

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 7548/MUM/2016
Assessment Year: 2012-13

Asstt. CIT-1(1)(1),
579, Aayakar Bhavan,
M.K. Road,
Mumbai-400020.

Appellant

Vs.

M/s AJE India Pvt. Ltd.,
3rd floor, Yusuf Building,
M G Road,
Mumbai-400001.

PAN NO. AACHA 9177 A

Respondent

CO No. 133/MUM/2022
(Arising out of ITA No. 7548/MUM/2016)
Assessment Year: 2012-13

M/s AJE India Pvt. Ltd.,
3rd floor, Yusuf Building,
M G Road,
Mumbai-400001.

PAN NO. AACHA 9177 A

Appellant

Vs.

Asstt. CIT-1(1)(1),
579, Aayakar Bhavan,
M.K. Road,
Mumbai-400020.

Respondent

Assessee by

: None

Revenue by

: Mr. Akhtar Hussain Ansari, Sr. DR

Date of Hearing

: 18/01/2024

Date of pronouncement

: 31/01/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue and cross-objection by the assessee are directed against order dated 25.08.2016 passed by the Ld. Commissioner of Income-tax-2, Mumbai [in short 'the Ld.



CIT(A)] for assessment year 2012-13. The grounds raised by the Revenue are reproduced as under:

1. "Whether, on the facts and circumstances of the case and in law, the Ld. CIT(A) was correct in deleting the Transfer Pricing adjustment of Rs.5,17,24,173/- made by the A.O."

2. "Whether, on the facts and circumstances of the case and in Law, the Ld. CIT(A) failed to appreciate principles of comparability in transfer pricing while directing the comparability of margin to be undertaken between average margin of 14 comparables operating in Indian geography with that of the profitability (PLI/margin) of assessee's overseas Associated Enterprise, M/s. assessee's supplier thereby comparing PLI of AE, a foreign company, with that of Indian comparables?"

3. "Whether, on the facts and circumstances of the case and in Law, the la. CIT(A) failed to appreciate that if foreign AE is treated as a tested party, then comparables must also be from the same geography i.e. country of AE and thus, directions are against the principles of transfer pricing as also the mandate of Rule 10B(2) and 10B(3) of I.T. Rules?"

4. "Whether, on the facts and circumstances of the case and in Law, the la. CIT(A) erred in impliedly approving assessee's foreign AB, M/s Ayacucho, as tested party without appreciating the fact that the assessee has not demonstrated any valid justification for the same and without giving reasons for rejection of TPO's selection of assessee as tested party?"

5. "Whether, on the facts and circumstances of the case and in Law, la. CIT(A) has erred in directing comparison of profitability of M/s Ayacucho (assessee's foreign AE) while impliedly approving comparables operating in Indian geography?"

6. "Whether, on the facts and circumstances of the case and in Law, the ld. CIT(A) is justified in holding that the AO/TPO has erred, while determining the Arm's Length Price (ALP), by taking the assessee as the tested party as opposed to the analysis carried out by the assessee in which Ayacucho Preforms Co. Ltd, Thailand was considered as the tested party, even though the assessee did not make available the reliable data for foreign comparables necessary for application of the method, in view of Rule 10C(2)(c) of Income-tax Rules, 1962 read with Section 92C of the Income-tax Act, 1961?"

7. "Whether, on the facts and circumstances of the case and in Law, the ld. CIT(A) has erred in determining the arm's length price (ALP) by taking the foreign AE as the tested party and by rejecting the finding of the AO/TPO that the assessee has to be considered as the tested party?"



8. "Whether, on the facts and circumstances of the case and in Law, the Id. CIT(A) erred in selecting and using certain Indian companies as comparables to determine the ALP by not appreciating the fact that the comparable companies selected by TPO are operating in India, whereas the foreign AE is operating in Thailand, a different geographical location and hence, cannot be used in the instant case, in view of Rule 10B(2)(d) of Income-tax Rules, 1962 read with Section 92C of the Income-tax Act, 1961?"

2. The ground raised by the assessee are reproduced as under :

1. The Commissioner of Income-tax (Appeals) - 2, Mumbai (hereinafter referred to as the CIT(A)) erred in upholding the action of the Deputy Commissioner of Income-tax - 1(1)(1), Mumbai (hereinafter referred to as the Assessing Officer) in treating the 14 Indian companies determined by the Deputy Commissioner of Income-tax (Transfer Pricing 1(1)(2)), Mumbai (hereinafter referred to as the Transfer Pricing Officer) as comparable entities without appreciating that the functions, assets and risk analysis of the said companies are different from the functions, assets and risk analysis of the appellant-company.

The cross objectors contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer and the Transfer Pricing Officer inasmuch as the CIT(A) has not appreciated the facts of the case in its entirety.

2. The CIT(A) erred in directing to compare the operating margin or the profit level indicator of the foreign associate enterprise considered as tested party with the operating margin or profit level indicator of the 14 Indian companies considered by the TPO instead of the foreign comparable considered by the cross objector for making transfer pricing adjustment.

The cross-objectors contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have issued the impugned direction inasmuch as the geographical location of the foreign associate enterprise and the Indian companies are completely different and as such, the impugned direction is invalid.

3. None represented on behalf of the assessee despite notifying for the hearing nor was any adjournment sought. It is seen from the record that on the past occasion also none appeared on behalf of the assessee. Therefore, we were of the opinion that assessee was not interested in prosecuting the cross-objection and responding to



the appeal of the Revenue, therefore, we heard the appeal and cross objection *ex-parte* qua the assessee after hearing the Ld. Departmental Representative (DR) and perusal of record.

3. In the case the Ld. CIT(A) has issued direction to the Assessing Officer for computing the arithmetic means of the 14 companies for comparing with the margin of the tested parties. The relevant finding of the Ld. CIT(A) is reproduced as under:

"5. Ground No.1

The AO has added sum of Rs. 5,17,24,173/- by invoking Section 92CA(3) of the Income-tax Act, 1961. I have also gone through the copy of the Order passed by TPO (1)(1)(2) dated 28.01.2016 wherein the TPO has made comparable margins with about 14 companies who are in the business of packing material and on the other hand the AR of the appellant argues that the appellant company is in the business of bottling and distribution of beverages in India and the submissions of the company is as under :-

"Ajeindia is a company whose functions are bottling and distributing beverages in India. Its main activity is the production of beverages, sodas, water, nectar beverages, citric drinks, rehydrating drinks, teas and energizing drinks to further sell in the Indian Market."

Therefore, the comparable figures arrived by TPO are in the business of packing material etc and not directly connected with the appellant company but with the Associate Enterprises Ayacucho Preforms Ltd. and that the company's activity is as under:

"Ayacucho is a company whose main function is manufacturing bottles and caps for its related entities to use in their beverage manufacturing activities. Ayacucho sold preform materials to Ajeindia during 2012."



The AR of the appellant argues that the appellant company mainly deals with the production of beverages, sodas, water, nectar beverages, citric drinks, rehydrating drinks, teas and energizing drinks to further sell in the Indian Market. On the other hand, the supplier Ayacucho Preforms Ltd deals only in manufacturing of bottles & caps and it is fair to make the comparable margin with the 14 companies so as to arrive at the correct margin.

The arguments of the AR of the appellant company has been considered and found to be acceptable one as the AO compared the margin of 14 companies who deals with the packing material and the appellant company's main business is with the production of beverages, sodas, water, nectar beverages, citric drinks, rehydrating drinks, teas and energizing drinks to further sell in the Indian Market.

Therefore, I am in agreement with the arguments of the AR of the, appellant company that the comparable company margin to arrive at arithmetic meaning may be exercised between 14 companies as enumerated in para 9 of the Assessment Order by the AO with the supplier M/s Ayacucho who supplied material to the appellant company. Therefore, I direct the AO to make comparable margin to arrive at arithmetic mean with the 14 companies and the Ayacucho and assess accordingly.”

4. We find that as per section 251 of the Income-tax Act, the Ld. CIT(A) in appeal against order of the assessment made confirm, reduce, enhance or annul but he can't restore the matter back to the Assessing Officer. Further section 250(4) of the Act prescribe for making any inquiry by himself or he may direct the Assessing Officer for making further inquiry but in this case no inquiry has been carried out by the Ld. CIT(A). Therefore, we are of the opinion that the direction given by the Ld. CIT(A) not being in accordance with law, we set aside the finding of the Ld. CIT(A) and restore the matter back to him for deciding afresh after providing adequate



opportunity of being heard to both the Revenue as well as to the assessee.

5. In the result, the ground of appeal of the Revenue and cross-objection of the assessee both are allowed for statistical purposes.

Order pronounced in the open Court on 31/01/2024.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 31/01/2024
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai