IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT, AND

SHRI SAKTIJIT DEY, JUDICIAL MEMBER

IT(TP)A no.51/Mum./2017
(Assessment Year : 2012–13)

M/s. S.B. & T. International Ltd.
9, Yusuf Building
Room no.15, 1st Floor
A.R. Street, Pydhonie
Mumbai 400 003
PAN – AAACS7275C

……. Appellant

v/s

Dy. Commissioner of Income Tax
Circle–11(2)(1), Mumbai

……. Respondent

Assessee by : Dr. P. Daniel
Revenue by : Shri Uodhalraj Singh

Date of Hearing – 05.11.2019	Date of Order – 26.11.2019

O R D E R

PER SAKTIJIT DEY, J.M.

The captioned appeal by the assessee arises out of the final assessment order dated 22nd November 2016, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short *"the Act"*) for the assessment year 2012–13, in pursuance to the directions of learned Dispute Resolution Panel–2 (DRP), Mumbai.

2. In total, the assessee has raised five grounds of appeal. Grounds no.1 and 2, being general in nature, do not require specific adjudication.

3. As regards ground no.5, Dr. P. Daniel, the leaned Counsel for the assessee submitted that the assessee has instructed him not to press this ground. Hence, this ground is dismissed.

4. In ground no.3, the assessee has challenged the addition of ₹ 17,62,963, on account of transfer pricing adjustment relating to sale of goods to the overseas Associated Enterprises (AE).

5. Brief facts are, the assessee, an Indian company, is engaged in the business of procurement of raw materials like diamond, gold, colour stone, silver and platinum from local market and after processing them, exports gold studded jewellery to its AEs as well as others. Besides the above, the assessee also trades in cut and polished diamond procured mainly from indigenous source. As stated by the Assessing Officer, trading in diamond accounts for more than 87% of the total turnover of the company for the year under consideration. During the transfer pricing proceedings, the Transfer Pricing Officer noticed that the assessee has benchmarked the international transaction relating to export of cut and polished diamond to the AEs by adopting Cost Plus Method (CPM) as the most appropriate method.

The Revenue earned from this transaction was shown at ₹ 66,35,648. The Transfer Pricing Officer observed, the assessee has neither benchmarked the transaction nor made any transfer pricing study report on the plea that the transaction amount is below ₹ 1 crore. Since, the assessee had not benchmarked the transaction, the Transfer Pricing Officer called upon the assessee to show cause as to why Transactional Net Margin Method (TNMM) should not be used to benchmark the transaction. Further, the Transfer Pricing Officer also forwarded a list of comparables selected by him. As observed by the Transfer Pricing Officer, the assessee neither objected to applicability of external TNMM nor the set of comparables selected for benchmarking the transaction with the AEs. Thus, the Transfer Pricing Officer applied the arithmetic mean of 3.52% of the nine comparables selected by him to the operating cost and determined the arm's length price of the sales effected to the AEs at ₹ 83,98,610, as against the revenue earned by the assessee of ₹ 66,35,648. The resultant shortfall of ₹ 17,62,962, was proposed as upward adjustment to the arm's length price of the transaction with the AEs. On the basis of adjustment proposed by the Transfer Pricing Officer, the Assessing Officer completed the assessment by adding the amount of ₹ 17,62,962, to the income of the assessee. The assessee challenged

the aforesaid addition before learned DRP. However, learned DRP also upheld the adjustment made by the Transfer Pricing Officer.

6. The learned Authorised Representative submitted, the assessee has also entered into similar transaction with non–AEs/unrelated parties. Therefore, such transactions with non–AEs/unrelated parties should be applied as internal TNMM for benchmarking the transaction. He submitted, while deciding identical issue in assessee's own case for the assessment year 2011–12, the Tribunal has accepted internal TNMM as the most appropriate method to benchmark the export of cut and polished diamond to the AEs.

7. The learned Departmental Representative relying upon the observations of the Transfer Pricing Officer and learned DRP submitted, since the assessee did not object to either applicability of external TNMM as the most appropriate method as well as the set of comparables selected by the Transfer Pricing Officer, the Transfer Pricing Officer had no other option but to determine the arm's length price by applying external TNMM as well as the comparables selected by him. He submitted, neither before learned DRP nor before the Tribunal, the assessee has furnished any relevant information/data to justify applicability of internal TNMM.

8. We have considered rival submissions and perused the material on record. The dispute before us is with regard to the adjustment made towards arm's length price of the export of cut and polished diamond to the AEs amounting to ₹ 66,35,648. It is noticed, though, in Para–7 of the order passed under section 92CA(3) of the Act, the Transfer Pricing Officer has specifically mentioned that as per audit report in Form no.3CEB, the assessee has benchmarked this particular transaction applying CPM, however, in subsequent paragraphs he has observed that the assessee has neither made any transfer pricing study report nor benchmarked the transaction on the plea that the transaction amount is below ₹ 1 crore. Further, the Transfer Pricing Officer has alleged that when called upon to offer his explanation/submissions with regard to the applicability of external TNMM as well as the comparables selected for that purpose, the assessee did not object to it and in this context, the Transfer Pricing Officer has referred to the order sheet entry dated 8th October 2015. Even, learned DRP while dealing with the objections on this particular issue has observed that apart from referring to rule 10B(1)(c) and submitting that unaudited segmental account can be relied upon for comparing profitability of controlled transaction with uncontrolled transaction, the assessee has not advanced any specific argument against applicability of external TNMM as well as the comparables

selected by the Transfer Pricing Officer. Thus, from the aforesaid facts, it appears that the assessee has not furnished adequate material/data to justify its claim of applicability of internal TNMM as the most appropriate method either before the Transfer Pricing Officer or even before learned DRP. No doubt, while dealing with similar issue of adjustment made to the arm's length price of export of studded jewellery to the AEs in the assessment year 2011–12, the Tribunal in ITA no.5189/Mum./2015, dated 3rd May 2017, has held that internal TNMM is the most appropriate method to benchmark the subject transaction. However, on a careful perusal of the order passed by the Tribunal, it is observed that in the said case, the assessee had applied internal TNMM as the most appropriate method to determine the arm's length price of the export transaction. Further, the assessee had also furnished the relevant information/data relating to the non–AE transactions which were considered for internal TNMM. Even, the assessee had furnished the segmental cost allocation between the AE and non–AE transactions. Thus, as could be seen from the facts on record, in assessment year 2011–12 the assessee did furnish relevant information/data in support of its benchmarking applying internal TNMM. Whereas, in the facts of the present case, no such factual information was furnished by the assessee to support the applicability of internal TNMM. At least, no such factual information or detail is

forthcoming either from the orders of the Revenue authorities or have been submitted before us by the assessee. In view of the aforesaid factual position, at this juncture, we cannot direct the Assessing Officer to apply internal TNMM by accepting the plea of the assessee. In our considered opinion, assessee's claim of applicability of internal TNMM has to be established by furnishing relevant information/data relating to both AE and non–AE transactions which, as it appears, has not been furnished before the Departmental Authorities. Therefore, we think it appropriate to restore the issue to the Assessing Officer/Transfer Pricing Officer to consider assessee's claim of internal TNMM as the most appropriate method to benchmark the export of diamond to AEs. In case, the assessee is able to justify the applicability of internal TNMM through authentic data relating to both AE and non–AE segments, there should not be any hindrance in applying internal TNMM to benchmark the subject transaction as was directed by the Tribunal while deciding assessee's appeal in the assessment year 2011–12 cited supra. Accordingly, the issue is restored back to the file of the Assessing Officer/Transfer Pricing Officer for de novo adjudication after due opportunity of being heard to the assessee. Ground raised is allowed for statistical purposes.

9. In ground no.4, the assessee has challenged the disallowance of ₹ 79,50,776, made under section 14A r/w rule 8D.

10. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that as on 31st March 2012, the assessee's investment in exempt income yielding asset stood at ₹ 25,73,35,000. Noticing the above, he called upon the assessee to explain why expenditure attributable to investment made in exempt income yielding asset should not be disallowed under section 14A r/w rule 8D. In response, it was submitted by the assessee that since it did not receive any exempt income during the year under consideration, no disallowance under section 14A of the Act can be made. However, rejecting the explanation of the assessee, the Assessing Officer proceeded to compute the disallowance under section 14A of the Act by applying the method prescribed in rule 8D, which worked out to ₹ 79,50,776. The disallowance made by the Assessing Officer was upheld by learned DRP.

11. The learned Authorised Representative submitted, since the assessee had not earned any exempt income during the year, the provisions of section 14A r/w rule 8D would not be applicable. In support of such contention, he relied upon the following decisions:–

i) Cheminvest Ltd. v/s CIT, [2015] 378 ITR 33 (Del.); and

ii) PCIT v/s Ballarpur Industries Ltd., ITA no.51/2016, dated 13.10.2016 (Bom.).

12. The learned Departmental Representative relied upon the observations of the Assessing Officer and the DRP.

13. We have considered rival submissions and perused the material on record. From the stage of assessment proceedings itself, the assessee had objected to applicability of section 14A of the Act on the plea that it had not earned any exempt income during the year under consideration. The aforesaid contention of the assessee has remained uncontroverted. No material has been brought on record by the Revenue to suggest that the assessee had earned any exempt income during the year under consideration. Now, it is fairly well settled that if any particular assessment year no exempt income has been earned, no disallowance under section 14A of the Act can be made. Even, the Hon'ble Jurisdictional High Court in case of Ballarpur Industries Ltd. (supra) has expressed the aforesaid view. That being the case, the disallowance made under section 14A of the Act cannot be sustained. Accordingly, the Assessing Officer is directed to delete the disallowance of ₹ 79,50,776. This ground is allowed.

14. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 26.11.2019

Sd/-	**Sd/-**
PRAMOD KUMAR	**SAKTIJIT DEY**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 26.11.2019

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai