



IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA no.6635/Mum./2018
(Assessment Year : 2014-15)

DSM Nutritional Products India Pvt. Ltd.
B-502, Delphi Building, Orchard Avenue
Hiranandani Business Park, Powai
Mumbai 400 076 PAN – AACCCR3973J

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-9(3)(1), Mumbai

..... Respondent

Assessee by : Shri Dhanesh Bafnaa/w
Ms. Chandani Shah
Revenue by : Shri Akhtar H. Ansari

Date of Hearing – 30.07.2020

Date of Order – 05.08.2020

ORDER

PER SAKTIJIT DEY. J.M.

The captioned appeal has been filed by the assessee against the assessment order dated 29th August 2018, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short "*the Act*") for the assessment year 2014-15, in pursuance to the directions of the Dispute Resolution Panel (DRP)-I, Mumbai.

2. The subject matter of challenge in the present appeal in sum and substance is, comparability of a single comparable viz. Axis Integrated Systems Ltd.

3. Facts necessary for disposal of this issue are, the assessee, a resident company, is engaged in the business of marketing of nutrition and health care products of DSM Group which is its Associated Enterprise (AE). In the year under consideration, the assessee entered into various international transactions with its AE, such as purchase of goods for distribution, provision of marketing support service, payment for e-connectivity charges, sale of finished goods, purchase of capital goods, reimbursement of expenditure and recovery of expenses. However, in the facts of the present appeal, the dispute is only with regard to the adjustment made to the arm's length price of provision of marketing support services to the AE. As per the audit report in Form no.3CEB, during the year under consideration the assessee reported revenue of ₹ 10,02,22,324 from the provision of marketing support services to the AEs. The assessee benchmarked the aforesaid transaction by selecting transactional net margin method (TNMM) as the most appropriate method. For comparability analysis, the assessee selected three comparables with weighted average margin of 14.52%. Since, the margin shown by the assessee @ 13.29% was within the acceptable range, the transaction with the AEs was claimed to be at

arm's length. The Transfer Pricing Officer, however, was not satisfied with the economic analysis made by the assessee. Though, he accepted TNMM as the most appropriate method, however, he did not accept one of the comparables selected by the assessee, namely, Asian Business Exhibition and Conference Ltd. Further, the Transfer Pricing Officer wanted to include two fresh comparables, namely, Axis Integrated Systems Ltd. and BVG India Ltd. and accordingly issued a show cause notice to the assessee. Vide letter dated 30th October 2017, the assessee objected to inclusion of these two comparables. However, rejecting assessee's objection, the Transfer Pricing Officer included both the aforesaid companies as comparables along with three other companies proposed by the assessee. Thus, in total, the Transfer Pricing Officer finally selected five comparables with weighted average of 17.95%. Since, the margin shown by the assessee was not within $\pm 3\%$ of the average weighted margin of the comparables, the Transfer Pricing Officer proposed an adjustment of ₹ 42,63,879. In terms with the adjustment proposed by the Transfer Pricing Officer, the Assessing Officer framed the draft assessment order. While considering assessee's objection against the draft assessment order, learned DRP partly accepting assessee's claim directed the Transfer Pricing Officer to exclude BVG India Ltd. In view of such direction of learned DRP, the adjustment was reduced to ₹ 38,43,195.

4. Objecting to selection of Axis Integrated Systems Ltd., the learned Counsel for the assessee submitted, this company is functionally dissimilar to the assessee as it is engaged in the business of trading in digital signature and is providing liasioning and consultancy services. In this context, he drew our attention to the financial statements of this company as placed in the paper book. Further elaborating, he submitted, the liasioning and consultancy services provided by this company is in relation to Foreign Trade, Customs, Excise and GST related matters. In this context, he drew our attention to the information contained in the website of the company as placed at Page-68 and 69 of the appeal set. Thus, he submitted, the company being functionally dissimilar cannot be selected as comparable. In support of such contention, he relied upon the following decisions:-

- i) *Bergen Engines India Pvt. Ltd. v/s ACIT, ITA no.7802/Del./2017, dated 27.04.2020;*
- ii) *PCIT v/s LI & Fung India Pvt. Ltd., ITA no.176 of 2019 (DHC), dated 08.07.2019;*
- iii) *LI & Fung India Pvt. Ltd. v/s ACIT, ITA no.7549/Del./2017, dated 14.05.2018; and*
- iv) *Arkay Logistics Ltd. v/s DCIT, ITA no.765/Mum./2018, dated 19.11.2019.*

5. The learned Departmental Representative strongly relying upon the observations of the Transfer Pricing Officer and learned DRP

submitted that the consultancy and liasioning service segment of this company is comparable to the assessee. therefore, it has been rightly included as a comparable. To support his submission, he specifically drew our attention to the observations of learned DRP at Para-4.2.6. of their order.

6. We have considered rival submissions and perused the material on record. On going through the financial statements of the disputed company, a copy of which is placed at Page-326 of the paper book, it is noticed that the company is engaged in the business of trading in digital signature, consultancy and providing liasioning services. Though, the Revenue's stand is that the consultancy and liasioning service segment is comparable to the assessee, however, on deeper scrutiny, we find that such consultancy and liasioning services provided by this company is in relation to foreign trade, customs, excise and GST related matters. Further, the company provided such services to independent clients / agencies, unlike, the assessee which is purely a captive service provider. As could be seen, in case of Bergen Engines India Pvt. Ltd. (supra), the Co-ordinate Bench while examining the functionality of this company has noted that the consultancy/liasioning services relating to foreign trade, customs, excise, GST, etc., are of expert nature and cannot be compared with routine marketing services like raising invoice, co-ordination with

customers, logistics, etc. Similar view was expressed in case of LI & Fung India Pvt. Ltd. (supra). Notably, the decision of the Bench in case of LI & Fung India Pvt. Ltd. (supra) was challenged by the Revenue before the Hon'ble Delhi High Court specifically on the issue of comparability of Axis Integrated Systems Ltd. While dealing with the issue, the Hon'ble High Court has very categorically observed that no comparison can be drawn between a captive service provider and an entity like Axis Integrates Systems Ltd. which is providing liasioning services to a large number of entities. Accordingly, the Hon'ble High Court upheld the decision of the Tribunal. In case of Arkay Logistics Ltd. (supra), the Tribunal, while examining the comparability of this very company has also found it to be functionally dissimilar to a routine marketing service provider. Though, the aforesaid decisions pertain to the assessment year 2013-14, however, the material facts on the basis of which such decisions have been rendered are no different from the facts involved in the impugned assessment year insofar as it relates to this comparable. Keeping in view the facts and material on record as well as the cited decisions, we hold that Axis Integrated Systems Ltd. cannot be treated as a comparable to the assessee, hence, should be excluded from the list of comparables. Before us, the learned Counsel for the assessee has filed a written note, as per which, on exclusion of Axis Integrated Systems Ltd., the weighted average margin of rest of the comparables would work out to

15.36%. That being the case, assessee's margin would be within the acceptable range requiring no further adjustment. In view of the aforesaid, we direct the Assessing Officer to compute the margin of comparables afresh and grant consequential relief to the assessee.

7. Since, the learned Counsel for the assessee has restricted his arguments only to the issue of comparability of Axis Integrated Systems Ltd., we do not intend to deal with the other issues raised in this appeal and such issues are treated as not pressed.

8. In the result, appeal is allowed to the extent indicated above.

Order pronounced through notice board under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963, on 05.08.2020

Sd/-
G. MANJUNATHA
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 05.08.2020

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.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai