

THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 3907/Mum/2017 (Assessment Year 2011-12)
I.T.A. No. 3906/Mum/2017 (Assessment Year 2012-13)

DCIT-4(1)(1) Room No. 640 6 th Floor Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Elara Securities (India) Pvt. Ltd. 21 st Floor, Tower 3 Indiabulls Finance Centre Senapati Bapat Marg Elphinstone Road West Mumbai-400 013. PAN : AABCE7968D
(Appellant)		(Respondent)

Assessee by	Shri Rahul Mitra & Ms. Komal Mehta
Department by	Shri S. Senthil Kumar
Date of Hearing	08.11.2019
Date of Pronouncement	06.01.2020

ORDER

Per Shamim Yahya (AM) :-

These are appeals by the Revenue against respective orders of learned CIT(A) pertaining to A.Ys. 2011-12 & 2012-13. Issues are common and connected and appeals were heard together, hence these are being consolidated and disposed of by this common order.

2. Grounds of appeal for A.Y. 2011-12 read as under :-

1. "On the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred in rejecting the TNMM method adopted by the Assessing Officer without appreciating the fact that the Assessing Officer has justified the applicability of TNMM method in the assessment order.
2. "On the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred in accepting the CUP method adopted by the assessee without giving any reason as to why the TNMM is not a suitable method in the case of the assessee."

3. "On the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred the holding that the loss of Rs.39,631/- in derivative segment is not speculation loss without appreciating the fact the assessee being a share broker and not a share trader, case of the assessee does not fall under any of exceptions enlisted in Section 73(1) of the Act."
 4. "On the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred the holding that the loss of Rs.39,631/- in derivative segment is not speculation loss without appreciating the rationale laid down by the decision of the Hon'ble Delhi High Court in the case of CIT v. DLF Commercial Developers Limited."
 5. "On the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred the trading expenses of Rs.17,07,026/- are not attributable to speculative business of the assessee of trading in derivative segment, without appreciating the rationale laid down by the decision of the Hon'ble Delhi High Court in the case of CIT v. DLF Commercial Developers Limited".
3. Grounds of appeal for A.Y. 2012-13 read as under :-
1. "On the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred in rejecting the TNMM method adopted by the Assessing Officer without appreciating the fact that the Assessing Officer has justified the applicability of TNMM method in the assessment order."
 2. "On the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred in accepting the CUP method adopted by the assessee without giving any reason as to why the TNMM is not a suitable method in the case of the assessee."
 3. "On the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the trading expenses of Rs.2405350/- are not attributable to speculative business of the assessee of trading in derivative segment, without appreciating the rationale laid down by the decision of the Hon'ble Delhi High Court in the case of CIT v. DLF Commercial Developers Limited"
 4. "On the facts & in the circumstances of the case and in law, the Ld. CIT(A) erred the holding that the trading expenses of Rs.2405350/- are not attributable to speculative business of the assessee of trading in derivative segment without appreciating the fact the assessee being a share broker and not a share trader, case of the assessee does not fall under any of exceptions enlisted in Section 73(1) of the Act."
4. One common issue in these appeals is transfer pricing adjustment by the TPO by rejecting assessee's CUP method adopted, by substituting the same with TNMM method and resultant transfer pricing adjustment.

5. Since facts are identical, we are referring the facts from A.Y. 2011-12. The assessee is a corporate member of various stock exchanges engaged in the business of trading and investment in share and securities, dealing in capital market and F&O segment, currency derivatives depository participant of Central Depository Services (India) Ltd., merchant banking and portfolio management services. During the course of assessment, the Assessing Officer noted that the assessee has entered into international transactions with its associated enterprises as under :-

Sr. No.	Name of the AE	Description of Service provided	ALP as computed by the assessee	Method used for determination of ALP
1	Elara Capital A/c, UK	Stock Broking	41,59,982	CUP
2	Elara India Opportunities Fund Ltd., Mauritius	Stock Broking	2,58,79,835	CUP
3	Elara Global Funds Elara Emerging Markets Fund, Mauritius	Stock Broking	64,774	CUP
4	Rajendra Bhatt, UK	Stock Broking	10,739	CUP
5	Elara Absolute Return Fund, Mauritius	Stock Broking	4,09,127	CUP
Total:			3,05,24,457	

The Assessing Officer issued notice to the assessee seeking certain details. In the notice the Assessing Officer inter alia asked as to why CUP method is the most appropriate method and why TNMM cannot be applied as the most appropriate method (MAM) with arithmetic mean of following companies :-

Sr.No.	Name of Company
1	Motilal Oswal Investment Advisors Ltd
2	Kshitij Investment Advisors Ltd
3	IDFC Investment Advisors Ltd
4	Ladderup Corporate Advisory Pvt. Ltd.
5	ICRA Online Ltd.

6. Assessing Officer noted the following response from the assessee for CUP as the MAM (Most Appropriate Method) :-

The assessee submitted details of comparable uncontrolled transactions considered as CUP for benchmarking the international transaction of the assessee. The gist of the same is as under:

- The assessee as applied internal CUP since it has entered into similar transactions with unrelated parties.
- The transactions with third parties have been documented in transfer pricing analysis
- The comparable companies are into Investment advisor/portfolio management and the assessee is into stock broking business
- The assessee relied on the ruling in case of DCIT Vs. M/s. SGlobal Service Private Limited
- The assessee provides financial advisory services in line with primary business of stock broking but the international transaction falls under its business of stock broking.

7. However, the Assessing Officer was not satisfied. The Assessing Officer rejected the CUP method adopted by the assessee by observing as under :-

The reliance of the assessee on the case law is in different industry i.e. IT/ITES and not related to industry in which the assessee-operates. The income earned by the assessee is brokerage income from stock broking activities and considering the comparable companies earning brokerage/advisory fees from rendering stock broking/advisory services applying the TNMM method can be evaluated as under: -

The assessee submitted the chart for internal CUP transactions. However, under the CUP as per Rule 10B the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions are identified. In the instant case the assessee has not been able to prove the fact that the uncontrolled transaction was comparable to the assessee with regard to the following:-

- a. Date of transactions
- b. Volume of transactions
- c. Type of account
- d. Country of transactions
- e. Terms and condition

The same has been analysed and explained as under: -

- In Annexure 53A(A) at transaction 4, the type of account with AE is FDI a/c of FII but the uncontrolled transaction is in different country. Further in respect of transaction at 1, 2 and 3, the date, volume and other comparability factors are not explained. Hence the said CUP has been rejected.
- In Annexure 53A(B) although the type of account is same, in one case the country is different, further other comparability factor such as date, volume are not explained. Hence the said CUP has been rejected.

- In Annexure 53A(C) although the type of account is same, but other comparability factors such as date, volume are not explained. Hence the said CUP has been rejected.
- In Annexure 53A(D) the type of account with AE is "Reissuance A/C of FII" and with comparable uncontrolled transaction it is "FDI of overseas corporate body". Further the country is different from that AE. The date, volume and other comparability factors are also not explained. Hence the said CUP has been rejected.
- In Annexure 53A(E) the type of account with AE is "NRI" and with comparable uncontrolled transaction it is "Retail" The date, volume and other comparability factors are also not explained. Hence the said CUP has been rejected.
- In Annexure 53B the type of account with AE is "FII" and with comparable uncontrolled transaction it is "Mutual Fund". The date, volume and other comparability factors are also not explained. Hence the said CUP has been rejected.

In view of the above the CUP provided by the assessee has been rejected.”

8. Thereafter the Assessing Officer rejected RPM on the ground that data of Indian companies for providing services was unavailable. He also rejected the choice of CPLM and PSM method. Thereafter the Assessing Officer held that the TNMM was the MAM. He noted that the assessee's objection to the comparables and thereafter he selected the following comparables on arithmetic means. Accordingly computed arm's length price adjustment as under :-

Sr. No.	Company Name	NCP% FY 201 0-11
1	IDFC Investment Advisors Ltd	6.51
2	Kshitij Investment Advisors Ltd	27.77
3	Ladderup Corporate Advisory Pvt. Ltd.	54.92
4	Motilal Oswal Private Equity advisors Pvt. Ltd.	33.78
	Arithmetic Mean	30.74

The arm's length price of the international transaction is calculated as under:-

Particulars	Amount (Rs.)
Operating Revenue (A)	6,70,24,877
Operating Cost (B)	12,41,84,391
ALP(C=Bx 1.3074)	16,23,58,673
Difference between ALP and Transfer Price (C-A)	9,53,33,796

9. The difference between ALP and Transfer Price of Rs. 9,53,33,7967- is more than the 5% of the transfer price i.e. Rs.33,52,244/-, therefore, the adjustment proposed is Rs.9,53,33,796/-.

10. Against the above order the assessee is in appeal before learned CIT(A). Learned CIT(A) reproduced the submission of the assessee in his appellate order. Learned CIT(A) on the basis of the assessee's submission noted the merits and demerits of CUP & TNMM and thereafter held that TNMM followed by the Assessing Officer is without proper basis and deleted the adjustment by concluding as under :-

“2.8 Further Rule 92C Clause 1 of the Income Tax Rules, 1962, specifies the factors for selecting the best method suited for international transaction carried by the company and associated enterprises. Based on the same the AR of the appellant company has stated that they have applied CUP as the most appropriate method for determining arm's length price for international transaction under stock broking services.

2.9 Further from the submission of the AR of the appellant it is seen that as CUP being the most direct method, it is preferred over all other methods. Even though the CUP method and another transfer pricing method can be applied in an equally reliable manner, the CUP method is preferred and chosen as the most appropriate method since it is the most direct method. Where it is possible to locate the comparable uncontrolled transactions, the CUP method is adopted as it provides the most direct evidence of an arm's length price.

2.10 Further the AR of the appellant relied on DCIT Vs. M/s 3 Global Service Private Limited (ITA No. 1812/MUM/2009), Mumbai, the ITAT held that companies operating in different segment of the industry cannot be selected as comparable for applying the TNMM.

2.11 It is thereafter explained by the AR of the appellant that the companies which are stated by the AO in the assessment order are not comparable.

2.12 Further AR of the appellant explained that Without Prejudice even if TNMM is considered, Operating cost in proportion to the transaction with the associated enterprises instead of total operating cost should only be considered for the purpose of calculation of Arms Length Price.

2.13 Therefore on going through the facts of the case and on the basis that there is no precedent addition with regards to said matter in the case of the appellant company, I am of the view that the CUP method followed by the appellant company with regards to the transaction with the AE is based on the factors for selecting the best method suited for international transaction carried by the company and associated enterprises as per Rule 92C Clause 1

of the Income Tax Rules, 1962 for the year under consideration. Further the TNMM method followed by the AO is without proper basis as to why the CUP method followed the appellant company is incorrect. Further the transfer pricing analysis, details and chart provided by the appellant during the course of assessment proceedings were not properly considered for the purpose of rejection of CUP method. Therefore the addition of Rs.9,53,33,796/- with regards to the ALP of the transaction with the AE is deleted.”

11. For A.Y. 2012-13 also the Assessing Officer rejected the CUP method by observing as under :-

The above submission has been duly considered and the same cannot be accepted for the following reasons: -

The reliance of the assessee on the case law is in different industry i.e. IT/ITES and not related to industry in which the assessee operates. The income earned by the assessee is brokerage income from stock broking activities and considering the comparable companies earning brokerage/advisory fees from rendering stock broking/advisory services applying the TNMM method can be evaluated as under.

The assessee submitted the chart for internal CUP transactions. However, under the CUP as per Rule 10B the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions are identified. In the instant case the assessee has not been able to prove the fact that the uncontrolled transaction was comparable to the assessee with regard to the following :-

- a. Date of transactions
- b. Volume of transactions
- c. Type of account
- d. Country of transactions
- e. Terms and condition

The same has been analysed and explained as under :-

In Annexure 53A(A) at transaction 4, the type of account with AE is FDI a/c of FII but the uncontrolled transaction is in different country. Further in respect of transaction at 1,2 and 3, the date, volume and other comparability factors are not explained. Hence the said CUP has been rejected.

In view of the above the CUP provided by the assessee has been rejected.

12. Thereafter he adopted TNMM and made arm's length price adjustment similar to earlier assessment year. On similar line as per earlier year, learned CIT(A) deleted the adjustment by concluding as under :-

2.12 Further AR of the appellant explained that during the course of assessment proceedings in response to the show cause notice it had been specifically explained that the segment of the comparable Companies were totally different than that of the appellant's business operations however the comparable companies stated in the assessment order were also totally different for A.Y. 2012-13. It is submitted that such addition on the basis of which the show cause notice provide some different-details as compared to the details shown in the assessment order is against the basic rule of natural justice and bad in law. Further Without Prejudice even if TNMM is considered, Operating cost in proportion to the transaction with the associated enterprises instead of operating cost stated by the AO should only be considered for the purpose of calculation of Arms Length Price.

2.13 Therefore on going to the facts of the case and on the basis that there is no precedent addition with regards to said matter in the case of the appellant company, I am of the view that the CUP method followed by the appellant company with regards to the transaction with the AE is based on the factors for selecting the best method suited for international transaction carried by the company and associated enterprises as per Rule 92C Clause 1 of the Income Tax Rules, 1962 for the year under consideration. Further the TNMM method followed by the AO is without proper justification as to why the CUP method followed the appellant company is incorrect. Therefore the addition of Rs.2,46,79,325/- with regards to the ALP of the transaction with the AE is deleted'.

13. Against the above order, the Revenue is in appeal before us.

14. We have heard both the counsel and perused the records. Learned Departmental Representative relied upon the order of the Assessing Officer. Learned Counsel of the assessee submitted that the assessee is providing stock broking services to the AEs and third parties. Brokerage charges are dependent on type of market and type of investor account. Assessee agreed to provide services under the same service commitments and default service charges to the AEs and third parties. Increase and decrease in the default brokerage rates may vary considering the business dynamics, customer penetration strategy etc., which are equally applicable for AEs as well as third parties. The nature of services provided to AEs and third parties under stock broking is the same and is comparable. Hence, learned Counsel of the assessee submitted that it is appropriate to compare the broking rate charged from AEs as well as third parties while applying the CUP method for determination of arm's length price. Thereafter, learned counsel referred to

OECD TP guidelines and UN TP Manual for the proposition that if internal comparable exists, the same should be considered over external comparable. Further learned counsel referred to the ITAT decision in the case of RBS Equities (India) Ltd. for A.Ys. 2002-04 & 2005-06 respectively, where ITAT held that CUP method was most appropriate method.

15. Upon careful consideration, we note that the assessee in this case is basically offering stock broking services to its AEs as well as unrelated parties. The assessee has applied internal CUP method for determination of arm's length price (ALP) of international transaction. The assessee's claim has been that the transactions with the third party have been documented with transfer price analysis. That the comparable-companies are also into investment advisory/portfolio management and the assessee is also in stock broking business. Further, the assessee is providing stock broking services to the AEs and the third party. The assessee's claim is that nature of services provided to the AEs and third party into stock broking is the same as is comparable and in such circumstances the assessee's claim that CUP method for determination of ALP is the most appropriate method. These pleas of the assessee are duly supported by the OECD TP guidelines and UN TP manual for the proposition that internal comparable exists, the same should be considered over external comparable. We note that the Assessing Officer has rejected the CUP method adopted by the assessee without bringing any cogent material on record as to why the same is not appropriate. The Assessing Officer has made general observation that the assessee has not been able to prove that uncontrolled transaction was comparable to the assessee with regard to address like date of transactions, volume of transactions, type of account, country of transactions and terms and conditions. We find that the Assessing Officer has referred to above in a general manner and this remains only theoretical observation without any specific details on cogent finding. In this view of the matter in our considered opinion learned CIT(A) is correct in holding that the Assessing Officer has rejected CUP method used by the assessee without bringing any cogent material on record as to why the same method is not appropriate and

should be replaced with TNMM as the most appropriate method chosen by the Assessing Officer. On the facts and circumstances of the case in our considered opinion CUP method selected by the assessee is appropriate and the Assessing Officer has rejected the same without any cogent basis. Accordingly, we do not find any interference in the order of learned CIT(A). Accordingly, we uphold the same.

16. Another common issue raised relates to disallowance of Rs. 17,07,026/- for A.Y. 2012-13 and a sum of Rs.24,05,350/- as attributable to a speculation business. The A.O. has disallowed these expenses by invoking provision of Explanation to section 73.

17. Upon the assessee's appeal, the Id. CIT(A) noted that there is no case of assessee engaging into any speculative activity. He also relied upon the ITAT order on the same issue in the assessee's own case for A.Y. 2010-11 vide order dated 31.01.2017 as under:

“5. I have heard both the parties and have perused the material available on record. Looking at the turnover and assessee's commission income, operational default by assessee's huge staff cannot be held as unreasonable. The assessee's total income is a loss and not a positive figure. The accounts are duly audited and follow the established rules and norms. The loss caused by operational default of the employees cannot be treated as loss on account of speculation activity of the assessee and such loss represents normal business exigencies. Such type of ITA No.2885/Mum/2016 Elara Securities (India) Pvt. Ltd business exigencies cannot be assumed to be speculative activity so much to attract explanation to section 73.

6. Apropos ground no.2, since it is held that there no speculation activity carried on by the assessee consequently; there is no justification in disallowing the same expenditure assuming speculation activity. Besides assessee has demonstrated that expenditure disallowed represent institutional fees and other incidental expenses, which has not be factually disallowed by the authorities below. In view thereof, both the disallowances are deleted and the assessee's grounds are allowed.

Accordingly, he deleted the disallowance.”

18. Against this order, the Revenue is in appeal before us.

19. We have heard both the counsel and perused the records. The learned Departmental Representative relied upon the order of the Assessing Officer and also the decision of Hon'ble Delhi High Court in the case of DLF commercial developers (supra).

20. Per contra, learned Counsel of the assessee submitted that assessee's case does not fall under the realm of speculative transactions. He submitted that the decision of Hon'ble Delhi High Court referred by the Revenue was not with reference to a member of stock exchange. He submitted that in the present case exceptions listed in section 73(1) are fully relevant. In this regard he placed reliance upon Hon'ble Karnataka High Court decision in the case of CIT Vs. First Securities (P) Ltd. (56 Taxman.com 137).

21. Upon careful consideration we find ourselves in agreement with the submissions of learned Counsel of the assessee. We find that learned CIT(A) is correct in holding that the transactions do not fall under the realm of speculative transaction. In this regard we may gainfully refer to the decision of Hon'ble Karnataka High Court decision in the case of First Securities (P) Ltd. (supra) :-

“A reading of the provisions of section 73 makes it clear that any loss computed in respect of a speculation business carried on by the assessee has to be set off only against the profits earned in such speculation business. There is a total prohibition for setting off such loss against profits and gains arising from any other business. However, an explanation was added by Taxation Laws (Amendment) Act, 1975, which came into effect from 01.04.1977 providing for a deeming clause.

As per the said explanation, where any part of the business of a company other than a company whose gross total income consists of mainly purchase and sale of shares of other companies, then such company shall for the purpose of the section 73 that is, for setting off the losses be deemed to be carried on as a speculation business to the extent to which the business consists of purchase and sale of such shares.

Therefore, it has no application to a contract entered into by a member of the NSE or Bangalore Stock Exchange, whose business is in trading of shares on behalf of his clients, which is known as jobbing or arbitrage. Any loss which may arise in the course of such business, shall not be deemed to be a speculative transaction. If the nature of the transaction by the assessee is

not a speculative transaction at all, then, the Explanation to section 73 has no application. The loss sustained by the assessee is a business loss which can be set off against income from other sources. Therefore, the prohibition under section 73 is attracted only to set off the loss in a speculative business against the profit from other business, because loss from speculation business should be set off only from a profit of speculation business. Therefore, Tribunal was justified in setting aside the order passed by the authorities and allowing the claim of the assessee”.

22. Accordingly respectfully following the precedent as above, we do not find any infirmity in the order of learned CIT(A). Accordingly, we uphold the same.

23. In the result, appeal filed by the Revenue stands dismissed.

Order has been pronounced in the Court on 06.01.2020.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 06/1/2020

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS