

आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ “आई-2”, नई दिल्ली में

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH ‘I-2’, NEW DELHI**

सुश्री सुषमा चावला, उपाध्यक्ष एवं श्री प्रशांत महर्षि, लेखा सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, VP & SHRI PRASHANT MAHARISHI, AM

[THROUGH VIDEO CONFERENCING]

आयकर अपील सं. / ITA No.124/Del/2017

निर्धारण वर्ष / Assessment Year 2012-13

Bucher Hydraulics Pvt. Ltd.,
Plot No.6, Sector-5,
IMT manesar, Gurgaon-122050.
PAN-AAECS5991H

.....अपीलार्थी / Appellant

vs

The ACIT,
Circle-5(1), Room No.G-15B,
C.R.Building,
New Delhi-110002.

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Sh. Pradeep Dinodia, CA

प्रत्यर्थी की ओर से / Respondent by : Sh. M.Barnwal, Sr.DR

सुनवाई की तारीख/ Date of Hearing :	20.08.2020	घोषणा की तारीख / Date of Pronouncement:	27.10.2020
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आदेश/ORDER

PER SUSHMA CHOWLA,VP

The present appeal filed by assessee is against the final assessment order dated 15.12.2016 relating to assessment year 2012-13 passed under section 143(3) r.w.s 144C of the Income-tax Act, 1961 (in short ‘the Act’).

2. The assessee has raised following grounds of appeal:-

1. *“The Ld. Transfer Pricing Officer (T.P.O.)/DRP and consequently Ld. Assessing Officer (A.O.) have erred in law and on facts, in making a transfer pricing adjustment of Rs.2,26,38,427/-on account of Arm's Length Price u/s 92CA of the Income-tax Act ('the Act'), wholly on illegal, erroneous and untenable grounds.*

2. *The order of Assessment is bad in law and on the facts and under the circumstances of the case, on account of Arm's Length Price u/s 92CA of the Act.*

Incorrect calculation of PLI of the assessee:

3. *The Ld. TPO/DRP and consequently Ld. AO have grossly erred in law and on facts in incorrectly computing the PLI of assessee by not considering the items such as commission and insurance claim recovered as operating income while computing the PLI of assessee.*

4. *The ld TPO and consequently ld AO have grossly erred in not following the ld DRP's directions by not treating the certain expenses viz. foreign exchange fluctuation loss, fixed interest expense and provision for doubtful debts, as non-operating expenses while computing the PLI of the assessee.*

Incorrect calculation of PLI of comparables:

5. *The Ld. TPO/DRP and consequently Ld. AO have grossly erred in incorrectly computing the PLI's of the comparable companies namely Roto Pumps and Bemco Hydraulics by ignoring the PLI calculated by the assessee which is based on audited financials of said companies. The Ld. TPO has grossly erred in not providing the computation of the PLI of aforesaid comparables such that the assessee might have placed its objections before ld TPO.*

Rejection of Comparable by ld TPO:

6. *The Ld. TPO/DI\N and consequently Ld AO have grossly erred in rejecting Hawa Engineers Ltd., as a comparable company, without considering the FAR Analysis provided by the assessee.*

Cherry picking of comparables:

7. *The Ld. TPO/DRP and consequently Ld AO have grossly erred in cherry picking new companies viz. Yuken India Ltd. and WPIL Ltd. as comparables ignoring the assessee's objections that such companies does not meet the comparability criteria as prescribed under Rule 10B(2) viz difference in product, R&D activities, economies of scale etc.*

Rejection of adjustment as permitted by Rule 10B(3):

8. *The Ld. TPO/DRP and consequently Ld. AO have grossly erred in rejecting the import fluctuation adjustment under Rule 10B(3) on account of exchange rate fluctuation while applying the TNMM.*

Voluntary transfer pricing adjustment made by the assessee

9. The Ld. TPO and consequently ld AO have grossly erred in law and on facts in not following the ld DRP's direction by not granting the claim of voluntary transfer pricing adjustment of Rs.39,65,940 to the ALP of the international transactions offered by the assessee in its Income.

TP Adjustment in proportion to value of international transaction:

10. The Ld. TPO and consequently ld AO have grossly erred in law and on facts in not following the ld DRP's direction by not restricting the transfer pricing adjustment proportionate to the value of international transactions to the total operating cost incurred by the assessee.

Others:

11. That the learned Assessing Officer failed to give the claim of brought forward losses and unabsorbed depreciation as per law although the same was claimed in the Return of Income and all the details/information for the same was available before him in the Return of Income and Tax Audit Report filed by the assessee.

12. That the interest charged u/s Sec 234B/234C of the Act is on wholly illegal and untenable grounds and is prayed not to be upheld.

13. That the penalty proceedings initiated u/s Sec 271(1)(c) are on wholly illegal and untenable grounds since there was no concealment of any income nor submission of inaccurate particulars of income, nor any default according to law by the assessee.”

Additional Grounds of appeal

14. That the computation of PLIs of the comparable companies be calculated based on annual reports of said companies as available in public domain as per Rule 10B(4) read with Rule 10D of the Income Tax Rules, 1962 (‘the Rules’)

15. That Roto Pumps Ltd. be rejected as comparable since it is dissimilar to the assessee as per criteria laid down in Rule10B(2) on account of manufacturing operations being in a SEZ, operating in a different geography (more than 60% sales being Export sales) and operating in a different product segment i.e. spare parts (more than 50% sales from Spare Parts) following a different business model as compared to the assessee.”

3. The preliminary issue raised in the present appeal is vide ground of appeal nos. 1 and 2, under which the assessee has challenged the assessment order passed by the Assessing Officer consequent to the order of the TPO being bad in law and void-ab-initio. Further vide ground appeal nos. 3 to 11, the

assessee has challenged the transfer pricing adjustment made to the tune of Rs.2.26 Crores. The Ld. AR for the assessee pointed out that vide ground of appeal no.7, issue which is raised is of rejection of two comparables. The assessee is aggrieved by the inclusion of M/s. Yuken India Ltd. and WPIL Ltd. on the ground that these are giant companies with R & D functions and are not comparable to the assessee having turnover of Rs.17.87 Crores. The assessee has also raised certain issues on the computation of the operating income. Further, additional grounds of appeals are against TP adjustment. Vide ground no appeal no.11, the assessee is also aggrieved by the absence of directions on account of carry forward/brought forward loss and unabsorbed depreciation. The assessee has filed written submissions, which are taken on record.

4. The Ld. DR for the Revenue has placed reliance on the orders of the authorities below and have referred to the directions given by the DRP in this regard. It is pointed out that where the TPO had applied filter of Rs.5 Crores and above, the two concerns M/s. Yuken India Ltd. and WPIL Ltd. were selected for inclusion. About the additional ground of appeal raised by the assessee, it was stressed by the Ld. AR for the assessee that since the details in respect of the said company were available on the website on a later date, the same could not be used at the time of preparation of TP study report. The Ld. DR for the Revenue pointed that the concern Roto Pumps was included by the assessee during the preceding year and also during the year under consideration and now at this juncture he is praying for its exclusion. The Ld.

AR for the assessee stated that since, the Tribunal was the last fact finding body, hence, the plea before the Tribunal.

5. Briefly in the facts of the case, the assessee is engaged in the business of manufacturing of hydraulic drive pumps and control systems which are used in the automobile industry, agriculture industry, construction of roads, mining industry etc. The assessee has its manufacturing plant located in Gurgaon. The assessee is wholly owned subsidiary of Bucher Industries AG, Switzerland. During the year under consideration, the assessee had entered into various international transactions with its AE. The AO made reference under section 92CA(1) of the Act to the TPO, who in-turn has on the analysis and modifying the filter and recomputing the PLI of the assessee made an upward adjustment of Rs.2.26 Crores. The first plea raised before us is that the order of the AO/TPO suffer from infirmity. The Ld. AR for the assessee has elaborately taken us through the various paras of the order of the TPO and pointed out that at the outset at page-2, the TPO while issuing show cause notice talks of the year ending of the assessee as on 31.03.2011 though the actual fact the year ending is 31.03.2012. Then, he referred to pages 5 to 15 of the TPO's order which are on capacity utilization, whereas the assessee had not claimed any capacity utilization. The Ld. AR for the assessee then pointed out that where the assessee was engaged in import of raw material to the extent of 85%, there is no question of making purchases of raw materials from domestic market. He stressed that whole order of the TPO shows non application of mind and the order is non-est. Referring to the order of the AO/TPO, he pointed out

that extraneous reasons were applied for changing the PLI of the assessee and no reasons relating to the assessee were used. Our attention was drawn to the status of the assessment from Assessment Years 2006-07 to 2016-17. The Ld. AR for the assessee pointed out that the international transactions from year to year were same; even the AEs were same and in all the years TNMM method was applied. He then pointed out that even after orders of the Tribunal, no adjustment has been made. However, the TPO has ignored all of them. He also pointed out that the assessee had made voluntary TP adjustment of Rs.39,65,940/- which has not been referred to. The Ld. AR for the assessee stressed that there was no merit in applying CUP method for making adjustment in the hands of the assessee.

6. Another issue which is raised by the Ld. AR for the assessee was that the AO/TPO has not restricted the adjustments to the value of international transaction but has made the adjustment on the entire transactions.

7. The Ld. DR for the Revenue strongly opposed the submissions of the assessee and pointed out that the orders subsequent to the year under consideration were not relevant for deciding the issue in the present appeal. He also pointed out that the DRP gave directions under para 11 at page 40 onwards of the order and TNMM method had been applied. The Ld. AR for the assessee however objected and stated that the fundamental errors were made by the TPO goes to the root of the issue, which was challenged before the DRP. Hence, the argument of the assessee that the orders passed by the AO/TPO

were non-speaking orders, passed without application of mind and are *non-ese*. Before commenting on the said pleas raised by both authorized representatives, we shall refer to the issues raised on merits.

8. Coming to the issue on merits, the assessee has entered into various international transactions with its AE. The assessee had selected TNMM as most appropriate method to benchmark the international transactions, however, the AO/DRP/TPO were of the view that the international transactions were not at arm's length price. The TPO proposed an adjustment of Rs.2.57 Crores, which was incorporated by the AO in the draft assessment order. The DRP passed certain directions consequent to which the list of final comparable were reduced and the AO/TPO then made an adjustment of Rs.2.26 Crores. The final list of comparable read as under:-

Sl. No.	Comparable Name	PLI(%)
1	Bemco Hydraulics Limited	10.14%
2	Contental Valves Limited	3.26%
3	Roto Pumps Limited	12.01
4	WPIL Limited	12.01%
5	Yuken India Ltd.	10.72%
6	Arithmetical Mean	10.14%

9. The PLI of the assessee was determined at a loss of -2.45% without giving effect to DRP directions regarding treatment of certain items as operating/non-operating, voluntary TP adjustment and proportionate TP adjustment. The

assessee is aggrieved by the inclusion of two concerns i.e. Yuken India Ltd. and WPIL Limited. At the first instance, the case of the assessee before us is that the total turnover of the assessee for the year is only Rs.17.87 Crores. The total turnover of Yuken India Ltd. is Rs.170.49 Crores and WPIL Limited is Rs.300.66 Crores. Another aspect which is also distinctive is that both the concerns were performing R & D function, whereas the assessee has no significant R & D function. Both Yuken India Ltd. and WPIL Limited in their financial statement have reported that the said companies were carrying out continuous R & D for development of new projects.

10. The Hon'ble Delhi High Court in Agnity India Technologies [2013] 262 CTR 291 (Del.) and Hon'ble Bombay High Court in Pentair Water India [TS-566-HC-2015(BOM)-TP] have held that turnover is a relevant factor to consider the comparability of any company. The Hon'ble Delhi High Court in the case of Sanvih Info Group Pvt. Ltd.(earlier known as Oks Span Tech Pvt. Ltd./Sanvih Info)[TS-439-HC-2019(Del.)-TP], have held as under:-

“8. It appears that the comparable discussed in Agnity India Technologies Pvt. Ltd. (supra) which was sought to be excluded was an Infosys Group Company which undoubtedly was 'a giant corporation'. On the other hand, in Chrys Capital Investment Advisors India (P.) Ltd. the three comparables included were Brescon Corporate Advisors Limited, Keynote Corporate Services Limited and Khandwala Securities Limited and the rejected comparables were IDFC Investment Advisors Ltd., Sumedha Fiscal Services Limited and Future Capital Holdings Limited. Clearly therefore none of the comparables involved was a 'giant corporation' like Infosys. Consequently, this Court is not persuaded that the ITAT erred in the present case in excluding Infosys BPO Limited relying on the decision of this Court in Agnity India Technologies Pvt. Ltd. (supra).”

11. The Ld. AR for the assessee further pointed out before us that due to above recent Delhi High Court judgment of Sanvih Info, the reliance of the Hon'ble DRP on the ruling of Chrys Capital Investment Advisors India (P.) Ltd. [2015] 56 taxmann.com 417(Del.) is misplaced, wherein the Hon'ble High Court held turnover as not relevant comparability factor to select the comparable companies since none of the comparables involved was a giant corporation. Applying the said ratio laid down by jurisdictional High Court in different decisions, we held that Yuken India Ltd. and WPIL Limited having high economic scale and R & D function are not functionally comparable to the assessee, whose turnover is low and is not performing any R & D functions. Accordingly, we direct the exclusion of Yuken India Ltd. and WPIL Limited from the final list of comparables.

12. The assessee has also raised additional ground of appeal for the exclusion of Roto Pumps Ltd. from the final list of comparables. In this regard, the case of the assessee is that though the assessee had taken Roto Pumps as a comparable in the TP study report, the same is to be rejected owing to differences with regard to area of operations, nature of products sold (different business model) and operating in a different market in which goods are sold (export sales).

13. The Ld. DR for the Revenue has opposed the proposition raised by the assessee vide additional ground of appeal no.15 on the ground that no such proposition was raised before the lower authorities and also because the

assessee itself had picked up the said concern as functionally comparable. The Ld. AR for the assessee in reply had pointed out that at the time the TP study report was prepared, only software details were available and later the details became available to the assessee and transpired that it was operating in different geography wherein more than 60% sales were exported. The break up of the export sales and the total revenue from operation are as under:-

Sl. No.	Particulars	Roto Pumps (INR)	Assessee (INR)
1	Export Sales of products (A)	45,95,89,953	92,61,874
2	Total Revenue from Operations(B)	76,27,92,101	17,87,07,940
	Export Turnover Ration (A/B)	60,25%	5.18%

14. The next aspect, which is pointed out by the assessee is that Roto Pumps had different business model as it has different product segment of spare parts; the break up of the export sales for the year are as under:-

Particulars	FY 2011-12
	(INR)
Exports of goods	
Pumps	22,90,91,063
Spares	23,04,98,890
Total export Sales	45,95,89,953
Spares Sales/Total Export Sales	50.15%

15. First of all, we find support from ratio laid down by the Hon'ble Punjab & Haryana High Court in CIT-II vs Quark Systems India (P.) Ltd. [2011] 244 CTR

542, wherein, it upheld the right of the assessee to plead before the ITAT that it wrongly selected a comparable, which did not fulfill the tests laid down in the Act and the Rules of being a comparable of the controlled transaction. It held that the assessee is not estopped from pointing out a mistake in the assessment though such mistake is the result of evidence adduced by the taxpayer. The relevant extract is reproduced below:-

"4. The issue involved in this case is whether the Tribunal was justified in entertaining the additional ground for exclusion of M/s. Datamatics Technologies as comparable and remanding the case to the Assessing Officer whereby it had directed that the assessee shall be entitled to produce all relevant material for determination of proper Arm's Length Price and shall co-operate for expeditious disposal of the matter.

6. In view of the observations of the Tribunal whereby an opportunity was provided to the assessee to produce material before the Assessing Officer and the fact that after the remand and consideration of the material produced by the assessee in terms of the order of the Tribunal, an order in favour of the assessee has been passed, no question of law much less a substantial question of law arises in this appeal for consideration of this Court. Accordingly, the present appeal is dismissed."

16. So, we are of the view that the assessee can refer to the information available to point out whether a concern initially selected by it is comparable or not. In respect of Roto Pumps, we find that the major sale turnover of the said concern is in the form of export sales i.e. to the extent of 60.25% as against export turnover of the assessee at 5.18%. Further, Roto Pumps is also having different product segment of spare parts, wherein sale of spares is to the extent of 50% in contrast to the sale of finished products by the assessee. The assessee has filed the details of the break up of the sale of finished goods in Note-6.h of audited financial statement, which is placed in the paper book at

page 14 and in these circumstances, we hold that the concern Roto Pumps is to be excluded from the final list of comparable, both on geographical differences and also on being functionally not comparable to the assessee. Thus, the additional ground of appeal no.15 raised by the assessee is allowed.

17. Ground of appeal no.6 raised by the assessee is not pressed, hence dismissed as not pressed.

18. Now, coming to the ground of appeal no. 5 and the additional ground of appeal no.14, wherein, the grievance of the assessee is that the AO/TPO has incorrectly computed the PLI of the comparable. As per Rule10B(4) read with Rule 10D of I.T. Rules, the PLIs are to be calculated based on the annual report of the company as available in the public domain. The assessee states that the TPO did not provide the calculation of the PLIs of the comparable companies and hence, no objections were filed before him. However, before DRP, the same along with annual report were filed, which was rejected on the ground that the assessee had not given required data and valid reason for difference in margin. We are of the view that where the annual reports are available in public domain then the PLIs are to be computed based on such annual reports. The AO/TPO is thus directed to verify the correctness of the PLIs from the annual reports and revise the average of the PLIs of the finally selected comparables. Consequently, the ground of appeal no.5 and additional ground of appeal no.14 are allowed.

19. Now, coming to the grounds raised by the assessee in respect of computation of PLI. First such ground of appeal no.3, wherein, the assessee aggrieved by certain income side items not considered as operating income by Ld. AO/DRP/TPO, which are as under:-

- Commission received on direct sales made by AE in India-Rs.54,973/-:- Compensation paid by the AEs to the assessee in consideration of direct sales affected in the assessee's specified territory i.e. to any third party customer in India.
- Insurance claim recovered Rs.7,774/-:- Recovery of insurance claim on lost laptops and testing devices.

20. Vide ground of appeal no. 4, the assessee is aggrieved as DRP directions were not followed by Ld. AO/TPO regarding treatment of certain expenses as non-operating expenses. We are of the view that both these issues raised vide ground of appeal nos. 3 and 4 needs to be looked into by the AO/TPO and decide the issue after affording reasonable opportunity to the assessee. Hence allowed.

21. Further, vide ground of appeal no.8, the assessee is aggrieved by the orders of the lower authorities in treatment of foreign exchange fluctuation import cost as non-operating expenses. The Ld. R for the assessee points out that where the assessee has high import content of 85.48% and the comparable selected have very low content, then adjustment is to be made Reliance was placed on para 2.86 of the OECD TP Guidelines 2017, which

sates that exception and extraordinary items of a non-recurring nature should generally also be excluded from the determination of the net profit indicator. The Ld. AR for the assessee stressed that even if these comparables are taken in the final list, but adjustment needs to be made in the hands of the assessee. The Pune Bench of the Tribunal in Mercedes-Benz India Pvt. Ltd. [TS-823-ITAT-2019(PUN)-TP] has held as under:-

“28.....We find merit in the claim of the assessee in treating foreign exchange loss as non-operating in nature. There was fluctuation in the rate of Euro/INR rates when compared to the previous year and the market witnessed around 14.10% increase in Euro/INR rates. In such facts and circumstances, where the phenomenon was unique, then the same is to be excluded while computing PLI of assessee.”

22. Relying on the said propositions of the Pune Bench of the Tribunal in Mercedes-Benz (supra), we direct the Assessing Officer/TPO to exclude the foreign exchange fluctuation cost while computing the PLI of the assessee.

23. Vide ground of appeal no.9, the limited grievance of the assessee is that the voluntary transfer pricing adjustment offered by the assessee should be considered. The assessee had offered a sum of Rs.39,65,940/- which needs to be taken into account in case any transfer pricing adjustment is made in the hands of the assessee. Accordingly, we hold so.

24. Now, coming to the last issue of transfer pricing provision i.e. the grievance of the assessee that TP adjustment is not made in proportion to value of international transaction. The case of the assessee is that the DRP had allowed the said ground of appeal but the Assessing Officer had not followed the directions of the DRP. However, the Tribunal in Assessment Year 2013-14

had also given similar directions and the same may be adopted. We find merit in the plea of the assessee and following the ratio laid down by the Tribunal in assessee's own case for Assessment Year 2013-14 in ITA No.7803/Del/2017, order dated 13.04.2018, we direct the Assessing Officer accordingly to recompute if any.

25. Now, we come to the last ground of appeal no.11, wherein the assessee is aggrieved by the orders of the authorities below in not giving any direction regarding carry forward/brought forward losses. The Assessing Officer is directed to carry out the necessary verification in this regard and decide the same in accordance with law after affording reasonable opportunity of hearing to the assessee.

26. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 27th October, 2020.

Sd/-
(PRASHANT MAHARISHI)
लेखासदस्य/ **ACCOUNTANT MEMBER**

Sd/-
(SUSHMA CHOWLA)
उपाध्यक्ष / **VICE PRESIDENT**

दिल्ली / दिनांक Dated : 27th October, 2020

Shekhar, Sr. P.S,

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

1. **अपीलार्थी** / The Appellant
2. **प्रत्यर्थी** / The Respondent
3. **आयकर आयुक्त(अपील)** / The CIT(A)
4. **मुख्य आयकर आयुक्त** / The Pr. CIT

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,दिल्ली/ DR, ITAT, Delhi
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति//True Copy//

सहायकरजिस्ट्रार, आयकर अपीलीय अधिकरण ,दिल्ली
Assistant Registrar, ITAT, Delhi