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

BEFORE SHRI G. S. PANNU, PRESIDENT
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 4986/DEL/2019 (A.Y. 2014-15)

Karcher Cleaning Systems Private Limited, Level 4, B – Wing, Statesman House Building, Barakhamba Road, Connaught Place, New Delhi – 110 001. **PAN No. AAECK2479G** **(APPELLANT)**	Vs.	Addl. CIT, Special Range : 5, New Delhi. **(RESPONDENT)**

Assessee by :	**Shri Rohit Tiwari, Adv.; and Ms. Tanya, Adv**
Department by:	**Shri Mrinal Kumar Das, Sh. Mrinal Kumar Das, and Dr & Sh. Mahesh Shah, CIT (DR)**

Date of Hearing	**26.09.2023**
Date of Pronouncement	**18.10.2023**

ORDER

PER YOGESH KUMAR U.S., JM

The present appeal is preferred by the assessee for the Assessment Year 2014-15 against the assessment order dated 22/12/2107 passed by the Addl. CIT, Special Range-5, New Delhi u/s 143(3) r/w Section 144C(3)/144C(3) of Income tax Act, 1961,('the Act' for short).

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

"1. That on the facts and circumstances of the case and in law, the impugned order passed by the Learned Commissioner of Income Tax (Appeals) - 44, New Delhi ["Ld. CIT(A)"] is bad in law.

2. That on the facts and circumstances of the case, the Ld. CIT(A) / the Learned Additional Commissioner of Income Tax, Special Range 5, New Delhi ("Ld. AO") / the Learned Assistant Commissioner of Income Tax, TPO-2(2)(l), New Delhi ("Ld. TPO") have grossly erred in assessing / upholding the assessment of loss of Appellant at INR 21,916,349, instead of returned loss of INR 69,121,104.

3. That on the facts and circumstances of the case, the Ld. CIT(A) / Ld. AO / Ld. TPO have erred in undertaking adjustments to the price of goods purchased by the Appellant from its associated enterprise ("AE") for the purposes of distribution in India. In doing so, the Ld. C1T(A) / Ld. AO/ Ld. TPO have erred in:

3.1 not appreciating the characterization of the Appellant that it is a normal risk taking distributor engaged in distribution of industrial cleaning systems;

3.2 erroneously concluding that the functional profile of the Appellant is much more than of a normal risk taking distributor;

3.3 disregarding the economic analysis conducted by the Appellant in its transfer pricing ("TP") documentation on frivolous grounds;

3.4 disregarding the application of Resale Price Method on frivolous grounds;

3.5 upholding the application of Transactional Net Margin Method ("TNMM") to determine the arm's length price ("ALP") of international transaction undertaken by the Appellant;

3.6 disregarding certain comparable companies selected by the Appellant in its TP documentation, on frivolous grounds;

3.7 conducting / upholding the fresh comparability analysis based on the application of erroneous additional/ revised filters in determining the ALP for the Appellant and rejecting the filters applied by the Appellant in its TP documentation.

4. That on the facts and circumstances of the case, the Ld. C1T(A) / Ld. AO / Ld. TPO have erred in disregarding the fresh search submitted by the Appellant on a without prejudice basis, during the course of assessment proceedings, considering TNMM as the most appropriate method;

5. That on the facts and circumstances of the case, the Ld. CIT(A) / Ld. AO / Ld. TPO have grossly erred in rejecting the audited segmental accounts submitted by the Appellant during the course of assessment proceedings, and application of entity wide margin to test the distribution function of the Appellant;

6. That on the facts and circumstances of the case, the Ld. CIT(A) /

Ld. AO/ Ld. TPO have erred in disregarding the transaction by transaction analysis undertaken by the Appellant in the TP documentation and upholding the approach of aggregation of all international transactions to determine the ALP;

7. That on the facts and circumstances of the case, the Ld. CIT(A) / Ld. AO/ Ld. TPO have erred in ^ disregarding various comparability adjustments (including working capital and foreign currency) in determining the arm's length profit margin;

8. That on the facts and circumstances of the case, the Ld. C1T(A) / Ld. AO / Ld. TPO have erred in including certain companies in the final set of comparable companies despite the fact that those companies fail the related party transaction filter of 25 per cent;

9. That on the facts and circumstances of the case, the Ld. CIT(A) / Ld. AO/ Ld. TPO have erred in 0 disregarding the computation of margins, submitted by the Appellant during the course of assessment proceedings, of the comparable companies selected by the Ld. AO/ Ld. TPO;

10. That the Ld. C1T(A) / Ld. AO / Ld. TPO have erred in disregarding the judicial pronouncements in

India with respect to the issues comprised in the grounds raised above;

11. That on the facts and circumstances of the case, the Ld. AO/ Ld. TPO have grossly erred in initiating penalty proceedings u/s 271(l)(c) of the Act.

That the above grounds of appeal and sub-grounds therein are independent and without prejudice to each other.

That the Appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal."

3. The brief facts of the case are; the assessee being a distributor engaged in the business of importing and resale of industrial cleaning equipment in India. The assessee imports cleaning equipment from AE and sale and distributors to local customers in India having head office at Noida, 9 Branches in India. During the Financial Year 2013-14 the assessee imported industrial cleaning machines, spares and chemicals from it's AE for the purpose of resale of the same in the Indian market.

4. The original return declaring total income of loss amounting to Rs. 6,91,21,104/- was filed by the assessee, the return was processed u/s 143(1) of the Income Tax , as the case was selected for scrutiny notice u/s 143(2) of Income Tax Act, the Notice issued u/s 143(2) of the Act was issued. In response, the assessee has participated through its Authorized Representative.

5. The case of the assessee for the year under consideration was referred to TPO in terms of Section 92CA of the Act to determine the Arm's Length Price. The TPO has passed order u/s 92CA(3) of the Income Tax Act on 17/10/2017, wherein the Ld. TPO has proposed adjustment of Rs. 4,72,04,755/- as under:-

Particular	Amount (in Rs.)
Operating Revenue (OR)	573401392
ALP Margin of comparables	1.47%
ALP Profit	8429000
ALP Cost	564972392
Assessee's Actual Cost	612177147
Proposed Adjustment	4,72,04,755

6. The assessee has submitted the reply to the draft assessment order stating that the assessee wishes to exercise the option file appeal with Commissioner of Income Tax (Appeals) and not to file any objection before Dispute Resolution Panel (DRP). Accordingly, an adjustment of Rs. 4,72,04,755/- was added back to taxable income of the assessee on issue of Transfer Pricing transaction adjustment and assessment order came to be passed on 22/12/2017 by assessing the income of the assessee at -2,19,16,349/- as against returned income of Rs. -6,91,21,104/-.

7. As against the assessment order dated 22/12/2017, the assessee has preferred an Appeal before the CIT(A) , the Ld.CIT(A) by order dated 14/03/2019 partly allowed the Appeal.

8. Aggrieved by the same, the assessee has filed the present appeal on the grounds mentioned above.

9. The Ld. Counsel for the assessee submitted that Ground No. 1 & 2 are general in nature, which requires no adjudication and further submitted that except Ground No. 3 and its sub grounds which are in respect of disregarding application of resale price method by the Ld. TPO/A.O and Ground No. 8 regarding inclusion of certain Companies in the final set of comparable all other Grounds are not pressed.

10. The Ld. Counsel for the assessee further submitted that the Ld. TPO in the TP order has rejected the characterization of the assessee as a normal

distributor and characterized the assessee as a Company performing functions more than applying distributor. The Ld. Counsel for the assessee further relied on the various judicial pronouncements and submitted that the Ld. TPO/A.O ought to have concluded that RPM should be applied in the case of the assessee. Further submitted that, the said issue has already been decided in favour of the assessee by the Co-ordinate bench of this Tribunal in assessee's own case in ITA No. 6507/Del/2016 for Ay 2012-13, therefore, submitted that the Grounds of Appeal No. 3 and its sub grounds require to be allowed by following the principles of consistency.

11. Per contra, the Ld. DR submitted that, in reply to show cause notice the assessee has identified new scheme, no mention of this was made in the TP Study Report or during virtual discussions with the understanding during the course of multiple opportunities of personal hearing that was accorded to the AR. Further submitted that, if this case of the assessee is a pure distributor and hence RPM is the most appropriate case, but the discover of 'new segment by the assessee is nothing but an afterthought and deliberate and mischievous attempt to mislead determine and this assertion done its strength from assessee's own TP Study Report. Further, the Ld. DR has also drawn our attention to TP Study Report and submitted that the order impugned requires no interference. But the Ld. DR has not brought any judicial pronouncements to contradict the order of the Coordinate Bench in assessee's own case for AY 2012-13 on the issue in hand.

12. We have heard the parties perused the material on record and gave our thoughtful consideration. The issue involved in Ground No. 3 and its sub grounds have been already dealt and decided in favour of assessee in assessee's own case in ITA No. 6507/Del/2016 for AY 2012-13 wherein it is held as under:-

"12. We have given thoughtful consideration to the orders of the authorities below. It is not in dispute that the assessee is engaged in trading of goods. It is also not in dispute that the assessee does not add value to the goods purchased from related parties. The scope of intercompany agreement is mentioned as "AKW grants to KFC according to the following terms the right of importation and sale of products determined by AKW in the Republic of India. Re-export to other countries is principally not allowed".

13. Under the clause 'Relationship', it has been mentioned "The relationship between AKW and KFC is that of manufacturer and distributor or that of licensor and licensee respectively. KFC is not the agent of AKW and has no right to bind AKW in any way whatsoever".

14. We further find that the TPO himself observed that the reseller generally performs the functions of advertising, marketing, distribution and guaranteeing the goods, financing the stocks and warranty risk. We find that the assessee is also performing all these functions which a normal distributor/reseller would undertake in a comparable uncontrolled transaction.

15. We are of the considered view that the extent of incurring expenses including employee costs for performing these functions is the prerogative /business decision of a company's management based on the market penetration policies adopted by a company. The characterization of a reseller, who does not add value to the purchased product would not change owing to the mere fact that the tested party and comparables have incurred varying levels of employee costs, or selling and distribution, or marketing and promotion expenses for boosting company's own sales volume.

16. In our humble opinion, since the expats came to help the assessee to set up its business and employee costs included an exceptional expenditure amounting to Rs. 1,61,62,594/- for two of its expatriate employees towards payment for salaries and other expenses for the purpose of stabilizing the business in India as it was the first year of the company's operations.

17. This fact has also been appreciated by the DRP.

18. The co-ordinate bench of the Tribunal Mumbai Bench in ITA No. 6956/MUM/2012 in the case of M/s Videojet Technologies [I] Pvt Ltd. has made the following observations:

> *"Further, we find that another reason given by the TPO/DRP for rejecting the RPM is that the assessee as per them was a full-fledged/full risk distributor and was performing a host of functions which would involve huge costs and, hence, the said method may not represent correct gross profit margin. We are unable to persuade us to accept the said observations of the lower authorities, because, in our considered view, in a comparable uncontrolled transaction scenario also a normal distributor will undertake all such functions which are related to sales of a product viz. market research, sales and marketing, warehousing, inventory control, quality ITA No.6956/Mum/2012 M/s Video jet Technologies (I) Pvt Ltd. control etc., and would also bear risks viz. market risk, inventory risk, credit risk etc. As a matter of fact, the TPO/DRP had not placed on record instances of any such comparable which is engaged in the business of a distributor and is not performing the aforementioned functions. We are of the considered view that for the purpose of application of RPM*

what is relevant is that as to whether there is any value addition or not to the goods purchased for resale or not. In case, there is no value addition and the finished goods which are purchased from the AE are resold in the market in the same form, then the gross profit margin earned on such transactions becomes the determinative factor for benchmarking the international transaction of the assessee with its AE by taking RPM as the most appropriate method. Our aforesaid view is supported by the order of ITAT Pune Bench in the case of Fresenius Kabi India (P) Ltd. Vs. DCIT (ITA No. 235/Pun/2013), wherein it was held that in case of a distribution activity, the selling and marketing expenses which are borne by the assessee would not lead to any value addition to the product in question. We, thus, in terms of our aforesaid observations vacate the view taken by the TPO/DRP, who had concluded that the freight, transaction cost, insurance discounts, rebates, packaging, duties, etc. would affect the reliability of gross profit margin as PLI for the purpose of comparison. In terms of our aforesaid observations, we are of the considered view that the TPO/DRP while dislodging the RPM followed by the assessee for benchmarking its international transactions, had lost sight of the fact that only the transaction of import of goods by the assessee from its AEs were to be benchmarked and all the other functions carried out by the assessee having no nexus with the said import transactions were, thus, not relevant for the said benchmarking analysis."

19. This Tribunal in Nokia India Pvt. Ltd 153 ITD 508 has held that incurring of high advertisement and marketing expenses by the

assessee vis-a-vis the other comparable companies does not in any manner affect the determination of ALP under RPM.

20. Similar view was taken by the Pune Bench of the Tribunal in ITA No. 235/PUN/2013.

21. Considering the facts of the case in totality, we have no hesitation to hold that the assessee is a pure trading company involved in the distribution activity without adding any value to the purchased product and hence the RPM is the most appropriate method. We, accordingly, direct the Assessing Officer/TPO to accept RPM as the most appropriate method and decide the issue accordingly."

13. By respectfully following the above order of the Co-ordinate Bench for Assessment Year 2012-13 (supra), we hold that the RPM is the most appropriate method to determine the arms length price of International transaction undertaken be the assessee. Accordingly, we direct the Assessing Officer/TPO to accept the RPM as most appropriate method and decided the issue accordingly. Thus, we allow the assessee's Ground No. 3 and sub grounds for statistical purpose.

14. Ground No. 4 to 10 are in respect of benchmarking the other transaction and related issues. The Ld. Counsel for the assessee has not pressed Ground No. 4 to 7 and 9 to 11 further the Ground No. 11 is consequential in nature. Therefore, Assessee's grounds No. 4 to 7 and 9 to 11 are dismissed.

15. The Ground No. 8 is in respect of inclusion of certain Companies in the final set of comparable companies. The Ld. Counsel for the assessee submitted that the inclusion of certain companies in the final set of comparable companies ignoring the fact that those companies fail the related party transaction filter of 25% and prayed for remanding the issue to the TPO

for de-novo consideration. The Ld. DR has not objected for remanding the said issues to TPO for denovo consideration. Therefore, considering the facts and circumstances of the case, we deem it fit to remand the issue involved in Ground No. 8 to the file of the TPO for de-novo consideration on hearing the assessee. Accordingly, we allow Ground No. 8 of the Assessee for statistical purpose.

16. In the result, Appeal filed by the Assessee is partly allowed for statistical purposed.

Order pronounced in the open court on : 18th **October, 2023.**

Sd/-	**Sd/-**
(G. S. PANNU)	**(YOGESH KUMAR U.S.)**
PRESIDENT	**JUDICIAL MEMBER**

Dated : 18/10/2023

R.N Sr. PS

Copy forwarded to :

1. Appellant;
2. Respondent;
3. CIT,
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI