आयकरअपीलीयअधिकरण, विशाखापटणमपीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्रीदुव्वूरूआरएलरेड्डी, न्यायिकसदस्यएवंश्रीएसबालाकृष्णन, लेखासदस्यकेसमक्ष

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER
(Through Hybrid Hearing)

आयकरअपीलसं./ I.T.(TP).A. No.44/Viz/2017

(निर्धारणवर्ष/ Assessment Year : 2012-13)

Teejay India Private Limited, Plot No. 15, Brandix India Apparel City Private Limited SEZ, Pudimadaka Road, Atchutapuram, Visakhapatnam – 530 011. PAN: AAACO 9452 H	Vs.	Assistant Commissioner of Income Tax, Circle-5(1), 2nd Floor, Direct Taxes Building, MVP Double Road, Visakhapatnam, Andhra Pradesh.
(अपीलार्थी/ Appellant)		(प्रत्यर्थी/ Respondent)
अपीलार्थीकीओरसे/ Assessee by	:	Sri Darpan Kirpalani
प्रत्यार्थीकीओरसे/ Revenue by	:	Dr. Satyasai Rath, CIT-DR
सुनवाईकीतारीख/ Date of Hearing	:	22/01/2024
घोषणाकीतारीख/Date of Pronouncement	:	13/02/2024

O R D E R

PERS. BALAKRISHNAN, Accountant Member :

This appeal filed by the assessee against the final assessment order passed U/s. 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 [the Act] dated 5/12/2016 for the AY 2012-13.

2. Briefly stated the facts of the case are that the assessee, M/s. Teejay India Private Limited (formerly known as M/s. Ocean India Private Limited) is engaged in the business of manufacturing and exporting of knitted fabrics / apparels at Brandix APSEZ, Atchutapuram, Visakhapatnam. The assessee filed its return of income for the AY 2012-13 admitting a loss of Rs. 38,59,95,609/- on 28/09/2012. Subsequently, the return was selected for scrutiny under CASS and notice U/s. 143(2) was issued and served on the assessee on 30/08/2013. Subsequently, due to change in the incumbent another notice U/s. 143(2) r.w.s 129 of the Act was issued on 16/09/2015. In response to the notices, the assessee's Authorized Representative appeared from time to time and furnished the information called for. The Ld. AO during the course of the assessment proceedings found as per the Form 3CEB that the assessee-company has entered in to international transactions with its Associated Enterprises [AEs] as detailed below:

Nature of transaction	**Amount (Rs)**
Export of finished goods	32,00,34,704
Receipt towards share capital	20,85,23,730
Receipt towards share premium	41,70,47,460
Receipt of share application money pending allotment	3,05,49,207
Total	97,61,54,921

Since the international transactions with its AEs exceeded the limits prescribed, a reference was made to the Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad on 20/10/2014 after obtaining the due approval of the Commissioner of Income Tax-1, Visakhapatnam. Accordingly, the Ld. Transfer Pricing Officer [TPO] passed the order U/s. 92CA(3) of the Act on 29/01/2016 by making upward adjustment of Rs. 12,88,76,471/- as detailed below:

Operating Revenue of the taxpayer	107,33,69,195
Operating Cost of the Taxpayer	142,58,91,748
% of AE Sales to total sales	29.67%
AE Cost (in proportion to revenues)	42,30,62,082
Arm's Length Margin determined by the TPO	6.11%
Arm's Length Price = (100 + AALM) x OC	44,89,11,175
Less: Price received	32,00,34,704
Shortfall being the adjustment U/s. 92CA of the Act	12,88,76,471

Further, the Ld. AO proposed an addition of Rs. 2,26,671/- on account of inadmissible depreciation and Rs. 3,477/- under income from other sources. The Ld. TPO has not disputed the TNMM Method as the Most Appropriate Method (MAM). The Ld. TPO has also accepted the 15 comparable companies selected by the assessee. The Ld. TPO computed the Arithmetic Mean of the comparable companies based on the independent analysis

considering the single year margin. Aggrieved by the Draft Assessment Order, the assessee filed its objections before the Ld. Dispute Resolution Panel [Ld. DRP]. The primary objection raised by the assessee before the Ld. DRP is with respect to the Ld. TPO's decision in not considering the multiple year / prior year data of comparable companies while determining the Arm's Length Price in relation to the assessee's international transactions with its AEs. Further, the assessee also objected that the Ld. TPO has not considered under-utilization of capacity by the assessee to eliminate the affect of difference between the assessee and the comparable companies. Further, the assessee also raised objections with regard to treatment of certain expenditure as operating or non-operating in nature. Further, the assessee also objected that the Ld. TPO has erred in not providing appropriate adjustment towards differences on account of working capital between the assessee and the comparable companies. Considering the above submissions, the Ld. DRP partly rejected the objections raised by the assessee and partly directed the Ld. AO / TPO to compute the Arithmetic Mean as directed in DRP's directions dated 31/10/2016. Considering the directions of the Ld. DRP, the Ld. AO passed the final assessment order on 5/12/2016 confirming the adjustment made by the Ld.

TPO for Rs. 12,88,76,471/-. Aggrieved by the final assessment order of the Ld. AO, the assessee is in appeal before us by raising the following grounds of appeal:

"1. That the order of the Ld. AO in relation to AY 2012-13 to the extent prejudicial to the appellant, is arbitrary, contrary to law, facts and circumstances of the case and liable to be quashed.

2. That on the facts and circumstances of the case, the Ld. DRP and the Ld.AO erred in upholding the approach of the Ld. TPO and the consequent adjustment of Rs. 12,88,76,471/- made to the transfer price of the appellant's international transactions with AEs.

3. The Ld. AO and the Ld. DRP erred both in facts and in law in confirming the action of the Ld. TPO of making an adjustment to the transfer price of the appellant holding that the international transactions do not satisfy the arm's length principle envisaged under the Act and in doing so, grossly erred in:

3.1. Not considering the multiple year / prior year data comparable companies while determining the arm's length price in relation to the assessee's international transactions with its AEs;

3.2. Using data that was not contemporaneous and which was not available in the public domain at the time, the transfer pricing documentation was prepared by the assessee;

3.3 Disregarding the peculiar economic conditions faced by the assessee during AY 2012-13 for carrying out its manufacturing operations;

3.4. Not providing appropriate adjustment under Rule 10B(3)(ii) of the Income Tax Rules, 1962 on account of

3.4.1.Abnormal business loss suffered by the assessee;
3.4.2.Underutilization of capacity by the assessee;

In order to eliminate the effect of difference between the assessee and the comparable companies;

3.5. Considering certain non-operating expenses and extraordinary expenses while computing the operating mark-up on cost of the assessee;

3.6. Not providing an appropriate adjustment towards differences on account of working capital differences between the assessee and the comparable companies;

3.7. Not appreciating the limited-risk nature of the manufacturing activity of the assessee as a manufacturer and in not providing an appropriate adjustment towards the risk differential, even when full-fledged manufacturers are selected as comparable companies."

3. Further, the assessee has also raised additional grounds of appeal numbered from 3.8 to 3.10 as under:

3.8. Based on the facts and circumstances of the present case and in law, the final order passed by the AO being passed not in conformity with the directions issued by the Ld. DRP is bad in law as per the provisions of section 144C(10) r.w.s 144C(13) fo the Act and hence liable to be quashed.

3.9. That the Ld. AO / TPO erred in not considering the comparable uncontrolled price (CUP) analysis submitted before the Hon'ble DRP substantiating that the losses incurred be attributed to the extraordinary circumstances during the year;

3.10. The appellant craves to plead before this Hon'ble Tribunal that if the Transactional Net Margin Method (TNMM) is not applied as the most appropriate method for testing the arm's length nature of the international transactions entered into by the appellant with its AEs after considering the appropriate adjustments claimed by the appellant with regards to the various peculiar economic conditions, the Ld. AO / TPO ought to apply the CUP method given the availability of similar products sold to the associated enterprises and third parties. The appellant craves to plead to include the

CUP details furnished along with the additional grounds of appeal providing the international transactions of the appellant relating to manufacturing of fabric meeting the arm's length standard.'

4. **Grounds No.1 & 2 are general** in nature and therefore they need no adjudication.

5. With respect to additional **Ground No.3.8**, the assessee has raised a legal ground stating that the Ld. AO has not complied with the directions of the Ld. DRP while passing the final assessment order U/s. 143(3) r.w.s 144C(13) of the Act. Therefore, the Ld. AR pleaded that since the directions of the Ld. DRP are not followed by the Ld. AO, the final assessment order deserves to be quashed. The Ld. AR further elaborated that the Ld. AO has not considered the directions of the Ld. DRP with regard to working capital adjustment and hence the assessment order passed by the Ld. AO is bad in law. The Ld. AR in his written submissions relied on the case of Basware Corporation India (ITA No. 1289/Chd/2019 & ITA No. 123/Chd/2017). The Ld. AR therefore pleaded that the impugned assessment order deserves to be quashed considering the fact that the directions of the Ld. DRP have not been given effect in the order passed by the Ld. AO. The Ld. AR further submitted that the Ld. AO has not

rectified his order to incorporate the directions of the Ld. DRP. Therefore, the order passed by the Ld. AO has no sanctity in law.

Per contra, the Ld. Departmental Representative submitted that the Ld. AO has duly followed the directions of the Ld DRP as evident from para 5 of the impugned assessment order.

6. We have heard both the sides and perused the material available on record as well as the orders of the Ld. Revenue Authorities. We find from the directions of the Ld. DRP wherein the objections raised by the assessee with respect to providing appropriate adjustment towards difference on account of working capital, the Ld. DRP in para 2.1 of its order has directed the Ld. AO to compute the mean of the working capital adjustment in respect of the comparables retained. The Ld. AO in his order in para 5 while considering the other directions of the Ld. DRP has erred in not considering the directions of the Ld. DRP with regard to working capital adjustment. We find that the Ld. AO has partly carried out the directions and partly ignored the directions with regard to working capital adjustment. We are therefore of the considered view that it would be deemed fit to direct the Ld. AO/ Ld.TPO to consider all the directions of the Ld. DRP while drafting the final assessment order. Accordingly, this **legal**

ground raised by the assessee is partly allowed for statistical purposes.

7. With regard to additional **Grounds No. 3.9 and 3.10**, the Ld. AR submitted that it has requested for changing the method from TNMM to CUP which was rejected by the Ld. DRP. The Ld. AR submitted that for the AY 2011-12, this Bench of the Tribunal has accepted the CUP method as Most Appropriate Method in the assessee's own case. The Ld. AR further submitted that as per the OECD guidelines, the assessee is allowed to change the Method if it is considered as an appropriate method. In this connection, the Ld. AR relied on the decision of the Hon'ble Delhi High Court in the case of Matrix Cellular International Services Private Limited (ITA 484/2017). The Ld. AR further submitted that the rate per unit of the fabric sold to AEs is Rs. 3.81 as against the average rate per unit sold to Non-AEs stood at Rs. 3.56. The Ld. AR further submitted that the Revenue has not appealed against the Tribunal order for the AY 2011-12 and hence the issue is settled and therefore adopting the CUP Method for the impugned assessment year is valid.

Per contra, the Ld. DR submitted that the assessee has selected TNMM as Most Appropriate Method in its TP study

report. The Ld. DR also referred to the assessee's own case in ITA No. 154 & 155/Viz/2022 wherein under similar facts and circumstances, the assessee has adopted TNMM as Most Appropriate Method. Further, the Ld. DR also submitted that in the case relied on by the Ld. AR, there was a secondary method adopted by the assessee and therefore the Hon'ble High Court directed to adopt the secondary method. The Ld. DR therefore argued that in the instant case, there is no secondary method prescribed in the TP report and hence the decision of the Hon'ble Delhi High Court is distinguishable on facts. Countering the arguments of the Ld. DR, the Ld. AR submitted that in the assessee's own case in ITA No. 154 & 155/Viz/2022 there were multiple transactions and hence TNM method was used. However, in the instant case, there is only one transaction i.e sales and hence CUP method will be considered as Most Appropriate Method.

8. We have heard both the sides and perused the material available on record as well as the orders of the Ld. Revenue Authorities. The case of the assessee is that in view of the facts and circumstances of the instant case, CUP method will be Most Appropriate Method to benchmark the international transaction

with its AEs. Even though, the assessee can resile from the Most Appropriate Method as adopted in the TP Study Report provided the new method confirms the requirement of Rule-10C(2) of the IT Rules, 1962. The principle of *Res Judicata* is not applicable to tax proceedings but at the same time, when there is no change in the facts, then it is the requirement of law that consistency should be maintained and the method will be adopted by the assessee for benchmarking its international transaction should not be disturbed. The assessee has adopted the TNMM during the earlier and subsequent assessment years as Most Appropriate Method. In the absence of any reasoning brought on record, there is no merit in deviating or taking a stand contrary to the accepted method in both the preceding and succeeding years. We therefore find merit in the arguments of the Ld. DR and in the present case, since there is no change in the facts and circumstances which merits deviating from the TNMM to CUP method to benchmark its international transactions. We are therefore of the considered view that the change in method from TNMM to CUP method cannot be entertained and thereby **dismissed the grounds raised by the assessee.**

9. With regard to **Grounds No. 3.1 to 3.7**, the Ld. AR submitted that the objections raised before the Ld. DRP were not considered and rejected by the Ld. DRP. He therefore pleaded that appropriate adjustment shall be made with respect these grounds.

Per contra, the Ld. DR relied on the order of the Ld. DRP and the Ld. Revenue Authorities.

10. We have heard both the sides and perused the material available on record as well as the orders of the Ld. Revenue Authorities. On perusal of the directions of the Ld. DRP dated 31/10/2016, we find that the Ld. DRP has observed and rejected the objections raised by the assessee with respect to multiple / prior year data and comparable companies while determining the ALP in relation to the assessee that the assessee has failed to establish that the use of data of earlier FYs could result in more reliable results. Further, the Ld. DRP also relied on various judicial pronouncements and Rule-10B(iv) of the IT Rules, 1962. The assessee also failed to produce any data to establish its objections raised before the Ld. DRP, even before us. Further, the Ld. DRP also rejected the objections of the assessee with regard to peculiar economic conditions faced by the assessee by

observing that any such differences are taken care of while computing the mean margin. Further, with regard to abnormal business loss and under-utilization of the capacity by the assessee company, the assessee has failed to demonstrate such factors which are unique to the assessee-company and does not exist in the case of comparable companies. We find that the assessee has also failed to produce or demonstrate such factors even before us. With regard to non-operating and extraordinary expenses, the Ld. DRP has observed that these cannot be considered as operating expenses as it is only a provision made in the books of account. We also find that the assessee has failed to establish that the above expenses are extraordinary in nature and these are not incurred by the comparable companies which necessitate appropriate adjustment. We are therefore inclined to **uphold the directions of the Ld. DRP on the above issues thereby rejecting the grounds raised by the assessee**.

11. In the result, appeal of the assessee is partly allowed for statistical purposes as indicated herein above.

Pronounced in the open Court on 13th February, 2024.

Sd/-	Sd/-
(**दुव्वूरुआर.एलरेड्डी**)	(**एसबालाकृष्णन**)
(DUVVURU RL REDDY)	(S.BALAKRISHNAN)
न्यायिकसदस्य/JUDICIAL MEMBER	**लेखासदस्य**/ACCOUNTANT MEMBER

Dated :13.02.2024

OKK - SPS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee–Teejay India Private Limited, Plot No. 15, Brandix India Apparel City Private Limited SEZ, Pudimadaka Road, Atchutapuram, Visakhapatnam – 530 011.
2. राजस्व/The Revenue –Assistant Commissioner of Income Tax, Circle-5(1), 2nd Floor, Direct Taxes Building, MVP Double Road, Visakhapatnam, Andhra Pradesh.
3. The Principal Commissioner of Income Tax,
4. आयकरआयुक्त(अपील)/ The Commissioner of Income Tax
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम/ DR,ITAT, Visakhapatnam
6. गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam