

IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 6226/Mum./2019
(Assessment Year : 2012-13)

Dy. Commissioner of Income Tax
Circle-11(3)(1), Mumbai

..... Appellant

v/s

Toto India Industries Pvt. Ltd.
2nd Floor, Ramkutir
58, Hanuman Road, Vile Parle (West)
Mumbai 400 057 PAN – AADCT7270M

..... Respondent

Assessee by : Shri Dhanesh Bafna
Revenue by : Ms. Vatsalaa Jha (CIT)

Date of Hearing – 03.02.2022

Date of Order – 14/03/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been preferred by the Revenue challenging the order dated 29.07.2019, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the Commissioner of Income Tax (Appeals)-58, Mumbai [*the CIT(A)*] for the assessment year 2012-13.

2. In this appeal, the Revenue has raised the following grounds:-

"1.1 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing the AO/TPO to delete the

Transfer Pricing adjustment of Rs.11,04,73,914/- made by TPO on account of Purchase of finished goods and payment of Technical Administrative Fees to its Associated Enterprise in para 8 of his order and at the same breath setting aside the TP benchmarking exercise in para 10 of his order?

1.2 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing the AO/TPO to do the exercise of fresh benchmarking by treating the assessee as Trader to see whether any adjustment is needed on the transactions of Purchase and Technical Administrative Fees despite the amendment to provisions of section 251(1)(a) of the Act w.e.f 01.06.2001 whereby power to set-aside the appealed issue has been withdrawn?

1.3 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in accepting the additional documents called for from assessee within the powers conferred on him u/r. 46A(4) of I T Rules, without giving an opportunity to the Assessing Officer within the meaning of provisions Rule 46A(3) of the said Rules?

1.4 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A), having come to the conclusion that with respect to the international transaction of purchase of finished goods of Rs.9,22,41,757/- assessee is only a trader and is to be benchmarked with the characterization of trader only, is correct in not adjudicating on the Technical Administrative Fees of Rs.1,83,84,448/- paid by the assessee to its AE Toto Ltd., Japan, which is majorly in the nature of Research & Development Cost as per the Notes of Accounts of Annual Report of the assessee, which needs to be reimbursed to the assessee with an appropriate comparable ALP markup?

1.5 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in directing the TPO to separately benchmark the reimbursement of expenses of Rs.30,70,410/- (which is reported by the assessee as purchase of finished goods in Form 3CEB) which is not an issue in dispute, instead of directing separate benchmarking of Technical Administrative Fees of Rs.1,83,84,448/- which is in the nature of R&D expenditure incurred by the assessee on behalf of the AE?

1.6 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not giving an opportunity to the TPO and not calling for a remand report from the TPO, when nothing prohibited the CIT(A) in calling for remand report from the TPO on the issues of separate benchmarking of purchase of finished goods of Rs.9,22,41,757/- with his finding of the assessee's characterization as trader as against manufacturer and separate benchmarking of payment of Technical Administrative Fees which is in the nature of R&D instead of setting aside partially the former in para 8 of his order, which is beyond his jurisdiction."

3. The brief facts of the case for deciding the appeal, as emanating from the record are: The assessee was incorporated on 23.01.2011, under the provisions of Companies Act, 1956. During the relevant assessment year, the assessee filed its return of income on 30.11.2012, declaring loss of Rs. 12,84,49,045. The assessee is a subsidiary of Toto Asia Oceanic Pte. Ltd., Singapore. The primary objectives of the assessee is to carry on the business of manufacturing, repairing, modifying, installing and trading of sanitary wares, sanitary wares accessories and spare parts of accessories for all kinds of sanitary wares. Financial year 2011-12 was the first complete year of the operation of the assessee.

4. During the relevant assessment year, the assessee entered into following international transactions with its Associated Enterprises ("A.Es.").

<i>Sl. No.</i>	<i>Nature of international transaction</i>	<i>Amount (In INR)</i>	<i>Method Used</i>
1.	<i>Purchase of finished goods</i>	<i>9,22,41,757</i>	<i>RPM</i>
2.	<i>Purchases of Fixed Goods</i>	<i>30,70,428</i>	<i>RPM</i>
3.	<i>Purchases of Fixed Assets</i>	<i>12,52,523</i>	<i>CUP</i>
4.	<i>Purchase of Machinery</i>	<i>35,90,819</i>	<i>CUP</i>
5.	<i>Trade License Fees</i>	<i>18,32,830</i>	<i>RPM</i>
6.	<i>Technical Administrative Fees</i>	<i>1,83,84,448</i>	<i>RPM</i>
7.	<i>Commission</i>	<i>4,16,78,419</i>	<i>TNMM</i>
8.	<i>Issue of Share Capital</i>	<i>90,00,00,000</i>	<i>CUP</i>

5. The assessee conducted a detailed transfer pricing analysis and came to a conclusion after considering the functions performed, assets employed and risk assumed that it is a trader with normal risk with respect to its international transaction pertaining to 'purchase of finished goods'. Accordingly, the assessee benchmarked its aforesaid international transaction by applying the Resale Price Method ("RPM") as the most appropriate method. Further, the payment of trade mark license fees and technical fees relating to trading activity carried on by the assessee was also benchmarked by applying RPM as the most appropriate method. The assessee accordingly claimed that its aforesaid international transactions are conducted at arm's length price.

6. The Assessing Officer ("the AO") made a reference to the Transfer Pricing Officer ("the TPO") for determination of arm's length price of the aforesaid international transactions. The TPO vide order dated 21.01.2016, passed under section 92CA(3) of the Act came to the conclusion that the assessee is a manufacturer and not a mere reseller by observing as under:-

"It is therefore required to understand as to whether the assessee is a manufacturer or a trader. The submission made in respect of purchase of finished goods of Rs Rs 9,22,41,757/-, it stated that the company had purchased finished goods from Its AEs, which means the company act as a distributor for this international transaction, While In respect of Purchase of finished goods worth Rs.. 30,70,428/-, it is spelled out clearly that the company is engaged as a third party Indian manufacturer for manufacturing its products. The manufactured goods were then sent to the AE for quality check purpose in order to comply with TOTO group standard. And that In this regards / TOTO India incurred a cost of

Rs.30,70,410/- which includes cost of freight charges for sending these products to the AE and the reimbursement: of the cost incurred by the AE for modification of some of these products.

It is therefore indicative, that the assessee is a manufacturer and not mere reseller. This conclusion being drawn gets strength from the fact that during the year under consideration assessee has incurred total expenses on Employee Benefit expenses' amounting to Rs.924,98 lakhs, out total expenses of Rs.2931.45 lakhs (31.55%). While the 'Cost of goods sold" is only Rs.650.93 lakhs only."

7. Accordingly, the TPO rejected the application of RPM as the most appropriate method and applied Transactional Net Margin Method ("TNMM") for benchmarking the international transactions pertaining to purchase of finished goods and technical administrative fees. The TPO conducted an independent search for comparables and arrived at a set of 24 comparable companies having average profit level indicator (Operating Profit / Operating Revenue) of 10.02% as compared to operating margin ratio of assessee of (-) 108.60%. Consequently, the TPO proposed adjustment of Rs. 11,04,73,914, to the aforesaid international transactions entered into by the assessee. The AO passed the assessment order dated 26.05.2016 under section 143(3) r/w section 144C(3) of the Act, inter-alia, on the basis of adjustment proposed by the TPO.

8. In appeal, the CIT(A) taking note of the manufacturing license dated 16th July 2014, under rule 46A(4) of the Rules, held that the assessee was in trading activity and not in manufacturing activity during the year. Accordingly, the CIT(A) deleted the adjustment proposed by the TPO / A.O. and remanded the matter to the A.O./TPO to carry out fresh benchmarking

after considering the assessee as a trader. Further, the CIT(A) also directed the AO/TPO to undertake separate benchmarking of international transaction of Rs. 30,70,410 being reimbursement of expenses. Being aggrieved, the Revenue is in appeal before us.

9. During the course of hearing, only grievance raised by Ms. Vatsalaa Jha, the learned Departmental Representative ("*learned D.R.*") against the impugned order was that the CIT(A) has erred in considering additional evidence (i.e., manufacturing license) without calling for any remand report from the TPO / A.O. The learned D.R. further submitted that the CIT(A) has no power to set aside the matter to the TPO / A.O. under the provisions of section 251(1)(a) of the Act.

10. On the other hand, Shri. Dhanesh Bafna, the learned Authorised Representative ("*learned A.R.*") appearing for the assessee submitted that the relevant assessment year is the first complete year of operation of the assessee. The learned A.R. further submitted that the entire revenue of the assessee during the relevant assessment year is from sale of traded goods and commission income, and no income was earned by the assessee from the manufacturing activities. Thus, the transfer pricing analysis conducted by the assessee by treating itself as a trader was wrongly rejected by the TPO.

11. We have considered the rival submissions and perused the material available on record. In the present case, it is not disputed that the relevant assessment year is the first year of operation of the assessee. From the financial statements, forming part of the paper book, it is evident that the assessee only earned Rs.9,16,35,833, from sale of traded goods and Rs.4,16,78,419 from commission income during the relevant financial year. Further, the manufacturing license dated 16.07.2014, taken note by the CIT(A), also justifies the claim of the assessee as the trader during the relevant assessment year. In the present case, it is also not being denied by the Revenue that the TPO has accepted the assessee as a trader for assessment year 2013-14 and 2014-15. Thus, in view of the above, we are of the view that the assessee has rightly been characterized as a trader by the CIT(A). Accordingly, in view of the above, we deem it appropriate to restore the matter to the TPO/AO to undertake fresh benchmarking of the international transaction pertaining to 'purchase of finished goods' by considering assessee as a trader and to this extent we endorse the findings of the CIT(A). Since we are remanding the issue to the TPO/AO for conducting a fresh benchmarking of aforesaid international transaction, which causes no prejudice to the interest of the Revenue, the infirmities pointed out by the learned D.R. in the order passed by the CIT(A), during the course of hearing, becomes academic in nature in the present case. As, no other ground of appeal was pressed by the learned D.R. during the hearing, same are dismissed as not pressed. Accordingly, the grounds raised by the Revenue are dismissed.

12. In the result, the appeal by the Revenue is dismissed in terms of our aforesaid findings.

Order pronounced in the open court on 14/03/2022

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 14/03/2022

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