

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I' : NEW DELHI)**

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

**ITA No.2259/Del./2017
(ASSESSMENT YEAR : 2006-07)**

BioMerieux India Pvt. Ltd., vs. DCIT, Circle 3 (1),
43A, 1st Floor, Okhla Industrial Estate, New Delhi.
Phase – III, Modi Mill Compound,
New Delhi – 110 020.

(PAN : AAACB4984F)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri S.S. Tomar, Advocate
REVENUE BY : Shri Mahesh Shah, CIT DR

Date of Hearing : 27.07.2022
Date of Order : 02.08.2022

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

This appeal by the assessee is directed against the order of Assessing Officer dated 03.02.2017 passed under section 254/144C/143(3) of the Income-tax Act, 1961 (for short 'the Act') pursuant to the directions of the Dispute Resolution Panel (DRP).

2. The grounds of appeal raised by the assessee read as under :-

“1. That the assessing officer (' AO') erred on facts and in law in completing assessment under section 254 read with sections 143(3)144C of the Income-tax Act ("the Act") at an

income of Rs.43,44,537 as against the returned loss of Rs.1,23,96,776.

2. That the AO erred on facts and in law in making an adjustment of Rs.1,67,41,313 to the arm's length price of the 'international transactions' undertaken with the associated enterprises on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer ('TPO').

3. That the Dispute Resolution Panel ('DRP')/TPO erred on facts and in law in disregarding internal benchmarking analysis undertaken by the appellant for applying TNMM for determining the arm's length price of the international transactions, allegedly holding that:

(i) The audited annual accounts do not disclose bifurcation of associated enterprise and non-associated enterprise business and the reporting of financial information in annual audited account is at entity level.

(ii) The audited financials of the appellant do not contain information about associated enterprise and non-associated enterprise revenue separately.

(iii) The allocation of expenditure cannot be made on the basis of turnover because as per terms and conditions of the agreement, the appellant was required to incur expenditure on discounts, marketing, maintenance and after sale services and was required to maintain prescribed infrastructure for reporting and sales administration.

4. That the AO/TPO erred on facts and in law in not applying Resale Price Method ("RPM") for the purpose of benchmarking the international transactions undertaken with the associated enterprises even while admitting that the appellant was a trader.

5. That the DRP/TPO erred on facts and in law in not applying filter of trading sales greater than 75% of the total sales and proceeded to consider companies engaged in the business of manufacturing of diagnostic equipments and other products surveying as comparables.

6. That the DRP erred on facts and in law in directing not to exclude Organon (India) Limited as part of comparable company even while 79% of sale of the said company was from manufacturing and instead erred in holding " that since the taxpayer is primarily a trading company, and if 80% of Organon's sales are from manufacturing that would change the FAR of the comparable vice taxpayer."

6.1 Without prejudice, the AO/TPO erred on facts and in law in considering Organon (India) Ltd. as comparable not appreciating that the audited financial statement of the company is for the year ending December, 2005

6.2 Without prejudice, the AO/TPO erred on facts and in law in considering Organon (India) Ltd. as comparable ignoring that segmental data with respect to trading business segment is not available in the audited financial statement of the company.

7. That DRP/TPO erred on facts and in law in considering Span Diagnostic Ltd. as comparable company not appreciating that only 38% of the total turnover of the said company was derived from trading.

7.1 Without prejudice, the AO/TPO erred on facts and in law in considering Span Diagnostic Ltd. as comparable, not appreciating that segmental data with respect to trading business segment is not available in the audited financial statement and failed to adjudicate the ground of objection raised in this regard by the appellant.

8. That the assessing officer erred on facts and in law in levying interest under section 234B of the Act.”

3. At the outset, in this case, ld. counsel of the assessee submitted that addition on account of transfer pricing adjustment stand deleted by the TPO pursuant to rectified direction of the DRP. However, the assessment

order giving effect to the above determining the correct assessed income is awaited from AO.

4. Upon hearing both the sides and perused the records, we note that all the grounds raised by the assessee are in relation to transfer pricing adjustment. If after rectified direction of DRP, the TPO has deleted the addition, there cannot be any grievance to the assessee to continue with an appeal before the ITAT. However, ld. counsel of the assessee submitted that he shall be willing to withdraw the appeal if the giving effect order of the AO not requires to be appealed. We agree with the ld. counsel of the assessee. The assessee is permitted to withdraw the appeal. The assessee shall be at liberty to ask for a revival of the appeal if the final order of AO is in deviation of the TP adjustment being deleted by the TPO pursuant to rectified DRP directions. We order accordingly. Hence, the assessee's appeal is treated as withdrawn.

Order pronounced in the open court on this 2nd day of August, 2022.

**Sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER**

**sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

**Dated the 2nd day of August, 2022
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Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.DRP
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.