IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J" MUMBAI

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)
AND
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)

ITA No. 1834/MUM/2019
Assessment Year: 2011-12

M/s Shreya Life Sciences Pvt. Ltd., 301/A, Shreya House, Pereira Hill Road, Andheri East, Mumbai-400099. **PAN No. AADCS 9890 C**	**Vs.**	DCIT, Central Circle-8(1), Room No. 656, 6th floor, Aayakar Bhavan, Mumbai-400020.
Appellant		**Respondent**

ITA No. 2310/MUM/2019
Assessment Year: 2011-12

DCIT, Central Circle-8(1), Room No. 656, 6th floor, Aayakar Bhavan, Mumbai-400020.	**Vs.**	M/s Shreya Life Sciences Pvt. Ltd., 301/A, Shreya House, Pereira Hill Road, Andheri East, Mumbai-400058. **PAN No. AADCS 9890 C**
Appellant		**Respondent**

Assessee by	:	None
Revenue by	:	Mr. Rakesh Ranjan, CIT-DR & Mr. Samuel Pitta, DR
Date of Hearing	:	16/11/2022
Date of pronouncement	:	30/12/2022

ORDER

PER OM PRAKASH KANT, AM

These Cross appeals filed by the assessee and Revenue are directed against order dated 31/01/2019 passed by the Ld. Commissioner of Income-tax(Appeals)-58, Mumbai [in short, "the ld. CIT(A)"] for assessment year 2011-12, arising from the order passed by the Assessing Officer u/s. 143(3) r.w.s. 144C(1) of the Act on 18/05/2015.

2. No one appeared on behalf of the assessee despite notifying and accordingly, we are deciding these appeals on merits of the case after hearing to the arguments of the ld. Departmental Representative of the Revenue.

3. The grounds raised by the assessee are reproduced as under:

> *1. On the facts and in the circumstances of the case and in law the Hon'ble CIT(A) erred in treating M/s Shreya Life LLC, Russia Non-Associated Enterprise as Associated Enterprise of the appellant without considering the TP study report wherein the Auditor reported it as non associated enterprises and the reasons assigned for doing so are wrong and contrary to the provision of Income Tax Act and rules made there under.*
>
> *2. On the facts and in the circumstances of the case and in law the Hon'ble CIT(A) erred in upholding the addition made*

by Ld AO by adopting arithmetic mean of profit margin on proportionate basis to the international transactions instead of no adjustment for the reasons submitted before him and the reasons assigned for doing so are wrong and contrary to the provision of Income Tax Act and rules made there under.

3. On the facts and in the circumstances of the case and in law the Hon'ble CIT(A) erred in directing the Ld AO to consider Libor rate plus mark up of 4% for the purposes of arriving at arms length interest instead of no interest chargeable on amount receivable from its AE and the reason assigned for doing so are wrong and contrary to the provision of Income Tax Act and rules made there under.

4. On the facts and in the 3,33,25,667/-circumstances of the case and in law the Hon'ble CIT(A) erred in directing the Ld AO to consider Libor rate plus mark up of 4% for the purposes of arriving at arms length interest instead of no interest chargeable from its AE & Non AE debtors on a/c of delay in realization of export proceeds for the reasons submitted before him and the reason assigned for doing so are wrong and contrary to the provision of Income Tax Act and rules made there under.

3.1 The grounds raised by the Revenue are reproduced as under:

1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in holding that FE Shreya Lay Sainsis Farmatsevtika, Uzbekistan and LIC Shreya Life Science, Uzbekistan are not ABs of the assessee?

2) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in allowing the appeal of assessee though there is a reasonable prima facie case to treat the above two Uzbekistan entities as As of the assessee Shreya India in terms of similarities in Shreya group entity name and assessee has made huge export sales to these entities (Rs.2,70,39,916 + Rs.3,63,30,212) and that the assessee has not successfully rebutted this reasonable prima facie case against it?

3) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in allowing the appeal of the assessee, though the assessee failed to furnish the shareholding patterns of the assessee and these two Uzbekistan entities and financials of these two entities to rebut the reasonable case against it and to prove that it cannot be covered as A u/s 92A(1) or as deemed A u/s 92A(2) respectively?

4) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not appreciating the legal position that once the TPO establishes a prima facie case against the assessee based on some facts, he has discharged his primary onus and that the burden of proof shifts to the assessee to discharge its onus, which the assessee failed to do so?

5) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in not appreciating the fact that the assessee continued to have huge transactions with these

two Uzbekistan entities and that in view of these trade relations, it is in a position to obtain the details from them and discharge its shifted burden of proof by producing details in terms of Section 92A(1)&(2) in the form of confirmation letters from them?

6) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in allowing the appeal of assessee as it does not provide any basis of justification and documentary evidence either before the TO or CIT(A) for holding these companies not as Associated Enterprises?

7) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in allowing the appeal of the assessee where these associated enterprises namely, FE Shreya Layf Sainsis Farmatsevtika, Uzbekistan - Rs.2,70,39,916 and LLC Shreya Life Sciences, Uzbekistan - Rs.3,63,30,212 have huge export transactions with the assessee?

8) Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in allowing the appeal of assessee in a non-speaking manner without any basis and on a mere assumption that the reporting in Form 3CEB and TPSR of the assessee are sufficient to hold that they contain all the As and the transactions with them?

9. Whether on the facts and circumstances of the case and in law, the Id. CIT(A) is correct in failing to recognize that Section 92CA(2B) empowering the TPO to investigate the international transactions not reported in Form 3CEB clearly

indicates the possibility of certain transactions not reported in Form 3CEB and the TPO is duty bound to unearth such transactions also?

4. Brief facts of the case are that the assessee company is engaged in the business of manufacturing and trading of pharmaceutical products and filed its return of income electronically on 30/11/2011 declaring total income at Rs. Nil. The return was processed u/s. 143(1) of the Income Tax Act [in short, "the Act"]. The case was selected for scrutiny and statutory notices under the Act were issued and complied with. In the assessment completed u/s. 143(3) r.w.s. 144C of the Act, the Assessing Officer made total adjustment of Rs. 64,99,25,131/- as per the Transfer Pricing provisions based on the order passed u/s. 92CA(3) of the Act dt. 21/01/2015 by JCIT, Transfer Pricing 4(1), Mumbai (TPO). Aggrieved by the said addition, the assessee preferred appeal before the ld. CIT(A) who gave partial relief to the assessee. Aggrieved by the order passed by the ld. CIT(A), both the assessee and Revenue are in appeal before us, the Income-tax Appellate Tribunal (in short 'the Tribunal') raising the grounds as reproduced above.

5. The ground nos. 1 to 9 of the appeal of the revenue and the ground nos. 1and 2 of the appeal of the assessee relates to adjudication of three parties treated as Associate Enterprises (AE) by the TPO and Assessing Officer, whereas the ld. CIT(A) have

treated only one of these three parties as AE of the assessee company.

6. Brief facts qua this issue are that the assessee company in its From no. 3CEB has shown transaction of exports to Shreya Corporation, Russia of Rs. 7,07,97,014/- as transaction with AE but the TPO and Assessing Officer made a transfer pricing adjustment of Rs. 9,43,10,286/- in relation to other three parties (namely, FE Shreya Layf SainsisFarmatSevtika, Uzbekistan; LLC Shreya Life Sciences, Russia and LLC Shreya Life Sciences, Uzbekistan) treating as AE as under:

Particulars	**Amount (Rs.)**
Export to AEs	91,15,87,115
OP /OC of the assessee	15.41%
Operating Cost of assessee on sales to AEs	78,98,68,395
Arm's Length Margin (OP/OC)	27.35%
Arm's Length Exports	100,58,97,401
Exports to AE	91,15,87,115
Adjustment / Difference	**9,43,10,286**

6.1 However, the ld. CIT(A) directed that the transactions with 2 parties of Uzbekistan are not transactions with AEs as the TPO and Assessing Officer have not given any clear direct or indirect finding to substantiate the same.

7. The ld. Departmental Representative of the revenue argued that the transfer pricing adjustments made by the TPO and the Assessing Officer are validly made by applying correct comparables and therefore the addition of Rs. 9,43,10,286/- be upheld.

8. We have heard the arguments made by the ld. Departmental Representative of the revenue and perused the material on record. The moot issue involved in these grounds of appeal of the assessee and the Revenue is to decide whether the three parties to whom the assessee company has made exports during the year, falls under the definition of Associated Enterprises (AEs)?

8.1 In regard to the party namely, Shreya Life LLC, Russia the following comments of the TPO and contentions of the assessee are relevant which are reproduced as under:-

Section	TPO's Comments	Assessee's contention
92A(2)(h) ninety percent or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise are supplied by the other enterprise, or by persons specified by the other enterprise and the prices and other conditions relating to the supply are influenced by such other enterprise; or	Labour charges have been debited in the book of Shreya Life LLC, Russia which shows that some value addition is done in Russia and thus the goods supplied from India are raw materials for the Russian entity	Your honour may appreciale the fact that this clause is applicable only when the proposed AE's are engaged in manufacturing activities. Thus, this clause is not applicable as goods supplied by Shreya Life India are finished goods only, requiring no further processing. Further the Ld AO erred in not bringing on record any cogent reason or valid evidence that m/s Shreya Life LLC has purchased raw material from appellant which needs further value addition. The Ld AO on presumption basis held the said company as its AE.
92A(2)(i) the goods or articles manufactured or processed by one enterprise are sold to the other enterprise or to	The very fact that almost 100% of the requirements of the Russian entity is met by the assessee, shows that it is a tainted	In the case of the assessee, prices and other conditions relating thereto are solely decided by Shreya Life sciences India considering

persons specified by the other enterprise and the prices and other conditions relating thereto are influenced by such other enterprise	transaction. Moreover, out of all exports of ₹85.91 cr more than 82% (₹70.92cr) is to LLC Shreya Life Russia	prevalent market condition and are never influenced by the proposed AE.
92A(2)(m) there exists between the two enterprises, any relationship of mutual interest, as may be prescribed	The interdependence of these entities and the assessee clearly reflects the mutual interest of these entities on one another.	No such relationship of mutual interest has yet been prescribed and accordingly this clause is not applicable.

8.2 It is pertinent to note here that assessee company is selling the manufactured article to M/s. Shreya Life LLC, Russia and the TPO and the Assessing Officer has not controverted this fact by bringing any evidence on record but merely placed an argument that certain labour charges have been debited in books of M/s. Shreya Life LLC to presume that some value addition is done in Russia. However, such a view would be too farfetched in absence of any evidence at all. Hence, provisions of section 92A(2)(h) cannot be applied. However, in applying section 92A(2)(i) of the Act, it is the finding given by the TPO and the Assessing Officer that nearly 82% of export sales made by the assessee is to the said AE and almost 100% of the requirements of the said AE are met by the assessee company itself. Accordingly, the ld. CIT(A) took the view that the section 92A(2)(i) of the Act which provides for AE if the goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the process and other conditions relating thereto are influenced by such other enterprise gets satisfied in the case of Shreya Life

LLC, Russia and hence, treated this party to be the AE of the assessee company. On contrary, the assessee submitted before the ld. CIT(A) that no such prices are influenced by the AEs but are solely decided by the assessee. In this regard, it is observed that the averment that almost 100% of the requirements of Shreya Life LLC, Russia is not supported with any concrete evidence or finding on part of the TPO or the Assessing Officer and therefore, merely on presumptions one cannot go ahead. Further, the criteria of price influencing by the Russian entity is also not substantiated although primafacie, it may appear to be so. Also, merely because the said party has been treated as AE in the subsequent year for some other reason cannot be the ground to treat the same as AE even in the year under consideration. Hence, in light of justice, we feel it appropriate to restore this matter back to the Assessing Officer for de novo verification and come out with clear findings on the issue before making any adjustments if required the Assessing Officer shall gather information under the Exchange of Information treaty with foreign country through appropriate route. Needless to say, that the assessee company shall be granted adequate opportunities of being heard before deciding this issue.

8.3 Similarly, even for other two parties namely, M/s. FE Shreya LayfSainsisFarmatsevtika, Uzbekistan and Shreya Life Science LLC, Uzbekistan; the assessee had submitted that the said concerns are not the AEs and even the Assessing Officer has not brought on

record any material fact and evidences in this regard to prove as to which of the categories specified for AEs are satisfied under the provisions of the Act. Even the ld. CIT(A) has given the finding that the treatments of these two parties of Uzbekistan as AEs by the TPO and the Assessing Officer are merely on assumption without any clear direct or indirect finding in support of the same. Hence, in light of justice, we feel it appropriate to restore this matter back to the Assessing Officer for de novo verification and come out with clear findings on the issue these two parties as well before making any adjustments invoking Exchange Information treaty or protocol with foreign country. Needless to say, that the assessee company shall be granted adequate opportunities of being heard before deciding this issue.

8.4 As regards the comparables selected for making the transfer pricing adjustments, we are in agreement with the ld. CIT(A) to confirm the criteria laid down by the TPO and Assessing Officer as the assessee do not have any definite criteria in selection of its comparables. Before us, neither any one has appeared on behalf of the assessee nor any written submission has been filed on this issue in dispute. Therefore, in absence of any documentary evidence in support of the ground raised on the issue in dispute rebutting the finding of the ld. CIT(A), we do not find any infirmity in the order passed by the ld. CIT(A).

8.5 Accordingly, the grounds nos.1 to 9 of the appeal of the revenue and the ground nos. 1and 2 of the appeal of the assessee are allowed for statistical purposes.

9. The ground nos. 3 and 4 of the assessee relates to the addition of Rs. 55,56,14,845/- on account of transfer pricing adjustment made for the outstanding receivables from AEs.

10. Brief facts qua this issue is that the TPO and the Assessing Officer treated above discussed three parties as AEs of the assessee and found that total opening debit balance of the AE in the books of the assessee company stands at Rs. 273,44,69,745/- on which notional interest @ 16.50% has been levied. As against this, the ld. CIT(A) followed its own order for A.Y. 2010-11 wherein the notional interest to be levied was directed at LIBOR plus 4% mark-up. Aggrieved by the same, the assessee is in appeal before us.

10.1 In this regard, we find that this issue is now covered by the decision in the case of assessee's own case for A.Y. 2010-11 wherein the ITAT (ITA no. 3713 & 4372/M/2016) has deleted the same following the decision of Hon'ble Bombay High Court in the case of Indo American Jewellery Ltd. (44 taxmann.com 310) (Bom). The relevant extract of the said decision of ITAT is reproduced below:

> *"23. We find that the assessee deserves to succeed firstly on the ground that the assessee is not charging interest on outstanding*

both with the A as wel as non-AEs. In this regard issue is covered in favour of the assessee by the decision of Hon'ble Jurisdictional High Court in the case of Indo Americar Jewellery Ltd. (44 taxman.com 310). In this case, it was held that when ther is complete uniformity in the act of the assessee in not charging interest from both the AEs and non-AEs debtors and the delay in realization of the export proceeds, deletion of addition of interest on outstanding amount of export proceeds was justified. We find that this case law is fully applicable on the facts of the present case. The Revenue has not disputed that the assessee is not uniform in its act of not charging interest from both AEs and non-AEs for delay in realization of export proceeds.

24. Apart from the above, assesses's other limb of submission is also germane. The Authorities below have erred in disregarding the fact that A had itself in problem in making realization from its debtors because fluctuating economic condition at that time prevailing Russia/ CIS countri where AE is operating. No defect in the evidences submitted by the assessee this regard is noted by the authorities below. In these circumstanc assessee's submission is quite cogent that when recovery of principal doubtful there is no point in charging notional interest on the outstandin Accordingly, we set aside the orders of the authorities below on this issue as delete the addition."

10.2 In light of the above discussion, we find that the said decision of ITAT for AY 2010-11 squarely applies in this year as well.

However, as no one has appeared before us on behalf of the assessee, we feel it appropriate to direct the Assessing Officer to verify that the assessee has not been charging interest to non AEs also in order to apply the ratio of the aforesaid decisions. Accordingly, the ground nos. 3 and 4 of the assessee stands allowed for statistical purposes.

11. In the result, the appeals of the assessee and Revenue are allowed for statistical purposes.

Order pronounced under Rule 34(4) of the ITAT Rules, 1963 on 30/12/2022.

Sd/-	**sd/-**
(VIKAS AWASTHY)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 30/12/2022
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai