

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH: 'I' NEW DELHI]

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND

SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 808/DEL/2021 (A.Y 2016-17)

Louis Dreyfus Company India Pvt. Ltd., 8 th Floor, Tower : A, Building No. 5, Cyber City, DLF Phase : III, Gurgaon, Haryana - 122 002. PAN No. AAACL7361E (APPELLANT)	Vs.	DCIT, Circle : 2 (1) New Delhi. (RESPONDENT)
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Assessee by :	Shri Ravi Sharma, Advocate; 8s Ms. Shruti Khimta, AR;
Department by:	Shri Rajesh Kumar, [CIT] - D. R.;

Date of Hearing	05.01.2023
Date of Pronouncement	15.03.2023

ORDER**PER YOGESH KUMAR US, JM**

This appeal is filed by the assessee against the order of the Additional/Joint/Deputy/Assistant Commissioner of Income Tax/Income-tax Officer, National e-Assessment Centre, Delhi for assessment year 2016-17.

2. The assessee has raised the following substantive grounds of appeal :-

“Each of the grounds and/ or sub-grounds of the appeal are independent and without prejudice to the other:

1. *On the facts and circumstances of the case & in law, the Learned Transfer Pricing Officer (Ld. TPO] [in pursuance to the directions of the Ld. Dispute Resolution Panel (DRP)] erred in enhancing the income of the Appellant by Rs.18,57,18,810 while holding that the international transactions pertaining to import/export of Agri-commodities with the Associated Enterprises (AEs] do not satisfy the Arm's Length Principle (ALP) envisaged under the Income-tax Act, 1961 (the Act).*

2. *On the fact and circumstances of the case & in law, the Ld. TPO erred in rejecting the Comparable Uncontrolled Price (CUP) analysis undertaken by the Appellant based on the rates available as per the industry reports and independent broker quotes as on the date of contract.*

3. *On the fact and circumstances of the case & in law, the Ld. TPO erred in comparing the prices of the international transactions of import and export of Agri-commodities, with the data collected from*

the Custom Authorities without giving emphasis to economically relevant characteristics such as date of contract, incoterms, quality, etc.;”

3. There is a delay in filing the present appeal and the assessee submitted vide written reply to the defect memo that, the appeal could not be filed due to Covid Situations and relied on the judgment of the Hon'ble Supreme Court dated 27th April 2021 in Miscellaneous Application No. 665/2021 in SMW (C) No. 3/2020. For the above reasons stated by the assessee, the delay in filing the appeal is condoned.

4. Brief facts of the case are that, the assessee filed return declaring loss of Rs. 64,17,81,731/- which has been processed by CPC. Later, the case of the assessee was selected for scrutiny under CASS. Draft order u/s 144C of the Act was passed on 21/12/2019 by assessing the income of the assessee at Rs. 42,49,43,801/- after making addition of Rs. 106,67,25,532/- on account of TP adjustment. Subsequently, the assessee filed the objection before the Dispute Resolution Panel against the draft assessment order passed u/s 144C of the Act.

5. The Final Assessment order came to be passed on 31/03/2021 u/s 143(3) read with Section 143(3) r.w. Section 144(C) and 144 (C13) r.w. Section 143(3A) & 143(3B) of the Act by making TP adjustment of Rs. 18,57,18,810/- and assessing the income of the assessee at Rs. 45,60,62,921/- as against the returned loss of Rs. 64,17,81,731/- in following manner: -

“2-Transfer Pricing Approach of the TPO:-

In the TP study report assessee has used CUP as the most appropriate method. TPO rejected the TP study report submitted by assessee, However accepted CUP as MAM after making verification from tire data collected from the Custom department and proposed ar. adjustment of Rs. 1,06,137,17,211/- on account of 'Import of Commodities and adjustment of Rs.10\08;321/- was proposed on account of 'Export of commodities/ The adjustment proposed of 'Import of Commodities' and “.Export of Commodities” was subsequently revised to Rs, 19,40,52,522/- vide order passed u/s 154 of the IT Act dated 13.03.2020.

3. *Aggrieved by the TPO order, assessee went before Ld. DRP on various issues. Ld. DRP vide its order dt. 23.02.2021, upheld the TPG findings and directed*

“ In the light of the foregoing discussion, the objections of the assessee agaimt the use of customs data under CUP are rejected. However, in regard to the Assesses submission for allowing of the range as per the proviso to sections 92C(2) of the Act, the TPO is directed to compute the arm’s length price as per the said provisions, where a number of prices were available for the same specifications on the same date in the customs data. Also, the relevant date froming the basis of the exchange rate used in computing the price as per customs data shall be recorded for reference of the assessee.”

4. *In view of the above facts and following the direction of Hon’ble DRP, the adjustment proposed in revised as follows:-*

S. No.	Name of Commodities	Difference in price import (in INR)
1	Oil Import	14,10,30,456/-
2	High Sea Oil Import	2,68,01,075
3	Grain Import	1,78,34,404
4	Cotton Import	12,166
Total amount of adjustment		18,56,78,191

Variation in Price of export:

Name of Commodities

Difference

N o		<i>in Price export (in INR)</i>
1	<i>Export of Cotton</i>	
2	<i>Meal Export</i>	
3	<i>Sugar Export</i>	
<i>Total amount of adjustment</i>		<i>40,619/-</i>

5. The Assessing Officer shall revise the amount of adjustment from Rs. 19,40,52,522/- vide rectification order u/s 92CA(5) r.w.s. 154 of the Income Tax Act, 1961 to Rs. 18,57,18,810/- (Rs. 18,56,78,191+ Rs. 40, 619/-).

3. Therefore, the addition of Rs.18,57,18,810/- is hereby made to the total income of the assessee on account of TP adjustment.

Addition of Rs. 18,57,18,810/-

Penalty proceedings u/s 271(l)(c) of the I.T. Act is separately initiated for furnishing inaccurate particulars of income.

4. In view of the above, the total income of the assessee is computed as follows:

Return Income : (-) Rs.64,17,81,731/-

Add: TP Adjustment Rs.

18,57,18,810/ -

Assessed Income

Rs. 45,60,62,921/-

5. Assessment order passed u/s 143(3) r.w.s. 144C(13) of the I.T. Act. Issued demand notice and computation sheet as per Annexure attached. Penalty notice u/s 271(l)(c) issued separately."

6. Aggrieved by the assessment order dated 31/03/2021, the assessee has preferred the present appeal on the grounds mentioned above.

7. The Grounds of the Appeal of the assessee directed against the assessment order in enhancing the income of the assessee by

Rs. 18,57,18,810/- by relying on the data collected from custom authorities by

rejecting the comparable uncontrolled price ('CUP) analysis undertaken by the assessee.

8. The Ld. Counsel for the assessee submitted that, to bench mark the transaction relating to import and export of agri-commodities, CUP Method was selected as Most Appropriate Method by relying upon the rates/quotes offered by authenticated independent market report/3rd party broker quote as CUP. Further, submitted that the market rate relied upon by the assessee should be undisputedly treating as comparable uncontrolled price as bench mark of the Assessee's international transaction, the Ld. TPO/DRP have erroneously rejected the economic analysis of the assessee. Further submitted that, even in the Assessee's own case for Assessment Year 2008-09 in ITA No. 6409/Del/2012 by following decision of the Hon'ble Gujarat High Court in the case of CIT Vs. Adani Wilmar Ltd. 363 ITR 338(Guj) (2014), remanded the matter to the file of TPO to examine the data filed in support of CUP for the very same transaction and the Ld. TPO after the remand by the Tribunal, accepted the data so filed and deleted the addition. Therefore, submitted that the appeal of the assessee deserves to be allowed.

9. On the other hand, the Ld. DR submitted that the case of the assessee for the year under consideration is entirely different than the Assessment Year 2008-09 and also the other years. Further submitted that the Ld. TPO and DRP have rightly taken into consideration of the data available with the custom

authorities since the broker data used by the assessee are unreliable and unauthenticated which itself is against the findings/decisions of the Tribunal for Assessment Year 2008-09. The quotation provided by the third party brokers are not a real time transactions but only projection and the private third party report relied by the assessee provided an average price which cannot be used. Further submitted that, the Tribunal has time again held that the customs authorities are assigning the values to the import goods on the basis of scientifically formulated method and they are responsible for making a fair assessment value of the imported goods the valuation made by the custom authorities are not an arbitrary exercise. Therefore, it is not possible to say that the credibility of the price rate furnished by the custom authorities needs to be discounted. Therefore, submitted that, the appeal requires to be dismissed.

10. We have heard the parties perused the material available on record and gave our thoughtful consideration.

11. At the outset, it is found that for the Assessment Year 2008-09 to 2013- 14 the CUP data has been accepted by the Department for the Assessment Year 2014-15 & 2015-16 there is not TP reference and for the Assessment Year 2017-18 the CUP data has been accepted by the Department. It is found that the Department was not having the benefit of the data of the custom authorities in the Assessment Year 2014-15 & 2015-16 and the Department

was having the benefit of data provided by the Custom Department in the year under consideration and relying on the bench marking analysis conducted by the assessee it has been held to be not reliable or bonafide.

12. There is no dispute between the assessee and the Department regarding the applicability of the CUP method for benchmarking. Both the assessee and the TPO having taken CUP as the MAM in the assessment proceedings, no other method is considered in view of the same. The moot question in the present appeal that whether the prices published by industry associations and brokerages along with third party transactions constitutes a more reliable CUP compared to customs data for import / export transactions of such agri-commodities.

13. As per Customs Valuation Rules, the comparison has been made on the transaction value /tariff value of similar/identical products at the time of import / export. As observed by the TPO, a gap could exist between the contract date and actual contract realization date. Under such circumstances, the prices of comparable products on their respective invoice / shipment date as considered in customs valuation would yield a more reliable result. Customs data serves as a more reliable CUP as it Compares the value of identical or similar goods imported / exported at or around the same time.

14. The OECD Commentary on TP guidelines also allow for the adoption of

a price-setting date which is different from the stated contract date as follows-

"... When the taxpayer does not provide reliable evidence of the pricing date agreed by the associated enterprises in the controlled transaction and the tax administration cannot otherwise determine a different pricing date under the guidance in Section D of Chapter I, tax administration may deem the pricing date for the commodity transaction on the basis of the evidence available to the tax administration; this may be the date of shipment as evidenced by the bill of lading or equivalent document depending on the means of transport. This would mean that the price for the commodities being transacted would be determined by reference to the average quoted price on the shipment date, subject to any appropriate comparability adjustments based on the information available to the tax administration."

15. It is also observed that the customs data at the port of shipment / delivery would better reflect the price of the commodity as it is inclusive of interest, insurance, freight costs, storage expenses, foreign currency terms, country of origin charges, transportation charges from place of origin to place of destination, port charges, customs clearance charges etc. Such data would be a more reliable indicator of the uncontrolled arm's length transaction value (inclusive of the relevant costs) of identical or similar transactions between independent parties.

16. It is the specific contention of the assessee is that the rates published on the commodities exchange are the actual prices of the commodities which vary on an inter-day or intra-day basis and that the TPO had arbitrarily selected any one price from the multiple prices of the commodity available on the same

date of Bill of Entry and that the data shared by the Customs Department does not specify the quality and price variations of the commodities in particular. On the other hand, the TPO had noted that the assessee had erroneously applied the CUP method by taking the average price of certain commodities and that the industry average in such data would also include other related party transactions which may influence the average prices. It is seen that, prices published by industry Associations or industry reports and third party transactional data may not reflect the accurate price for benchmarking. For example, the differences would exist with such quoted prices arising out of standard contracts between independent parties vis-a-vis the negotiated related party terms of contract between the assessee and its associated enterprise in terms of premium/discounts applied based on the quantity/ quality /volume, supply chain logistics of the group etc. Until and unless adjustments are made in respect of such material differences vis-a-vis the quoted price and/or the comparable uncontrolled transactions/the prices determined by using the quoted figures would not reflect the accurate arm's length price under CUP. The impact of such variables on the price determined under CUP is recognised in the OECD Commentary on TP guidelines as under:-

"2.25 One illustrative case where adjustments may be required is where the circumstances surrounding controlled and uncontrolled sales are identical, except for the fact that the controlled sales price is a delivered price and the uncontrolled sales are made fo. b

factory. The difference in terms of transportation and insurance generally have a definite and reasonably ascertainable effect on price. Therefore, to determine the uncontrolled sales price, adjustment should be made to the price for the difference in delivery terms.

2.26 As another example, assume a taxpayer sells 1000 tons of a product for \$80 per ton to an associated enterprise in its MNE group, and at the same time sells 500 tons of the same product for \$100 per ton to an independent enterprise. This case requires an evaluation of whether the different volumes should result in an adjustment of the transfer price. ”

17. *It is the case of the assessee that for AY 2016-17, except for import of oil, no tariff values were notified by the Central Government for cotton, sugar, grains, and meals, as per information provided under the RTI Act, 2005 by CBIC as under-*

" In this regard, it is to inform that in terms of Section 14(2) of Customs Act, 1962, if the Central Board of Indirect Taxes and Customs (CBIC) is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value. The Tariff Value is fixed and notified in case evidence indicate that there is volatility in the prices of a commodity. In order to remedy the same and to bring uniformity in the assessment of such goods at various ports,, the Tariff Value is fixed by CBIC. Therefore, in such cases the goods are not assessed at Transaction Value but at the Tariff Value as notified.

For fixation of prices of Tariff Value of Crude Palm Oil and Crude

Soyabean Oil, it is to inform that the computed landed price of each of the subject commodity is arrived at on the basis of international prices of these commodities published in reputed data bases, journals and indices: The average international prices of these commodities as published during the preceding 15 days is considered to arrive at the Tariff Value. The Tariff Value of such commodities therefore are reflective of the international prices and revised twice every month to incorporate any changes in such international prices, of the commodities. ”

18. Thus the assessee contended that as no import or export duty was payable on these commodities, the data provided by the Customs Department thereon pertains to the invoice values of the commodities as and when declared by various taxpayers vide Shipping Bill/ Bill of Entry. The Panel is of the view that the tariff value notified by customs prepared from data from international databases, journals and indices and based on a 15-day average with a bi-monthly revision of international prices constitutes a credible arm's length benchmark under CUP.

19. We do not agree with the above contention of the Ld. Counsel for the assessee, even where no tariff rate is notified as in the case of sugar, cotton, meals and grains, the transaction values of customs data can be relied upon as it is based on transaction of similar nature and items on the same date at the same port. The issue of related party transactions in customs data would equally apply to any other public data as well. In the absence of complete details of the differences arising out of contract terms and product quality, the customs data being Govt, notified would provide a reasonable basis for

arriving at the uncontrolled transaction price.

20. The Co-ordinate bench of the Tribunal in the case of M/s Sinosteel India Pvt. Ltd. Vs. DCIT (I.T.A No.-175/Del/2012), Hon'ble ITAT, Delhi has held that bare quotation price cannot be accepted under the CUP method for the purposes of benchmarking under Rule 1QBA(l)(a) of the IT Rules, 1962 as follows: -

8... A bare perusal of the above discussed legal provisions in the light of the ratio of the Special Bench order, it is manifest that the ALP under the CUP method can be determined with the starting point of 'the price charged or paid' in a comparable uncontrolled transaction as per sub-clause (i). It is this price which is adjusted to account for differences under sub-clause (j). The nitty-gritty of sub-clause (i) is that there should firstly be available some 'price charged or paid' to start with the procedure as per this clause. When the statute read with rules specifically provides that the ALP under the CUP method should be determined by considering 'the price charged or paid' in a comparable uncontrolled 'transaction', we fail to comprehend as to how any 'quotation' which has not fructified into a 'transaction' can be substituted with the actual price charged or paid in a transaction.

As the law provides for considering the price charged or paid in a comparable uncontrolled transaction, there can be no scope for considering a quotation price in isolation which is not preceded with or succeeded by any actual transaction." (Emphasis added)

21. Further, the reliability of customs data being Govt, notified as CUP has been upheld by ITAT Chennai Bench in Coastal Energy Pvt. Ltd. Vs. ACIT (I.T.A. No., 2099/Mds/2010) as under-

"6. The next question to be considered is whether this price variation noticed by the TPO should be taken as the basis for making adjustment in the transfer pricing. The grievance of the assessee is that the comparable price has been obtained by the TPO from the customs authorities and the valuation of the customs authorities need not necessarily be realistic as that department is more interested in collecting import duties. We should state without fear of contradiction that the customs authorities are assigning values to the imported goods on the basis of scientifically formulated methods and they are responsible for making a fair assessment value of the imported goods. The valuation made by the customs authorities is not an arbitrary exercise. But on the other hand, it depends upon large volume of international data classified according to internationally accepted protocol. Therefore, it is not possible to say that the credibility of the price rate furnished by customs authorities needs to be discounted.

22. Similarly, in Rohm And Haas India (P) Ltd. vs. ACIT (ITA No.2199/Mum/2015), the ITAT, Mumbai Bench held as under-

"...We find that assessee had also filed additional evidences before us by producing data from TIPS Data Base maintained by the Customs Department, for the purpose of comparability of the prices of import transactions carried out by the assessee vis-a-vis comparable prices on the relevant date or nearer to the date of transactions. This according to the Id. AR covers 94.69% of the total value of import transaction from AEs, which according to the Id. DR covers only 70% of the total transactions. We hold that in either case, substantial amount of transactions gets covered using TIPS Data Base under CUP method. Hence, we admit the entire additional evidences filed by the assessee before us in this regard..."

23. Further, in Tilda Riceland Pvt. Ltd¹, vs. ACIT (161 TTJ 213), the

coordinate bench of the Tribunal has held that the information available in TIPS Database maintained by the Customs department provided comprehensive information, including description and prices as per invoices presented to customs and therefore can be used comparison purposes.

24. In so far as the judgment relied by the Ld. Counsel for the assessee i.e. Hon'ble Gujarat High Court in CIT versus Adani Wilmer Ltd 363 ITR 338 (Gujarat) (2014) and Ors judgments, on perusal of same, we find that the facts and circumstances of those cases are entirely different and the question of applicability of customs data was not under consideration in the above orders unlike in the present case wherein the Revenue Authorities have elaborately considered the applicability of custom data. Apart from the same, the TPO has highlighted the discrepancies in the prices arrived at by the assessee and has provided reasons for rejection of the Assessee's data which requires no interference. Therefore, reliance on the various judgments and also on Assessee's reliance on its case for AY 2008-09 are misplaced in terms of the facts of the present case.

25. Thus, in the light of the foregoing discussions, we are of the opinion that the objections of the assessee against the use of customs data under CUP had been rightly rejected by the Authorities. Further we do not find any error or infirmity in the direction given by the DRP. Accordingly, we dismiss the Grounds of Appeal of the Assessee.

26. In the result, the Appeal of the Assessee is dismissed.

Order pronounced in the open court on : **15/03/2023**.

Sd/-

**(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

Sd/-

**(YOGESH KR. US)
JUDICIAL MEMBER**

**H KUM
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Dated : 15/03/2023

**R.N, Sr. PS*/*

**Kavita, Sr. PS*

Copy forwarded to:-

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ASSISTANT REGISTRAR
ITAT NEW DELHI