

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI. B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No. 229/Bang/2015
Assessment Year : 2010-11

M/s. Givaudan (India) Pvt. Ltd., Plot No. 26, 2 nd Cross, Jigani Industrial Area, Bangalore – 562 106. PAN: AAACV7454J	Vs.	The Assistant Commissioner of Income Tax, LTU, Circle – 1, Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Sumeet Khurana, CA
Revenue by	:	Shri Sumer Singh Meena, CIT-I

Date of Hearing	:	11-01-2022
Date of Pronouncement	:	29-03-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

It is submitted that the main appeal was heard by this *Tribunal* and order was passed on 02/08/2019. However Grounds 6 & 7 were not adjudicated independently for assessment year 2010-11. The assessee preferred MP no.15/Bang/2020 requesting for adjudication of these grounds.

2. Accordingly the present appeal is fixed for hearing for adjudication of following grounds:

“6. That the learned AO and the learned Panel erred both in facts and law in confirming the action of the learned TPO of making an adjustment to the transfer price of the Appellant in respect of the payment of royalty by Rs.27,67,42,242, holding that the international transaction

does not satisfy the arm's length principle envisaged under the Act and in doing so grossly erred in:

6.1. Upholding the approach of the learned TPO on Applying the CUP method as the most appropriate method despite acknowledging and accepting the selection of TNMM by the Appellant in demonstrating the arm's length nature of its international transactions in the TP documentation.

6.2. Upholding the conclusion of the learned TPO that no commercial or economic benefits have been received by the Appellant on payment of royalty to the Associated Enterprises.

6.3. Ignoring the business exigency for the use of technical know-how license in conducting the manufacturing operations of the Appellant.

7. That the learned AO and the learned Panel erred both in facts and law in confirming the action of the learned TPO of considering the amount paid for buyback of shares as international transaction for making an adjustment of INR 151,256,201 to the transfer price of the Appellant, and in doing so grossly erred in:

7.1. Upholding the conclusion of the learned TPO that the buyback of equity shares from an Associated Enterprise is an international transaction.

7.2. Disregarding the valuation guidelines on transfer of shares by non-resident prescribed by the Reserve Bank of India ('RBI') under circular no. 16 dated October 4, 2004, adopted by the Appellant for the valuation of shares for buyback in the absence of relevant transfer pricing methodology as on the date of the buyback.

7.3. Levying penalty for non-reporting of the alleged international transaction of buyback of shares in the Form 3CEB of the Appellant for the year, when based on the provisions of law as on the date of filing the Form 3CEB, there was no requirement for such disclosure."

3. Assessee is a wholly owned subsidiary of Givaudan SA, Switzerland. Based on the profile of the assessee as observed by this Tribunal in para 3.1 of order dated 02/08/2019, we proceed to adjudicate the following grounds.

4. Ground No.6: This ground deals with the Ld.TPO's treatment of payment of Royalty as separate international transaction.

It is submitted that the assessee had bench marked the payment of Royalty by adopting a combined approach by considering TNMM as the most appropriate method. The Ld.AR submitted that payment of royalty is closely linked to the manufacturing segment.

5. For the year under consideration, assessee paid Rs.276,742,242 to its AE as royalty based on the license agreement between the assessee and the AE. It was submitted that the payment made during the year constituted 5.92% of the sales

6. The Ld.AR submitted that the Ld.TPO observed as under:

“(a) the parent company had not charged royalty in past; (b) PLI of the Appellant is lower than the comparable companies, and the Appellant had not demonstrated the following:- (i) how novel the technical know-how is; (ii) the cost of creating the technical know-how; and (iii) whether the Appellant (licensor) has the capacity to exploit the market without the licensee. Further, the TPO opined that since the Appellant is making lesser profit than the comparable average margin, payment of royalty is not justified which has not resulted in any benefit of the Appellant. Based on above, the learned TPO treated the arm's length price ("ALP") of royalty as NIL by applying CUP method and proposed an adjustment of INR 276,742,242.

The learned Dispute Resolution Panel (learned Panel) upheld the findings of learned TPO on the basis that except stating that the payment was made as per the license agreement, the Appellant failed to produce the evidence to contradict the findings of the learned TPO.”

On receipt of the DRP direction the Ld.AO passed the final assessment order disallowing the royalty paid by assessee to the AE.

Aggrieved by the order of the Ld.AO, assessee is in appeal before this Tribunal.

7. The Ld.AR has filed various details to establish that assessee is a licensed manufacturer and cannot run its business without technical knowhow from the AE and payment to obtain such technical know how from AE is warranted during the course of the business.

On the contrary, the revenue contends that the royalty payment is separately paid based on the sales and therefore has to be independently bench marked.

8. At the outset both sides submitted that this issue needs to be remanded as the determination of ALP of Royalty cannot be Nil. As admittedly assessee has been paying Royalty to the AE in the past for licensing of trade mark. The transaction has to be remanded to the Ld.AO/TPO for determining the ALP by following the procedure envisaged under section 92(2) of the Act. We place reliance on the decision of *Hon'ble Mumbai Tribunal* in case of *Deloit Consulting India (P.) Ltd vs DCIT* reported in (2012) 22 *taxmann.com* 107.

We accordingly direct the Ld.AO to determine the ALP of the transaction based on the documents/ evidences filed by assessee.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

9. Ground No. 7:

It is submitted that the assessee carried out buy-back of equity shares from its parent company Givaudan SA which resulted in decrease in share capital of the Appellant from INR 82,270,000 in FY 2008-09 to INR 75,755,110 in FY 2009-10. The shares were bought back at a price of INR 804.60 per share.

The Ld.TPO held the buy-back of equity shares to be an international transaction and observed that the Appellant did not report this transaction in Form 3CEB. Further, the Ld.TPO benchmarked the transaction based on “Net Asset Value (“NAV”) method” for valuation of shares [@ INR 372,931,848] and compared it against the share valuation adopted by the assessee using the Earning Per Share (“EPS”) method [@ INR 524,188,049]. The Ld.TPO thus computed INR 151,256,201 being the difference between value of buy back based on NAV and value of buy back based on EPS.

Aggrieved by the proposed adjustment, the assessee filed objections before the DRP.

The Panel upheld the adjustment made by the Ld.TPO and observed that the transaction has a bearing on the assets of the assessee and, therefore, is subject to of the Transfer Pricing regulations. The learned Panel also held that the Ld.TPO was justified in making adjustment based on “NAV method” as the method followed in accordance with RBI guidelines does not consider the provisions of Chapter X of the Act.

On receipt of the DRP direction, the Ld.AO passed the final assessment order making addition in the hands of assessee.

10. Before us the Ld.AR submitted that buy back is a transaction on capital account and therefore cannot result in any adjustment to taxable income. He further submitted that this plea found favour with the Ld.AO and therefore the Ld.TPO while passing the order, had not included the difference in transaction value and ALP in the summary of adjustment, instead mentioned as a remark that the Appellant had paid INR 151,256,201 in excess to

ALP. The Ld.AR submitted that if it had been the intention of Ld.TPO to make an adjustment in this account, the same should have been included in the summary. Hence there was no recommendation by the Ld.TPO to the Ld.AO for making an adjustment on this count.

On the contrary, the Ld.SR.DR placed reliance on the decision of Hon'ble Karnataka High Court in case of *Fidelity Business Services India (P.) Ltd vs.ACIT* reported in (2018) 95 taxmann.com 253.

We have perused the submissions advanced by both sides in light of records placed before us.

11. It is submitted by the assessee that the buy back of shares were done at a price based on valuation guidelines on transfer of shares prescribed by the RBI. It is also submitted that the RBI Guidelines provides that in case the transfer of shares is by a non-resident, where the shares of an Indian company are not listed on a stock exchange, and if the amount of consideration payable for the transfer exceeds INR 20 lakh per seller per company, at a price arrived at, at the seller's option can be at a price based on EPS, or a price based on NAV, whichever is higher.

Valuation Method	Price computed in accordance with RBI Regulations (refer page no. 172 to 174 of the paper book)	Price at which shares brought back
EPS	804.60	804.60
NAV	572.43	

Accordingly, the assessee considered INR 804.60 as value of shares for the buy back from AE, which is in line with the RBI regulations. The Ld.TPO disregarded the RBI regulations and considered value of shares at INR 572.42 based on NAV method without providing any cogent reason.

12. We note that the authorities below have not verified the valuation of assessee in determining the price at which the shares have been brought back. The Ld.AO/TPO is directed to carry out necessary verification and assessee is directed to file all requisite details in support of its claim. In the interest of justice, we direct the Ld.AO/TPO to consider the claim in accordance with law.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

In the result the appeal filed by assessee stands allowed for statistical purposes.

Order pronounced in the open court on 29th March, 2022.

Sd/-
(B.R. BASKARAN)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 29th March, 2022.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore