

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "बी", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "B", CHANDIGARH

HEARING THROUGH: HYBRID MODE

श्री विक्रम सिंह यादव, लेखा सदस्य एवं श्री परेश म. जोशी, न्यायिक सदस्य
BEFORE: SHRI. VIKRAM SINGH YADAV, AM & SHRI. PARESH M. JOSHI, JM

आयकर अपील सं. / ITA NO. 165/Chd/2024
निर्धारण वर्ष / Assessment Year : 2014-15

Saraswati Agro Chemicals (India) Pvt. Ltd. Village Dao Majra, Tehsil Kharar Ditt: Mohali	बनाम	The DCIT Circle 6(1), Mohali
स्थायी लेखा सं. / PAN NO: AAFCS2290A		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारिती की ओर से/ Assessee by : Shri R.K. Gupta, C.A and
Shri Akshun Gupta, C.A
राजस्व की ओर से/ Revenue by : Shri Vivek Vardhan, JCIT, Sr. DR
सुनवाई की तारीख/ Date of Hearing : 09/09/2024
उदघोषणा की तारीख/ Date of Pronouncement : 15/10/2024

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

This is an appeal filed by the Assessee against the order of the Ld. CIT(A)/NFAC Delhi dt. 09/01/2024 pertaining to Assessment Year 2014-15.

2. In the present appeal, the Assessee has raised the following grounds of appeal:

"The order passed by worthy CIT (A), NFAC is erroneous in law, prejudicial, arbitrary and not in keeping with the facts of the case:

1. *On the facts and circumstances of the case, the worthy CIT (A), NFAC is not justified in confirming the addition of Rs. 89,22,420/- on account of difference in arm's length price being 10% of the aggregate value of Specified Domestic Transactions.*

2. *That the appellant craves leave to add, amend, alter, or substitute any or all grounds of appeal before or at the time of hearing."*

3. Briefly the facts of the case are that the assessee filed its return of income declaring total income of Rs. 12,18,99,100/- which was processed under section

143(1) and thereafter, the matter was selected for scrutiny and notice under section 143(2) and 142(1) were issued. Further during the course of assessment proceeding, the AO referred the matter to the Transfer Pricing Officer (TPO) to determine the Arms Length Price in respect of certain specified domestic transactions entered into by the assessee with its associate enterprises.

3.1 During the course of Transfer Pricing proceedings, there was no compliance on the part of the assessee and thereafter, after issuance of show cause, the TPO proceeded with the matter *ex parte qua* the assessee and held that the AO shall enhance the income of the tax payer by Rs. 89,22,420/- being 10% of the aggregate value of the specified domestic transactions amounting to Rs. 8,92,24,206/-. Thereafter, during the course of assessment proceeding, the AO again issued a show cause as to why the Transfer adjustment of Rs. 89,22,420/- be not made in its case and in absence of any plausible explanation submitted by the assessee, addition of Rs. 89,22,440/- was made in terms of adjustment so proposed by the TPO and assessment proceedings were completed after making certain other additions/disallowances vide order dt. 30/12/2017 passed under section 143(3) r.w.s 144C(1) of the Act.

4. Being aggrieved, the Assessee carried the matter in appeal before the Ld. CIT(A) who has sustained the said Transfer Pricing adjustment and the relevant findings of the Id CIT(A) read as under:

"6.2 In this grounds of appeal the appellant has contested the addition of Rs. 89,22,440/- on account of difference in Arms Length Price in specified domestic transactions. The appellant has challenged the applicability of the provisions of Section 92BA on account of the fact that the provisions of the transfer pricing do not apply to investment in equity shares amounting to Rs. 5,42,29,540/- and Dividend paid amounting to Rs. 1,19,94,666/- and if the above amounts are reduced from the aggregate value of specified domestic transactions of Rs. 8,92,24,206/-, the balance figure would be below Rs. 5 Crores required for applicability of provisions of section 92BA. Also, the appellant has contended that the payment of remuneration to director/relative of director of Rs. 2.32 Crores is at arm's length. The submission of the appellant has been extracted in the preceding para.

6.2.1 However, the AO has mentioned in the assessment order that the appellant has filed Form 3CEB in which the above specified domestic transactions are required to be specified. On perusal of Form 3CEB, the AO has observed that the appellant had reported total specified domestic transactions of Rs. 8,92,24,206/- (being sum of Rs. 5,40,29,540/- as Investment in equity shares, Rs. 2,32,00,000/- as Salary paid & Rs. 1,19,94,666/- as Dividend paid) with its associated enterprises during the year under consideration. Subsequently, the AO made a reference under section 92CA(1) to Transfer Pricing Officer to determine the Arm's Length Prices in respect of the above specified domestic transactions of Rs. 8,92,24,206/- entered into by the appellant with its associated enterprises during the year under consideration. In absence of any reply /justification/information with respect to the above specified domestic transactions during the course of transfer pricing proceedings, the Transfer Pricing Officer completed the transfer pricing proceedings ex-parte with an enhancement of 10% of the specified domestic transactions and accordingly, the AO enhanced the income of the appellant by Rs. 89,22,420/- being 10% of total specified domestic transactions of Rs. 8,92,24,206/- with its associated enterprises during the year under consideration.

6.2.2 I have carefully considered the relevant and material facts on record, in respect of this ground of appeal, as brought out in the assessment order and submissions made during appeal proceedings. As stated by the AO, while making a reference to the Transfer Pricing Officer the aggregate value of specified domestic transactions has been taken from the Form 3CEB filed by the appellant. Perusal of Form 3CEB, prescribed under Rule 10E, states as "Report from an accountant to be furnished under section 92E relating to International Transaction(s) and Specified domestic transaction(s). The particulars of the above transaction(s) required to be furnished under section 92E are given in the annexure to this Form. This report has to be signed by the Chartered Accountant. Part C of the above annexure to Form 3CEB, specifies the details in relation to the specified domestic transaction(s). The appellant has not controverted the above fact mentioned by the AO that reference has been made based on the details in Form 3CEB. Therefore, it is apparent that at the time of sending the reference to TPO, the aggregate value of specified domestic transaction(s) has been extracted from the Form 3CEB and its annexures filed by the appellant itself and the above report has been signed by the Chartered Accountant of the appellant-company. The appellant has also not submitted that it has filed any revised Form 3CEB. The appellant has also not challenged the same with the corrected facts or revised Form 3CEB, if any to be done, before the TPO or the AO. The claim of the appellant that the counsel of the appellant being son-in-law of the MD of the appellant-company did not intentionally provide the details to the AO/TPO due to some family disputes. But, the appellant has not filed any such complaint of professional mis-conduct against its counsel before the appropriate forum either for intentionally mis-reporting in Form 3CEB and its annexures or for intentionally not representing before the TPO etc. and no such fact have been brought to the notice of the AO or TPO or even during the appellate proceedings and therefore, no credence can be given to such plea taken. Under such facts, the reference by the AO to the TPO based on the quantum of specified domestic transaction(s) being more than Rs. 5 Crores as per the prescribed guidelines cannot be found fault with and hence, the challenge of the appellant to the same cannot be entertained. Further, the appellant has also not filed any submission before the TPO/AO and has not filed copy of such submission filed, if any, in the appellate proceedings. Thus the appellant did not

demonstrate before the TPO/AO that the above transactions are at arm's length. During the appellate proceedings also, the appellant has not filed any additional evidence under Rule-46A to substantiate its contention that the above payments are at arm's length, in absence of which the challenge of the appellant is dismissed. As such, Grounds on this issue are dismissed."

5. Against the aforesaid findings and directions of the Ld. CIT(A), the assessee is in appeal before us.

6. The Ld. AR submitted that during the course of assessment proceeding, the AO referred the matter to the TPO in respect of following alleged specified transactions namely investment in equity share amounting to Rs. 5,40,29,540/-, salary amounting to Rs. 2,32,00,000/- and dividend amounting to Rs. 1,19,94,666/- totaling to Rs. 8,92,24,206/-.

6.1 It was submitted that though the assessee could not attend to the proceedings before the TPO and thereafter before the AO, however during the course of appellate proceedings before the Ld. CIT(A), he was apprised that investment in equity shares as well as dividend paid are not part of expenditures to be examined u/s 92BA(i) and rest of the expenditure of salary amounting to Rs.2,32,00,000/- is less than Rs.5 crore hence these transactions are not attracted by provisions of Section 92BA of the Income Tax Act, 1961. Therefore, reference to TPO is void ab initio. Without prejudice to this, it was also brought to the knowledge of Ld CIT(A) that Finance Act, 2017 has omitted clause (i) of section 92BA which implies and supported with the help of case laws that it stands deleted since inception. The Ld CIT(A) was also apprised that same Ld. A.O under similar facts in subsequent A.Y 2015-16 have neither made any reference to TPO nor have made any addition in this regard. The CIT(A) has taken cognisance of all these submissions in his order at pages 6 to 12 in para 6.1. However, while adjudicating this ground of appeal, the Ld CIT(A) have relied on Ld. AO's order that in Form 3CEB, the appellant had reported investment in equity and dividend paid as part of specified domestic transactions. Further CIT(A) has stated that AO has held that assessee has not given any

reply/justification before TPO and in absence of this, TPO has completed the proceedings ex-parte with an enhancement of 10% of Rs.8,92,24,206 i.e Rs.89,22,420 (para 6.2.1 of CIT(A)'s order). It was submitted that Para 6.2.2 of CIT(A)'s order is very relevant where he has held that in view of reference of specified domestic transactions in 3CEB by CA of appellant this version of appellant that investment in equity shares & dividend paid are not an expenditure cannot be considered by him. Further, as per CIT (A), non-attendance of then counsel who is son-in-law of CMD of appellant company & because of dispute in family, he has not attended proceedings deliberately before TPO is not acceptable as this matter was never raised before Ld. TPO or Ld. A.O. The Ld CIT(A) held that reference to Ld. TPO by Ld. A.O cannot be found faulty and challenge of appellant cannot be entertained. Further as per Ld CIT(A) for any such ground, the appellant should have resorted to Rule 46-A for additional evidence that above payments are at arm's length in absence of which the challenge of appellant was dismissed.

6.2 It was submitted that in Form 3CEB, only those specified Domestic Transactions are to be reported which are in nature of any expenditure. Neither investment in equity shares nor dividend paid is expenditure of appellant. Neither the Ld. A.O nor the Ld. TPO nor even Ld CIT(A) should take benefit of appellant's mistake. Reliance was placed on CBDT Circular No. 14 (XL-35), dated 11.04.1955 wherein it has been held that "That officers of Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard, the officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him". In this case, investment in equity shares is an item of Balance Sheet on asset side and not claimed as an expense. Similarly, the dividend paid is an appropriation of profits and not claimed as expenditure. The copy of Audited Annual Accounts for relevant

assessment year is placed at page 17-52 of Paper Book and a perusal thereof reveals that investment in equity shares & dividend paid being reported as an expense covered u/s 40A(2)(b) in Form 3CEB is a mistake apparent from records. The Ld. A.O as well as TPO & Ld CIT(A) should not get influenced by this mistake. An item of Balance Sheet when not claimed as an expense then how 10% of it can be adjusted as disallowed and added to income. In fact, issuance/investment of shares is undoubtedly on capital account and thus cannot be construed as income/expense and therefore not subject to transfer pricing provisions. Similarly dividend paid is not an item of expense but appropriation of profits. Thus, dividends are not subject to arm's length pricing principles. Hence Ld. TPO, Ld. A.O & Worthy CIT(A) are not justified to hold that once these items are reported in Form 3CEB as specified Domestic Transactions being any expenditure in respect of which payment has been made or is to be made to any person referred to in section 40A(2)(b) of the Income Tax Act, 1961 then these are to be construed as Specified Domestic Transactions and reference to TPO and subsequent adjustment is justified. It was submitted that anything emanating from assessment records can be considered at any stage by Ld. A.O or Worthy CIT(A) when question of law is involved whether it is right or wrong. Both Ld. A.O and Worthy CIT(A) should have guided appellant in order to make lawfully a correct assessment.

6.3 It was further submitted that under similar facts and circumstances, the same Ld. Assessing officer in appellant's own case in A.Y 2015-16 (placed at 53-63 of Paper Book) has not referred the case to TPO. Kind attention is drawn to page 11 of Worthy CIT(A)'s order which is reproduced as under:

"Kindly see the assessment order passed by the Ld. A.O. in the following assessment year 2015-16 (copy attached as an Annexure 'B'). The perusal of the order reveals that neither the Ld. A.O has referred the case to Worthy TPO for specified domestic transactions nor she has disallowed any part of the remuneration to directors/relatives by invoking provisions of sec.40(A)(2)(b) of the Income Tax Act, 1961. When such remuneration is justified in A.Y 2015-16 then

under similar facts how it can be disallowed in the assessment year 2014-15. The turnover of both the years & net profit is detailed as under:

	A.Y. 2014-15 (Rs)	A.Y. 2015-16 (Rs)
Turnover	1018,91,39,652	1003,81,48,697
Net profit	18,27,05,739	17,97,26,582

Which are almost same and no change"

6.4 It was submitted that the Id CIT(A) has not uttered a single word to this argument of appellant and has confirmed the addition. Even the Id CIT(A) has remained silent on this submission of appellant discussed at page 8-9-10 of CIT(A)'s order wherein it was submitted as under:

"The Finance Act of 2017 has omitted clause (i) of section 92BA, with effect from 1st April 2017. Meaning thereby, since the Finance Act, 2017 omitted Section 92BA (i), the impugned transactions would not fall under the definition of a 'specified domestic transactions' and would accordingly be outside the purview of transfer pricing provisions."

6.5 It was further submitted that pursuant to the aforesaid amendment, Section 92 BA(i) should be deemed to not to be on the statute since the beginning and reliance was placed on Bangalore Bench decision in case of Texport Overseas Private Limited (*ITA No. 1722/Bang/2017 dated 22/12/2017*) wherein it was held that since clause (i) of section 92BA of the Income Tax Act, 1961 was omitted by the Finance Act, 2017, it is deemed that the clause was never part of IT Act which has since been affirmed by the Hon'ble Karnataka High Court (*ITA No. 392/2018 along with ITA No. 170/2019 dated 12/12/2019*).

6.6 It was further submitted that in subsequent assessment year 2016-17, similar specified domestic transactions were referred to TPO and since proceedings before TPO were attended & all the necessary details were filed, the Ld. TPO has held that "no adverse inference is drawn in respect of the price of the specified Domestic Transactions". It was submitted that although each year is a separate year from other but when facts & circumstances are similar, then consistency should be followed. In the light of aforesaid submissions, it was submitted that the transfer pricing adjustment so made by the AO and

confirmed by the Id CIT(A) be set-aside and necessary relief be provided to the assessee.

7. Per contra, the Ld. DR submitted that at the time of sending the reference to TPO, the aggregate value of specified domestic transaction(s) has been extracted from the Form 3CEB and its annexures filed by the appellant itself and the above report has been signed by the Chartered Accountant of the appellant-company. The appellant has also not submitted that it has filed any revised Form 3CEB. The appellant has also not challenged the same with the corrected facts or revised Form 3CEB, if any before the TPO or the AO. Under such facts, the reference by the AO to the TPO based on the quantum of specified domestic transaction(s) being more than Rs. 5 Crores as per the prescribed guidelines cannot be found fault with and hence, the challenge of the appellant to the same cannot be entertained and rightly rejected by the Id CIT(A). Further, the appellant has also not filed any submission before the TPO/AO and has not filed copy of such submission filed, if any, in the appellate proceedings. Thus the appellant did not demonstrate before the TPO/AO that the above transactions are at arm's length. During the appellate proceedings also, the appellant has not filed any additional evidence under Rule-46A to substantiate its contention that the above payments are at arm's length, in absence of which the transfer pricing adjustment has rightly been confirmed by the Id CIT(A). Further, he relied on the order of the lower authorities.

8. We have heard the rival contentions and perused the material available on record. The transactions under consideration are investment in equity shares, dividend paid, and salary paid to Directors by the assessee company. As per Section 92BA, the transaction by way of investment in equity shares and dividend paid doesn't fall in the definition of "specified domestic transactions" and thus, there is no legal basis for aggregation thereof for the purposes of making reference to TPO and any subsequent transfer pricing adjustment in

respect of these transactions. No doubt, Form 3CEB is disclosure so made by the assessee and but at the same time, where the nature of transactions are crystal clear and there is no ambiguity or complexity involved and on face of it, they doesn't fall in the definition of specified domestic transactions as so defined, we donot find any justifiable and legal basis for the AO making any reference to TPO. There has to some application of mind by the AO and prima facie examination which has not happened in the instant case. Further, even the TPO has failed to take cognizance thereof and has proposed an adjustment and that too, adhoc at the rate of 10% of value of investment in equity shares and dividend paid and such action of the TPO deserve to be set-aside. The Id CIT(A) has also failed to appreciate the same and has summarily upheld the findings of the AO/TPO.

9. The transaction relates to salary paid to directors was hitherto covered under clause (i) of Section 92BA of the Act, however the quantum of such salary paid during the financial year relevant to impugned assessment year 2014-15 is Rs 2.32 crores which is less than the prescribed threshold of Rs.5 crore hence, the reference thereof and subsequent transfer pricing adjustment has no legal basis. Further, the said clause has since been deleted by the Finance Act, 2017 and it has been held by the Hon'ble Karnataka High Court in case of PCIT vs Texport Overseas Pvt Ltd (*Supra*), while affirming the decision of the Tribunal, that where clause (i) of Section 92BA has been omitted by the Finance Act 2017 with effect from 1/04/2017 from the statue, the resultant effect is that it had never been passed and to be considered as a law never been existed and the decision taken by the AO under the effect of section 92BA and reference made to TPO under Section 92CA was held to be invalid and bad in law. In the instant case, following the same, the reference to TPO deserves to be set-aside. Further, it is noted that the TPO has proposed an adhoc adjustment of 10% of such expenses without any reasoning and basis of arriving at the said findings as to how the same doesn't meet the criteria of arm's length. In view of the same and

considering the entirety of facts and circumstances of the case, we find that it is a case which has no legal legs to stand and the reference to TPO and consequent adjustment so made by the TPO deserve to be set-aside.

10. In the result, the transfer pricing adjustment so made by the AO and confirmed by the Id CIT(A) amounting to Rs 89,22,420/- is hereby set-aside and the ground of appeal is allowed.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 15/10/2024

Sd/-

परेश म. जोशी
(PARESH M. JOSHI)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

विक्रम सिंह यादव
(VIKRAM SINGH YADAV)
लेखा सदस्य/ ACCOUNTANT MEMBER

AG

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar