

आयकर अपीलीयअधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य एवं श्री एस बालाकृष्णन, लेखा सदस्य के समक्ष

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ I.T.A. No.68/Viz/2022

(निर्धारण वर्ष / Assessment Year :2017-18)

Alliance One Industries India
Private Limited,
Hyderabad.

PAN: AAAC 8064 A

(अपीलार्थी/ Appellant)

अपीलार्थी की ओर से/ Appellant by

प्रत्यार्थी की ओर से / Respondent by

सुनवाई की तारीख / Date of Hearing

घोषणा की तारीख/Date of
Pronouncement

Vs. Deputy Commissioner of
Income Tax,
Circle-1(1),
Guntur.

(प्रत्यर्थी/ Respondent)

Sri K.C. Devdas, AR

Sri MN Murthy Naik, CIT-DR

26/04/2023

14/07/2023

ORDER

PER S. BALAKRISHNAN, Accountant Member :

This appeal filed by the assessee is against the final order of the Ld. Assessing Officer passed U/s. 143(3) r.w.s 144C(13) r.w.s 144B of the Income Tax Act, 1961 [the Act] vide DIN No. ITBA/AST/S/143(3)/2021-22/1039078406(1) dated 25/01/2022.

2. Brief facts of the case are that the assessee is a company engaged in the business of export of unmanufactured tobacco after threshing and redrying in order to enhance its shelf life. The assessee filed its return of income for AY 2017-18 on 27/10/2018 admitting total income of Rs. 1,01,13,210/-. The return was summarily processed U/s. 143(1) of the Act. Subsequently, the case was selected for complete scrutiny and notice U/s. 143(2) & 142(1) were issued and served on the assessee. The Ld. AO observed that the assessae has entered into large international transactions with Associated Enterprises [AEs] and thereafter made a reference to the Ld. Transfer Pricing Officer [TPO] for determining the Arm's Length Price [ALP] U/s. 92CA of the Act. Accordingly, the Additional Director of Income Tax (Transfer Pricing) passed an order vide DIN & Order No. ITBA/TPO/F/92CA3/2020-21/1030178955(1) dated 29/01/2021. While passing the order U/s. 92CA(3) of the Act, the Ld. TPO observed that as per 3CEB report, the following international transactions entered into by the assessee with its AEs:

Sl No	Associated Enterprises	Nature of International Transaction	Total amount paid / received or payable / receivable in the transaction	Method
1.	Alliance One International AG	Sale of unmanufactured	174,45,58,168	TNMM

	Switzerland	tobacco and its by-products on FOB basis		
2.	Alliance one International AG, Switzerland	Sale of unmanufactured tobacco and its by-products on CIF basis	13,12,79,824	TNMM
3.	Alliance one International Inc, USA	Sale of unmanufactured tobacco and its by-products on FOB basis	10,32,13,440	TNMM
4.	Alliance one International AG, Switzerland	Purchase of software License	2,46,875	CUP Method
5.	Alliance one International AG, Switzerland	Advance received against sales	24,52,59,000	TNMM
6.	Alliance one international Inc., USA	Corporate Guarantee for borrowings from bank by the extent Standard Commercial tobacco	NIL	CUP Method

3. The Ld. TPO also arrived at the Profit Level Indicator [PLI] as follows:

Description	Amount in Rs.
Operating Revenue	204,07,49,149
Operating cost	196,49,82,499
Operating profit	7,57,66,650
OP/OR(%)	3.71
OP/OC (%)	3.86

4. The Ld. TPO rejected the assessee's TP study report based on the inappropriate filter criteria selected by the assessee. The Ld. TPO therefore applied a search process for selection of comparables and selected the following comparables:

Sl No.	Name of the company	Total OR	Total OC	Total OP	WT OP/OC	WT OP/OR
1.	DTE Exports Pvt Ltd	878.59	862.19	16.4	1.90	1.87
2.	Sinnar Bidi Udyog Ltd	27.05	24.93	2.12	8.50	7.84
3.	Premier Tobacco Packers Pvt Ltd	558.63	513.94	44.71	8.70	8.00
4.	Bommidala Ventures Pvt Ltd	80.85	73.57	7.28	9.89	9.00
5.	Miraj Products Pvt Ltd	1025.28	780.74	244.54	31.31	23.85
	Arithmetic Mean of comparable				12.06	

5. The Ld. TPO based on the above selection issued a show cause notice to the assessee on 29/12/2020. In response, the assessee furnished objections to the show cause notice on 13/1/2021. Considering the objections raised by the assessee, the Ld. TPO retained the following comparables:

1. Bommidala Ventures Pvt. Ltd.,
2. Premier Tobacco Packers Pvt Ltd.

6. Further, the Ld. TPO also rejected the claim of the assessee to treat the export incentives as part of the Operative Revenue by relying on the following case laws:

1. DCIT, Circle-11(1), Kolkata vs. J J Exports Limited, ITAT Kolkata.
2. CIT-2 vs. Welspun Zucchi Textiles Limited – Bombay High Court.

7. The Ld. TPO also placed reliance on the order of the Coordinate Bench of ITAT, Delhi in the case of Goodyear India Limited in ITA No. 1706/Del/2017, dated 22/01/2018. Based on the final set of comparables considered by the Ld. TPO, he computed the Arm's Length Price as follows:

Sl No.	Name of the company	Total OR	Total OC	Total OP	WT OP/OC	WT OP/OR
1.	Bommidala Ventures Pvt Ltd	80.85	73.57	7.28	9.89	9.00
2.	Premier Tobacco Packers Pvt Ltd	177.77	158.01	19.76	12.50	11.11
					22.39	20.11
	Arithmetic Mean				11.19	10.05

8. The Ld. TPO therefore made an upward adjustment of Rs. 14,41,14,891/- to the returned income of the assessee. Accordingly, the draft assessment order U/s. 144C(1) of the Act was passed on 24/03/2021 by the Ld. AO. Against the draft order, the assessee filed its objections before the Ld. Dispute Resolution Panel [DRP]. The Ld. DRP considering the submissions made by the assessee, gave certain directions to the Ld. TPO on 22/12/2021. Considering the directions given by the Ld. DRP, the Ld. TPO vide its order dated 25/01/2022 revised the TP adjustment to Rs. 13,76,30,449/-. The Ld. AO based on the Ld. TPO's order, passed the final assessment order by adding Rs.

13,76,30,449/- to the returned income of the assessee on account of adjustment to the ALP. Aggrieved by the final assessment order of the Ld. AO, the assessee is in appeal before the Tribunal.

9. The assessee has raised the following grounds of appeal:

- "1. The Ld. DRP and the Ld. AO / the Ld. TPO erred in law and on facts in making TP adjustment of Rs. 13,76,30,449/- to the returned income of the appellant any by holding that the international transactions between the appellant and its AEs is not at Arm's Length.*
- 2. The Ld. DRP and the Ld. AO / Ld. TPO erred in law and on facts in rejecting the TP documentation maintained by the appellant in the manner provided in the IT Act r.w.s prescribed Rules.*
- 3. The Ld. DRP and the Ld. AO / Ld. TPO have erred in law and on facts in considering the export incentives as non-operating in nature while computing the PLI.*
- 4. Without prejudice to ground no.3, the Ld. DRP and the Ld. AO / Ld. TPO having treated export incentives as non-operating in nature while computing the PLI of the appellant company erred in holding that the export incentives are not considered as part of the operating revenue even for the comparables ie Premier Tobacco Packers Private Limited which is contrary to the facts and evidence on record.*
- 5. The Ld.DRP and the Ld. AO / Ld. TP erred in lay by conducting a fresh search for comparable companies and by rejecting the search process carried out by the appellant company.*
- 6. The Ld. DRP and the Ld. AO / Ld. TPO erred in law and on facts in adopting additional filters and modifying the filters adopted by the appellant company for conducting the TP analysis without appreciating the TP documentation prepared by the appellant company.*
- 7. The Ld. DRP and the Ld. AO / Ld. TPO erred in selecting Bommidala Ventures Private Limited which is not*

comparable to the appellant on the grounds of functional dissimilarity, super profit, or other appropriate filter etc.

8. *The Ld. DRP and the Ld. AO / Ld. TPO erred in not accepting the assessee's contention of inclusion of DTE Exports Private Limited as a comparable on the grounds of functional similarity.*
9. *Any other ground(s) that may be urged at the time of hearing."*

10. In the above grounds, the following two issues are raised by the assessee:

- (i) Selection of comparable viz., Bommidala Ventures Pvt Limited and exclusion of comparable viz., DTE Exports Pvt Ltd., and
- (ii) Consideration of export incentives as Non-operating income while computing the ALP.

11. With regard to the comparables, the Ld. AR submitted that Bommidala Ventures Pvt Ltd., [BVPL] is functionally dissimilar with the assessee company as it is engaged in trading / export without any employment of assets. The Ld. AR further submitted that BVPL is not engaged in the manufacturing activity and also in threshing and redrying of the unmanufactured tobacco. The Ld. AR vehemently argued that the assessee is engaged in the export of unmanufactured tobacco by carrying out the activities of threshing and redrying. The Ld. AR also submitted in his

written submissions stating that the level of fixed assets (plant & machinery) as a percentage of total sales is 34.39% for the assessee whereas it is 2.31% in the case of BVPL. The Ld. AR therefore argued that the comparable viz., BVPL failed in the Functions, Assets and Risks [FAR] analysis and therefore it should not be included as a comparable for the computation of ALP. The Ld. AR further submitted that the company's FAR analysis has not changed from the AY 2009-10 and therefore submitted that on the basis of principles of consistency, BVPL should be excluded as a comparable. In this connection, the Ld. AR placed reliance on the Hon'ble Supreme Court in the judgment of Radhasoami Satsang vs. CIT [1992] 193 ITR 321 (SC). Further, with reference to exclusion of DTE Exports Pvt Ltd., by the Ld. TPO and the Ld. DRP that the exports of the company is only 3.47% which is insignificant and less than 50% of the total turnover, the Ld. AR submitted that if the filter of more than 50% of the exports is applied, there would be no comparable left and benchmarking of the international transaction would be impossible. The Ld. AR also further submitted that the DTE Exports Pvt Ltd., was included as a comparable in the earlier Assessment Years and hence excluding

this comparable in the impugned assessment year is not valid. The Ld. AR also further submitted that the Ld. DRP erred in taking two mutually contradicting stands while including Premier Tobacco Packers and found comparable even though the export sales are NIL and excluding the comparable viz., DTE Exports Pvt Ltd., stating that exports are only 3.47% of the total revenue. The Ld. AR therefore pleaded that the contrary view of the Ld. DRP may be rejected. The Ld. AR also further submitted that if BVPL is excluded as a comparable based on past years and DTE Exports Pvt Ltd., is included based on the functional similarity, the assessee would be adhering to the Arm's Length standard under the Indian Transfer Pricing Regulations. With respect to export incentives, the Ld. AR vehemently argued that export incentives should be considered as operating income for the purpose of PLI computation.

Per contra, the Ld. DR submitted that comparables selected by the Ld. TPO also in the business of processing of unmanufactured tobacco and hence the Ld. TPO is right in including it as a comparable. With respect to the exclusion of DTE Exports Pvt Ltd and export incentives, the Ld. DR relied on the orders of the Ld. Revenue Authorities. The Ld. DR also

further placed heavy reliance in the decision of the Coordinate Bench of the Delhi in the case of Goodyear India Limited (supra).

12. We have heard both the sides and perused the material available on record and the orders of the Ld. Revenue Authorities. With respect to the inclusion of comparable of BVPL by the Ld. TPO which was confirmed by the Ld. DRP, from the submissions made by the Ld. AR we find that if any company which should be considered as a good comparable with that of the assessee-company for the purpose of benchmarking its international transactions, it should be based on the FAR analysis ie., **F**unctions performed, **A**ssets employed and **R**isk undertaken. In the instant case, the Assets employed by the assessee company in the form of Plant & Machinery is Rs. 68,67,22,223/- whereas the comparable viz., BVPL selected the Ld. TPO has employed Assets in the form of Plant & Machinery for Rs. 55,20,109/-. We are therefore of the considered view that based on one of the parameters of FAR analysis ie., Assets employed, we hold that the comparable BVPL could not be a good comparable with that of the assessee company. Hence, the Ld. TPO / Ld. AO is directed to exclude the entity BVPL from the

final set of comparables while reworking the international transactions.

13. With respect to DTE Exports Pvt Ltd., we find that the exports constitute only 3.74% of the total turnover and therefore the Ld. TPO / Ld. DRP considered the insignificant exports of DTE Exports Pvt Ltd., and rejected it as a comparable. However, the Ld. DRP has considered the inclusion of Premier Tobacco Packers Private Limited which does not have any export turnover. We find that the Ld. TPO has not applied filter of minimum of 50% should be from exports turnover in the case of Premier Tobacco Packers Private Limited. While observing the inconsistency in the comparables selected by the Ld. TPO wherein Ld. DRP also affirmed the selection of Premier Tobacco Packers Private Limited, we find that the same is not in accordance with Rule 10B(2)(d) of the Income Tax Rules, 1962. Therefore, we direct the Ld. TPO / Ld. AO to exclude Premier Tobacco Packers Private Limited as a comparable in determining the ALP of the assessee company. However, we noticed that the Ld. DRP has already excluded DTE Exports Pvt Ltd., based on the insignificant turnover and following the principle of consistency, we confirm the same.

14. With respect to the export incentives, whether it is to be treated as operating or non-operating income for the purpose of PLI computation, we find that Rule-10B of the IT Rules, 1962 provides methodology for computation of ALP. Since the assessee has adopted TNM Method which was not disputed by the Revenue, Net Profit is used as a bench mark for ALP computation. Rule 10B(1)(e)(ii) provides for computation of net profit margin in the uncontrolled comparable transactions whereas a net margin realized by the enterprise namely the tested party as well as the comparables, the total income and expenditure of the business should be considered. It is also a general principle that all the subsidies / export incentives are factored by all the exporters while determining their sales price in the international market. We also find that various Courts have held the export incentives as operating in nature while calculating the operating margins. Reliance placed by the Ld. TPO in Hon'ble Bombay High Court decision in the case of CIT-2 vs. Welspun Zucchi Textiles Limited wherein the Hon'ble High Court dismissed the Revenue's appeal and confirmed that the DEPB benefit is operating revenue includable in arriving at operating profit. Similar views have been held by various Courts

viz., (i) DCIT vs. Indo Spanish Tasty Foods Pvt Ltd TS-118-ITAT-2016 (Bang); (ii) Greenland Exports Pvt Ltd vs. DCIT TS-879-ITAT-2016(Chny)-TP; (iii) Cummins India Ltd vs. DCIT [2019] 101 taxmann.com 325 (Pune-Trib.); (iv) FCI OEN Connectors Ltd vs. ACIT [2017] 77 taxmann.com 223 (Cochin-Trib.) (v) AB INBEV GCC Services India Pvt Ltd vs. DCIT (IT)(TP) A No. 792/Bang/2022; (vi) Sami Labs Ltd vs. DCIT (IT)(TP) A No. 186/Bang/2015; (vii) Reitzel India Pvt Ltd vs. DCIT [2020] 119 taxmann.com 401 (Bangalore – Trib.); (viii) Carraro India (P.) Ltd vs. ACIT [IT appeal No. 1629 and 1673 (Pune) of 2013], dated 19/1/2017]; (ix) Behr India Ltd vs. ACIT [2017] 81 taxmann.com 46 (Pune-Trib.). The case law relied on by the Ld. DR in the case of Goodyear India Limited vs. DCIT [2013] 33 taxmann.com 507 (Delhi – Trib.) is distinguishable on the facts that the export incentive was reduced from the cost of goods sold whereas in the instant case it is treated as operating revenue arising out of the export sales. Further, in that case, it was held that the export incentives were not accrued at the time of sale of goods for treating it as a component of the cost of goods sold. Therefore, in our considered view, this case is of no help to the Revenue. Considering the facts and circumstances as discussed above, we

direct the Ld. TPO / Ld. AO to consider the export incentives as operating income while computing the PLI of the assessee. It is ordered accordingly.

15. In the result, appeal of the assessee is partly allowed.

Pronounced in the open Court on the 14th July, 2023.

Sd/-

(दुव्वूरु आर.एल रेड्डी)

(DUVVURU RL REDDY)

न्यायिकसदस्य/JUDICIAL MEMBER

Sd/-

(एस बालाकृष्णन)

(S.BALAKRISHNAN)

लेखा सदस्य/ACCOUNTANT MEMBER

Dated :14.07.2023

OKK - SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee – Alliance One Industries India Private Limited,1-90/28/C/5 &10, Suryakanth Mansion, Plot No. 5 & 10, Madhapur, Gafoor Nagar, Hyderabad – 500 081, Telangana.
2. राजस्व/The Revenue – Deputy Commissioner of Income Tax, Circle-1(1), Hyderabad.
3. The Principal Commissioner of Income Tax,
4. आयकर आयुक्त (अपील)/ The Commissioner of Income Tax
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/ DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam