

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 65/Ind/2022
Assessment Year: 2017-18

M/s.Limagrain India Private Limited, H.No. 1-8-201 to 203, Ashoka My Home Chambers, Flat No. 208, 209, 2 nd Floor, S.P.Road, Secunderabad, Hyderabad	<u>बनाम/</u> Vs.	National Faceless Assessment Centre, Delhi
(Assessee / Appellant)		(Revenue / Respondent)
PAN: AACCB6862A		
Assessee by	Shri Pankaj Sancheti, CA	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	21.12.2023	
Date of Pronouncement	19.01.2024	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

Feeling aggrieved by assessment-order dated 19.01.2022 bearing DIN: ITBA/AST/S/143(3)/2021-22/1038887762(1) passed by National Faceless Assessment Centre, Delhi ["AO"] u/s 143(3) read with section 144C(13) & 144B of the Income-tax Act, 1961 ["the Act"] for Assessment-Year ["AY"] 2017-18, the assessee has filed this appeal.

2. The registry has informed that that the present appeal is filed after a delay of 11 days and therefore time-barred. Ld. AR for assessee prayed that the delay has occurred due to Covid-19 Pandemic. Ld. AR further placed reliance on the order of Hon'ble Supreme Court in **Suo Motu Writ Petition (C) No. 3 of 2020 read with Misc. Applications** by which *suo motu* extension of the limitation-period for filing of appeals w.e.f. 15.03.2020 under all laws has been granted; hence there is no delay in fact. We confronted Ld. DR for Revenue who agreed to the submission of Ld. AR. In view of this, we proceed with hearing of appeal, there being no delay.

3. The background facts leading to this appeal are such that the appellant/assessee is a company originally known as "M/s Bisco Bio Sciences Private Limited", later changed to present name "M/s Limagrain India Private Limited". It is engaged in the business of research, production and sale of hybrid seeds of various field crops and also provides services in the field of agro bio-technology. For the relevant AY 2017-18, the assessee filed return of income u/s 139(1) on 30.11.2017 declaring total income at Rs. Nil with a loss of Rs. 37,90,21,971/-. The case was selected under scrutiny and statutory notices u/s 143(2)/142(1) were issued by AO while were complied with by assessee. During assessment-proceeding, the AO found that the assessee had entered into international transactions with its Associated Enterprises ["AEs"] situated outside India. The AO made a reference to Transfer Pricing Officer ["TPO"] on 27.09.2019 to determine Arm's Length Price ["ALP"] of those transactions. Vide order dated

31.01.2021 passed u/s 92CA(3), the TPO reported that certain transactions undertaken by assessee were not at ALP, accordingly an upward adjustment of Rs. 7,77,89,935/- was required. Then, the AO served a draft-assessment order dated 31.03.2021 upon assessee proposing to make such upward adjustment. Against draft-assessment order, the assessee filed objection dated 28.04.2021 to Disputes Resolution Panel ["DRP"] whereupon the DRP passed order dated 30.12.2021 u/s 144C(5) whereby certain objections of assessee were allowed and others were rejected. Ultimately, the AO passed final assessment-order dated 19.01.2022 u/s 143(3) having regard to TPO's order u/s 92CA(3) and DRP's order u/s 144C(5), after making an addition of Rs. 7,36,56,010/- and thereby reducing the loss declared by assessee from Rs. 37,90,21,971/- to Rs. 30,53,65,961/-. Aggrieved by order of AO, the assessee has come in this appeal before us.

4. The grounds raised by assessee are as under:

Annexure A

GROUNDS OF APPEAL

Based on the facts and circumstances of the case, Limagrain India Private Limited (hereinafter referred to as 'the Appellant') respectfully craves to prefer an appeal against the Assessment order passed by Additional / Joint / Deputy / Assistant Commissioner of Income Tax/Income-tax Officer, National Faceless Assessment Centre, Delhi [hereinafter referred to as the 'Ld. AO'] under Section 143(3) r.w.s 144C(13) read with sections 144B of the Act in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel - 2 (hereinafter referred to as the 'Hon'ble DRP') on the following grounds which are without prejudice to one another:

A. General

1. On the facts and circumstances of the case and in contrary to law, the Deputy Commissioner of Income-tax (Transfer Pricing Officer) - 1, (hereinafter referred to as the 'Ld. TPO') and the Ld. AO under the directions issued by Hon'ble DRP erred in making a Transfer Pricing addition of Rs. 7,36,56,010 to the Appellant's income and thereby reducing the total loss to (Rs. 30,53,65,961) and the said addition being wholly unjustified are liable to be deleted.

Receipt of intra-group services

2. On the facts and in the circumstances of the case and in the law, the Ld. AO /Ld. TPO erred in and the Hon'ble DRP further erred in upholding / confirming the actions of the Ld. AO /Ld. TPO in computing the Arm's Length Price ('ALP') of the receipt of intra-group services of Rs.6,59,25,424 paid by the Appellant to its AE as 'Nil'.
3. On the facts and in the circumstances of the case and in contrary to law, the Ld. AO /Ld. TPO and the Hon'ble DRP further erred in going beyond the scope under section 92CA in questioning the commercial rationale of the legitimate business expenses incurred by the Appellant and further erred in determining the ALP of receipt of intra group services to be 'Nil'.



The Ld. AO /Ld. TPO further erred in not appreciating the nature of business of the Appellant and the need for management support services from its Associated Enterprises ('AE'), which was critical for the Appellant's business in India.

4. On the facts and in the circumstances of the case and in contrary to law, the Ld. AO /Ld. TPO erred in and the Hon'ble DRP further erred in not considering the evidences submitted by the Appellant demonstrating receipt of intra-group services in India.
5. On the facts and in the circumstances of the case and in contrary to law, the Ld. AO /Ld. TPO erred in and the Hon'ble DRP further erred in not considering the benchmarking study reports, maintained by the AEs, that were submitted by the Appellant, which substantiates the mark-up of 8% on cost charged by the AEs. Without prejudice to the above, no adjustment ought to have been made qua the cost of the intra-group service recovered by the AEs.

Provision of business support services

6. On the facts and circumstances of the case and in contrary to the law, the Ld. AO /Ld. TPO erred in and Hon'ble DRP further erred in upholding / confirming the action of the Ld. AO /Ld. TPO in concluding that no documentary evidences were submitted in relation provision of business support services.
7. On the facts and in the circumstances of the case and in contrary to law, the Ld. AO /Ld. TPO erred in and Hon'ble DRP further erred in arriving at the ALP mark-up of 7.75% by erroneously rejecting two comparable companies, from the final set of comparable companies selected by the Appellant in the Transfer Pricing Documentation.
8. On the facts and circumstances of the case and in contrary to the law, the Ld. AO /Ld. TPO erred and Hon'ble DRP further erred in upholding / confirming the action of the Ld. AO /Ld. TPO in rejecting the following two companies selected by the Appellant in the Transfer Pricing Documentation though they are functionally comparable:
 - Empire Industries Limited
 - Honeycomb Relationship Management Services Private Limited



9. Without prejudice to the above, on the facts and circumstances of the case and in contrary to the law, the Ld. AO /Ld. TPO erred in not allowing +/-3% benefit to the Appellant as provided under proviso to Section 92C(1) of the Act.

Seed testing and trial charges

10. On the facts and in the circumstances of the case and in law, the Ld. AO /Ld. TPO erred in and the Hon'ble DRP further erred in upholding / confirming the action of the Ld. AO /Ld. TPO in computing the ALP of the seed testing and trial charges of Rs.73,93,241, paid by the Appellant to its AE, as 'Nil'.
11. On the facts and in the circumstances of the case and in contrary to law, the Ld. AO /Ld. TPO and Hon'ble DRP further erred in going beyond the scope under section 92CA in questioning the commercial rationale of the legitimate business expenses incurred by the Appellant and further erred in determining the ALP of the seed testing and trial charges to be 'Nil'.

The Ld. AO /Ld. TPO further erred in not appreciating the nature of business of the Appellant and the need for seed testing and trial services from its Associated Enterprises ('AE'), which was critical for the Appellant's business in India.

12. On the facts and in the circumstances of the case and in contrary to law, the Ld. AO /Ld. TPO erred in and Hon'ble DRP further erred in disregarding the relevant extract of the benchmarking study report submitted by the Appellant in relation to seed testing and trial charges incurred.

Sale of Services to Seed Asia Company

13. On the facts and in the circumstances of the case and in contrary to law, the Ld. AO /Ld. TPO erred in and Hon'ble DRP further erred in erroneously applying the ALP mark-up of 7.75% that was determined for the aforesaid provision of business support services, without appreciating the facts of the case.
14. On the facts and in the circumstances of the case and in contrary to law, the Ld. AO /Ld. TPO erred in and Hon'ble DRP further erred in upholding / confirming the action of Ld. AO /Ld. TPO in concluding that no documentary evidences in relation sale of services were submitted.



5. Ld. AR for assessee carried us to above grounds which are fourteen (14) in number and submitted that Ground No. 1 is general and the grievance raised therein is covered by other specific grounds, therefore the same does not require any adjudication. Further, he did not press Ground No. 6 to 8 and 13 to 14; therefore those grounds are dismissed being non-pressed. Thus, we are left with Ground No. 2 to 5, 9, 10 to 12 for adjudication. We proceed to adjudicate the same in subsequent paras.

Ground No. 2 to 5 and 10 to 12:

6. In Ground No. 2 to 5, the assessee challenges the upward adjustment of Rs. 6,59,25,424/- made by AO in respect of payment made by assessee towards 'Intra-group services' and in Ground No. 10 to 12, the assessee challenges the upward adjustment of Rs. 73,93,241/- made by AO in respect of payment made by assessee towards 'Seed testing and trial charges'. Since these grounds involve identical reasoning, we are deciding them analogously for the sake of brevity and convenience.

7. The precise facts apropos to the upward adjustment of Rs. 6,59,25,424/- in respect of "Intra-Group Services" are such that during relevant year, the assessee made a total payment of Rs. 6,59,25,424/- to its AEs (Rs. 64,62,631/- to M/s Group Limagrain Holdings and Rs. 5,94,65,793/- to M/s Vimorin & Cie) towards 'Intra-group services'. In pursuance of the reference made by AO, the TPO examined these transactions. The TPO has dealt these transactions in Para 6 of his order. When the TPO show-caused assessee vide notice dated 23.01.2021 to file

documentary evidences of the service received, working of cost allocation etc., the assessee filed a reply dated 28.01.2021 which is re-produced by TPO in Para 6.1 of his order. The assessee submitted that it has received these services from AEs (i) Human resources support services, (ii) Strategic assistance services in relation to development of business, (iii) Finance and treasury services and (iv) General administration and organization services. The TPO, however, considered assessee's reply in Para No. 6.2 to 6.11 and rejected assessee's submission precisely on following basis:

- (i) The assessee did not file any documentary evidence with regard to actual receipt of services and without proof of actual receipt of service, the benchmarking and determining ALP was not possible. The assessee had filed only invoices raised by AEs, Transfer Pricing Study Report ["TPSR"] of AEs and Copy of agreement.
- (ii) The "TPSR" dated 30.06.2015 submitted by assessee did not pertain to financial year 2016-17 relevant to AY 2017-18 under consideration. Further, in the "TPSR", the benchmarking had been done by taking assessee's foreign AE as tested party and using foreign database, this is faulty.
- (iii) The assessee has not only failed to submit evidences of actual receipt of service but also failed to submit detailed working of cost allocation (Para 6.4 of TPO order). The allocation done by assessee is merely based on a formula decided by parent company and not based on

actual facts and no third party would pay for such services in independent situation (Para 6.8 and 6.11 of TPO order).

Accordingly, the TPO determined ALP at Rs. Nil. The assessee objected to the TPO's order before DRP. The DRP dealt assessee's objection in Para 6 of his order. The DRP noted at multiple places, particularly in sub-para 6.6.20, that the assessee has failed to demonstrate that it has received services or that it has benefited from such services as claimed and that the assessee has further failed to demonstrate the incurrence of cost by AE as well as its allocation among various group entities. Finally, the DRP approved TPO's action of determining ALP at Rs. Nil. Thereafter, the AO passed assessment-order taking ALP at Rs. Nil as reported in the orders of TPO/DRP.

8. The facts apropos to the upward adjustment of Rs. 73,93,241/- in respect of "Seed testing and trial charges" are such that the assessee is engaged in the business of developing new seeds and during relevant year, the assessee made a total payment of Rs. 73,93,241/- to its AEs (Rs. 53,98,327/- to M/s Limagrain Europe and Rs. 19,94,914/- to M/s Limagrain Netherland) towards 'Seed testing and trial charges". In pursuance of the reference made by AO, the TPO examined these transactions. The TPO has dealt these transactions in Para 10 of his order. When the TPO show-caused assessee vide notice dated 23.01.2021 to file documentary evidences of the service received, working of cost allocation etc., the assessee filed a reply dated 28.01.2021 which is re-produced by TPO in Para 10.1 of his order. The assessee submitted that the seed testing

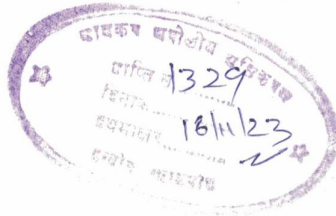
and trial activities were carried out by its AEs and therefore charges were recovered from assessee based on actual expenses incurred. The TPO, however, considered assessee's reply in Para 10.2 to 10.10 of his order (There is some mistake in mentioning Para Nos. in TPO order, we have suitably rectified for a smooth discussion) and rejected assessee's submission for following reasons:

- (i) The assessee has not filed any documentary evidence with regard to the actual receipt of services and without proof of receipt of actual services, it is not possible to determine the ALP and benchmark the same. The assessee has filed only copy of the invoices raised by AEs.
- (ii) The assessee has not filed "TPSR" although the assessee claimed to have filed.
- (iii) The assessee has not only failed to submit evidences of actual receipt of service but also failed to submit detailed working of allocation and mark-up charged by AEs. The allocation done by assessee is not based on actual facts and no third party would pay for such services in independent situation (Para 10.4 and 10.10 of TPO order).

Accordingly, the TPO determined ALP at Rs. Nil. The assessee objected to the TPO's order before DRP. The DRP dealt assessee's objection in Para 10 of his order. Finally, vide Para 10.3.1, the DRP approved TPO's action of determining ALP at Rs. Nil by stating that this issue was identical to the issue of 'intra-group services' dealt by him in Para 6 of his order. In short, the DRP upheld TPO's action by accepting that the assessee has failed to

demonstrate that it has received services or that it has benefited from such services as claimed and that the assessee has further failed to demonstrate the incurrance of cost by the AE as well as its allocation to assessee. Thereafter, the AO passed assessment-order taking ALP at Rs. Nil as reported in the orders of TPO/DRP.

9. During hearing before us, learned Representatives of both sides made vehement arguments against or in favour of the orders of TPO/DRP/AO. While arguing, Ld. AR for assessee submitted that the TPO issued show-cause notice dated 23.01.2021 to assessee and required the assessee to file details/documents by 28.01.2021 since the case was getting time-barred by 31.01.2021, copy of the notice is filed at Page No. 277 to 284 of Paper-Book. Thus, the AO allowed just a meagre period of 5 days. Furthermore, the impugned period was a time when entire nation was struggling with Covid Pandemic. Therefore, the assessee made its best efforts to compile details/documents and submitted to TPO on the appointed date of 28.01.2021. But, however, there are documents which the assessee could not file. Those documents are filed in the form of an "additional paper book" with an application dated 16.11.2023 in terms of Rule 29 of Income-tax (Appellate Tribunal) Rules, 1963. Ld. AR prayed to admit these evidences which are critical and robustly substantiate the appellant/assessee's stand. The application filed by assessee alongwith index of additional documents is scanned and re-produced below:



16/11/23
A C

10 November 2023

To,

The Hon'ble Members,
Income Tax Appellate Tribunal,
Indore.



Esteemed Members of the Tribunal,

Reference : ITA No. 65/IND/2022 – AY 2017-18
Appeal : M/s Limagrain India Private Limited (PAN AACCB6862A) vs NFAC, Delhi
Subject : Submission for Admission of Additional Evidence under ITAT Rule 29

In connection with the appeal scheduled for November 23, 2023, we, M/s Limagrain India Private Limited, hereby present additional documents critical for the Tribunal's consideration in our case.

These documents aim to robustly substantiate the Appellant's stance concerning the adjustments made by the Learned Assessing Officer/Transfer Pricing Officer and upheld by the Learned Dispute Resolution Panel. Initially, a selection of sample documents was presented to demonstrate the nature of the transactions. Unfortunately, the documentation did not satisfy or was not fully accepted by the Lower Authorities, who also did not afford an ample opportunity for a thorough presentation.

Given the circumstances, it is our humble plea that the Tribunal allows the admission of this supplementary evidence under Rule 29 of the ITAT Rules. These documents are pivotal in validating the Appellant's claims.

Additionally, it is pertinent to mention that on August 07, 2023, we had submitted an additional evidence paper book (acknowledgement enclosed), which was not sequentially aligned with the existing paper book on record. We intend to rectify this oversight by withdrawing the previously submitted version and resubmitting a revised, sequentially correct additional evidence paper book.





We trust that our request will be met with your understanding and favorable consideration. Your cooperation is deeply appreciated.

Yours sincerely,

For Limagrain India Pvt Ltd.

Satish Sadasivappa Ganiger
Managing Director



Encl.: Acknowledgement copy of the additional evidence paper book submitted on August 07, 2023

Cc: Department Representative

Limagrain India Private Limited

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4	Media Hub Portal to download required media at one place	2	354	355
5	Yammer - Intranet portal showing various use of yammer to build community/ groups	2	356	357
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7	LG India IT Office 365 users list	2	362	363
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24	Financial internal control handbook related to treasury management	9	483 491
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29	Need Benefit Documentation – Prepared by PWC	24	512 535
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For Limagrain India Pvt Ltd

Authorized Representative



Ld. AR carried us through these documents one by one to demonstrate that the assessee has in fact received services from its AEs and that the cost has been correctly allocated/assigned to assessee after a careful working. Placing heavy reliance upon certain decisions, Ld. AR submitted that the lower authorities are wrong in adopting ALP at Rs. Nil and thereby making the impugned upward adjustments to assessee's income.

10. Per contra, Ld. DR for revenue strongly supported the orders of lower authorities and argued that the lower authorities have made a clear-cut finding that the assessee submitted only general documents in reply dated 28.01.2021 which could not establish even the factum of receipt of services, what to talk about benchmarking and determining ALP? Ld. DR, however, fairly agreed with assessee's claim that the time of 5 days given by AO for filing reply was very short and during relevant time, there was Covid pandemic also. Ld. DR submitted that due to these reasons, the additional evidences filed by assessee can be considered at appropriate level and the Bench can take a suitable call.

11. We have peacefully heard the learned representatives at length, considered their rival submissions and perused the orders of lower-authorities. After a careful consideration, we find that the TPO has determined ALP of impugned transactions at Rs. Nil and the same is accepted by DRP and AO. The foundational reason of taking a decision to determine ALP at Rs. Nil as culled out from order of TPO is such that the TPO was not even satisfied that the assessee had actually received services

for which payments were made. The TPO has strongly noted that in absence of proof of receiving services, it is not possible to carry out benchmarking exercise and determine ALP. Ld. AR for assessee also acknowledges that there was a short period of just 5 days allowed by TPO and moreover that period was a difficult time of Covid due to which the assessee could not file all documents. The assessee has also filed additional evidences in terms of Rule 29 as noted above. Further, the assessee has also reported in first para of the application filed under Rule 29 that the evidences now filed are critical and robust to substantiate the assessee's stand. Ld. DR has also submitted that he has no objection if the evidences are considered at appropriate level. During hearing, with the assistance of Ld. AR for assessee we have seen that the evidences are substantial. Looking into the circumstances preventing the assessee from filing these evidences before TPO coupled with the fact that the present appeal before us is the first-appeal against assessment-order passed by AO, we are persuaded to admit these evidences. However, these evidences go to the root of the matter and require an in depth examination and analysis at lower level. Further, if the lower authorities, based on evidences, take a view that the assessee had actually received services, there would be further necessity to determine the amount of ALP. Therefore, in the situation, we feel it most appropriate to refer this matter back to the file of AO/TPO who shall re-fix the case and give necessary opportunities to assessee to make all submissions including these additional evidences. Needless to mention that the assessee shall be free to make all submissions as think fit apart from these additional

evidences to substantiate its stand. Thus, these grounds are remanded to AO/TPO.

Ground No. 9:

12. In this ground, the assessee claims that the AO/TPO has erred in not allowing (+)/(-) 3% benefit to assessee as provided under Proviso to Section 92C(2) of the Act in the matter of "Provision for Business Support Services".

13. Ld. AR straightaway carried us to Para 7.3.7 / Page 37 of DRP's order where the DRP has passed following order:

"7.3.7 However, we find merit in the submission of the assessee that the main business company is research, production, sale of hybrid seeds of various field crops and to provide services in the field of agrobiotechnology, hence the entity level margin earned by the company cannot be utilized for the purpose of benchmarking the transaction of business support services. The adjustment made by the AO has resulted into a mark-up of Rs. 39,62,800/- on transaction value of Rs. 10,217,344 i.e. a PLI of 38.8% as against PLI of 7.75 % determined by the TPO himself. We find that the approach of the TPO to apply PLI at entity level and then apportioning towards the segment of the 'Business Support Services' is totally unjustified in the facts of the case when the limited issue before the TPO was to determine the arm's-length price of the 'Business Support Services'. Therefore, in our view, any adjustment on account of PLI has to be restricted to the transaction of Rs.

10,217,344/-reported as Revenue from Business Support Services.

Accordingly, the TP is directed to apply a markup of 7.75% on the transaction value of Rs. 10,217,344 reported as Revenue from Business Support Services, allow benefit of mark of 5% to the assessee, if it is found to be charged separately in the invoices submitted to the AE, and make adjustment to the arm's-length price of the transaction of Business Support Services, accordingly."

14. Ld. AR submitted that the assessee is not disputing the above order passed by DRP. The assessee's submission is only such that the DRP has directed the AO to apply mark-up of 7.75% and also allow benefit of mark-up of 5% actually charged in the invoices, if any. But, however, the DRP has not explicitly mentioned to give benefit of (+)/(-)3% tolerance band statutorily available in terms of Proviso to section 92C(2) which prescribes thus:

"Provided further that if the variation between the arm's length price so determined and price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed such percentage not exceeding three per cent of the latter, as may be notified by the Central Government in the Official Gazette in this behalf, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price:"

Ld. AR prays that there should be a clear direction to AO/TPO to give benefit of this Proviso. We find that the above-noted Proviso to section 92C(4) is a statutory provision which cannot be ignored by AO/TPO. Accordingly, the AO/TPO is directed to consider the effect of this provision. Accordingly, this ground is allowed.

15. Resultantly, this appeal of assessee is allowed in terms indicated above.

Order pronounced in the open court on 19.01.2024.

sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 19.01.2024.

CPU/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore