

**IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI**

BEFORE SHRI PRAMOD KUMAR (VICE PRESIDENT)

AND

SHRI SAKTIJIT DEY(JUDICIAL MEMBER)

I.T.A. No.7041/Mum/2017
(Assessment Year : 2013-14)

Supermax Personal Care Private Ltd Wagle Estate P.O., LBS Marg, Thane (W)- 400 064 PAN : AAOCS7144Q	vs	Deputy Commissioner of Income-tax (LTU)- 1, Mumbai
(APPELLANT)		(RESPONDENT)

Appellant by	Shri J.D. Mistry (Adv) / Shri Hiten Chande (Adv)
Respondent by	Shri A Mohan [CIT(DR)]

Date of hearing	07-01-2021
Date of Pronouncement	27/01/2021

ORDER

Per Saktijit Dey (JM),

Captioned appeal by the assessee arises out of assessment order dated 27-10-2017 passed under section 143(3) r.w.s. 144C(13) of the Act for the assessment year 2013-14 pursuance to directions of learned Dispute Resolution Panel (DRP)-II, Mumbai.

2 Grounds 1 & 2 being general in nature, do not require specific adjudication; hence dismissed.

3. In grounds 3 to 11, the assessee has raised various issues relating to the addition of Rs.63,44,93,337/- made on account of transfer pricing adjustment to the arm's length price of sale of raw materials and goods.

4. Briefly the facts are, the assessee, a resident company, is engaged in the business of manufacturing and sale of shaving products. Thus, the assessee broadly carries out following two business activities:-

- (a) Manufacturing and sale of products to associated enterprises (AEs) outside India;
- (b) Manufacturing and distribution of products in India.

5. It is stated, 54% of its total sales effected during the year were to the AEs and the balance 46% was in domestic market. It is stated by the assessee that insofar as sales to AEs are concerned, assessee carried out manufacturing of the products and sales activities like distribution, marketing, etc. are carried out by the AEs. However, insofar as domestic sales are concerned, assessee carried out manufacturing, distribution, marketing, etc. During the year under consideration, the assessee broadly entered into following international transactions with its AEs:- sale of razor blade, sale of packing material, steel and stores, purchase of packing material and recovery of freight charges. Since all these transactions are closely linked to the manufacturing operations of the assessee, the transactions were aggregated for arm's length analysis in the transfer pricing study. For benchmarking the international transactions, the assessee prepared separate segmentals to arrive at the operating profit earned from international transactions. Since, the profit earned by the assessee at 18.60% was much higher than the average profit margin of the selected comparables computed at 11.39%, the transactions with the AEs were claimed to be at arm's length. The Transfer Pricing Officer (TPO), however, was not satisfied with the benchmarking done by the assessee. Stating that the segmental profit and loss account submitted by the assessee in respect of finished goods are unaudited and basis of apportionment of expenses was not provided. Further, various expenses such as travelling and conveyance, rates and taxes, legal and professional fees, printing and stationery auditor's remuneration and vehicle expenses have been entirely

allocated to local segment and appropriate allocation keys have not been used to allocate the common expenses in two segments. Therefore, he rejected the segmental P&L Account prepared by the assessee. Having done so, he considered the entity level margin of 0.8% for benchmarking. However, the TPO rejected four comparables selected by the assessee and introduced two fresh comparables. After considering the average margin of comparables selected, which worked out to 15.78% as against the margin of the assessee at 0.8%, the TPO proposed adjustment of Rs.89.32 crores. The adjustment proposed by the TPO was added to the income of the assessee in the draft assessment order. Against the draft assessment order, assessee raised objections before learned DRP. In course of the proceedings before learned DRP, the assessee filed various submissions and also submitted that though segmental P&L accounts were submitted, they were not properly considered. On the basis of submissions made by the assessee, learned DRP called for a remand report. After considering the submissions of the assessee and taking note of the remand report, learned DRP upheld the adjustment made by the TPO broadly on the following reasonings:-

- The Assessee was not at all maintaining its financial accounts treating the two segments as separate;
- The manufacturing facility is common, raw materials, and consumables are common, direct expenses are common;
- A segmental account was produced before the TPO, which when doubted by the TPO, was got certified by the Auditor three years after the end of relevant financial year and the same was furnished before the DRP as additional evidence. When the DRP observed some severe discrepancies in this 'newly audited segmental account', the same was again revised with revised allocations and produced before the DRP; and
- The difference in profit of the export segment as per the two segmental accounts was] huge of INR 20.00 crores.

6. Further, the learned DRP also rejected the objection of the assessee with regard to rejection of some of the comparables by TPO and introduction of the fresh comparables by him. Thus, in sum and substance, learned DRP upheld the transfer pricing adjustment.

4. Before us, Shri J D Mistry, learned Senior Counsel for the assessee, referring to ground 7 raised in the Memorandum of Appeal submitted that rejection of segmental P & L account of the assessee on unsustainable reasons is bad in law; hence unacceptable. He submitted, the

reasoning of the TPO that segmental P&L accounts are unaudited is totally wrong as there is no requirement in law that the segmental accounts have to be audited. Further, he submitted, the observations of the TPO that proper allocation keys were not provided by the assessee for allocating cost to both the segments is wholly unacceptable as the assessee has provided all the allocation keys to the TPO. He submitted, whatever allocation key is followed, assessee's margin will be within the ALP even accepting the comparables selected by the TPO. To support his contention, learned Senior Counsel drew our attention to the audited segmental P&L accounts which were filed before learned DRP. He also drew our attention to the submission dated 15-03-2017 filed before learned DRP, wherein, as per the audited segmental accounts, the margin of the assessee is worked out at 23.83%. He submitted, though, various documentary evidences including audited segmental P&L accounts were filed before the DRP, they were rejected without proper reasoning. Strongly contesting the observations of learned DRP that there is a huge difference in the profit margin of the export segment as per the two segmental accounts, the learned Senior Counsel submitted, as per the directions of DRP, the assessee has furnished a fresh working on without prejudice basis wherein the margin was worked out at 17.18%. Thus, he submitted, the allegation of the DRP that there is huge difference in the profit margin as per segmental P&L account is grossly erroneous. To substantiate his claim, the learned Counsel drew our attention to the segmental P&L accounts furnished in the paper book. Finally, the learned Senior Counsel submitted, in similar facts and circumstances, the TPO had made adjustment in assessee's own case in Assessment Year 2012-13 which was upheld by the DRP. Further, he submitted, when the issue came up before the Tribunal in ITA No.1840/Mum/2017 dated 07-06-2019 reported in (2019) 107 taxmann.com 361, the Tribunal has completely rejected / disapproved the reasoning of the departmental authorities and directed the TPO to delete the adjustment after verifying assessee's claim on the basis of segmental P&L account furnished before the TPO. Thus, he submitted, the aforesaid decision of the Tribunal squarely covers the issue.

5. The learned Departmental Representative fairly submitted that this issue is covered by the decision of the Tribunal.

6. We have considered rival submissions and perused materials on record. Since, we have dealt in detail with the submissions made by learned Senior Counsel with regard to the segmental P&L account furnished before the departmental authorities and rejection of the same on flimsy ground, we do not intend to deal with those facts over again. Suffice to say, before the TPO, the assessee had furnished segmental P&L accounts. The TPO has rejected them merely on the reasoning that they were not audited. Though, before learned DRP, the assessee has made good the deficiency alleged by the TPO by furnishing audited segmental P&L accounts, learned DRP has rejected them on an unacceptable reasoning that they were not by the same auditor. From the material on record, we find that the assessee has not only furnished the segmental P&L accounts, but has also furnished the details of allocation keys for allocating various expenses. It is the contention of learned Senior Counsel that if segmental accounts are accepted, whatever allocation key is applied to the satisfaction of the TPO, still assessee's margin would be within arm's length, even, with the comparables selected by TPO. It is relevant to observe, before learned DRP, the assessee had furnished working of margin as per which it is 23.83%. The learned DRP has rejected the same on the ground that in the fresh segmental P&L account, the margin has been worked out at 17.18%. It is the contention of the learned Senior Counsel that the fresh working of the margin is on the directions of learned DRP to re-work the margin in a particular manner. Be that as it may, the material on record clearly reveals that the assessee has furnished cogent evidence to substantiate the claim that the margin shown by it is within the average margin of the comparables selected by the TPO.

7. It is worth mentioning, while deciding identical issue relating to adjustment made to ALP of sale of finished products and raw materials in assessee's own case in Assessment Year 2012-13 (supra), the co-ordinate bench, upon examining almost identical reasoning on which the adjustment has been made has decided the issue in the following manner. For better clarity, we reproduce the observations of the Bench in extenso, as under:-

“6. We have heard both the counsel and perused the records. Leaned counsel of the assessee submitted that firstly there is no mandatory requirement for submitting audited segmental accounting. Nevertheless he submitted that even if the common expenses are allocated on the basis of whatever basis the operating margin of the assessee for the export segment would compare favourably with the

mean of the operating margin of the comparables as selected by the TPO. Hence he submitted that authorities below have totally erred in rejecting the assessee's submission on the ground that segmental account is not audited.

7. Per Contra learned departmental representative would not disputed the proposition that even if the common expenses are allocated on the basis of whatever allocation key chosen the operating margin of the export segment of the assessee would compare favourably with that of the comparables selected by the transfer pricing officer. However the learned departmental representative in this regard submitted that if this proposition is accepted the matter may be set aside to the transfer pricing officer who would then compare the profit margin of the export segment of the assessee to the profit margin of the comparable companies since only likes can be compared in transfer pricing proceedings. He submitted that it would not be proper to compare the profit margin of export segment of the assessee with the profit margin of the entity level business of comparables as submitted by the assessee/TPO.

8. In rejoinder to the above learned counsel of the assessee submitted that learned departmental representative is trying to totally make out a new case and improve upon the order's of the authorities below. He submitted that it was never a case of the transfer pricing officer or even that of the dispute resolution panel that the export segment of the assessee is not comparable with the comparables selected by the transfer pricing officer. We find that nowhere the authorities below have objected in this regard. The only objection was that segmental accounts were not audited and that proper allocation keys were not submitted. However this has been duly countered by the learned counsel of the assessee by submitting that allocating the common expenses to the export segment by whatever key the result would compare favourably with the arithmetic mean of the operating margin of the comparable's selected by the transfer pricing officer. In this regard learned counsel of the assessee placed reliance upon the decision of ITAT in the case of Asstt. CITv. Maersk Global Service Centre (I) (P.) Ltd. [2011] 16 taxmann.com 47/133 ITD 543 (Mum.) for the following proposition :- "we are unable to accept the contention of the Id. DR for excluding certain cases not rejected by the TPO but which in her opinion did not pass the test comparability. It is evident that Departmental Representative has the duty to defend the order of the Assessing Officer while arguing the appeal filed by the Revenue, He is fully competent and free to support the reasoning of the Assessing Officer from any other angle so as to put forward a strong case of the Revenue, There is a marked distinction between supporting order of the AO/TPO by the Departmental Representative on one hand and finding flaws in the order of the AO/TPO in an attempt to show that the AO/TPO failed to do what was required to be done by him. In our considered opinion if the learned Departmental Representative is allowed to fill in the gaps left by the AO/TPO it would amount to conferring the jurisdiction of the CIT u/s 263 to the Departmental Representative, which is not permitted by the statute. Let us take another situation. Suppose a particular deduction is permissible on the cumulative satisfaction of three conditions. The AO examines the case and finds the very first condition as tacking. Without examining the fulfillment or otherwise of the other two conditions, he rejects the claim, in that case if such first

requirement is subsequently found to be fulfilled in the appellate proceedings, the Departmental Representative can very well point out to the tribunal that the other two conditions were also not fulfilled. By so contending the DR cannot be said to set up a new case, Rather it would amount to supporting the view point of the Assessing Officer on the question of deduction. But in no circumstance the Departmental Representative can be allowed to take a stand contrary to the one taken by the AO/TPO". Learned Counsel of the assessee submitted that this decision has been upheld by Hon'ble Jurisdictional High Court in ITA No. 692/2012.

9. Per Contra learned departmental representative submitted that the reliance by the learned counsel of the assessee for this decision was not appropriate in this regard he referred to the decision of honourable Delhi ITAT in the case of Swarovski India (P.) Ltd. v. Dy. C/r[2016] 69 taxmann.com 124 (Delhi - Trib.).

10. In rejoinder learned counsel of the assessee in this regard submitted that the said ruling was pronounced under different fact pattern, wherein the Assessee has undertaken allocation on an adhoc basis without there being any parameter to justify the rationality of such allocation. Hence, it was submitted before the Hon'ble ITAT that the said ruling is not applicable to fact pattern of the Assessee's case, since the case of the Assessee the expenses are allocated on judicially recognised ratios like sales and production.

11. Up on careful consideration we find ourselves in agreement with the submissions of the learned counsel of the assessee. The assessee has submitted that the margin of its export segment compares favourably with the comparables selected by the TPO. This has been rejected by the transfer pricing officer on the ground that segmental accounts are not audited. It has further been held by the authorities below that proper allocation keys of common expenses between export and other segment have not been provided. In this connection assessee has submitted that if the common expenses are allocated by applying any of the keys the operating margin of the export segment would compare favourably with the operating margin of the comparables. This proposition has not at all been rebutted by the authorities below. The learned departmental representative also could not dispute the above proposition. However learned departmental representative has tried to make out a new case by making a submission that the matter may be set aside to TP. This in fact tantamounts to submission that the transfer pricing officer has not acted properly inasmuch as he has not compared the export segment profit margin of the assessee with similar export segment margin of other comparables . In this regard we agree with the learned counsel of the assessee that learned departmental representative is trying to make out an altogether new case. Authorities below objected to comparability of assessee's export segment with the comparable selected by the TPO only on account of their observations regarding absence of proper allocation key. It was never their case that there is lack of comparability. Learned departmental representative is well within his rights on supporting the order's of the authorities below. However he cannot argue that the transfer pricing officers action is incomplete and therefore the issue needs to be set aside so that the transfer pricing officer can be given a second innings .Such a view was rejected by the ITAT in the case of Maersk

Global Service Centre (I) P. Ltd. (supra) above, which was duly upheld by the honourable jurisdictional High Court.

12. In the background of aforesaid discussion and precedent we find cogency in assessee's submission that the operating margin of the export segment of the assessee can be compared with the profit margin of the comparables selected by the transfer pricing officer by any allocation key selected. The TPO is directed to examine the veracity of this submission and delete the adjustment on account of arm's length price, if the result compares favourabl."

8. Facts being identical, respectfully following the aforesaid decision of the co-ordinate bench we direct the Assessing Officer to compare the export segment of the assessee as per the segmental P&L accounts with the profit margin of the comparables selected by TPO by applying any allocation key and determine the ALP accordingly. This ground is allowed, as indicated above.

9. In ground 12, assessee has challenged disallowance of additional depreciation claimed under section 32(1)(ia).

10. Briefly the facts are that the assessee purchased and installed certain new plant and machinery in financial year 2011-12 corresponding to Assessment Year 2012-13. Since, the new assets were put to use for a period less than 180 days in Assessment Year 2012-13, the additional depreciation allowable at 20% to the assessee was restricted to 50% as per Second Proviso to section 32(1)(ia). The balance unclaimed additional depreciation was carried forward to the impugned assessment year and was claimed by the assessee. The Assessing Officer, however, disallowed assessee's claim on the reasoning that it has to be allowed only in the year in which plant and machinery was purchased and put to use and the unclaimed additional depreciation cannot be carried forward and allowed in the subsequent assessment year. The learned DRP also upheld the aforesaid decision of the Assessing Officer.

11. We have considered rival submissions and perused the materials on record. The facts on record clearly reveal that in Assessment Year 2012-13 the assessee had purchased new plant and machinery on which additional depreciation @20% is allowable. However, since the plant and machinery were put to use for a period of less than 180 days in Assessment Year 2012-13, the additional depreciation was restricted to 50% of the admissible amount. In other words,

depreciation was allowed @10%. The balance unclaimed additional depreciation was claimed by the assessee in the impugned assessment year. Now, the law is fairly well settled that the balance unclaimed amount of additional depreciation has to be allowed to the assessee in the immediately succeeding assessment year. In this context, we may refer to the following decisions, wherein, it has been held that the amendment made to section 32(1)(iii) by Finance Act, 2015 being clarificatory in nature would apply retrospectively.

1. Rittal India Pvt Ltd 80 ITR 423 (Kar)
2. Shree T.P. Textiles Pvt Ltd – 79 taxmann.com 411
3. PCIT vs Godrej Industries Ltd – ITA No. 511/Mum/2016

12. Respectfully following the judicial precedents noted above, we allow assessee's claim. This ground is allowed.

13. Ground 13 being premature at this stage is dismissed.

14. The issue raised in all other grounds having become academic, do not require adjudication at this stage. However, they are left open for adjudication if need arises in future.

15. In the result, appeal is partly allowed.

Order pronounced in the Open Court on this 27 /01/2021.

Sd/-

sd/-

(PRAMOD KUMAR)	(SAKTIJIT DEY)
VICE PRESIDENT	JUDICIAL MEMBER

Mumbai, Dated : 27/ 01/2021.

Pavanan, Sr.P.S (on contract)

Copy of the order forwarded to :

1. The Appellant.
2. The Responent.
3. The CIT(A)
4. 4. The CIT
5. D.R., ITAT, Mumbai.
6. Guard File.

//True Copy//

By order

I.T.A.T., Mumbai.