

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S.VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.939/PUN/2022

निर्धारण वर्ष / Assessment Year: 2016-17

Dy./ACIT, Circle-1, Kolhapur	Vs.	Rafiq Naik Exports Private Limited, Plot No.44 to 48, Mirkar Wada Fish, Industry Locality, Ratnagiri – 415 612 Maharashtra PAN : AAGCR9577G
Appellant		Respondent

C.O. No.11/PUN/2023

(Arising out of ITA No.939/PUN/2022

निर्धारण वर्ष / Assessment Year: 2016-17

Rafiq Naik Exports Private Limited, Plot No.44 to 48, Mirkar Wada Fish, Industry Locality, Ratnagiri – 415 612 Maharashtra PAN : AAGCR9577G	Vs.	Dy./ACIT, Circle-1, Kolhapur
Cross Objector		Appellant in the appeal

Assessee by: Shri R.D. Onkar
Revenue by: Shri Suhas Kulkarni

Date of hearing: 26-09-2023
Date of pronouncement: 27-09-2023

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the Revenue and Cross Objection by the assessee arise out of the order dated 14-10-2022 passed by the CIT(A)-13, Pune in relation to the assessment year 2016-17.

2. There is a delay of 03 days in presenting the appeal by the Revenue. The Id. AR did not raise any objection. We, therefore, condone the delay and admit the appeal for disposal on merits.

3. Broadly, there are two issues in the Departmental appeal, viz., Comparables and Computation of the arm's length price (ALP) under the dataset. We will espouse these issues in seriatim.

I. COMPARABLES

4. The first two grounds raised by the Revenue are against the exclusion by the Id. CIT(A) of certain companies from the list of comparables finalized by the Transfer Pricing Officer (TPO).

5. Briefly stated, the facts of the case are that the assessee filed its return declaring total income at Rs.1,65,79,300/-. This return was accompanied by the Audit Report in Form No.3CEB containing details of certain Specified Domestic Transactions (SDT). The Assessing Officer (AO) made a reference to the TPO for determining the ALP. The latter recommended transfer pricing adjustment of Rs.11.68 crore. The draft order was notified accordingly. The Id. CIT(A) allowed part relief, *inter alia*, by

excluding eight companies from the list of comparables, against which the Revenue has come up in appeal.

6. The assessee's functional profile has been recorded by the TPO as, being, a company engaged in the retail trade of frozen fish and other seafood products both in the domestic as well as overseas markets and not carrying out any processing activity. The final product of the assessee is not ready to cook and eat but needs to be processed by its customers till it reaches that stage. The assessee made specified domestic transactions of purchase of frozen fish and seafood from its three Associated Enterprises. During the course of transfer pricing proceedings, the assessee adopted the Resale Price Method (RPM) as the most appropriate method for benchmarking these transactions. Its own Profit Level Indicator (PLI), i.e. Gross Profit/Turnover was computed at 7.99%. Three companies were chosen as comparables with their mean PLI of 8.32% for demonstrating that the specified domestic transactions were at ALP. The TPO did not dispute the application of the RPM as the most appropriate method. He, however, excluded one company from the assessee's list of comparables, namely, Phillips Foods India Pvt. Ltd. and added ten new

companies making a total of twelve comparables. The assessee went in appeal before the Id. CIT(A), challenging, *inter alia*, the inclusion of companies by the TPO and also one of its own comparables, namely, Tolar Ocean Products Pvt. Ltd. The Id. CIT(A) removed the assessee's own selected company as well as seven others from the final list of comparables drawn by the TPO. As such, only four companies left as comparables. The Revenue has come up before the Tribunal against the exclusion of such eight companies by the Id. CIT(A).

7. Comparability of companies can be examined only after first properly understanding the functional profile of the assessee. As briefly noted above, the assessee is engaged only in trading of frozen fish and other seafood products. Further, the limited processing of fish and seafood products is done only for the preservative and not for making the products ready to eat. Even the TPO also noted the assessee's functional profile at page 2 of his order by specifically mentioning that: "It does not carry on any processing activities on its own". This transpires that the assessee's function is confined to purchasing and selling of fish and sea food products without making any value addition. Even

otherwise, the assessee applied the RPM as the most appropriate method, which is applicable in case of goods purchased from associated enterprise sold as such without making any value addition. The TPO also did not challenge the adoption of the RPM as the most appropriate method. This indicates that the assessee is engaged only in retail trade of frozen fish and other seafood products and not its processing. Having jotted down the functional profile of the assessee, we now proceed to examine the comparability or otherwise of the eight companies under challenge.

(i) Tolar Ocean Products Pvt. Ltd. :

8. This was comparable chosen by the assessee not objected to by the TPO. However, the assessee assailed its *suo motu* inclusion in the list of comparables before the Id. CIT(A), who concurred with the assessee's submissions and expelled it from the list.

9. This company is engaged in diverse activities and also in processing of marine products. It has outside processing as well. As against that, the assessee is only in retail trade of fish and sea products. Since the assessee is not in processing of any marine

products, we hold that the Id. CIT(A) was justified in excluding this company from the list of comparables.

(ii) Forstar Frozen Foods Private Limited :

10. This company was chosen by the TPO as a comparable. The assessee's objection that it was engaged in processing and export of ready to eat fish with large shelf life did not weigh with the TPO, who included it in his list. The Id. CIT(A) deleted the same.

11. This company is engaged in the business of manufacturing and export of fish and fish products which has ready to eat different packaged products using individually quick frozen technology. This company has also installed the breeding line instruments producing ready to eat value added seafood in Unit No.2. These facts indicate that this company was rightly excluded by the Id. CIT(A) from the list of comparables. We, therefore, countenance the same.

(iii) Nekkanti Sea Foods Ltd. :

12. This was comparable chosen by the TPO. The assessee objected to its inclusion along with five other companies proposed by the TPO. Such common objections anent to the six companies

have been noted by the TPO at page 23 of his order, who did not agree and proceeded to include in the list of comparables. The Id. CIT(A) removed this company from the list.

13. It is observed that this company is in the business of processing and exporting. It has got state of art processing plants in four locations by integrating functions of deep-sea trawling and processing seafood. These facts indicate that it is substantially different from the assessee, which is engaged only in trading of fish and seafood products. We, therefore, approve the view point of the Id. CIT(A) on this score.

(iv) Asvini Fisheries Private Limited :

14. This company was proposed by the TPO for inclusion. The assessee objected to its inclusion in a common manner, which did not get the TPO's nod. The Id. CIT(A) excluded it from the list.

15. This company is in the business of processing and export of shrimps. It has a processing facility at Bhimavaram, Andhra Pradesh and Tuticorin, Tamilnadu. It has a huge fixed asset base of Rs.62.94 crore. As against it, the assessee is only in trading of fish and seafood products without having any manufacturing

facility. We, therefore, approve the action of the Id. CIT(A) in excluding this company from the list of comparables.

(v) Apex Frozen Foods :

16. This company was included by the TPO in the list of comparables, which got excluded in the first appeal.

17. It is engaged in processing and export of ready to eat aquaculture products with large shelf life. It has its own intangibles, under which the ready products are sold to direct consumers. Further, it is engaged in shrimp farming activity and hatchery in addition to the business of export of frozen shrimps. In our view, this company was rightly excluded by the Id. CIT(A).

(vi) Shree Datt Aquaculture Farms Pvt. Ltd.:

18. The assessee objected to the inclusion of this company in the list of comparables which was not accepted by the TPO. The Id. CIT(A) removed it.

19. This company is engaged in not only fish processing but also other business segments like food processing, tobacco products and further no segmental data is available. Such a contention

raised before the TPO remained uncontroverted. The Id. CIT(A) further observed that this company is engaged in the business of manufacture, marine farming and sale of marine products. Obviously, the assessee is not into any manufacture or marine farming. In our view, the Id. CIT(A) rightly excluded it from the list of comparables.

(vii) Uniroyal Marine Exports Ltd. :

20. The TPO included this company in the list of comparables. The assessee's general objections did not get the concurrence of the TPO. The Id. CIT(A) excluded it from the list.

21. This company is engaged in diverse activities of manufacturing shrimps and squids. As the assessee is not into manufacture of shrimps and only in their marketing, we hold that the Id. CIT(A) was right in excluding it from the list of comparables.

(viii) Gadre Marine Exports Pvt. Ltd. :

22. This company was included by the TPO in the list of comparables, which got excluded at the hands of the Id. CIT(A).

23. It is a manufacturer and exporter of frozen seafood and manufactures a wide range of products including marinated, ready to cook fish and cut-n-clean raw fish. This company has factories across four locations of west coast of India. Its main business is manufacture and sale of Surimi value added products and fish meal. This company has operational wind mill at its facility at Sadawaghapur, Patan, Satara. These points eminently show its incomparability with the assessee company. This company is also held to have been rightly excluded.

II. COMPUTATION OF ALP UNDER DATASET

24. The sum and substance of the grievance of the Revenue through the last ground is against the direction of the Id. CIT(A) in upholding the assessee's contention of using the current year data and taking the mean margin of the comparables for benchmarking the specified domestic transaction.

25. The facts of this issue are that during the course of transfer pricing proceedings, the assessee urged to compute the ALP by taking the simple average of current year data of the comparables. The TPO rejected the assessee's contention. When the matter came up before the Id. CIT(A), he held that Rule 10B(4) read with

its proviso along with Rule 10B(5) suggest that the approach adopted by the assessee in determining the ALP of its Specified Domestic Transactions by using the current year data and taking the mean margin of the comparables, was correct. Aggrieved thereby, the Revenue has approached the Tribunal.

26. Before proceeding further, it is worthwhile to mention that the hitherto mechanism of determining the ALP under the prescribed methods by considering the arithmetic mean of the PLI of comparables by primarily considering the relevant data for the current year, has undergone change with the insertion of the third proviso to section 92C(2), which applies to the international and SDTs undertaken on or after 1.4.2014. Under the new regime, the concepts of dataset in ascending order; the computation of the PLI of comparables on the basis of the data for the current year plus up to two preceding years; consideration of the values of the dataset between 35th percentile and 65th percentile for the arm's length range; and value at median of the dataset etc., have come into place. The new rule provides that where more than one price is determined by the most appropriate method, the ALP shall be computed in such manner as may be prescribed and accordingly

the first and second proviso shall not apply. The first and the second provisos of section 92C(2) read with rule 10B(4) and (5) dealt with the computation of the ALP with reference to the arithmetical mean of the PLI of the comparables computed by considering, usually, the figures for the current year only. Simultaneous with making the first and second provisos inoperative through the third proviso to section 92C(2), rule 10CA has been inserted by the 16th amendment rules. Sub-rule (1) of rule 10CA provides that the ALP of the international or SDTs 'shall be computed in accordance with the provisions of this rule'. This shows that where there are more than one comparable, then the ALP for the relevant years, including the year under consideration 2016-17, should be governed by rule 10CA.

27. Sub-rule (2) of Rule 10CA provides that dataset shall be constructed by placing the values of comparables in ascending order. The first proviso to this sub-rule is relevant for our purpose, which reads as under:-

'Provided that in a case referred to in clause (i) of sub-rule (5) of rule 10B, where the comparable uncontrolled transaction has been identified on the basis of data relating to the current year and the enterprise undertaking the said uncontrolled transaction, [not being the enterprise

undertaking the international transaction or the specified domestic transaction referred to in sub-rule (1)], **has in either or both of the two financial years immediately preceding the current year undertaken the same or similar comparable uncontrolled transaction** then,—

(i) the most appropriate method used to determine the price of the comparable uncontrolled transaction undertaken in the current year shall be applied in similar manner to the comparable uncontrolled transaction or transactions **undertaken in the aforesaid period** and the price in respect of such uncontrolled transactions shall be determined; **and**

(ii) **the weighted average of the prices**, computed in accordance with the manner provided in sub-rule (3), of the comparable uncontrolled transactions undertaken **in the current year and in the aforesaid period preceding it shall be included in the dataset instead of the price referred to in sub-rule (1):'**

28. This proviso deals with a case referred to in Rule 10B(5)(i).

The relevant part of rule 10B(5)(i) states that where, *inter alia*, the RPM is used, then, usually, the data of the comparables for the current year should be used. Coming back to the first proviso of rule 10CA(2), it says that where the comparable, having data for the current year, **has in either or both of the two financial years immediately preceding the current year undertaken the same or similar comparable uncontrolled transaction**, then the data for the comparable uncontrolled transaction should be considered for **the aforesaid period**, that is, the current year plus either or

both of the two immediately preceding years in which same or similar transactions were undertaken by the comparable. Between the clauses (i) and (ii) of the first proviso to rule 10CA(2), the word `and` has been used. The first clause of the proviso says that the data of the current and earlier two preceding years etc. should be used and the second clause further states that **the weighted average of the prices**, of the comparable uncontrolled transactions undertaken **in the current year and in the aforesaid period preceding it shall be included in the dataset**. The manner of determination of the weighted average has been enshrined in rule 10CA(3). To summarize, the crux of rule 10CA(2) is that the PLI of the comparables for the purpose of inclusion in the dataset should be computed by considering the weighted average values for the current year plus two preceding years. However, it is useful to mention that the adoption of values for the current plus preceding two years is only *qua* the comparables and not *qua* the computation of the PLI of the assessee, which should be computed only w.r.t. the current year values. This becomes glaring from the use of the bracketed part in the first proviso to rule 10CA(2) excluding `not being the enterprise undertaking the international

transaction or the specified domestic transaction referred to in sub-rule (1)'.

29. Then comes sub-rule (4) of 10CA, which provides that where the most appropriate method is, *inter alia*, the RPM and the **dataset constructed in accordance with sub-rule (2) consists of six or more entries**, then the arm's length range beginning from 35th percentile of the dataset and ending with 65th percentile of the dataset shall be constructed and the arm's length price shall be computed in accordance with sub-rule (5) and sub-rule (6)'. These two sub-rules provide for computing the ALP, with which there is no dispute in the extant case.

30. Sub-rule (7) of 10CA is relevant for our purpose, which provides that : 'In a case **where the provisions of sub-rule (4) are not applicable**, the arm's length price shall be the arithmetical mean of all the values included in the dataset..'. Sub-rule (4) covers the cases of a dataset consisting of six or more comparable uncontrolled transactions. The sequitur is that sub-rule (7) will govern the cases where the dataset consists of comparables numbering between two to five. When a case falls under sub-rule

(7), the ALP is determined by considering the arithmetical mean of the values included in the dataset. While discussing sub-rule (2) of rule 10CA, we have noted above that the dataset under the new system requires consideration of the PLI of the comparables, not only determined on the basis of the current year values but also of the two preceding years, whose weighted average is finally considered. Irrespective of the number of comparables, whether less or more than six, the ALP needs to be determined by preparing dataset, which always consists of the PLI of comparables determined on the basis of the weighted values for the current and preceding two years. If the comparables are six or more, the ALP is determined under sub-rule (4) read with sub-rules (5) and (6) by considering the arm's length range of such weighted values, but when the comparables are between two to five, the ALP is determined under sub-rule (7) by taking the arithmetical mean of such weighted values. In both the cases, PLI of the comparables is computed under sub-rule (2) read with sub-rule (3) by considering the weighted average of the value of current year plus two preceding years. Since the arm's length range is not available under sub-rule (7), the proviso to this sub-rule extends benefit in

case variation between the transacted price and the ALP does not exceed the prescribed percentage, not exceeding three percent.

31. Reverting to the facts of the instant case, the assessee benchmarked the SDT with three comparables. The TPO expanded the list of comparables to twelve. The Id. CIT(A) reduced it to four, which we have countenanced above. As the surviving comparables are four, which is less than six, the case gets covered under sub-rule (7) of 10CA. Going with this sub-rule, the ALP shall be the arithmetical mean of the PLI of the comparables computed by considering the weighted values of current plus two preceding years, which will be further subjected to the benefit enshrined in the proviso. In our considered opinion, the Id. CIT(A) was not justified in taking recourse to rules 10B(4) and 10B(5), when the ALP was required to be mandatorily computed as per rule 10CA. In that view of the matter, the direction of the Id. CIT(A) that the assessee adopted a correct approach by using the current year data and taking the mean margin of the comparables, is fallacious and needs modification. It is therefore, held that, firstly, the ALP should be determined w.r.t. rule 10CA and not rule 10B and secondly, sub-rule (7) of rule 10CA will apply mandating

the determination of the ALP by considering the arithmetical mean of the PLI of the four comparables computed by taking weighted average of the figures of the current plus two preceding years.

32. Ground No.3 of the Departmental appeal is against the Id. CIT(A) computing the gross profit considering direct costs, such as, expenditure on power and fuel, freight, labour cost and processing charges etc. The Id. DR fairly admitted that this ground does not arise from the impugned order. Further, he could not point out any relevant discussion of the TPO on this issue. As such, this ground is dismissed as infructuous.

33. The Id. AR did not press the Cross objection.

34. In the ultimate analysis, we set aside the impugned order and remit the matter to the file of the AO/TPO with a direction to recompute the ALP of the SDT of 'Purchase of Frozen fish and sea food' in the hue of the discussion made above. Needless to say, the assessee will be allowed a reasonable opportunity of hearing.

35. In the result, the appeal of the Revenue is partly allowed and the Cross objection of the assessee is dismissed.

Order pronounced in the Open Court on 27th September, 2023

Sd/-
(S.S.VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 27th September, 2023
Satisfy

आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The Pr.CIT-1, Pune
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे “C” / DR ‘C’, ITAT, Pune
5. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

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Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	26-09-2023	Sr.PS
2.	Draft placed before author	27-09-2023	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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