

IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 1733/Mum./2020
(Assessment Year : 2013-14)

Yash Jewellery Pvt. Ltd.
Unit no.603 & 604, Block no.1
Seepz++, SEZ, Andheri (East)
Mumbai 400 093 PAN – AAACY2834R

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Circle-11(3)(2), Mumbai

..... Respondent

Assessee by : Shri Amod Prabhudesai
Revenue by : Shri Tajinder Pal Singh

Date of Hearing – 31.01.2021

Date of Order – 18.02.2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The captioned appeal has been filed by the assessee challenging the impugned order dated 19th September 2019, passed by the Commissioner of Income Tax (Appeals)-58, Mumbai (hereinafter referred to as "*the learned CIT(A)*") under section 250 of the Income-tax Act, 1961 (hereinafter referred to as "*the Act*") for the assessment year 2013-14.

2. The assessee has filed the present appeal on the following grounds:-

"In the facts and circumstances of the case and in law, the AO/TPO and the Ld. CIT(A) ought to have held that -

1. Adjustment of interest for delay in realization of sales made to Associated Enterprises (A.Es) of Rs.55,24,388, should be imputed in computing operating margin of the appellant instead of considering as an independent international transaction and since the revised operating margin on cost of the appellant of 10.33% is higher than that of comparables i.e., 3.86%, adjustment of interest of Rs.55,24,388 is not warranted and accordingly, same should be deleted in its entirety.

2. It is humbly prayed that the reliefs as prayed for here-in-above should be granted."

3. The appeal filed before us is delayed by 198 days. The assessee received the order passed by the CIT(A) on 29.11.2019, however, the appeal before the Tribunal was filed on 13.08.2020. The assessee has also filed application seeking condonation of delay supported by affidavit sworn by Director of assessee, Shri Anant Laxman Prabhudesai, stating that assessee's business operations were stopped w.e.f. 31.12.2018 and there is no staff available to look after the Income Tax matters except 2-3 persons who look after day-to-day administration work. Further, when the order of the CIT(A) was received by the Authorised Representative, the same was immediately handed over to the accountant of the assessee, who was under impression that in view of the assessed loss for the year, there is no tax liability and hence, no further action was required to be taken against the order passed by the CIT(A). Subsequently, while reviewing the year wise status of Income Tax litigation matters of the

assessee company, it was noticed that in respect of certain additions/disallowances confirmed by the CIT(A), the Assessing Officer (hereinafter referred to as "the AO") has initiated penalty proceedings under section 271(1)(c) of the Act. Only pursuant thereto, assessee approached the Tribunal by way of present appeal alongwith prayer for condonation of delay in filing same. Shri Amod Prabhudesai, Learned Authorised Representative ("hereinafter referred to as "Ld. A.R."), appearing for the assessee submitted that delay in filing the appeal is completely unintentional and *bona fide* and prayed for its condonation.

4. On the other hand, Shri Tejinder Pal Singh, Learned Departmental Representative ("Ld. DR"), appearing for the Revenue, vehemently objected and submitted that the delay cannot be condoned as there is no sufficient reason for filing of delayed appeal.

5. We have carefully considered the rival contentions and perused the application and supporting affidavit seeking condonation of delay in filing the present appeal. The reasons stated by the assessee for seeking condonation of delay falls within the parameters for grant of condonation laid down by Hon'ble Supreme Court in the case of *Collector Land Acquisition, Anantnag Vs. MST Katiji and others: 1987 SCR (2) 387*. It is well established that rules of procedure are handmaid of justice. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. In the present case, the assessee did not stand to benefit by late filing of appeal.

Thus considering the detailed reasons furnished by the assessee, we are of the view that there was sufficient cause for not presenting the appeal within the prescribed limitation period. Accordingly, we condone the delay in filing present appeal.

6. On merits, the only grievance of the assessee in this appeal is regarding charging of notional interest on outstanding receivables from its Associated Enterprises.

7. The brief facts of the case pertaining to this issue as emanating from the records are: The assessee was engaged in the business of manufacture and sale of studded jewellery. During the previous year relevant to assessment year 2013-14, the assessee entered into following international transactions with its Associated Enterprises:

<i>Sr. No.</i>	<i>Nature of international transaction</i>	<i>Amount (Rs.)</i>	<i>Method Adopted by assessee</i>
1.	<i>Sale of studded jewellery to Jewel America Inc. USA</i>	<i>67,88,27,131</i>	<i>TNMM</i>
2.	<i>Sale of studded jewellery to Barjon Jewellery Inc., USA</i>	<i>32,19,65,831</i>	<i>TNMM</i>
3.	<i>Purchase of Colour stones, Cut & Polished Diamonds, Findings, Gold, Silver and Stored from Jewel America Inc. USA.</i>	<i>1,44,222</i>	<i>TNMM</i>
	<i>Total:</i>	<i>100,09,37,184</i>	

8. The Transfer Pricing Officer (hereinafter referred to as "the TPO") vide order dated 25.10.2016 passed under section 92CA(3) of the Act noted that export receipts were received by the assessee beyond the

credit period mentioned in the invoices i.e. 205 days (180 days plus grace period of 25 days). The TPO, following the approach adopted by it for assessment year 2009-10, proposed an upward adjustment of Rs. 55,24,388 by applying USD LIBOR rate. The AO passed the order dated 31.01.2017 under section 143(3) read with 144C(3) of the Act, inter-alia, on the basis of adjustment proposed by the TPO.

9. The CIT(A), inter-alia, dismissed the appeal filed by the assessee against the adjustment made by TPO/AO.

10. During the course of hearing, Ld. A.R. submitted that the issue arising in present appeal has been decided by the Co-ordinate Bench of the Tribunal in assessee's own case for assessment year 2012-13.

11. On the other hand, Ld. D.R. vehemently relied upon the orders passed by the TPO and CIT(A).

12. We have considered the rival submissions and perused the relevant material on record. We find that on identical issue the Co-ordinate Bench of the Tribunal in assessee's own case vide order dated 22.04.2020, passed in Yash Jewellery Pvt. Ltd. v/s ACIT, ITA No. 2305/Mum/2017, for the assessment year 2012-13, restored the issue to the file of AO/TPO following its earlier order for assessment year 2009-10 by observing as under:-

"9. We have considered the submission of the parties and perused the material of label on record. We have noted that on

similar grounds of appeal the Tribunal in assessee's own case for assessment year 2009-10 has restored back the issue to the file of AO/TPO with the following directions;

10. We have considered the submissions of the parties and perused the materials on record as well as the decisions cited at the Bar. There is no dispute to the fact the margin shown by the assessee for international transactions with A.E. is reasonably higher than the margin shown by the comparable companies. It is also not disputed that in some instances credit facilities provided by the assessee to its AE extended beyond the period of 180 days. As far as providing such extended credit facility is concerned, it comes within the scope and ambit of international transaction as defined u/s 92B of the Act as held in a number of judicial precedents. Therefore, we have to proceed on the basis that extended credit facility to AE is an international transaction.

11. Having held so, we have to examine whether the adjustment to ALP made by the TPO and held by the DRP on account of such extended credit facilities is valid or not. As stated earlier, the margin shown by the assessee of international transaction with its AE is at 13.67% on cost and at entity level is 8.9% on cost. Even including foreign exchange fluctuation, the margin of the assessee at entity level is 8.94% on cost. Thus, as could be seen the margin shown by the assessee is reasonably higher than the average margin of the comparable companies selected by the assessee as well as TPO himself. That being the case, it is to be seen whether separate adjustment is still required on account of extended credit facilities. It is the contention of the Id. counsel before us that considering the margin shown by the assessee no separate adjustment can be made on account of credit facility as element of interest for delayed payment is subsumed in the higher margin charged by the assessee. Per contra, it is the contention of the department that assessee has not proved through documentation that interest component for delayed payment has been factored in, in the price charged. After analysing the facts on record, we find that assessee has provided extended credit facilities as far as realisation of export receivables to both A.E and non-A.E. without charging interest. While credit facilities to non-A.Es have never exceeded 180 days, in case of AE in some instances it has exceeded 180 days and even more than a year. However, before concluding that a tangible benefit has been passed on to the A.E. as a result of such extended credit facility, margin of both the transactions viz. A.E. and non-A.E. have to be seen. If there is considerable difference between the margin of A.E. transaction with that of non-A.E. then it needs to be examined whether higher margin

charged to A.E. takes care of the extended credit period for realisation of export sale proceeds. In the present case, undisputedly, the margin of A.E. transaction is relatively higher than the margin of comparables brought on record both by assessee and the TPO. That being the case, it is all the more necessary to examine assessee's claim that cost involved due to delay in realisation of export receivables from A.E. was factored in while fixing the price of international transaction with A.E. However, in our view, assessee has to establish such claim through proper documentary evidence which, as it appears, have not been examined by Transfer Pricing Officer or DRP, nor they are before us.

12. The next issue which arises is whether allowing extended credit period to A.E. should be considered as an independent international transaction for benchmarking or should be aggregated with other international transactions with A.E. for determining ALP. It is evident from material on record as well as order of the Transfer Pricing Officer, assessee has benchmarked the price charged for international transactions with A.Es applying TNMM by aggregating all transactions viz., both purchase and sale. TPO has also not found fault with the aforesaid approach of the assessee. Therefore, in our view, credit facility allowed to A.E. cannot be considered on standalone basis for benchmarking but has to be aggregated to all international transactions with A.E. for determining arm's length price. More so, because as per rule 10A(d) all closely linked transactions with A.Es have to be aggregated and clubbed together for transfer pricing. In the present case, there is no dispute that extended credit period to A.E. for realisation of sale proceeds is directly related to and arising out of the sale transaction. Therefore, sale transaction with A.E. and resultant extended credit period for realisation of sale proceeds are two sides of a coin, hence, closely linked transactions. Thus, in terms with the statutory provisions the transaction relating to extra credit period to A.E. has to be aggregated with the sale transactions for determining ALP. The Tribunal, Mumbai Bench. in *M/s. Goldstar Jewellery Ltd. (supra)* while considering identical issue held as under.

"The first issue raised by the assessee.....
..... Accordingly, we direct the Assessing Officer/TPO to re-do the exercise of determination of ALP in terms of above observation.

13. Similar view has also been expressed by the Tribunal. Mumbai Bench, in case of *Tecuimount ICB House (supra)*. In fact, in case of *Kusum Healthcare Pvt. (supra)*, the Tribunal. Delhi Bench, held that if ALP of the main sale transaction

computed under TNMM is accepted, no separate adjustment on account of outstanding receivables can be made. However, it needs to be mentioned, in case of Kusum Healthcare (supra), assessee demonstrated that impact of extended credit period on working capital was factored in the pricing / profitability. The decision of IGate Computer Softwares Ltd. v/s Addl. CIT is factually distinguishable as in that case assessee itself has considered the extended credit facility as a separate international transaction. Thus, taking into consideration, the principle laid down as above we are of the view that transaction relating to extended credit period provided to A.E. is required to be aggregated with other international transactions for computing ALP and cannot be done separately. For doing so rate of interest has to be on the basis of LIBOR+ basis point and not domestic PLR. As in the present case, TPO himself has worked out LIBOR rate of 2.69% same can be considered. As, neither the department nor the assessee has undertaken this exercise. We remit this issue to the file of the AO/TPO for verifying this aspect and determining the ALP of international transaction with A.E. after affording full opportunity to the assessee to establish its case. This ground is allowed for statistical purposes."

10. Considering the decision of tribunal in assessee own case on similar grounds of appeal, we deem it appropriate to restore the issue to the file of AO/TPO to pass the order afresh by following the order of earlier year. The assessing officer /TPO is also directed to consider the decision of tribunal in Agilisys IT Services India Private Limited (supra) before passing the order. Needless to order that before passing the order the AO/TPO shall grant opportunity of hearing to the assessee. In the result this ground of appeal is allowed for statistical purpose."

13. As the facts and circumstances of the present case are similar to the assessment year 2012-13, respectfully following the decision of the Co-ordinate Bench rendered in assessee's own case cited supra, we deem it appropriate to restore the issue to the file of AO/TPO to pass the order afresh by following the directions rendered by Co-ordinate Bench in orders for earlier assessment years. Needless to mention that before passing the order the AO/TPO shall grant opportunity of hearing to the assessee.

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

Order pronounced in the open court on 18.02.2022

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 18.02.2022

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