

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

SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 2065/MUM/2017
(Assessment Year: 2012-13)

M/s Hannover Milano Fairs India Private Limited,
102/B/ Wing, Business Square,
Opp. Solitaire Business Park,
Chakala, Andheri (East), Mumbai - 400093
[PAN : AABCH8291G]

..... Appellant

Vs

Assistant Commissioner of Income Tax,
Circle 10(1)(1), Mumbai,
Aayakar Bhavan, Room No. 209, 2nd Floor,
M.K. Road, Mumbai - 400020

..... Respondent

Appearances

For the Appellant/Assessee : Shri Manuj Sabharwal
For the Respondent/Department : Ms. Samruddhi Dhananjay Hande

Date of conclusion of hearing : 15.09.2022
Date of pronouncement of order : 12.12.2022

ORDER

Per Rahul Chaudhary, Judicial Member:

1. The present appeal is directed against Final Assessment Order dated, 25.01.2017, passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] as per directions issued by Dispute Resolution Panel-I, Mumbai (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act pertaining to the Assessment Year 2012-13.
2. The Appellant has raised the following grounds of appeal:

"1.) Adjustment in determination of arm's length price of International Transactions Rs,5,74,45,969/-

1.1 *The Hon'ble Dispute Resolution Panel-I, Mumbai (DRP) erred in upholding the adjustment of Rs 5,74,45,969/- made by the Dy. Commissioner of Income Tax (TP)-2(2)(2), Mumbai ("TPO") in the arm's length price (ALP) to international transactions entered into by the Appellant with its Associate Enterprises (AEs) and added to the income of the Appellant by the Assessing Officer.*

In doing so, the Hon'ble DRP erred in upholding the action of the TPO in rejecting the Comparable Uncontrolled Price (CUP) method adopted by the Appellant and adopting Transactional Net Margin Method (TNMM) as the most appropriate method in determination of ALP.

1.2 *Without prejudice to 1.1 above, in determination of ALP under TNMM, the Hon'ble DRP erred in confirming the action of the TPO in:*

a) *rejecting the comparable selected by the Appellant viz. Messe Duesseldorf India Pvt Ltd. on the ground of incomplete financial data, even though the said company is comparable.*

b) *adopting Asian Business Exhibition & Conference Ltd. as comparable company and not appreciating the fact that the said company is not strictly comparable due to its size of operations i.e., its turnover is Rs.94.19 crores as against Rs.7.47 crores of the Appellant i.e. more than 12 times that of the Appellant's turnover.*

1.3 *Without prejudice to the above, the Hon'ble DRP erred in upholding the TPO's action of computing the ALP by applying the Profit Level Indicator (PLI) at entity level and not with reference to international transactions with the AEs. In other words, the TPO applied the PLI margin to aggregate of transactions with AEs as well as Non-AEs as against PLI applied only to transactions with AEs, in computing the ALP.*

On the basis of the facts and in the circumstances of the case and in law, the adjustment made by TPO and upheld by the Hon'ble DRP, ought to be deleted."

3. The Appellant is a company engaged in the business of organizing, arranging, promoting, marketing, providing assistance for trade fairs, exhibitions, conference, events, conventions, seminars, and

delegations of all kind in India and abroad. The Appellant filed its return of income for the Assessment Year 2012-13 on 29.11.2012 declaring total loss of INR (-) 3,17,55,204/-.

4. 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.
5. The TPO, vide order dated 29.01.2016, passed under Section 92CA(3) of the Act proposed transfer pricing adjustment of INR 5,74,45,969/- which was incorporated in the Draft Assessment Order, dated 18.03.2016, passed under Section 143(3) read with Section 144C(1) of the Act. The Appellant filed objections before DRP against the aforesaid Draft Assessment Order. Vide order dated 08.12.2016, the DRP granted relief to the Appellant by directing the Assessing Officer to exclude HCCA Business Services Limited as a comparable. However, the DRP declined to grant any other relief to the Appellant. As per directions of DRP, Final Assessment Order was passed by the Assessing Officer under Section 143(3) read with Section 144C(13) of the Act on 25.01.2017 making transfer pricing addition of INR 5,74,45,969/-.
6. Being aggrieved, the Appellant has preferred the present appeal against the Final Assessment Order, dated 25.01.2017.
7. All the grounds raised by the Appellant in the present appeal pertain to the transfer pricing addition of INR 5,74,45,969/- and are therefore, taken up together hereinafter.

8. The facts, in brief, relevant to the adjudication of the issue raised in the present appeal are that Appellant had adopted Comparable Uncontrolled Price (CUP) Method as the most appropriate method for benchmarking the international transactions with its AEs. During the assessment proceedings, the Appellant was asked by the TPO to substantiate its benchmarking analysis in respect of payment of Offshore Service Charge made to its AE (i.e., Hannover Messe International GmbH) towards exhibitions organized in India. In response, the Appellant submitted service agreement with its AEs and other group companies as material/data to substantiate the ALP determined by the Appellant using CUP Method. The TPO rejected CUP method since the aforesaid service agreements were entered into controlled entities forming the part of the same group and therefore, could not be use a basis for benchmarking international transactions using CUP Method. The TPO adopted Transactional Net Margin Method (TNMM) as the most appropriate method with Net Cost plus Margin as the Profit Level Indicator (PLI). The Appellant submitted list of two comparables, namely Fun Films and Music Entertainment Limited and Messe Duesseldorf India Private Limited. On the other hand, the TPO shortlisted ten companies as comparables and vide order sheet entry, dated 07.01.2016, asked the Appellant show cause why the ten companies should be selected as comparable for computing ALP under TNMM. The Appellant vide letter, dated 21.10.2016, replied to the aforesaid show cause notice. The TPO, after taking into consideration the response from the Appellant, selected the following three comparables: Asian Business Exhibition & Conference Ltd., HCCA Business Services Ltd. and Fun Film & Music Entertainment Ltd. By taking arithmetic mean of NCP margins of the above comparables for the Financial Year 2011-12, the TPO arrived at a margin of 15.53%. Adding the same to the total

operating cost, the TPO arrived at total arm's length Revenue of INR 13,22,16,180/- and after reducing the operating revenue as determined by the Assessee, arrived at transfer pricing adjustment of INR 5,74,45,969/.

9. The above transfer pricing adjustment was incorporated in the Draft Assessment Order, dated 18.03.2016, against which objections were filed before DRP. The DRP vide, order dated 08.12.2016, rejected all the objections raised by the Appellant except the objections to inclusion of HCCA Business Services Ltd. as a comparable. The DRP directed to TPO exclude this comparable as it was not functionally comparable. Appellants objection to inclusion of Asian Business Exhibition & Conference Ltd. (hereinafter referred to as '**First Comparable**') and exclusion of Messe Dusseldorf India Pvt. Ltd. (hereinafter referred to as '**Second Comparable**') from the list of comparables were rejected by the DRP. The DRP also rejected the challenge to adoption of TNMM Method as the most appropriate method as well as objection to the entity level transfer pricing adjustment (as opposed to transaction level adjustment) made by the TPO/Assessing Officer. Therefore, the Appellant is in appeal before us.
10. The Ld. Authorised Representative for the Appellant appearing before us submitted that CUP Method, being the direct method, should have been adopted as the most appropriate method for benchmarking the internal transaction under consideration. The Assessing Officer/DRP fell in error in adopting TNMM. Without prejudice to the aforesaid, he submitted that First Comparable should not have been included in the list of comparables as its turnover was 12 to 13 times higher than that of the Appellant. The turnover of the Appellant was only INR 7.47 Crores whereas the

turnover of First Comparable was 94.14 Crores. He submitted that First Comparable with very high turnover cannot be considered a good comparable to the Assessee. In this regard relied upon the judgment of the Hon'ble Karnataka High Court in the case of Acusis Software India (P) Ltd. vs. ITO, Ward 11(1), Bangalore : [2020] 116 Taxmann.com 754 (Bangalore - Trib.)[28.06.2019]. As regards Second Comparable, Ld. Authorised Representative for the Appellant submitted that as it was functionally comparable with the Appellant. The relevant data including the financial results of the Second Comparable were available online and could be extracted from the web portal of Ministry of Corporate Affairs, and therefore, Second Comparable should have been included in the list of comparables.

11. Per contra, the Ld. Departmental Representative relied upon the order passed by TPO and DRP. He submitted that the DRP has rejected the objections raised by the Appellant after taking into consideration the submission reiterated by the Appellant before us and therefore, the grounds raised by the Appellant in the present appeal should be rejected.

Ground 1.1

12. We have heard the rival contention and perused the material on record including the judicial precedents cited during the course of hearing. We concur with DRP to hold that comparable transactions with AEs cannot be adopted for benchmarking international transaction using CUP Method as the same do not qualify as uncontrolled transactions. Thus, we find no infirmity in rejecting CUP Method and adoption of TNMM as the most appropriate method for benchmarking international transaction in the facts of the present case. To this extent Ground 1.1 raised in the Appeal is treated as partly allowed.

Ground 1.2(b)

13. As regard First Comparable, the contention of the Appellant is that it should have been rejected on account of high turnover. However, we note that neither TPO nor the Appellant had applied any turnover filter. Further, as rightly observed by the DRP, in absence of any impact of high turnover on the profitability having been pointed out in proceedings before the TPO/DRP, First Comparable could not have been excluded merely on account of high turnover. During the course of hearing, the Appellant had placed reliance in the judgment of Hon'ble Karnataka High Court in the case of Acusis Software India (P) Ltd. vs. ITO, Ward 11(1), Bangalore (supra). The relevant extract of the same read as under:

"14. The findings of the learned Tribunal as regards the comparable namely, Mercury Outsourcing Management Ltd., which too have been excluded by the Tribunal are quoted below for ready reference:—

" (ii) Mercury Outsourcing Management Ltd.

13.1 The learned Authorised Representative has submitted that the TPO has rejected this company on the similar reasoning of diminishing revenue and abnormal cost.

13.2 On the other hand, the learned DR has submitted that this company is incurring persistent losses and further the turnover of this company is less than Rs.1 Crore and therefore it does not satisfy the filter of turnover applied by the TPO.

13.3 We have considered the rival submissions as well as the relevant material on record. At the outset, we note that turnover of this company in the ITES segment is only Rs.45.33 lakhs which is any case does not satisfy any filter of turnover in comparison to the assessee's turnover more than Rs.27 Crores. Even if we apply the tolerance range of turnover of 10 times on both sides of the assessee's turnover then the company which is having less than Rs. 2.7 Crores of turnover will be outside the said range of 10 times. Accordingly, we are of the view that this company which is having only Rs. 45.33 lakhs turnover cannot be considered as a good comparable to the assessee".

15. From the aforesaid findings of the learned Tribunal, we are satisfied that the reasons assigned by the learned Tribunal in excluding the aforesaid company as comparable is also reasonable and the same deserves to be accepted by us. It is analysed by the learned Tribunal in extenso which arrived at a decision that the company which is having only Rs.45.33 lakhs turnover cannot be considered as comparable to the Assessee-company whose turnover is more than Rs.27 Crores” (Emphasis Supplied)

14. On perusal of the above, it can be seen that the comparable sought to be included by assessee in that case did not pass the turnover filter applied by the Transfer Pricing Officer. Accordingly, on account of lower turnover the comparable was excluded. In the present case, no turnover filter has been applied by the TPO or the Appellant while selecting the comparables and therefore, the judgment of the Hon’ble Karnataka High Court does not apply to the facts of the present case. We also note that it is not the case of the Appellant that First Comparable is functionally dissimilar to the Appellant. We do not find any merit in the contentions raised on behalf of Appellant for exclusion of the First Comparable (i.e. Asia Business Exhibition & Conferences Ltd.). Accordingly, Ground No. 1.2(b) raised by the Appellant is rejected.

Ground 1.2(a)

15. As regards Second Comparable, the TPO had rejected the same holding as under:

“However in case of Messe Duesseldorf India Pvt. Ltd. Financials are incomplete- there is no detailed P/L account, Balance Sheet, Annual Report etc thus on account of lack of information/data this company is rejected as a comparable.”

16. The objections raised by the Appellant on exclusion of Second Comparable were rejected by the DRP holding as under:

“This comparable has been rejected by the TPO on the grounds that complete financials of this comparable are not available. The assessee has argued that summary of results available on ROC website should be accepted. We have considered the submission of

the assessee. It is seen from the Director's report that only the Figures of total income, total expenditure, profit before tax and profit after tax are available in the directors report and no other details are available in respect of the company. In view of these facts, we are of the opinion that this comparable has been rightly rejected by the TPO because it is not possible to analyse the results of the company from these figures and conclude whether these results can be compared with those of the assessee or not. Rejection of this comparable by the TPO is upheld”.

17. There is nothing placed on record by the Appellant to controvert the concurrent factual findings returned by the TPO and the DRP to the effect that proper information/material about Second Comparable was available. Therefore, we do not find any reason to interfere with the exclusion of Second Comparable from the list of comparables. Accordingly, Ground No. 1.2(a) raised by the Appellant is rejected.

Ground 1.3

18. We note that the Appellant was also aggrieved by the fact that while computing ALP of the international transaction the TPO had applied PLI at entity level and not with reference to international transaction. We note that while rejecting the objections of the Appellant in this regard the DRP had observed as under:

“2.19.1 So far as assessee's objection to non-restriction of the adjustment to the transactions with AES only is concerned, the issue of entity level adjustment versus transaction level adjustment is pending before honourable Supreme Court which has admitted SLP filed by the Department against the decision of honourable Bombay High Court, in the case of CIT v Firestone International Pvt Ltd [ITA No 1354 of 2013] - TS-401-HC- 2015(BOM)-TP. In this case honourable Bombay High Court had held that transfer pricing adjustment should be made with reference to the international transaction and not with reference to the entity level turnover. Since, there is a change in the provisions of the Act and the decisions of DRP are no longer appealable by the Department, if the issue is decided in favour of the

assessee, it will amount to pre-judging the issue and bringing finality to an issue which is pending before a higher judicial authority. In order to keep the issue alive and protect the interest of the Department, the action of the TPO in making a transfer pricing adjustment by considering the entire cost is upheld.”

Thus, the DRP had noted that this issue was decided in favour of the Appellant by the judgment of the Hon’ble Bombay High Court. However, the DRP confirmed the addition made by the Assessing Officer to keep the issue alive and to protect the interest of Revenue.

19. During the course of hearing the Ld. Authorised Representative for the Appellant has also relied upon the judgment of the Hon’ble Bombay High Court in the case of Commissioner of Income Tax-16, Mumbai vs. Ratilal Becharlal & Sons : 288 CTR 31 (Bombay) wherein it has been held as under:

“2. The Revenue urges the following questions of law for our consideration:

(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the adjustment arising out of the Arm's Length Price (ALP) is to be restricted to only International Transactions with the Associated Enterprise instead of entire turnover of the assessee ?

xx xx

3. Re. :- Question No.(i)

- (a) During the subject assessment year, the Respondent Assessee had both domestic and international transactions including transactions with Associated Enterprises over and above transaction with independent third parties.*
- (b) The Tribunal by the impugned order rejected the Revenue's contention that the adjustment arising out of the Arm's Length Price (ALP) has to be made to the entire turnover of the Respondent Assessee instead of restricting the same only to the International Transactions entered into by the Respondent Assessee with its Associated Enterprises. The Tribunal by the impugned order negated the contention as the same is contrary to the clear mandate for Section 92*

of the Act, which permits taxation only of income arising from International Transactions having regard to its ALP.

- (c) *The Revenue being aggrieved submits that the adjustment has to be made on the entire universe of transactions entered into by the Respondent Assessee and not restricted only to its International Transactions with Associated Enterprise. In support, reliance was placed upon the fact that two appeals filed by the Revenue being Income Tax Appeal No.298 of 2013 (The Commissioner of Income-tax v. Super Diamonds) and Income Tax Appeal No.2068 of 2011 (The Commissioner of Income Tax v. Ankit Diamonds) raising a similar issue have been admitted on 5th May, 2014 and 16th February, 2015 respectively. On the other hand, the Respondent Assessee invites our attention to the decision of this Court in CIT v. Tara Jewels Exports (P.) Ltd. [Income Tax Appeal No. 1814 of 2013, decided on 5th October, 2013] and CIT v. Keihin Panalfa Ltd. in ITA No.11 of 2015 decided on 9th September, 2015, wherein the view taken by the Tribunal in the impugned order has been approved.*
- (d) *Chapter X of the Act inter alia deals with computation of income from international transactions having regard to the ALP. Section 92 thereof specifically brings to charge income arising from International Transactions with an Associated Enterprise to tax on computation of income having regard to the ALP of the transactions entered into between the Associated Enterprises, as the heading of Chapter X itself indicates that these are special provisions relating to avoidance of tax and the mandate is to ensure adjustment in respect of the International Transactions with Associated Enterprise or specified domestic transaction on the determination of ALP. It does not allow adjustment of the income on the basis of determining of ALP in respect of all the Assessee's transactions. If the contention of the Revenue is to be accepted, it would result in taxing non-existing income/profits of transactions entered into between the Respondent Assessee and independent third parties. This in the present fact, even in the absence of an allegation that the transactions with parties other than Associated Enterprise is not at ALP. The transactions with parties other than the International Transactions with Associated Enterprise or in respect of specified domestic transactions are not within the ambit of Chapter X of the Act. In fact, a similar question arose for our consideration in Tara Jewels Exports Pvt. Ltd. (supra) and an identical contention was negatived. So also the Delhi High Court in*

Keihin Panalfa Ltd. (supra) has negated a similar contention.

- (e) *In the facts and circumstances of the present case, the question as proposed would be contrary to the plain meaning and interpretation of Chapter X of the Act. Therefore, question of law as proposed, does not give rise to any substantial question of law. Thus, not entertained.*
(Emphasis Supplied)

20. In view of the above judgment of the Hon'ble Bombay High Court in the case of Ratilal Becharlal & Sons: 288 CTR 31 (Bombay) and the observations of DRP, we direct the Assessing Officer to compute transfer pricing adjustment in respect of international transactions with AE. Accordingly, Ground No. 1.3 raised by the Appellant is allowed.

In the result, the present appeal is partly allowed.

Order pronounced on 12.12.2022.

Sd/-
(Prashant Maharishi)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 12.12.2022
Alindra, PS

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2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
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