

IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI

SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 5313/MUM/2016
(Assessment Year: 2005-06)

M/s Diaster Jewellery Pvt. Ltd.,
G-5, Gem & Jewellery Complex-1,
Seepz-SEZ, Andheri (East),
Mumbai - 400096
[PAN: AAACD1757C]

..... Appellant

Income Tax Officer 8(1)(3),
Aaykar Bhavan, Maharshi Karve Marg,
Mumbai - 400020

Vs

..... Respondent

Appearances

For the Appellant/Assessee : Shri Jitendra Singh
For the Respondent/Department : Ms. Samruddhi D Hande

Date of conclusion of hearing : 16.08.2022
Date of pronouncement of order : 15.11.2022

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant/Assessee has challenged the order, dated 05.04.2016, passed by the Ld. Commissioner of Income Tax (Appeals)-55, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2005-06, whereby the Ld. CIT(A) had partly allowed the appeal against the Assessment Order, dated 23.12.2008, passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
2. The appeal was filed with the application seeking condonation of delay in filing the appeal on the ground that the Director of the Appellant-Company at the relevant time was outside India and

therefore, could not execute the appeal paper. In view of the explanation provided by the Appellant, delay of 10 days in filing the appeal is condoned. Accordingly, we proceed to examine the appeal on merits. The Appellant has raised following grounds of appeals:

"1. Under the facts and in law, the Hon'ble CIT(A) has erred in confirming the addition of Rs. 1,79,98,287/-.

1.1 The Hon'ble CIT(A) confirmed the addition concluding that invocation of section 92CA was justified and hence the addition made by the learned A.O.

1.2 Further, the Hon'ble CIT(A) failed to appreciate the fact that following adjustments are to be considered before determining the comparability of the selling price between Associate Enterprise and Non-Associate Enterprise:

a) Giving concession for different sales circumstances.

b) Conducting FAR analysis

2. Under the facts and in law, the Hon'ble CIT(A) has erred in confirming the addition of unsecured loans of Rs. 18,00,000/- (incorrect stated as 18,98,287/-) as unexplained cash credit u/s 68 of the Income Tax Act, 1961.

2.1 In spite of appellant submitting all the supporting for unsecured loans, the Hon'ble CIT(A) erred in confirming the additions just because the loans were interest free loans from unknown parties."

3. The relevant facts, in brief, are that the Appellant is engaged in the business of manufacture and export of fine jewellery in gold/silver studded with diamonds, precious/semi-precious stones, and cubic zirconia and has a manufacturing unit located at Santacruz Electronic Export Processing Zone (SEEPZ), Special Economic Zone, Andheri (East), Mumbai.

3.1. The Appellant filed return of income for the Assessment Year 2005-06 on 30.10.2005 declaring total income of INR 9,15,745/-. The case of the Appellant was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the Appellant has entered into international transactions with its Associated Enterprises (AEs) and therefore, a reference was made under Section 92CA(1) to the Transfer Pricing Officer (TPO) for the determination of Arm's Length Price (ALP) of the international transactions. The TPO, while examining the international transaction of 'Export Finishing Goods' amounting to INR 17,11,08,977/-, noted that sales of INR 17.75 Crores, being 42.8% of the total sales, were made to the AEs while sales of INR 22.49 Crores, being balance 57.2% of the total sales, were made to Non-AEs. According to the TPO, the gross margin on cost earned in case of sales made to non-AEs was 16.68% which was more than the gross margin on cost (computed at 11.45%) in case of sales made to AEs. Therefore, the Appellant was asked to show cause why transfer pricing adjustment of INR 1,79,98,287/- by taking margin of 16.68% on cost of sales made to AEs should not be taken. Vide letter, dated 24.10.2008, the Appellant replied to the aforesaid show cause notice stating, inter-alia, that the difference in margin on sales made to AEs in USA and Non-AEs in Europe was on account of difference in market conditions and the terms of the contract. Since the AE of the Appellant in USA incurs expenses for promoting the products and assumes the risk in respect of the rejected products, the European customers of the Appellant do not assume such risk or incur such expenditure, therefore, lesser margin the charged by the Appellant on the sales made to AE in USA. The TPO, however, not being satisfied with the aforesaid contentions of the Appellant, proceeded to

recommend upward transfer pricing adjustment of INR.1,79,98,287/- in respect of sales made to AE in USA taking margin of 16.68% on cost of sales (margin in case of sales made to Non-AEs in Europe) computing the same as under:

| | | |
|----------|--|--------------|
| A | Total direct costs in respect of sales to the AE | 15,92,70,155 |
| B | Arm's Length margin (margins on sales to non AE) | 16.68% |
| C(A*B) | Arm's Length profit based on above | 2,65,66,262 |
| D(A+C) | Arm's Length value of sales | 18,58,36,417 |
| E(D*95%) | 95% thereof | 16,78,38,130 |
| G(D-F) | Adjustment | 1,79,98,287 |

3.2. The transfer pricing adjustment of INR 1,79,98,287/- proposed by the TPO order, dated 30.10.2008, was incorporated by the Assessing Officer in Assessment Order, dated 23.12.2008, passed under Section 143(3) of the Act.

3.3. Further, the Assessing Officer also made an addition of INR 72,50,000/- under Section 68 of the Act treating the following unsecured loans as unexplained cash credit in terms of Section 68 of the Act:

| Name of the Lender | Amount (INR) |
|---|--------------|
| - Shri Pravin Kumar Jain | 22,50,000 |
| - Jain International | 5,00,000 |
| - Radhika Woolen and Silk Mills Pvt. Ltd. | 30,00,000 |
| - Rawmet Commodities Pvt. Ltd. | 15,00,000 |
| | 72,50,000 |

3.4. Being aggrieved, the Appellant preferred an appeal before CIT(A) challenging, both, the transfer pricing addition of INR.1,79,98,287/- and the addition made by the Assessing Officer under Section 68 of the Act in respect of unsecured loans of INR 75,50,000/-. While disposing of the aforesaid appeal, vide order, dated 05.04.2016, the CIT(A) concluded transfer pricing

adjustment of INR 1,79,98,287/- was justified and therefore, the CIT(A) declined to delete the addition.

3.5. However, the CIT(A) granted some relief to the Appellant. The addition of INR 27,00,000/- (INR 30,00,000/- Less INR 3,00,000/-) in respect of loan from Radhika Woolen & Silk Mills Pvt. Ltd. was deleted by the CIT(A) on account of typographical mistake by which amount of INR 3,00,000/- was typed as INR 30,00,000/-. Further, the CIT(A), relying upon additional evidence filed by the Appellant, treated the loan of INR 22,50,000/- from Shri Pravin Kumar Jain and loan of INR 5,00,000/- from Jain International as genuine and deleted the additions in respect of the same. Thus, addition of INR 54,50,000/- out of total addition of INR 72,50,000/- made by the Assessing Officer under Section 68 of the Act was deleted by the CIT(A).

3.6. Not being satisfied with the relief granted by the CIT(A), the Appellant has preferred the present appeal raising grounds reproduced in paragraph 2 above against the order of CIT(A) confirming the transfer pricing addition of INR 1,79,98,287/- and confirming the addition of INR 18,00,000/- under Section 68 of the Act.

Ground No. 1 to 1.2

4. Ground No. 1 to 1.2 pertain to order of CIT(A) confirming the transfer pricing addition of INR 1,79,98,287/-.

5. The Ld. Authorised Representative for the Appellant reiterated the submission made before Assessing Officer and CIT(A) explaining the difference in the margin in respect of sales made to AE's and Non-AEs. The Ld. Authorised Representative for the Appellant submitted that in the immediately preceding Assessment Year 2006-07, the Tribunal has, vide order dated

11.03.2015 passed in ITA No.9123/Mum/2010, remanded the identical issue to the file of TPO for passing de-novo order in identical facts and circumstances. Per contra, the Ld. Departmental Representative relied upon the order passed by the TPO and the CIT(A).

6. We have considered the rival submissions and perused the material on record. We note that for the Assessment Year 2006-07, the TPO had made transfer pricing adjustment taking the rate of gross margin on cost of sales made by the Appellant to Non-AEs in Europe as the basis for determining ALP of the sales made to AEs in USA by using cost plus method as the most appropriate method. The approach adopted by the TPO was rejected by the Tribunal and issue was remanded back to the TPO holding as under:

“9. We have heard both the parties and their contentions have carefully been considered. We have carefully gone through the order passed by TPO. We could not understand that how TPO has arrived at the figure of 35.18% margin in the cases of non-AE sales. Such calculation is not made part of the TPOs order. Ld. DRP also did not give any reason to reduce the rate of 35.18% to 30% and same has been reduced in adhoc manner. As against these actions of TPO and DRP, it is the case of the assessee that on similar transaction in earlier years no TP adjustment is made and the matter has to be considered in right perspective.

9.1 We observe that the assessee has applied Cost Plus Method which has been accepted by TPO but in fact as it appears from the order passed by TPO, that he has adopted internal CUP method when he applied margin of non-AE to the transaction of the assessee with it's A.E. Keeping in view all these facts, We consider it appropriate to accept the request of Ld. AR to restore this issue to the file of TPO. Accordingly, we restore the issue to the file of TPO with a direction to consider this issue denovo and pass a reasoned and speaking order after giving the assessee reasonable opportunity of hearing. This issue is restored back to

the file of TPO and considered to be allowed for statistical purposes in the manner aforesaid.” (Emphasis Supplied)

7. We find that there is no change in the facts and circumstances in the assessment year before us. For Assessment Year 2005-06, the TPO has adopted same approach as adopted in the Assessment Year 2004-05 with stands rejected by the above order of the Tribunal. The Tribunal had, for the immediately preceding Assessment Year 2004-05, accepted the contentions raised on behalf of the Appellant and remanded the issue back for fresh de-novo adjudication. Therefore, we find merit in the contentions of the Ld. Authorised Representative for the Appellant that for the Assessment Year 2005-06 the issue relating to transfer pricing adjustment can also be remanded back. Accordingly, keeping in view the facts and circumstances of the case and the abovesaid order of the Tribunal in the case of the Appellant for the Assessment Year 2004-05, we deem it appropriate to remand this issue to the file of TPO/AO for de-novo determination of ALP after giving the Appellant reasonable opportunity of being heard. Accordingly, in view of the aforesaid directions, the transfer pricing adjustment of INR.1,79,98,287/- is set aside and Ground No. 1 to 1.2 are allowed for statistical purposes.

Ground No. 2 to 2.1

8. Ground No. 2 pertain to addition of INR 18,00,000/- made by the Assessing Officer under Section 68 of the Act to the extent confirmed by the CIT(A). The Ld. Authorised Representative for the Appellant appearing before us submitted that the unsecured loan of INR 15,00,000/- taken from Rawmet Commodities Pvt. Ltd. and the unsecured loan of INR 3,00,000/- taken from Radhika Woolen & Silk Mills Pvt. Ltd. were returned during the

relevant previous year. Taking us through the balance confirmations, ledger accounts and bank statements filed before the CIT(A) as additional evidence (*placed at page 69 to 84 of the paper-book*), the Learned Authorised Representative for the Appellant submitted that the aforesaid documents were filed before CIT(A) to establish genuineness of the transaction. However, the CIT(A) treated the unsecured loans as not genuine based upon conjecture and surmise. Per contra, the Ld. Departmental Representative submitted that loan of INR 3,00,000/- taken from Radhika Woolen & Silk Mills Pvt. Ltd., and INR 15,00,000/- taken from Rawmet Commodities Pvt. Ltd. cannot be treated as genuine since the lenders were neither related to the Appellant nor any goods were purchased or sold by the such lenders. Thus, the lenders had no motive/purpose to give loans to the Appellant as observed by the CIT(A).

9. We have considered the rival submissions and perused the material on record. We are not inclined to accept the approach/reasoning adopted by CIT(A) to hold the unsecured loans aggregating to INR 18,00,000/- were not genuine. The CIT(A) had accepted the identity and creditworthiness of the parties since the CIT(A) had only doubted the genuineness of the transaction and the reasons for the same was that the CIT(A) was of the view that the lenders had no reason/purpose to grant loan to the Appellant. We note that in paragraph 4.7 of the order impugned, the CIT(A) has specifically recorded that the Assessing Officer had merely prayed for rejection of additional evidence without giving any comments on the merits. In our view, having not accepted the aforesaid prayer of the Assessing Officer and admitted the additional evidence, the CIT(A) was not justified in brushing aside the additional

evidence in absence of any adverse material/comments either provided by the Assessing Officer or arising from the enquiry/investigation by the CIT(A). The material on record, i.e. the ledger accounts, balance confirmations and bank account statements show that the loan of INR 3,00,000/- and INR 15,00,000/- credited in the books of the account of the Appellant during the relevant previous year were returned by the Appellant during the relevant previous year itself through the banking channel. In our view, the Appellant had discharged the onus cast upon the Appellant in terms of Section 68 of the Act to prove genuineness of the aforesaid loan transactions and therefore, in absence of any material/information the CIT(A) was not justified in confirming the additions under Section 68 of the Act in respect of unsecured loan of INR 3,00,000/- and INR 15,00,000/- from Radhika Woolen & Silk Mills Pvt. Ltd., and Rawmet Commodities Pvt. Ltd., respectively. Accordingly, we delete the addition of INR 18,00,000/- made under Section 68 of the Act in relation to the aforesaid unsecured loan of INR 3,00,000/- from Radhika Woolen & Silk Mills Pvt. Ltd., and INR 15,00,000/- from Rawmet Commodities Pvt. Ltd. Ground No. 2 to 2.1 raised in the present appeal are, therefore, allowed.

In the result, the present appeal is partly allowed.

Order pronounced on 15.11.2022.

Sd/-
(Pradip Kumar Kedia)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 15.11.2022
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai