resale price method, by which,—

(i) the price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise, is identified ;

(ii) such resale price is reduced by the amount of a normal gross profit margin accruing to the enterprise or to an unrelated enterprise from the purchase and resale of the same or similar property or from obtaining and providing the same or similar services, in a comparable uncontrolled transaction, or a number of such transactions ;

(iii) the price so arrived at is further reduced by the expenses incurred by the enterprise in connection with the purchase of property or obtaining of services ;

(iv) the price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount has been of gross profit margin in the open market ;

(v) the adjusted price arrived at under sub-clause (iv) is taken to be an arm's length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise ;”

9. The crux of the RPM as given in rule 10B(1)(b) is that firstly the price at which property purchased from an associated enterprise is resold to an unrelated enterprise is identified, which is reduced by the amount of normal *gross profit margin* accruing in a comparable uncontrolled transaction. The price so arrived at is reduced by the *expenses incurred by the enterprise in connection with the purchase of property*, which is further adjusted to take into account the functional and other differences, if any. The price which follows thereafter is taken as an arm's length price of the purchase of property by the enterprise from the associated enterprise.

10. A careful circumspection of sub-clause (ii) of Rule 10B(1)(b) divulges that it is normal '*gross profit margin*' of the comparables,

which is considered for application. Then sub-clause (iii) reveals that the price arrived at after applying the gross profit of the comparables is reduced by the *'expenses incurred by the enterprise in connection with the purchase of property'*. Sub-clause (iv) talks of adjusting the price as determined under sub-clause (iii) with differences including *differences in accounting practices, if any, between the international transaction and the comparable uncontrolled transactions*. On a conjoint reading of the relevant parts of above sub-clauses, it is manifested that the RPM compares the transaction at gross profit level, which means considering all the direct costs forming part of the Trading account only. Not only the *'gross profit margin'* of the comparables is taken for application to the sale price of the goods purchased from the AE, but also the expenses incurred by the assessee in connection with the purchase of goods are then sought to be reduced. The mandate is for reducing only the expenses incurred by the assessee in connection with the purchase of goods and no other expenses. On a relative analysis, it emerges that it is only the items of the Trading account of the comparables as well as the assessee which go into determining the ALP of the international transaction of purchase of goods from the AEs under the RPM. If under sub-clause (iii), we proceed to reduce

the indirect costs also, meaning thereby, the costs debited to the Profit and loss account of the assessee, the effect would be that we would be comparing the figure of comparables at gross level with the figure of the assessee at net level, distorting the comparability. Sub-clause (iv) talks of even ironing out the differences in the accounting practices of the assessee and comparables. Its rationale is that even after considering all the costs debited to the Trading account of both the assesses and comparables, if still there remains some difference due to following of different accounting practices, then the effect of such difference should also be given to in the determination of the ALP. It may cover a situation in which a comparable may have either debited an item of indirect cost to the Trading account or some direct cost to the Profit and loss account, effect of which is required to be given. There is no prescription what so ever for considering the indirect costs either of the assessee or the comparables in determining the ALP under the RPM.

11. The TPO, in the calculation extracted above, has rightly considered the gross profit margin of the comparables, but stepped out of the method in considering the 'Operating cost' of the assessee and has, in fact, included all the direct and indirect costs of the assessee. The method adopted by the TPO has become a hybrid

of the RPM and the TNMM, which has needlessly dragged down the ALP of the international transaction of purchase of goods. As against that, he ought to have considered only the direct costs of the assessee so as to bring parity with the gross margin of the comparables under the RPM. Thus the impugned order cannot be sustained to this extent. We, therefore, set-aside the impugned order *pro tanto* and hold that only the direct costs incurred by the assessee should be considered.

12. The assessee has also disputed the inclusion of two companies in the final set of comparables, namely, Larsen and Toubro Ltd. and Siemens Ltd.

(i) Larsen and Toubro Ltd :

13. The TPO considered this company as comparable by observing in para 8.5 of his order that he was taking only the Trading segment of L&T. Thereafter, he worked out the gross profit margin of L&T starting with the figure of 'Revenue from trading activity' at Rs.6389.29 crore with reference to Note (Q)(25)(a)(i) on page 186 of the Annual report of the company. We have perused such report, whose copy has been placed in the paper book. The figure of Rs.6389.29 crore is given under the major head of 'Sales & service'

and sub-head of 'Manufacturing, trading and property development activity'. It is this figure which has been considered by the TPO as 'Revenue from Trading activity' for the purpose of computing the gross profit margin of this company. The assessee also contended before the TPO that L&T was engaged in other operations also unlike the assessee engaged only in the trading operations, which was jettisoned by the TPO by observing that he was considering 'the company's only trading segment'. We have also gone through the segmental reporting of L&T Ltd. from which it can be seen that no separate figures for trading segment are available. As the assessee is admittedly only in the trading, the consideration of L&T Ltd.'s figures also including manufacturing and property development activities, do not serve as a good comparable. We, therefore, order to remove L&T Ltd. from the list of comparables.

(ii) Siemens Ltd :

14. The TPO has computed at page 11 of his order the 'Gross margin of trading activity only' of Siemens Ltd. at 49.20%. We have gone through the Annual report of this company. It can be seen that the year ending of this company is 30-09-2012. As against that, the assessee is maintaining its accounts on financial year ending basis. The Hon'ble Bombay High Court in *CIT Vs. PTC*

Software (2017) 395 ITR 176 (Bom.) has held that the companies with different financial year endings cannot be considered as comparable under Rule 10B. Without going into further analysis and following the precedent on this preliminary issue, we order to delete this company from the list of comparables.

15. Ground no.5 is against making transfer pricing addition on the entity level figures of the assessee company rather than the international transactions.

16. We have heard the rival submissions and gone through the relevant material on record. The contention of the ld. AR is that the transfer pricing addition has been made on the entity level figures of the assessee, which ought to have been restricted only the international transactions. We find that this issue is no more *res integra* in view of catena of judgments delivered by the various High Courts. The Hon'ble jurisdictional High Court in *CIT vs. Thyssen Krupp Industries India Private Ltd. (2016) 381 ITR 413 (Bom)* has held that the transfer pricing addition can be made only with reference to the international transactions and not the transactions with the non-associated enterprises. Similar view has been espoused by the Hon'ble Delhi High Court in *CIT VS. Keihin*

Panalfa Ltd. (2016) 381 ITR 407 (Del). Respectfully following the precedents, we hold that the transfer pricing addition should be restricted only to the international transactions.

17. Ground Nos. 6 and 7 about charging of interest are consequential.

18. To sum up, we set aside the impugned order and remit the matter to the AO/TPO for carrying out a fresh determination of the ALP of the international transactions in consonance with our above observations.

19. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the Open Court on 09th December, 2019.

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 09th December, 2019
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The Pr.CIT-V, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
“C” / DR ‘C’, ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	05-12-2019	Sr.PS
2.	Draft placed before author	06-12-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

*