

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1" NEW DELHI
BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA: JUDICIAL MEMBER

ACIT Circle 5(1),
New Delhi.

ITA no. 4284/Del/2010
Asstt. Yr: 2005-06
Vs. M/s Kamla Dials and Devices Ltd.,
Kamla Centre, SCO 88-89, Sector 8-C,
Chandigarh-160018.
PAN: AAACK 1929 M

AND

ITA no. 5567/Del/2010
Asstt. Yr: 2006-07

M/s Kamla Dials and Devices Ltd., Vs. ACIT Circle 5(1),
Kamla Centre, SCO 88-89, Sector 8-C, New Delhi.
Chandigarh-160018.

(Appellant)

(Respondent)

Assessee by : Shri Ajay Vohra Sr. Adv.
Shri Ramit Katyal CA
Revenue by : Shri Amrendra Kumar CIT(DR)

Date of hearing : 23/05/2016.
Date of order : 30/05/2016.

ORDER

PER S.V. MEHROTRA, A.M:

The revenue is in appeal against CIT(A)'s order dated 8.7.2010 in appeal no. 44/2008-09/CIT(A)-XX relating to AY 2005-06 and the assessee has preferred appeal against assessment order dated 18.10.2010 passed by the AO u/s 143(3) pursuant to DRP directions u/s 144C relating to AY 2006-07. Both these appeals

were heard together and are being disposed of by this composite order for the sake of convenience.

2. Brief facts of the case for AY 2005-06 are that the assessee company dealt with the manufacturing of precision parts – dials for wrist watches, watch hands, press tools etc. The assessee had filed its return of income declaring income of Rs. 2,68,67,560/-. As the assessee had entered into international transactions with its AE, therefore, the matter was referred to the TPO by the AO, who proposed an increase of Rs. 2,50,54,274/- in the income of the assessee. The AO has pointed out that Hon'ble Delhi High Court had quashed the order of TPO on 19.12.2008 and as per the directions the order of TPO was again passed on 26.12.2008 and the same increase in the total income was made. Ld. CIT(A) while partly allowing the assessee's appeal, deleted the addition made on account of TP adjustment. Being aggrieved, the department is in appeal before us and has taken following grounds of appeal:

“1. On the facts and in the circumstances of the case and in law, the learned CIT(Appeals), New Delhi has erred in deleting the addition of Rs. 2,50,54,274/- made by the AO on account of TPO adjustments.

2. The Ld. CIT(A) erred on facts by applying the TNMM method as against the CUP method correctly adopted by the TPO & the AO as per OECD guidelines. The ld. CIT(A) has also ignored the findings recorded by the TPO.”

3. At the outset ld senior counsel for the assessee filed before us an application for admission of additional evidence for A.Ys. 2005-06 and 2006-07 in terms of Rule 29 of the ITAT Rules, 1963, which is in the form of affidavit sworn in by Ernst Huber son of Otto Huber, resident of CH-9053 Teufen. Ld. senior counsel clarified that though ld. CIT(A) has deleted

the adjustment directed by Id. TPO, but in subsequent year i.e. AY 2006-0, Id. DRP has confirmed the adjustment made by Id. TPO on the issue of ALP of the commission payment by assessee to its AE being determined at Nil. He submitted that the admission of this affidavit for both the years under consideration is necessary in order to establish the services rendered by AE in connection with the exports made by assessee.

4. Ld. CIT(DR) objected to the admission of additional evidence, firstly, on the ground that assessee has not given any reason as to why this affidavit could not be produced before Id. TPO and, secondly, on the ground that since the affidavit is of a non-resident, therefore, it should have been sworn before Indian Consular.

5. Before we proceed to decide the admission of additional evidence, we may point out that as far as the second objection raised by Id. CIT(DR) is concerned, Id. counsel has filed before us copy of Hague Convention dated 5.10.1961, wherein 12th convention was arrived at between signatory states for abolishing the requirement of legalization for foreign public documents. The preamble of the said convention reads as under:

*“The States signatory to the present Convention,
Desiring to abolish the requirement of diplomatic or consular
legalization for foreign public documents,
Have resolved to conclude a Convention to this effect and have
agreed upon the following provisions:”*

Article 1 of the said convention reads as under:-

*The present Convention shall apply to public documents which
have been executed in the territory of one Contracting State
and which have to be produced in the territory of another
Contracting State. For the purposes of the present Convention,
the following are deemed to be public documents:*

a) *documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("huissier de justice");* "-

.....

c) *notarial acts;*"

6. Ld. counsel has also filed a note on the said Article which is reproduced hereunder:

"Purpose of the Convention

The Apostille Convention facilitates the circulation of public documents executed in one State party to the Convention and to be produced in another State party to the Convention." It does so by replacing the cumbersome and often costly formalities of a full legalisation process (chain certification) with the mere issuance of an Apostille (also called Apostille Certificate or Certificate). The Convention has also proven to be very useful for States that do not require foreign public documents to be legalised or that do not know the concept of legalisation in their domestic law: the citizens in these States enjoy the benefits of the Convention whenever they intend to produce a domestic public document in another State party which, for its part, requires authentication of the document concerned.

Public documents

The Convention applies only to public documents. These are documents emanating from an authority or official connected with a court or tribunal of the State (including documents issued by an administrative, constitutional or ecclesiastical court or tribunal, a public prosecutor, a clerk or a process-server); administrative documents; notarial acts; and official certificates which are placed on documents signed by persons

in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures. The main examples of public documents for which Apostilles are issue in practice include birth, marriage and death certificates; extracts from commercial registers and other registers; patents; court rulings; notarial acts and notarial attestations of signatures; academic diplomas issued by public institutions; etc. Apostilles may also be issued for a certified copy of a public document. On the other hand, the Convention neither applies to documents executed by diplomatic or consular agents nor to administrative documents dealing directly with commercial or customs operations (this latter exception is to be interpreted narrowly).

7. After going through the aforementioned contents of Convention and the text on the same, we are of the opinion that the affidavit filed by assessee is an admissible evidence and can be taken note of as it is in terms of the requirements of Convention 12 noted above.

8. Now coming to the merits of the issue, brief facts as obtaining in A.Y. 2005-06 are as under:

9. In the TPO's order profile of assessee has been described as under:-

“PROFILE OF THE GROUP COMPANY AND ASSESSEE:

M/S Kamla Dials & Devices Limited (Hereinafter referred to as "KDDL"), the Assessee incorporated under the Companies Act, 1956 is engaged in the Business of manufacturing precision parts, dials for wrist watches, watch hands etc..KDDL has its headquarter at Chandigarh and manufacturing units at Parwanoo, Derabasi and Bangalore. Assessee is a public limited company. 43% equity stake of the company is held by Mr. R. K. Saboo and his family and the balance equity stake is held by public in general. The associated enterprise, M/s Taratec SA (TTCH) is a company incorporated in Switzerland,

wherein KDDL holds 34% equity stake. Taratec SA provides assistance in the form of soliciting business, supplying certain raw material and purchasing certain finished goods from KDDL for resale. Taratec SA acts as an agent catering to the requirements of KDDL for purchase of raw material/ components and for export sales of finished goods.”

10. The assessee had undertaken following international transactions:

S.No.	International Transactions	Method used to justify the arms' length price	Value (in Rs.)
1	Purchase/import of raw material.	TNMM	2,932,229
2	Sale of finished goods	TNMM	55,961,550
3	Commission provided to AE	TNMM	15,944,254
4	Handling charges provided to AE	CUP	2,214,955
5	Payment of interest on loan	CUP	110,379

11. The assessee in its TP study had applied TNMM method as the most appropriate method for bench marking the international transaction viz. purchase of raw-material, sale of finished goods, payment of commission, wherein Taratec SA acted as a mere intermediary reseller or agent. As regards other transactions, the assessee had applied CUP as the most appropriate method for the bench marking.

12. The operating results of the assessee were computed at 11.40% which was greater than 0.189% of the trading transactions with unrelated parties. The operating results of the assessee were computed as follows:

Profit & Loss Account	Year ended March 31,2005
PBT	3,91,59,680
Add: Interest	1,91,60,811
Operating profit	5,83,20,491
Operating Income	51,12,77,545
OP/Sales(%)	11.40%

13. For application of TNMM, the assessee had identified 4 comparable companies engaged in the business of manufacturing precision parts and considered operating profit margin (OP/sales) as under:

Sr. No.	Company name	Year	OP/ Sales %	Economic Activity
1.	Rambal Ltd.	20503	1.127	Precision Turned Components
2.	Precision Fasteners Ltd.	200409	-9.951	Precision screws, nuts etc.
3.	VST Tillers Tractors Ltd.	200503	7.500	Precision components
4.	Bombay Burmah Trdg. Corpn. Ltd.	200503	0.569	Precision Balances, Springs
	Average PLI		-0.189	

14. Accordingly, assessee concluded that the transactions run by the assessee with the AE were at arm's length price.

15. Ld. TPO rejected the TNMM and applied CUP method observing that *“the AE is acting mere routing agency and just acting as facilitating mechanism. Thus, the application of TNMM method as has been advanced by the assessee cannot not be accepted”*. The TPO held that the assessee is selling goods on huge discounts to its AE as compared with unrelated customers. Thus, the correct transfer pricing approach is to examine the international transactions from the perspective of application of CUP

method". Ld. TPO also rejected the comparable companies, selected by assessee, for the application of TNMM on the ground that they were not engaged in manufacturing of watch dials and watch components and they were having negative average PLI, whereas the assessee was a profit making company. The TPO determined the AOP as under:

Summary of ALP calculation:

(A). ALP of Sale of finished goods	
Sale of finished goods	Rs. 55,961,550/-
ALP of transaction	Rs. 65,071,570/-
Difference as above (a)	Rs. 9,110,020/-
B) ALP of Commission paid to AE	
Commission paid to AE	Rs. 15,944,254/-
ALP on commission	NIL
Difference as above(b)	Rs. 15,944,254/-
Total adjustment to be made to the income of The Assessee(a+b)	Rs. 25,054,274/-

16. At present as we are deciding on the admissibility of additional evidence, we are not going into details of various issues and are confining ourselves to the issue of commission paid by assessee, the ALP of which has been determined at NIL by Id. TPO. The facts in this regard are that during the FY 2004-05, the assessee had purchased brass circles/ blanks for manufacture of watch dials etc. from Taratec SA and also sold watch dials etc. to the same AE. The assessee had also sold goods to unrelated customers. The assessee's claim was that the sale of goods to unrelated customers was through Taratec SA on which commission was paid to the AE. Thus, the assessee was involved in both direct and indirect sale of finished goods, such as watch dials, strips and other parts of watches to its AE as well as unrelated customers in Switzerland. Total sales aggregating to Rs. 559.61 lakhs in value were directly made to Taratec SA and Rs. 1088.68

lakhs in value were sold to unrelated customers through Taratec SA. The assessee's claim was that it was in the business of watch components and focusing on export to Switzerland and European market along with the association of Taratec SA. The assessee claimed that Taratec SA provided the following services to the assessee:

- i. Developing new customers and promotion of sales for the assessee in Switzerland.
- ii. Procuring orders from Swiss customers for the assessee.
- iii. Facilitate clearance and delivery of export shipment for Swiss customers.
- iv. Arranging export realization for the assessee.
- v. Procurement of tools, components or any consumables to meet the emergency of the assessee production.
- vi. Screening the dials at their office for quality as per customer order.
- vii. Handling customer complaints.

17. Thus, primarily assessee's claim was that Taratec SA was an intermediary for it for sale of its products to unrelated customers in Switzerland. Ld. TPO examined the marketing and Project Management agreement between Taratec SA and assessee executed on 12.2.2004 and after considering the various covenants of the agreements observed that this agreement entitled the Taratec SA for a commission varying from 12% to 16% on invoiced value of customers other than Taratec SA. Further, Taratec SA was also entitled for purchase from assessee on his own account for resale for which it was getting discount varying from 12% to 16%. Ld. TPO rejected the assessee's claim in regard to payment of commissions, inter alia, observing as under:

“The assessee has failed to substantiate any reason or basis for making payment of huge commission varying from 12% to 16% on such sales made to unrelated parties as compared to

functions performed, assets employed and risks assumed by AE in relation to sale of products of KDDL to unrelated parties in Swiss market.”

18. Thus, primarily Id. TPO rejected the assessee's claim as it failed to substantiate its claim of services being rendered by AE for which commission was paid. Id. CIT(A) has allowed the assessee's claim after considering the entire facts. The assessee is filing the present affidavit of the Director of Company to corroborate its claim regarding services being rendered by Taratec SA.

19. Id. counsel has relied on the order of Tribunal Delhi Bench "I" dated 5.7.2013 rendered in ITA nos. 5420/Del/2011 and 6057/Del/2012 in the case of Hughes Systique India Pvt. Ltd., wherein the Tribunal after detailed consideration of facts admitted the additional evidence.

20. After going through the decision in the case of Hughes Systique (supra), we are of the opinion that it would be in the interest of justice to admit the additional evidence filed by assessee in the form of affidavit because this affidavit has come in possession of assessee after the proceedings were over for both the assessment years in question. We, therefore, set aside the order of Id. CIT(A) for AY 2005-06 and restore the matter to the file of Id. AO/TPO to decide the ALP of the commission paid by assessee after taking into consideration the affidavit of Ernst Huber, Director of Taratec SA. Accordingly, department's appeal for AY 2005-06 stands allowed for statistical purposes.

21. Now coming to the assessee's appeal for AY 2006-07, as the facts are identical except that Id. DRP has decided the issue against assessee, we admit the additional evidence filed by assessee and restore the matter to the file of Id. AO/ TPO to decide in terms of our observations for A.Y. 2005-06.

22. The grounds relating to TP issues raised by assessee are allowed for statistical purposes.

23. As far as corporate issues raised by the assessee in ground nos. 3 & 4 are concerned, the same are also restored back to the file of AO to decide the same afresh after providing reasonable opportunity of being heard to the assessee, in accordance with law.

24. We may clarify that as far as the issue relating to the disallowance u/s 14A is concerned, for AY 2006-07, under consideration, Rule 8D was not applicable. The issue relating to 43B deduction will also be examined afresh by AO.

25. In the result, both the appeals filed by the assessee as well as the department stand allowed for statistical purposes.

Order pronouncement in open court on 30/05/2016.

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 30/05/2016.

MP

Copy of order to:

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.

Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER