

IN THE INCOME TAX APPELLATE TRIBUNAL “J” BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM  
AND  
SHRI PAVAN KUMAR GADALE, JM

ITA No. 387/MUM/2019  
(Assessment Year 2014-15)

Phoenix Comtrade Private  
Limited  
Office No. 403, Swapna Siddhi,  
Akurli Road, Kandivali (East),  
Mumbai-400 101  
(Appellant)

Vs. DCIT 4(3)(1)  
Room No. 649, 6<sup>th</sup> Floor, Aaykar  
Bhavan, M.K.Road, Mumbai-400  
020  
(Respondent)

PAN No. AADCP7654N

Assessee by : None  
Revenue by : Shri Vinod Tanwani

Date of hearing: 06.12.2022  
Date of pronouncement : 03.03.2023

**ORDER**

**PER PRASHANT MAHARISHI, AM:**

01. This appeal is filed for AY 2014-15 by Phoenix Comtrade private limited (the appellant/assessee) against the assessment order passed by The Deputy Commissioner Of Income Tax - 4 (3) (1) Mumbai (the learned AO) passed under section 143 (3) read with section 144C (13) read with section 92CA of the Income tax act [ The Act] dated 28 November 2018 raising following grounds of appeal :-

*“1. General Ground- The Ld. DRP/AO have erred in law and on facts and in the circumstances of the appellant’s case in making an addition/adjustment of ₹ 31,34,18,824/- on*

account of the order of the Transfer Pricing Officer (TPO) u/s. 92CA (3) and making an addition/disallowance of ₹ 6,15,84,796/- on account of non-transfer pricing additions/disallowance.

1.1 That the final assessment order u/s. 143(3) r.w.s. 144C(13)/92CA(3) of the Act dated 28<sup>th</sup> November, 2018 is bad in law.

1.2 That the additions/disallowance made by Ld. AO are wholly illegal, untenable and on erroneous grounds.

Adjustment of ₹ 31,34,18,824/- in respect of sale agri-commodities to AEs

*Incorrect application of TNMM*

2. That the Ld. TPO/DRP and consequently the Ld. AO have grossly erred in making a transfer pricing adjustment of ₹31,34,18,824/- by incorrectly applying the Transactional Net Margin Method (TNMM).

*Treatment of foreign exchange loss*

3. The Ld TPO/DRP and consequently the Ld. AO have grossly erred in law and on facts and circumstances of the case by treating the foreign exchange loss/gain as operating item while computing the PLI of assessee and comparables, completely disregarding that:

3.1 Such foreign exchange loss has arisen from the reinstatement of long term advances which are within the domain of financing activities.

3.2 Those aforesaid advances are in nature of long term financing extended by holding company to its subsidiary and hence are in the capital filed.

*3.3 Foreign exchange loss/gain cannot have a different character from a transaction to which it pertains i.e. financing in nature.*

*3.4 Safe harbor rules in Rule 10TA specifically provides foreign exchange item to be non-operating in nature.*

*Rejection of assessee's search process*

*4. That Ld TPO/AO have grossly erred in law and on facts and circumstances of the case by rejecting the search process of the assessee without affording any cogent reasons and in introducing the new companies as comparables on wholly erroneous, illegal and untenable grounds.*

*4.1 That the Ld. TPO/AO have erred in rejecting the assessee's functionally comparables companies and introducing functionally/product-wise incomparable companies.*

*Incorrect computation of PLIs and non-grant of FE adjustment*

*5. The Ld TPO/AO have grossly erred in law and on facts and circumstances of the case incorrectly computing the PLs of comparables companies by:*

*1) treating the change in inventories and interest paid on Short term borrowings/working capital loans as non-operating item.*

*b) not allowing foreign exchange adjustment sought by the assessee in accordance with the Rule 10B(3)*

*Incorrect computation of PLIs and non-grant of FE adjustment*

6 That Ld. TPO/DRP addition consequently Ld. AO have grossly erred in law and on facts and circumstances of the case in not appreciating that assessee's controlled transactions are at arm's length under the Comparable Uncontrolled Price Method (CUP) proposed by Ld. TPO herself during the course of transfer pricing proceedings and accepted in remand proceedings and in the original order u/s. 92CA of the Act.

6.1 That Ld. TPO/DRP and consequently Ld. AO have grossly erred in law and on facts and circumstances of the case by dropping the benchmarking analysis carried out under more direct method viz. CUP method after finding out that assessee's controlled transactions were at arm's length under CUP method.

6.2 That Ld. TPO/DRP and consequently Ld. AO have grossly erred in law and on facts and circumstances of the case in making the enhanced transfer pricing adjustment over and above the original order u/s. 92CA without affording an opportunity of being heard by issue of show cause notice.

#### **GROUND OF APPEAL AGAINST CORPORATE TAX GROUNDS**

##### ***Disallowance of provision for doubtful debt***

8. That Ld. AO has erred in law and on facts and circumstances of the case in proposing and Ld. DRP erred upholding the disallowance of ₹ 6,14,77,582/- on account of specific provision for doubtful debt made by the assessee.

##### ***Addition for employees' contribution to PF/ESIC***

9. The Ld. AO has erred in law and on facts and circumstances of the case in proposing and Ld. DRP erred in upholding an addition of ₹ 1,07,214/- on account of late

*payment of employee's contribution towards Provident fund/Employee State Insurance Corporation.*

***Non-allowance of brought forward losses***

*10. The ld. AO has erred in law and on facts and circumstances of the case in not allowing the set-off of the brought forward losses and unabsorbed depreciation amounting got ₹ 90,74,54,523/- and ₹ 44,44,036/- respectively and consequently raising an unnecessary /infructuous demand of ₹ 44,22,850/-.*

*11. That the Ld. AO has erred in law in computing the interest u/s 234A and 234B on the alleged tax payable.*

*12. The at the Ld. AO has erred in law in initiating penalty proceedings u/s. 271(1)(c) alleged concealment of income.*

*13. That each ground appeal is independent and without prejudice to other grounds appeal raised herein.”*

02. Brief facts of the case shows that assessee is a company engaged in trading of comedy, it filed its return of income on 30/11/2014 declaring a loss of ₹ 361,072,457/-. Assessee is trader in rice, coal, manganese ore and turmeric etc. The return was picked up for scrutiny.
03. As assessee has entered into international transaction of sale of traded goods to its holding company for commodities private limited BVI amounting to ₹ 4,168,706,476 , sale of traded goods to its associated concern at Dubai DMCC, Mumbai of Rs 35,74,44,143. The assessee has sold non-basmati rice to its holding company amounting to ₹ 391,63,78,384, basmati rice of Rs. 25,23,28,092 and Non basmati Rice to Dubai entity of Rs. 35,74, 44,143/-. The assessee has selected itself

as a tested party, adopting transactional net margin method as most appropriate method adopting profit level indicator of operating profit/operating cost which is 3.61% of the assessee. Assessee selected three comparable companies whose margin was computed at 1.70% and therefore the assessee in its TPSR submits that international transaction of the assessee are at arm's-length.

04. The learned transfer-pricing officer held that when CUP method is available assessee has wrongly selected transactional net margin method as Most Appropriate method. Accordingly, he issued a show cause notice stating that transactional net margin method is not the most appropriate method. He also carried out search on TIPS database and found that as per TIPS database on sale of non-basmati rice to the holding company results in an adjustment of ₹ 109,166,426, sale of basmati rice to the holding company adjustment of ₹ 955,975 and sale of Basmati rice to Dubai adjustment of ₹ 6,430,518.
05. Assessee objected to the same challenging CUP as MAM, rates used by the TIPS database, comparability data used by the TPO, and mainly stating that there are different varieties of rice and prices vary based on its quality. Therefore, no adjustment is warranted. The learned TPO rejected the argument of the assessee holding that there is no reason submitted by the assessee that why the transactional net margin method selected by the assessee should not be rejected and cup to be adopted as most appropriate method. Therefore, according to him, the cup method is the most appropriate method. He further held that TIPS database is the best suited for the comparability analysis. It was for the comparability analysis it was held that TIPS data has been extracted based on quality only. He also rejected the contention of the assessee with respect to the bundled approach and held that cup method is applied on each transaction. The learned TPO also noted that in assessment year 2012 - 13 the assessee has submitted that the rates adopted by the Indian customs official for export of rice should be considered for cup analysis as the same would be reliable. He

further held that TIPS database is of Indian custom officials that was relied by the assessee himself and this year assessee is objecting to that. Thereafter the learned transfer-pricing officer applying that database computed the arm's-length price taking the price transacted by the assessee for each day and accordingly made an adjustment of Rs. 7,50,04,711 with respect to the trading activities. He made an adjustment of ₹ 67,618,218 on account of sale of non-basmati rice and ₹ 64,30,518 in respect of sale of basmati rice to Dubai entity and sale of to the holding company of ₹ 955,975/-.

06. He also found that the assessee has outstanding receivable from Dubai entity of ₹ 357,444,143 that is a transaction of capital financing and therefore interest is required to be benchmarked on the outstanding receivable. After considering the objection of the assessee, it was found that there is in ordinary delay in receiving payment for outstanding dues. In some of the cases, the outstanding was extended beyond 60 days and therefore he considered the 60 days as normal credit. And thereafter computed the interest of ₹ 1,069,963. Accordingly the learned TPO made the total adjustment on account of sale of rice of ₹ 75,004,711/- and on account of interest on overdue receivable of ₹ 1,059,963/- by passing an order under section 92CA (3) of the act on 31/10/2017.
07. The learned assessing officer incorporated the adjustment proposed by the learned TPO. The learned AO further found that assessee has delayed payment of employees contribution to the provident fund account amounting to ₹ 107,214 and therefore applying the provisions of section 2 (24) (x) read with section 36 (1) (va) of the act disallowed the above sum.
08. The learned AO further found that assessee has debited provision for doubtful debts of ₹ 61,477,582 which is not allowable. AO further made a disallowance of ad hoc expenditure amounting to ₹ 373 lakhs as assessee did not furnish the requisite information. Accordingly the

draft order the total income of the assessee was computed at a loss of ₹ 186,112,990/- against the returned a loss of ₹ 361,072,457/-.

09. Aggrieved assessee preferred objections before the learned dispute resolution panel. With respect to the transfer pricing adjustment the learned DRP upheld the applicability of the transactional net margin method accepting the objections of the assessee. However, it held that foreign exchange loss incurred by the assessee is an operating item while computing the profit level indicator of the assessee. Accordingly, as per direction of the learned dispute resolution panel the learned TPO made an adjustment of ₹ 313,418,824 because of sale of agricultural commodities to associated enterprises. The learned dispute resolution panel also upheld the disallowance of provision of doubtful debts of ₹ 61,477,582, disallowance of employee's contribution to provident fund and ESIC because of delay in deposit. With respect to ad hoc disallowances of ₹ 373 lakhs was deleted subject to verification whether the tax has been deducted from the payments whenever required.
010. Consequent to that the learned AO passed assessment order on 28/11/2018 wherein the adjustment of ₹ 313,418,824/- on account of transfer pricing adjustment, ₹ 107214 on account of late payment of provident fund and provision for doubtful debts of ₹ 61,477,582 were repeated determining the total income of the assessee at ₹ 13,931,163/-. Assessee is aggrieved with that and has preferred this appeal.
011. Despite notice, none appeared On behalf of the assessee on last several occasions. The earlier letter of authority was also withdrawn. The notices sent to the assessee through post were also returned with remark 'left". Therefore, we do not have any other alternative but to decide the appeal on the merits of the case as per information available on record.



012. The learned departmental representative vehemently supported the order of the learned dispute resolution panel and the learned TPO with respect to the transfer pricing adjustment. It was submitted that assessee is receiving huge advances from its AE and incurring cost of Forex as well as material sold. Therefore, forex loss is operating loss only. He referred to direction of LD DRP to show the various scenarios and why LD DRP held it to be inextricably linked with sales. On the issue of late payment of provident fund and ESIC dues, he specifically referred to the recent judicial pronouncements as well as the provisions of the law. With respect to the disallowance of provision of doubtful debts, it was submitted that it does not fulfill the requisite condition of its relevance.
013. We have carefully considered contention of learned departmental representative and perused the orders of the lower authorities.
014. Ground no 1 is general in nature Ground no 11 and 12 are consequential and premature and hence dismissed.
015. Ground no 2 is with respect to dispute of transfer pricing adjustment. Assessee claims that Foreign exchange loss is not to be considered as operating expense while computing profit level indicator with respect to the computation of arm's-length price with respect to the sale of agricultural commodities to its associated enterprise. The learned dispute resolution panel has accepted that for benchmarking most appropriate method is TNMM as adopted by the assessee. However the only dispute is with respect to considering the foreign exchange loss of ₹ 56.93 crores debited by the assessee as part of operating expenses or not. The claim of the assessee is that it should not be considered part of the operating expenditure. The learned dispute resolution panel held that case of the assessee is a typical case where the sales and forex losses are intrinsically linked to each other and both of them cannot be separated. Main reason being that assessee has received advance against sale from its AE and at the time of sales is booked as

per prevailing exchange rate and resultant loss of Forex on advance adjusted is also booked. According to the learned dispute resolution panel when the assessee entered into an agreement for sale in foreign currency, the figure of sales and forex loss/gain taken together gives the correct picture. In reality, the assessee incurs neither any loss nor any gain because of forex fluctuation it is only an accounting treatment. Assessee in reality did not incur any liability towards buyer's account on foreign exchange fluctuation. The learned dispute resolution panel also extracted the scenario provided by the assessee wherein it is proved that foreign exchange loss incurred even before the sale has been made and that is because of reinstatement/adjustment of advances received against sales. Therefore, the sales and forex losses incurred by the assessee are closely interlinked for this reason. Assessee in the sale price also giving AE benefit of forex fluctuation also. In view of this, we do not find any infirmity in the direction of the LD DRP by including forex loss in the PLI computation of Assessee. Thus, Ground no 3 is dismissed.

016. There is no justification available with us with respect to computation of PLI or Search process of the assessee. In absence of any argument before lower authorities and any representation before us, we dismiss ground no 4, 5 and 6 of the Appeal.
017. Ground no 2 is combines ground of TP adjustments, hence it is also dismissed.
018. Grounds of appeal are numbered incorrectly. There is no ground no 7.
019. Ground no 8 is with respect to late payment of dues of employees contribution as per respective due dates of the respective Act. In view of the decision of Honourable Supreme court in case of Checkmate solutions Services Limited this issue is to be decided against the assessee and hence Ground no 8 is dismissed.



020. Ground no 9 is provision of bad and doubtful debts which is not writing off actual debts. Therefore it does not fulfill the condition of allowability as bad debts and hence Id DRP has correctly upheld the order of the Id AO. We dismiss this ground also.
021. Ground no 10 is with respect to allowance of carry forward losses. We set aside this issue to the file of the dl AO that if the necessary conditions are satisfied, the claim of such set off may be examined in accordance with the law. This ground is allowed subject to verification.
022. According appeal of the assessee is partly allowed.

Order pronounced in the open court on 03.03.2023.

Sd/-  
(PAVAN KUMAR GADALE)  
(JUDICIAL MEMBER)

Sd/-  
(PRASHANT MAHARISHI)  
(ACCOUNTANT MEMBER)

Mumbai, Dated:03.03.2023

*Dragon*

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/ Asst. Registrar  
Income Tax Appellate Tribunal, Mumbai