

**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.211/Mum/2008-09)

TCL Holdings Private Limited C/O R.A. Moraes& Associates, 114, Mahim United Indl Premises, Moghal Lane, Mahim (W), Mumbai-400 016 PAN : AABCT9975D	vs	ACIT, Circle-8(3), Mumbai
(APPELLANT)		(RESPONDENT)

Appellant by	Dr. K. SAhivaram (Sr. Advocate) / Shri Shashi Bekal (AR)
Respondent by	Shri A Mohan[CIT(DR)]

Date of hearing	12-01-2021
Date of Pronouncement	27/01/2021

ORDER

Per Saktijit Dey (JM),

This is an appeal by the assessee against the final assessment order dated 19-10-2012 passed u/s 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 for the assessment year 2008-09 in pursuance to the directions of learned Dispute Resolution Panel (DRP)-II, Mumbai.

2. The solitary issue in dispute involved in the present appeal relates to addition of Rs.26,33,69,103/- on account of transfer pricing adjustment.

3. Briefly, the facts are, the assessee is a resident company. As stated by the Assessing Officer, 99.99% of assessee's shares are held by TCL Overseas Holdings Pvt Ltd, Hongkong and only one share is held by another company. The assessee is engaged in the business of trading in consumer electronic products such as television, digital video system, air conditioner, washing machines and consumer durable appliances. For carrying on such business activity, the assessee has imported completely built-in units (CBUs) with components and accessories from its associate enterprise (AE) for resale in India. Assessee had benchmarked the international transaction entered with the AE by adopting transactional net margin method (TNMM) as the most appropriate method. For comparability analysis, assessee selected six comparables. Since, assessee's margin shown as 4.99% compared favourably with the average operating margin of the comparables, the assessee claimed the transaction with the AE to be at arm's length. The Transfer Pricing Officer (TPO), however, did not find the benchmarking of the assessee acceptable, though, he accepted TNMM as the most appropriate method. Having done so, he selected his own comparables(six in number) with average margin of 3.99%.Whereas, he re-computed the margin of the assessee at (-) 13.74% at entity level. As a result, he proposed an adjustment of Rs.26,33,69,103/-. 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 the learned DRP. After considering the submissions of the assessee, learned DRP more or less agreed with the conclusion of the TPO. Accordingly, in terms of the directions of learned DRP, assessment was finalized.

4. Dr K. Shivaram, learned Counsel appearing for the assessee submitted, while dealing with identical issue in assessee's own case in Assessment Year 2007-08, the Tribunal has restored the issue back to the AO / TPO for deciding afresh in light of observations made by the Bench. He submitted, facts being identical, the issue may be restored back with similar directions.

5. The learned Departmental Representative agreeing with the aforesaid submission of the learned Counsel for the assessee, accepted for restoring the issue to the AO / TPO.

6. We have considered rival submissions and perused the materials on record. The main grievance of the assessee is with regard to applicability of TNMM at entity level for computing the margin. Further, the assessee has also raised objections against the comparables selected by the TPO. As we find, while deciding identical issue in assessee's own case in Assessment Year 2007-08 vide ITA No. 7129/Mum./2011, dated 15.05.2013, the Tribunal has restored the issue to the AO / TPO with the following observations:-

"7. We have perused the records and considered the rival contentions carefully the dispute raised is regarding the transfer pricing adjustment made to the international transaction entered into by the assessee with associate enterprise (AE). The assessee during the year has claimed to have made purchases of CBUs and components for total value of Rs.56,25,31,000/-. The matter had been referred to TPO for carrying out the transfer pricing exercise. As per the section 92, the income arising from an international transaction is required to be computed having regard to arm's length price of the transaction. For computing the arm's length price there are various methods prescribed in section 92 C which includes transactional net margin method (TNMM). in this case, both the assessee and the TPO have applied TNMM method. The assessee had selected six comparables the mean margin of which was found to be lower than the margin declared by the assessee. Therefore, it has been argued that no adjustment was required to be made. The TPO had not accepted the comparables selected by the assessee on the ground that most of them were loss making companies. The TPO has also excluded loss making cases out of seven comparables selected by him for making the TP adjustment. We agree with the submissions of the learned AR that the comparables could not be rejected only on the ground of loss making. The cases of loss making companies are required to be further examined to find out if the loss had occurred during the normal course of business or because of some extraordinary factors which have affected the comparability of the transaction. Only in the later case the loss cases have to be excluded. No such exercise has been done.

7.1 We also find that both assessee and TPO have applied TNMM method at entity level which is not correct. The adjustment is required to be computed only with respect to international transaction and not in respect of the entire business transactions. The argument given by TPO and DRP that they have made the adjustment at the entity level because the assessee had also made entity level adjustment, cannot be accepted. Merely because the assessee had made mistakes in computing the TP adjustment the authorities cannot follow the same blindly as they are duty bound to compute the adjustment correctly as per law. Because of the mistakes committed by both the sides TP adjustment has been made at Rs. 65.27 crore when the entire purchases from the AE was only Rs. 56.25 crore. The assessee has also objected to the comparables selected by the TPO on the ground that the products dealt with by the companies were totally different. The case of the department is that they have selected only those companies which were dealing in consumer electronics products which were the products dealt in by

the assessee. The objection raised by the assessee cannot be accepted if the products selected by the TPO are broadly similar as in TNMM method it is not necessary that the product should be exactly the same as dealt in by the assessee. The objections have also been raised by the assessee that the comparables selected by the TPO were manufacturing concerns. However, the learned CIT (DR) has pointed out that the assessee has also selected manufacturing concerns such as Salora International. In our view, in TNMM method, functions of the comparables selected should be similar. Therefore, it will not be appropriate to compare the margin of manufacturing companies to those of trading companies. The learned CIT (DR) also pointed out that business profile of the assessee itself was not very clear. The assessee has claimed that it was importing CBUs but the learned CIT (DR) pointed out that the PL account placed at page 27 of the paper book does not show any purchase of CBUs. The learned CIT (DR) has also pointed out discrepancy in the figures of total income shown by the assessee which was 377 crore as given at page 72 of the paper book whereas the figure given at page 27 is Rs. 304 crore. Similar discrepancy has also been pointed out in case of margin of Salora International which as per the assessee was 3.30% whereas as per the TPO it was 3.08%.

7.2 Considering the various discrepancies as well as infirmities in the approach adopted by both the parties we consider it appropriate that a fresh transfer pricing study be undertaken for selecting proper comparables after careful study of functional profile of the assessee so as to arrive at proper TP adjustment. We, therefore, set aside the order of AO and restore the matter back to AO/TPO for passing a fresh order after necessary examination in the light of observations made in this order and after allowing the opportunity of hearing to the assessee.”

7. There is no difference in the factual position in the impugned assessment year. Therefore, respectfully following the aforesaid decision of the co-ordinate bench, we restore the issue to the Assessing Officer for fresh adjudication keeping in view the observations of the co-ordinate bench reproduced hereinabove. Needless to mention, the Assessing Officer must provide reasonable opportunity of being heard to the assessee before deciding the issue. Grounds are allowed for statistical purpose.

4. In the result, appeal filed by the assessee is allowed, for statistical purpose.

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.

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By order

I.T.A.T., Mumbai.