

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES : “C” BENCH : BANGALORE
BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA (TP)A 2949/Bang/2018

A.Y. : 2014 – 15

M/s. PUMA India Corporate Services Private Limited, No. 509, CMH Road, Indiranagar, Bangalore – 560 038. PAN NO:AAFPC2970C.	Vs.	Dy. Commissioner of Income Tax, Circle- 5(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri. Chavali Narayan, CA
Respondent by	:	Shri. Pradeep Kumar , CIT - DR

Date of Hearing	:	03.12.2019
Date of Pronouncement	:	17.01.2020

ORDER

PER BEENA PILLAI JUDICIAL MEMBER

Present appeal has been filed by assessee against final assessment order dated 28/09/2018, passed by ACIT, Circle 5 (1) (2), Bangalore for assessment year 2014-15 on following grounds of appeal:

That on the facts and circumstances of the case and in law:

1. The impugned order and directions of the Hon'ble DRP are based on incorrect appreciation of facts and wrong interpretation of law and therefore, are bad in law:

2. The learned AO has erred in assessing the total income at INR3,59,30,146 as against the returned income of INR 87,85,760 computed by the Appellant in its return of income for AY 2014-15 .

3. The learned AO has erred in laws and in facts, in determining a sum of INR 1,31,47,772 as the balance tax (including interest) demand payable by the Appellant:

4. The learned AO has erred in laws and in facts, by not appreciating the fact that clause (i) of section 92BA was omitted by the Finance Act, 2017. Therefore, the reference made to the learned Transfer Pricing Office ("TPO") under section 92CA needs to be considered as invalid and bad in law and accordingly, the consequential order passed by the learned TPO should not be sustained;

5. Without prejudice to the above, the Learned AO/Transfer Pricing Officer ("TPO") have erred in laws and in facts, by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Income-Tax-Act, 1961 ("the Act") read with the Income-Tax Rules. 1962 ("the Rules") and conducting a fresh economic analysis for the determination of the arm's length price ("ALP") Accordingly the learned TPO has proposed transfer pricing adjustment amounting to INR2,71,44,382;

6. The Learned AO/TPO have erred in laws and facts by rejecting the following 3 companies considered as comparable in the transfer pricing documentation maintained by the Appellant, on the basis of non-availability of financial data on public domain for the FY 2013-14 inspite of the fact that the financial data were available and were functionally similar;

- I. Pantaloons Fashion & Retail Ltd.*
- II. PIL Industries Ltd.*

7. The learned AO/TPO have erred in laws and facts by retaining “Oswal Knit India Limited as comparable to PUMA Corporate ‘s business inspite of the fact that the company was engaged in manufacturing activities and hence the same is functionally dissimilar to PUMA Corporate ‘s business;

8. The Learned AO/TPO have erred in Laws and facts by computing the operating margin of PUMA corporate at 1.04% by adjusting the following items from the operating cost and operating revenue;

I. Items excluded from operating cost

a. Provision for slow moving inventory

b. Provision for retail shrinkage

II. Items Excluded from operating revenue

a. Liabilities no longer required written back

b. Miscellaneous income

9. The Learned AO/TPO have erred in Laws and facts by not making suitable adjustment to account for differences in the risk profile of Puma Corporate vis-à-vis the comparables ;

10. The Learned AO/TPO have erred in Laws and facts by computing the Alp without giving benefit +/-3 percent under proviso to section 92(2)of the Act;

General Grounds:

11. The learned AO has erred in levying interest of INR 34,27,380 under section 234B, INR 30,675 under section 234C and INR 5,68,674 under section 234D of the Act;

12. The learned AO had erred, in laws and in facts, in initiating penalty proceedings u/s 271(1) (c) of the Act;

The Appellant submits that each of above grounds is independent and without prejudice to grounds of appeal at any time before or at time of hearing of the appeal, so as to enable the Hon’ble Tribunal to decide on the appeal in accordance with the law.

Brief facts of the case are as under:

2. Assessee is a company and filed its return of income on 29/11/14 declaring total income of Rs.87,85,760/-. Case was selected for scrutiny and statutory notices were issued to assessee, in response to which representative of assessee appeared before Ld.AO and filed requisite details as called for. Ld.AO observed that assessee entered into international transaction during the year under consideration and accordingly, reference was made to transfer pricing officer under section 92 CA for computation of arms length price. Upon receipt of reference Ld.TPO called for economic details of international transaction entered into by assessee with its associated enterprises. Assessee filed details in Form 3 CEB according to which following international transaction were entered into by assessee with associated enterprises:

As per TP study, assessee entered into following international transaction with its associated enterprise during year under consideration:

International Transactions as per 3CEB			
Particulars	Receivables	Payables/Paid	Method
Management Fees		3458615	OTHER
Total		3458615	

As per TP study, assessee entered into following Specified domestic transaction transaction with its associated enterprise during year under consideration:

Specified Domestic Transactions as per 3CEB			
Particulars	Receivables	Payables/Paid	Method
Purchase of footwear, apparels and accessories		582379454	TNMM
Director's Remuneration		1200000	TNMM
Corporate Support fees		7888054	TNMM
Total		591467508	

Only disputed segment is regarding Purchase of Footware apparel and accessories from PUMA sports under specified domestic transaction.

2.1. Ld.TPO observed that, to determine arms length price of transaction in purchase of footwear apparel and accessories from Puma sports India, assessee has used TNMM as most appropriate method and OP/OC as PLI. Assessee used following 8 external comparables for carrying out comparability analysis with an average margin of 0.92% as against assessee is net margin of 1.48%.

Sl.No	Name of the Company (M/s)	Weighted Average Margin(%)
1	Arvind Lifestyle Brand Ltd.	1.97
2	Arvind Retail Ltd.	NA
3	Jade Blue Lifestyle India Ltd (Segmental)	NA
4	Pantaloons Fashion & Retail Ltd	-4.78
5	PIL Industries Ltd (Segmental)	NA
6	Trent Ltd	-0.67
7	V-mart Retail Ltd	7.17
8	Winner Sports Ltd	NA
Arithmetic mean		0.92%

Assessee thus held transaction to be at arms length price.

2.2. Ld.TPO rejected economic analysis carried out by assessee and undertook fresh analysis to determined ALP in connection with retail trading activity. Ld.TPO shortlisted following 5 comparables with average margin of 4.15%

Sl.No	Name of the Taxpayer	OP/OR (in %)
1	M/s. Oswal Knit India Ltd.	6.32
2	M/s. Goldmohur Design & Apparel Park Ltd.	3.68
3	M/s. Aurangabad Textiles & Apparel Parks Ltd.	1.02
4	M/s Jade Blue Lifestyle India Ltd.	7.63
5	M/s. Arvind Lifestyle Brands Ltd.	2.11
Average		4.15%

Also that, Ld.TPO excluded provisions for slow-moving inventory and provision for retail shrinkage for computation of operating cost

base and excluded liability is no longer required to be written back and miscellaneous income from operating revenue base.

He thus proposed adjustment of Rs.2,71,44,382/- in trading segment.

Aggrieved by proposed adjustment, assessee raised objections before DRP.

3. DRP rejected 3 comparables being;

- Pantaloons fashion and retail Ltd;
- P I L industries Ltd;
- Ostwal Knit India Ltd;

3.1. On receipt of DRP direction, Ld.AO passed impugned order against which assessee is in appeal before us.

4. At the outset, Ld.AR submitted that **Ground No. 1-3, 5** are general in nature and do not require any adjudication.

It is submitted that **Ground No. 4, 8, 9** are not pressed by assessee.

Accordingly these grounds stands dismissed.

5. Additional grounds filed by assessee:

Assessee filed application for admission of following additional grounds on 10/07/19:

On the facts and in the circumstances of the case and in law

13. The learned DRP/TPO has erred in law and facts in applying filter of 'companies having negative PBIT and negative net worth' for rejection of companies.

14. Without prejudice to the above ground, the learned DRP/TPO, while rejecting pantaloon fashion & Retail Ltd and PIL industries Ltd, has erred in considering only the data of the current year instead of also considering the data for preceding two years.

15. *The earned TPO and DRP have erred in law and in facts in making transfer pricing adjustment the fact that the transaction is tax neutral and therefore the adjustment is bad in law.*

The Appellant craves, to consider each of the above ground of appeal without prejudice to each other and craves leave to add, alter, amend, vary, omit or substitute the aforesaid ground of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law.

5.1. At the outset, Ld.AR submitted that **Ground No. 15** is not pressed.

He submitted that **Grounds 13-14** raised in application for admission of additional grounds could not be raised inadvertently. He submitted that these grounds emanates from order passed by Ld.TPO, wherein 2 comparables excluded, by Ld.TPO is upheld by DRP. He submitted that these grounds could not be raised as these went out of site and are accordingly raised now. In support of his argument he placed reliance upon decision of *Hon'ble Supreme Court* in case of *National thermal Power Co. Ltd., vs CIT* reported in *229 ITR 383*.

5.2. Ld.CIT DR though opposed admission of additional grounds, could not controvert submissions that these emanates from order of Ld.TPO.

5.3. We have perused submissions advanced by both sides in light of records placed before us.

It is observed that 2 comparables excluded by Ld.TPO/DRP are raised in additional Grounds 13-14 for inclusion. It is observed that comparables alleged in these grounds have been raised in ground No. 6 (i) -(ii) originally. By way of additional grounds, assessee is

raising specific issue regarding these comparables for having being rejected. It is observed that assessee had raised the objection before DRP. And that failure to raise these ground before this *Tribunal* originally, appears to be an inadvertent mistake. As no separate records needs to be analysed for purposes of adjudication of these grounds, we admit ground 13-14 raised by assessee in the application.

Accordingly, application for admission of additional grounds stands allowed partly.

Only grounds pressed by assessee to be adjudicated are **Ground 6 (i)-(ii) - 7 and Additional ground No. 13-14**

6. Ground 6(i) -(ii) and Addl.Gr.13-14

Ld.AR submitted that thus in all assessee alleges following comparables for inclusion/exclusion:

For Inclusion:

- Pantaloons fashion and retail Ltd;
- P I L industries Ltd;

For Exclusion:

- Ostwal Knit India Ltd;

6.1. DRP while considering these comparables for inclusion/exclusion, has not examined on account of the reference points in Rule10B(2). The grievance of assessee in case of Pantaloons Fashion and Retail Ltd., and PIL Industries Ltd., is that, revenue does not dispute similarity in FAR with that of assessee. These comparables have been excluded some really by holding that

they do not satisfy the ‘negative PBIT’ and ‘negative net worth’ filter applied by Ld.TPO. It has been submitted by Ld.AR that merely because these comparables made loss would not *ipso facto* result in its exclusion from the list of final comparables.

6.2. Ld.CIT DR submitted that during the year under consideration these comparables have incurred losses and therefore cannot be considered as good comparable is.

6.3. We have perused submissions advanced by both sides in light of records placed before us.

It is observed that merely because these comparables have earned losses during the year under consideration they have been excluded authorities below. Undisputedly, FAR analysis is accepted. Only reason for exclusion is that these companies earned losses during the year. To this we refer to rule 10 B (4) which provides that;

RULE 10 B(4):

“The data to be used in analysing the comparability of an uncontrolled transaction with an international transaction shall be the data relating to the financial year [(thereafter in this rule and in rule 10 CAA referred to as the ‘current year’)] in which the international transaction has been entered into”

Proviso to this rule further provides that:

“data relating to a period not being more than 2 years prior to [the current year] may also be considered if such data reveals facts which could have an influence on determination of transfer prices in relation to the transactions being compared”.

6.4. On account joint reading of the provision with rule 10 B (4) what emerges is that the current year is to be taken into account but the test for 3 consecutive years which means 2 years preceding the current year or also to be taken into account in the event there are factors which could influence the determination of transfer prices. In the present facts of case the authorities below has not considered the situation of these 2 companies in the immediately preceding 2 assessment years relevant to the assessment year under consideration. Merely because these companies have earned losses for the year under consideration would not lead to its exclusion without analysing as per rule 10 B (4) refer to herein above we are thus of opinion that DRP is to analyse the financials of immediately to preceding assessment years.

6.5. Accordingly, we set aside these comparables back to DRP for re-examining financials, on the basis of Rule 10B(4). Assessee is directed to provide all relevant details in respect of these companies before DRP.

In the result these grounds raised by assessee stands allowed for statistical purposes

7. Ground No. 7

This ground has been raised by assessee alleging exclusion of 'Oswal Knit and India Ltd' as a comparable.

Ld.AR submitted that this company is primarily a manufacturing company and do not satisfy various filters applied by Ld.TPO. Ld.AR referring to page 550-551 of paper book submitted that this company does not satisfy 75% trading filter applied by Ld.TPO. He

submitted that during the year this company has imported raw materials and spare parts components to the extent of Rs.8,33,72,000/-. It is submitted that, this company cannot be considered as comparable, as it is engaged in manufacturing operations.

7.1. On the contrary Ld. CIT. DR placed reliance upon observations of DRP which are as under:

“The assessee pleaded for exclusion of Oswal Knit and India Ltd., for the reason that it has manufacturing activity. The contentions of the assessee is carefully examined and facts are verified. As seen from annual report the sales are to the tune of Rs.123.14 crore purchase of stock in trade are Rs.79.93 crore which are tradable goods. No excise duties shown as paid. The cost of material consumed of Rs.13.84 crore does not infer manufacturing activity. Even if it is so, it constitutes only around 15% of purchases and satisfies the filter applied. Hence the ground raised by assessee is rejected.”

He submitted that merely because there is a small element of manufacturing activity carried out by this company cannot be considered to be bad comparable as assessee is not disputing its functional profile.

7.2. We have perused submissions advanced by both sides in light of records placed before us.

On perusal of profit and loss account placed at page 1055 of paper book it is observed that this company derives income from sale of products and excise duty paid during the year is ‘nil’. DRP notes an estimate of manufacturing activity carried on by this comparable.

From details filed by assessee we are unable to discern the impact of manufacturing activity on turn over of this company. However assessee do not object the functional similarity of this company. Under these circumstances, we direct Ld. AO/TPO to call for information under 133(6) of the Act from this company and then decide in terms of filters applied. Needless to say that assessee shall be granted proper opportunity of being heard.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

8. Ground No. 11 is consequential in nature and **Ground No. 12** is premature at this stage.

In the result appeal filed by assessee stands partly allowed as indicated hereinabove.

Order pronounced in open court on 17th January, 2020.

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Bangalore.
Dated 17th January, 2020.
/MK/

Copy of the Order forwarded to:

1. Appellant;
2. Respondent;
3. CIT;
4. CIT(A);
5. DR
6. ITO (TDS)
7. Guard File

By Order

Assistant Registrar