

IN THE INCOME TAX APPELLATE TRIBUNAL “K” BENCH, MUMBAI

**BEFORE SHRI OM PRAKASH KANT, AM AND
MS. KAVITHA RAJAGOPAL, JM**

ITA No. 5140/Mum/2017
(Assessment Year: 2011-12)

Bestseller Fashion India Private Limited The Lalit Residency, 1 st Floor, Lalit Hotel Sahar Airport Road, Andheri (E), Mumbai-400 059	Vs.	Asst. CIT-9(2)(1) Mumbai
PAN/GIR No. AAECB 2906 M		
(Assessee)	:	(Respondent)
Assessee by	:	Shri Jabir Contractor
Respondent by	:	Shri Ashish Kumar Agrawal
Date of Hearing	:	29.04.2024
Date of Pronouncement	:	25.07.2024

ORDER

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals)-55 Mumbai ('Id.CIT(A) for short) vide order dated 26.04.2017 passed u/s. 143(3) r.w.s. 144C(3)(b) of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2011-12.

2. The assessee has challenged the solitary ground where the Id. CIT(A) has upheld an upward adjustment of Rs.1,43,48,901/- being the arm's length price (ALP for short) of the international transaction by charging a markup of 13.61% as being the average earning on cost (PLI) of the comparable company selected by the Transfer Pricing Officer ('TPO' for short) on the reimbursement received by the assessee from its AE amounting to Rs.10,54,29,109/- on account of expenditure incurred for carrying out fashion shows at Mumbai and Delhi.

3. The brief facts of the case are that the assessee company was incorporated on 29.09.2010, engaged in trading of garments, fashion accessories and other products and is wholly owned subsidiary of Bestseller United NL BV, Netherland (holding company) which in turn was subsidiary of M/s. Bestseller A/S Denmark (BSAS), the assessee was engaged in purchases, sales and market of products designed by BSAS namely “jack & jones”, “vera moda” and “only” brands. The assessee company had filed its return of income dated 29.09.2011, declaring total loss at Rs.3,07,88,831/- and the same was processed u/s. 143(1) of the Act. The assessee’s case was selected for scrutiny and the notice u/s. 143(2) of the Act were issued and served upon the assessee.

4. The Id. Assessing Officer ('A.O.' for short) made a reference to the Id. TPO u/s. 92CA(1) of the Act for determination of the arm's length price ('ALP' for short) on the international transactions amounting to Rs.15,64,28,124/- entered into by the assessee with the AE duly reported in Form No. 3CEB.

5. The Id. TPO vide order dated 17.01.2015 passed u/s. 92CA(3) of the Act made an upward adjustment of Rs.1,43,48,901/- being a markup of 13.61% towards the fashion show expenses aggregating to Rs.10,54,29,109/- received by the assessee from its AE and after duly considering the average earning on cost of three comparables selected by the Id. TPO. The Id. A.O. passed the draft assessment order u/s. 144C(1) of the Act dated 24.03.2014 and subsequently the final assessment order dated 08.05.2015 passed u/s. 143(3) r.w.s. 144C(3)(b) of the Act determining a loss at Rs.1,64,39,930/- after making an addition of Rs.1,43,48,901/- being the upward adjustment for the impugned international transaction.

6. The assessee preferred an appeal before the Id. CIT(A) who vide order dated 26.04.2017 upheld the order of the Id. A.O./TPO.

7. The assessee is in appeal before us challenging the impugned order of the first appellate authority.

8. The learned Authorised Representative ('Id. AR' for short) for the assessee contended that the Id. TPO /A.O. had erred in charging mark up of 13.61% by taking the average margin of 3 comparable companies selected by the Id. A.O. towards the reimbursement of fashion show expenses of Rs.10.54 crores received from its AE. The Id. AR further stated that the said expenses was incurred by the assessee for conducting fashion shows at Mumbai and Delhi through an event manager named 'Celebrity Locker Entertainment Pvt. Ltd.' where the assessee does not have a bandwidth expertise for conducting such shows. The said expenses were reimbursed by the AE and that the assessee has not provided any additional service beyond what Celebrity Locker have provided. The Id. AR further contended that the BSF's establishment costs consists of only the "Personnel Cost" of Rs.42,419/- and Rs.5,75,875/- as rental cost thereby stating that the assessee had no risk and was merely a pass through service. The Id. AR relied on the decision of the co-ordinate bench in the case of *Signity India (P.) Ltd. vs. CIT(A) & Dy. CIT* [2022] 143 taxmann.com 267 (Mum-Trib.). The Id. AR further stated that the Id. A.O. in assessee's case for A.Ys. 2013-14 and 2014-15 has not made any addition on similar transaction. The Id. AR further stated that the expenditure incurred on fashion shows had in fact increased the sale of the assessee and are merely a routine expenditure incurred by the assessee and pointed out that the comparables selected by the Id. TPO are

into the business of marketing and promotion of brands which are not akin to that of the assessee and objected to the said selection of comparable as being functionally different.

9. The learned Departmental Representative ('Id.DR' for short), on the other hand, controverted the said facts and stated that these are long term expenditure incurred by the AE as brand promotion expenses in Indian fashion industries and are not mere pass through expenses. The Id. DR further stated that the expenditure incurred on fashion shows have increased the brand value of the AE for which mark up is to be charged unlike any advertisement and sales promotion expenses. The Id. DR also contended that the assessee in its P & L account has debit of Rs.3,01,66,855/- on sales promotion during the year under consideration where the sales aggregated to Rs.61,65,444/- which goes to show that the assessee had assisted the AE in promoting this product in the Indian market. The Id. DR relied on the orders of the lower authorities.

10. We have heard the rival submissions and perused the materials available on record. It is observed that the assessee during the impugned year has reported the following international transaction entered into with its AE in Form No. 3CEB:

<i>S. No.</i>	<i>Name of Country of AE</i>	<i>Nature of transactions</i>	<i>A.Y. 2011-12</i>	<i>Method used by assessee</i>
1	M/s. Bestseller A/S	Cost of traded goods sold (readymade garments, Fashion Accessories and other related merchandise)	28,90,281	RPM
2	M/s. Bestseller A/S	Reimbursement of Branding Expenses	15,35,37,843	CUP
	<i>Total</i>		15,64,28,124	

11. The assessee is said to have received reimbursement of Rs.15,35,37,843/- from its AE as expenses incurred for brand building which break up is tabulated hereunder:

S. No.	Nature of expenses	Reimbursement claimed from AE
1	Advertisement expenses	3,59,25,977
2	Fashion Show expenses	10,54,29,109
3	Sales promotion expenses	1,21,82,757
	Total	15,35,37,843

12. On perusal of the same, the Id. TPO/A.O. during the assessment proceeding considered that the reimbursement of fashion show expenses aggregating to Rs.10,54,29,109/- was not at ALP and had sought explanation from the assessee as to charging mark up on these expenses incurred by the assessee and reimbursed by its AE. The assessee furnished the details of fashion show expenses which are tabulated herein under:

Name of the Vendor	Nature of Expenses	Bill No. & Date	Amount (Rs.)
Celebrity Locker Entertainment Pvt. Ltd.	Contractual fees charges for event held from 13.10.2010 to 23.10.2010 at Turf Club, Mumbai show	CL/201011/2310/002 Dt. 23.10.2010	47,49,908
Celebrity Locker Entertainment Pvt. Ltd.	Expenses incurred for at Turf Club, Mumbai show	CL/201011/2310/DN/003 Dt. 23.10.2010	5,14,06,377
Celebrity Locker Entertainment Pvt. Ltd.	Expenses incurred for event held at Delhi	CL/201011/2909/003 Dt. 29.09.2010	34,96,835
	Total		10,54,29,109

13. On furnishing the said details, the assessee contended that the assessee entered into its first year of operation of the company where the first sale was made in the month of March, 2010. The Id. AR contended that the assessee had incurred huge losses declaring the same in its return of income. The Id. AR further contended that Celebrity Locker Entertainment Pvt. Ltd. was a third party vendor engaged to execute the advertisement and marketing campaigns of BSAS in India by conducting fashion shows in Delhi and Mumbai for introducing BSF and the brands promoted by it in the Indian market. The Id. AR stated that the assessee has incurred very meager expenses towards personnel cost of Rs.42,419/-, rental cost of Rs.5,75,875/- and the other substantial

expenditure pertaining to purchasing and marketing were borne out by BSAS during the commencement phase of the operation of the assessee. The assessee has merely acted as a channel for the payment to Celebrity Locker Entertainment Pvt. Ltd. by BSAS. The assessee in its submission has declared the increase in sales over the period was due to the efforts of BSAS through its manpower and cost incurred for such fashion shows. The results of the increase in sales shown by the assessee are tabulated hereunder:

Fashion shows were held in Delhi and Mumbai during the year directly through BSAS and helped BSF to establish itself in India. The result of these efforts is reflected in the sales achieved by BSF in subsequent years:

(INR in million)

F.Y.	Sales	OP	%age of OP/Sales
2011-12	965.20	62.19	6.44%
2012-13	1460.94	108.26	7.41%
2013-14	2787.54	167.53	6.01%
2014-15	4998.66	553.73	11.08%

14. The assessee claims the said expenses to be a pass through cost where the assessee was not involved in any of the activities and had no risks in whatsoever manner may be. The assessee denied any value addition to it by such services/costs. It has also contended that it did not have the necessary assets, infrastructure or technical personnel in conducting such fashion shows and the third party vendor namely Celebrity Locker Entertainment Pvt. Ltd. has obtained the arm's length price of the said expenditure incurred for the said fashion shows and reiterated that the cost reimbursement was only for the assistance render to its AE acting as a channel for making the payment. The assessee warranted no mark up on the said cost reimbursement and relied on various decisions in support of its contention.

15. The contention of the assessee that such expenses are revenue in nature as the apparel industry requires a continuous advertisement process incurred on yearly basis

was not accepted by the Id. TPO/A.O. who held that the same to be a capital expenditure and considered the following three comparable companies for determining the mark up of the international transaction:

	<i>Name of the comparable</i>	<i>OP/OC</i>
1	<i>Crystal Hues</i>	<i>10.46</i>
2	<i>Cyber Media Research & Services Ltd.</i>	<i>14.83</i>
3	<i>Quadrant Communication Ltd.</i>	<i>15.55</i>
	<i>Average</i>	<i>13.61</i>

16. The assessee objected to the said comparable companies on the ground that they are functionally different from the assessee company and that the assessee is into wholesale trading of fashion readymade garments and fashion accessories whereas the comparable companies are into marketing and advertisement service providers which is similar in nature with that of Celebrity Locker Entertainment Pvt. Ltd. The assessee had also objected to the function asset and risk analysis (FAR) which had a huge variation of 37.88% on the total operating cost compared to that of the assessee's which is around 0.04% with regard to the employee cost and the outsourced activity of the said comparables were 7.77% and in the case of the assessee the same was Nil as the said activities were performed by third party. The assessee also objected on the fixed assets of the assessee company and the comparable companies and also the risk parameters, which was wholly upon the Celebrity Locker Entertainment Pvt. Ltd. and the AE. The Id. TPO rejected the assessee's objection and held that these are not routine expenses and cannot be considered as pass through expenses as it does not relate to any business exigency like advertisement and sales promotion expenses. It was held that fashion show expenses are for long term brand building benefiting for over a period of years and without doubt has added value to the brand. The Id. TPO held that the comparable companies are

functionally comparable with that of the assessee's in terms of advertisement, marketing and brand promotion.

17. The Id. CIT(A) upheld the addition made by the Id. TPO/A.O. on the ground that the assessee in its profit and loss account for the impugned year has spent Rs.3,01,66,855/- on sales promotion of Rs.61,65,444/-, thereby rejecting the contention that the assessee was merely a distributor for the parent company (AE). The Id. CIT(A) further held that the assessee had incurred expenses in promoting and marketing products which was not reimbursed by AE. It was also held that the assessee had rendered some services to the AE by supervising the fashion show and monitoring the payments made to the Celebrity Locker Entertainment Pvt. Ltd. by BSAS and, therefore, markup was justifiable for building of brand value.

18. In the above factual matrix of the case, it is seen that the expenses incurred for conducting fashion show was reimbursed by the AE to the assessee on cost to cost basis for which the assessee has furnished the details of the invoices along with the dates claimed by it from the AE. The assessee being in the business of apparels and fashion accessories require advertisement and marketing especially when the impugned year was the first year of operation and conducting fashion shows is one of the mode of promoting the assessee's business which is a common trend in fashion industry. The Revenue's stand is that these are capital/long term expenditure having enduring benefit, whereas the assessee's contention is that it is a continuous process to advertise and market such products as and when there is a change in the fashion and trend of such garments. Further, the assessee states that the expenditure incurred for conducting fashion shows

was a mere reimbursement by the AE which had facilitated the assessee's business in India and it cannot no doubt be a service rendered by the assessee for its AE. The assessee has relied on the decision of the Tribunal in the case of *FedEx Express Transportation & Supply Chain Services India (P) Ltd. vs. Dy. CIT* [2015] 53 taxmann.com 138 (Mum)(Trib), which has relied on the decision of Hon'ble Delhi Court in the case of *Li and Fung India (P) Ltd. vs. CIT* [2014] 361 ITR 83 (Del) which has held that for applying TNMM method, the assessee's net profit margin out of the international transaction is to be the only criteria to be considered for the cost incurred by it and the same cannot be determined by any other third party vendors or the AE. It had also stated that Rule 10B(1)(e) does not pertain to the cost incurred by the third party or unrelated enterprises for the purpose of computing the assessee's net profit margin by applying TNMM method. It further reiterates that the determination of arm's length price (ALP for short) should be with regards to cost, assets, sales, etc. of the assessee and not the AE or the third party as in this case. The assessee has also relied on the decision of the Delhi Tribunal in the case of *CPA Global Services (P.) Ltd. vs. ITO* [2016] 76 taxmann.com 84 (Del) which has held that there can be no mark up on mere reimbursement of cost for the reason that there is no function that has been performed by the assessee resultantly with no profit margin. The assessee has also relied on the decision of the co-ordinate bench in the case of *Signity India (P) Ltd. vs. CIT & DCIT* [2022] 143 taxmann.com 267 (Mum-Trib).

19. In the present case in hand, it is observed that the ld. TPO has rejected the assessee's contention that these are mere pass through expenses and are not pertaining to

business exigency like advertisement, sales promotion expenses and has held that the sales cannot be directly related to the fashion show conducted on behalf of the AE. The Id. TPO further stated that these are long term brand building benefiting for over a period of time, thereby adding value to the brand. The Id. TPO has also accepted that the assessee bears no risk in such pass through services at para 7.2 of the Id. TPO's order. It is also pertinent to point out that the Id. TPO has considered the comparables which are into advertisement and marketing support services and are functionally distinct with that of the assessee. The Id. TPO has also not made a FAR analysis on the same as to the functions performed by the assessee, the assets and the risks for the purpose of determining the ALP of the said transaction. It is also to be noted that neither the assessee nor the Id. TPO/A.O. has dealt with the terms of the agreement between the assessee and its AE for carrying out the impugned transactions. We would place our reliance on the decision of the Delhi Tribunal in the case of *Dy. CIT vs. Cheil Communications India (P) Ltd.*[2011] 11 taxmann.com 205 (Del), which on identical facts has dealt with the OECD Guidelines in case where the assessee acts merely as an intermediary or an agent performing function for and on behalf of AE and is remunerated for the same by the AE on the basis of commission or charges on the expenses or cost incurred by the assessee for a performance of the function as intermediary rather than for the performance of the services themselves. The relevant extract of the OECD Guidelines herein under for ease of reference:

41. In the proposed revision of Chapter I-III of the Transfer Pricing Guidelines issued on 9th Sept., 2009 - 9th Jan., 2010 by OECD, it has been provided in para 2.134 as under :

"2.134 In applying a cost-based transactional net margin method, fully loaded costs are often used, including all the direct and indirect costs attributable to the activity or transaction, together with an appropriate allocation in respect of the overheads of the business. The question can arise whether and to what extent it is acceptable at arm's

length to treat a significant portion of the taxpayer's costs as pass-through costs to which no profit element is attributed (i.e. as costs which are potentially excludable from the denominator of the net profit margin indicator). This depends on the extent to which an independent party at arm's length would accept not to be remunerated on part of the expenses it incurs. The response should not be based on the classification of costs as 'internal' or 'external' costs, but rather on a comparability (including functional) analysis, and in particular on a determination of the value added by the tested party in relation to those costs."

42. Further, OECD in ITS 2009 Transfer Pricing Guidelines has laid down as under :

"7.36 When an AE is acting only as an agent or intermediary in the provision of services, it is important in applying the cost plus method that the return or mark-up is appropriate for the performance of an agency function rather than for the performance of the services themselves. In such a case, it may not be appropriate to determine arm's length pricing as a mark-up on the cost of the services but rather on the costs of the agency function itself or alternatively, depending on the type of comparable data being used, the mark-up on the cost of services should be lower than would be appropriate for the performance of the services themselves. For example, an AE may incur the costs of rendering advertising space on behalf of group members, costs that the group members would have incurred directly had they been independent. In such a case, it may well be appropriate to pass on these costs to the group recipients without a mark-up, and to apply a mark-up only to the costs incurred by the intermediary in performing its agency function."

20. From the above observation, it is evident that the ld. TPO should have determined the ALP as a mark up on the cost of the services rendered by the assessee in coordinating with the Celebrity Locker Entertainment Pvt. Ltd. which is limited to identifying and engaging the advertisement agency for the purpose of conducting the fashion show on behalf of the AE and not on the entire performance of service done by Celebrity Locker Entertainment Pvt. Ltd. The assessee even assuming to be an intermediary in performing the function on behalf of the AE should only be entitled to a mark up to the cost which is incurred by it as an intermediary between its AE and Celebrity Locker Entertainment Pvt. Ltd. The ld. TPO has not considered that the impugned transaction does not merely pertain to the assessee and the AE but is a performance done through a third party namely Celebrity Locker Entertainment Pvt. Ltd. We, therefore, deem it fit to restore the issue back to the file of the ld. TPO/A.O. for the purpose of characterization of the nature of function performed by the assessee in engaging Celebrity Locker Entertainment Pvt. Ltd.

for the purpose of conducting fashion shows on behalf of the AE, after duly considering the arrangement /agreement entered into by the assessee and its AE by duly selecting comparables which are functionally same as that of the assessee.

21. In the result, the appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open court on 25.07.2024

Sd/-

(Om Prakash Kant)
Accountant Member

Mumbai; Dated : 25.07.2024
Roshani, Sr. PS

Sd/-

(Kavitha Rajagopal)
Judicial Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai