आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA

श्री संजय गर्ग न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष

[Before Shri Sanjay Garg, Judicial Member & Shri Rajesh Kumar, Accountant Member]

I.T.A. No. 260/Kol/2020
Assessment Year : 2005-06

DCIT, CC-2(4), Kolkata	Vs.	M/s Global Wool Alliance Pvt. Ltd. (PAN: AACM 4121 H)
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	25.08.2022
Date of Pronouncement / आदेश उद्घोषणा की तिथि	02.11.2022
For the Appellant / निर्धारिती की ओर से	Shri Akkal Dudhwewala, FCA
For the Respondent / राजस्व की ओर से	Smt. Ranu Biswas, Addl. CITDR

ORDER / आदेश

Per Rajesh Kumar, AM:

This appeal is preferred by the revenue against the order of the Ld. Commissioner of Income Tax(Appeals)-22, Kolkata [hereinafter referred to as 'Ld. CIT(A)'] dated 29.11.2019 for the assessment year 2005-06.

2. Though the Registry has pointed out that the appeal is barred by limitation, however, in view of the decision of the Hon'ble Supreme Court in Miscellaneous Application No. 665 of 2021 in SMW(C) No. 3 of 2020, the period of filing appeal during the COVID-19 pandemic is to be excluded for the purpose of counting the

limitation period. In view of this, the appeal is treated as filed within the limitation period.

3. The grounds of appeal raised by the revenue are reproduced as under:

1. That on the facts and circumstances of the cases and in law the Ld. CIT(A) has erred in deleting the arm's length price adjustment of Rs. 4,75,00,000/- made by the AO/TPO on account of purchase of greasy wool from its AE by the assessee from its associated enterprise by the assessee.

2. That on the facts and circumstances of the cases and in law, the Ld. CIT(A) has erred in considering internal CUP as the most appropriate method ignoring the fact that CUP method is used in exact product similarly with AEs and non-AEs but in case of assessee, the product varieties/specifications are different and not comparable under CUP.

3. That on the facts and circumstances of the cases and in law, the Ld. CIT(A) has erred in not appreciating the fact that where prices varies on account of various issues i.e. timing of transaction, volume of order and geographical location, then CUP method cannot be applied and it is most appropriate to apply TNMM method.

4. That on the facts and circumstances of the cases and in law, the Ld. CIT(A) has failed to bring on record any cogent reason and rational for accepting CUP method as the most appropriate method in assessee's case and why TNMM which considered functionality at a broader level is not applicable for bench marking.

5. That on the facts and circumstances of the cases and in law, the Ld. CIT(A) has erred in deleting addition of Rs. 24,06,174/- under the head "Foreign Exchange Fluctuation Loss" by not considering the Board's Instruction No. 0-3/2010 dated 23.03.2010, stating that the Marked to Market Loss is a notional loss as no sale/conclusion/settlement of contract has taken place. In the present case, no sale or settlement has actually taken place and notional loss on this Marked to Market basis would be contingent in nature, hence cannot be allowed.

6. That on the facts and circumstances of the cases and in law, the Ld. CIT(A) has erred to consider the decisive enquiry made during the assessment proceeding and failure on the part of the assessee to justify and proof of its claim of purchase from bogus non-existent parties to the tune of Rs. 14,44,089/-.

4. Issue raised in ground nos. 1 to 4 is in respect of transfer pricing issue whereby the revenue has assailed the order of Ld. CIT(A) deleting the arm's length price adjustment of Rs. 4,75,00,000/- as made by the AO/TPO on account of purchase of greasy wool from its AE by following internal CUP method as the most appropriate method whereas according to TPO/AO the most appropriate method is TNMM method.

5. Facts in brief are that the assessee has entered into international transactions with its AE abroad during the year and accordingly a reference was made by the AO during assessment proceedings u/s 92CA(3) of the Act to TPO for determining arm's length price of these specified transactions with the AE. The assessee furnished tax audit report in Form 3CEB reporting the said transactions during the course of proceedings before the TPO. The assessee submitted that it followed comparable uncontrolled price method for determination of ALP in respect of purchase greasy wool from AE which according to TPO was not appropriate method for the reasons that purchase of greasy wool from AE and external third party were not fully comparable and the period in which the greasy wool was purchased from AE was significantly different from purchases from external third parties**.** The assessee filed written submissions before the TPO however according to TPO the contentions of the assessee are not tenable and he after rejecting the same applied TNMM method after considering a set of 12 comparables thereby proposing adjustment of Rs. 4,75,00,000/- to the international transactions to arrive at the ALP vide order dated 24.10.2018. Accordingly the AO framed the assessment by adding this amount.

6. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee by observing and holding as under:

> *"10. FINDINGS & DECISION: [Ground Nos. 4 to 7]*
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> *1. I have carefully considered the submissions of the Id. AR of the appellant in the backdrop of the observations and; the findings of the Ld. TPO recommending the adjustment of Rs.4,75,00,000/-. The appellant company is principally engaged in the business of processing raw wool, greasy wool, polyester into wool tops,woolen fabrics etc. On examination of Form 3CEB and the modus operandi of the business, I find that the appellant would import greasy*

wool from its AE, M/s EAC and other unrelated parties which would be processed at its manufacturing facility in India and the final product i.e. the woolen yarn and fabrics would be sold to its AEs, M/s GTM and M/s EAC and also unrelated independent parties. Both the international transactions involving import of raw materials from AEs as well as export of woolen yarn and fabrics to AEs were reported u/s 92B of the Act and benchmarked applying internalCUP Method. According to the appellant it had reliable data .available with regard to the similar transactions with unrelated parties and hence the Comparable Uncontrolled Price Method ('CUP Method') was the most appropriate method.

2. Before the Ld. TPO and in the proceedings u/s 92CA(3), the appellant had furnished the transfer pricing audit report along with the TPSR. The appellant explained that all the transactions entered into with AEs i.e. purchase of greasy wool and sale of woolen yarn & fabrics were benchmarked, by applying internal CUP Method. Before the Ld. TPO, the appellant furnished relevant details, data & invoices to substantiate that the; transaction in question was at arm's length. The Ld. TPO in his initial SCN dated 06.10.2008 objected to the application of CUP Method in respect of both the aforementioned set of international transactions on the premise that the items purchased from AEs & non-AEs and the items sold to AEs & Non-AEs were not identical as there was difference in 'microns' and also the timing of purchases & safes differed significantly. It is noted that the appellant objected to both these contentions put forth by the ld. TPO. It was pointed out that the absolutely-exact product comparability was not required under CUP Method. It was further substantiated that the appellant had considered weighted average price which also averaged the micron content in the purchases & sales from AEs & non-AEs and showed that the average price and average micron content was fully comparable. The appellant further explained that timing differences did not materially affect the prices and moreover the fact that the appellant had adopted yearly average price, the timing difference got eliminated. The Ld. TPO although accepted the explanations furnished by the appellant in respect of its sale of woolen yarn & fabrics to AEs but singled out the purchases of greasy wool from its AE. The Ld. TPO thereafter summarily rejected the TPSR of the appellant and proceeded to benchmark the transactions by applying external TNMM Method. The Ld. TPO identified 12 comparables and ascertained the PLI, viz. OP/OR, at 3.38% which; according to him fell outside the tolerance range of +/-5%. The Ld Rs.4,75,00,000/-.*

3. In the present appellate proceedings, the appellant has strenuously assailed the findings given by the Ld. TPO for rejecting the TPSR in respect of the purchases made from AEs. The Ld. AR of the appellant has pointed out the factual infirmities & errors in the averments made by the Ld. TPO to reject the TPSR and substantiated that the internal CUP was the most appropriate method. The Ld. AR referring to the comparative statements & details of invoices involving purchases by the appellant from AEs and non-AEs claimed that the transaction was at arm's length. The Ld. AR further argued that this manner and method of benchmarking under internal CUP Method was followed by the appellant in the preceding years as well and in all the transfer pricing assessments framed u/s 92CA(3) for AYs 2002-03 to 2004-05, the Id. TPO had accepted CUP Method to be most appropriate method and the comparability analysis using the weighted average price method. It was further explained that even the application of external TNMM by the Ld. TPO suffered from serious defects & infirmities. It was explained that even if TNMM Method is considered To be most appropriate method and is applied in the right perspective; then also the transactions of the eligible unit would be found to be at arm's length. In support of these contentions the Ld. AR has filed several details &calculations which are forming part of the paperbook.

4. At the onset I find sufficient merit in the Ld. AR's submission that the findings given by the Ld. TPO for rejectingthe TPSR was factually wrong. It is noted that the Ld. TPO

proceeded on the wrong factual premise that the CUP comparability analysis performed by the appellant, was not appropriate. Instead it is noted that the raw materials procured by the appellant from external parties was the same product i.e. greasy wool. Moreover-the average micron content in purchases from AEs was 21.36 in comparison to 21.76 found in purchases from non-AEs. Whereas the weighted average purchase price from AEs was Rs.280.66 in comparison to weighted average price of Rs.273.T2 from non-AEs and hence the purchases from AE fell with the tolerance range of +/-5% in comparison with purchases from non-AEs. I also find sufficient merit in the Id. AR's contention that the TPO's action of cherry picking one instance out of several instances of purchases to disprove the application of CUP was untenable. Having regard to the nature of product, I am of the considered view that minor variations in micron content did not have material impact on the price of greasy wool. I thus hold that the Ld. TPO proceeded to reject the CUP Methodology followed by the appellant on wrong assumption of facts and erroneously rejected the TPSR by observingthat the products were not comparable.

5. I further note that the Ld. TPQ's contention that averaging of the cost of purchases was not permissible un.der CUP Method is in direct contradiction with the expression provisions contained in Section 92C(2) of the Act read with Rule 10B(L)(a) of the IT Rules, 1962 wherein it has been explicitly provided that where more than one uncontrolled transactions or prices are available then the ALP shall be the arithmetic mean of such prices. This proposition also finds support from the decision rendered by the Hon'ble ITAT, Delhi in the case of JSW Ltd Vs ACIT (100 taxmann.com 268) and Hon'ble ITAT, Mumbai in the case of ACIT Vs Essar Steel Ltd (50 taxmann.com 183).

6. I also find sufficient force in the Id. AR's argument that when the Ld. TPOs in all the past transfer pricing assessments completed u/s 92CA(3) had accepted the application of internal CUP applied on same lines and methodology and the factual matrix of the case has remained unchanged, there is no reason to depart from the view followed in all the past transfer pricing assessments. For the reasons set out in the foregoing, T am of the considered view that the reasons given by the Ld. TPO to reject the appellant's TPSR are wholly unsustainable. I am of the considered view that the internal CUP was the Most Appropriate Method and hold that the transactions involving purchase of greasy wool from AE, EAC was on arm's length. In that view of the matter the impugned adjustment of Rs.4,75,00,000/- is held to be unsustainable.

7. In view of the reasons discussed in the foregoing paragraphs, since I have already held that the international transactions were at arm's length under the internal CUP Method, it is no longer be necessary to examine the alternate contention of the appellant. In the impugned transfer pricing order the Ld. TPO has dealt with in great detail the application of TNMM for benchmarking the international transactions and even the Ld. AR of the appellant in his written submissions has made detailed submissions pointing out specific infirmities & irregularities committed by the Ld. AO in wrongly applying the TNMM in determining the ALP of the international transactions in question. However in view of the above findings were internal CUP is found to be the MAM and applying this MAM the international transactions are found b- be at arm's length, and therefore assessee's objections to TNMM are only of academic importance. The transfer pricing adjustment of Rs.4,75,00,000/- is accordingly deleted. Ground Nos. 4 to 7 stand allowed."

7. After hearing the rival parties and perusing the material on record including the impugned order ,we find that the assessee is engaged in the business of processing raw wool, greasy wool, polyester into wool tops, woolen fabrics etc. during the year.

The assessee entered into international transactions with its AE and both the international transactions involving import of raw material with AE as well as fabrics to the AE were bench marked by applying internal CUP method. We note that the assessee has reliable data available with regard to the similar transactions with unrelated third parties and thus claimed CUP as the most appropriate method. We note that TPO has rejected the CUP method adopted by the assesse and instead applied external TNMM method after selecting 12 comparables and thus determined the transfer pricing adjustment of Rs. 4,75,00,000/- to arrive at the ALP. We note that the Ld. CIT(A) has recorded a detailed finding a fact that the raw material purchased by the assessee from external parties were of same product i.e. greasy wool and average micron purchase from AE in this 21.36 in comparison to 21.76 found in the purchases from non AEs and weighted average purchase price from AE was Rs.280.66 in comparison to weighted average purchase price of Rs. 273.12 from non AE and the purchases from AE fell within the tolerance range of +/- 5%.We note that the Ld. CIT(A) has given a finding that the proceeded on wrong presumption and assumption of facts and erroneously rejected the TPSR. The Ld. CIT(A) also held that observations of the TPO's that averaging of cost of purchases was not permissible under CUP method is in contradiction to the provision contained in Section 92C(2) read with Rule 10B(1)(a) of the Income Tax Rules, 1962 wherein it has been explicitly provided that where more than one uncontrolled transactions or prices are available then the ALP shall be the arithmetic mean of such prices. The Ld. CIT(A) also relied on the decision of Hon'ble ITAT, Delhi in the case of JSW Ltd. Vs. ACIT reported in (100 taxmann.com 268) and the decision of Hon'ble ITAT, Mumbai in the case of ACIT vs. Esser Steel Ltd. (50 taxmann.com 183). We further note that the was having similar transactions with its AE and CUP bench marking analysis done by the assesse under identical facts has been accepted by the TPO in the orders framed u/s 92CA(3) of the Act by accepting the transactions with the AE to be at arms length price and no transfer pricing adjustment was made. Therefore on this score also we find considerable force in the assesse arguments that once the revenue has accepted accepted the method or proposition in the earlier years , then it is not

open to the revenue to take a different in the subsequent years unless there is change in facts or in law. This is in consonance with the ratio raid down by the Hon'ble Apex court in the case of Radhaswami Satsang Vs CIT 193 ITR 321 (SC). Having perused the order of Ld. CIT(A) and the ratio laid down in the decisions as referred to above ,we are of the considered view that the Ld. CIT(A) has passed very reasoned and speaking order and accordingly we uphold the order of Ld. CIT(A)by dismissing the ground nos. 1 to 4 of the revenue.

8. The issue raised in ground no. 5 is against the deletion of addition of Rs. 24,06,174/- as made by the AO on account of marked to market loss.

9. During the year, the assessee has charged to the profit and loss account a sum of Rs. 24,06,174/- on account of exchange loss resulting from the restatement of loan in foreign currency at the year end of Euro 60,00,000 equivalent to 24,21,66,125/- from Industrialization Fund from the 12 countries (IFU). The said loss was apportioned in the ratio of the utilization of loan towards acquisition of fixed assets and working capital. The loss attributable to the fixed asset and working capital was worked out to Rs. 1,47,80,782/- and Rs. 24,06,174/- respectively. The loss in respect of relevant fixed asset was capitalized whereas the remaining loss pertaining to working capital was charged off to the profit and loss account. The AO however was not in concurrence with the treatment given by the assessee to this loss and disallowed the said loss by following the decision of his predecessor in AYs 2001-02 to 2003-04 and disallowed the same.

10. The Ld. CIT(A) allowed the said loss by observing and holding as under:

> *FINDINGS & DECISION:[Ground Nos. 3]*
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> *1. I have carefully considered the submissions of the Ld. AR of the appellant in the backdrop of the observations and the findings of the Ld. TPO in the impugned order. From the material on record it is observed that the appellant had claimed deduction in respect of "exchange fluctuation loss" incurred to the extent of Rs.24,06,174/-. According to; the appellant it had obtained loan of Euro 60,00,000 from IFU in FY 2000-0i which was partly utilized for acquisition of fixed assets and partly to fund its working capital requirements. Having regard to the utilization of funds, the appellant had apportioned the aggregate*

exchange fluctuation loss between the funds used for acquisition of fixed assets and funds used towards working capital. For the relevant year, out of the total exchange fluctuation loss of Rs.1,71,86,956/-, the sum attributable to the block of assets worked out to Rs. 1,47,80,782/--which was capitalized to the cost of assets and the remaining sum of Rs.24,06,174/- was found to be relatable to working capital of the appellant company. Accordingly, the appellant had claimed Seduction only" in respect of Rs.24,06,174/-. The Ld. AO however was not agreeable to aforesaid manner of apportionment of exchange fluctuation loss and following the line of reasoning adopted by his predecessor in AYs 2001-02, 2002-03 & 2003-04, he denied the claim of deduction,-of exchange fluctuation loss.

2. Upon giving due consideration to the submissions put forth by the appellant and the details furnished, it is noted that the appellant had utilized loan amount of Euro 60,00,000 to the extent of rupee equivalent of Rs. 18,79,63,018/- towards acquisition of fixed assets and sum of Rs.5,42,03,107/- towards working capital. In accordance with the Accounting Standards-11, the outstanding foreign exchange loan amount would be re-stated at the prevailing exchange rates and the exchange fluctuation loss was apportioned between the loan sum attributable to the fixed assets and working capital. I find that this manner of apportionment of exchange fluctuation loss was also followed in earlier AYs 2001-02, 2002-03 & 2003-04. The Ld AO's predecessors had disallowed the deduction claimed in respect of exchange loss pertaining to working capital holding it to be capital in nature. I find that on appeal the Ld. CIT(Appeals)-II, Mumbai in his order dated 26.02.2007 passed in Appeal No. CIT(A)-II/R-2(l)/IT-16/04-05 for AY 2001-02 after examining the complete details of loan and its manner of utilization found that the part of the loan was indeed utilized towards working capital requirements and therefore allowed the deduction of the exchange fluctuation loss attributable to loan utilized for working capital needs. Moreover I find that subsequent thereto, this particular issue has since been settled and answered by the Hon'ble Supreme Court in the case of Woodward Governor Pvt. Ltd (312 ITR 254) and ONGC vs. CIT (322 ITR 180) wherein the foreign exchange loss attributable to working capital was held to be revenue in nature and allowable as deduction from profits of the business. The Hon'ble Court further held that the MTM loss determined at the year-end on the basis of the prevailing exchange rate is a real loss and admissible for tax purpose in the year of recognition by debit to P & L account in terms of mercantile system of accounting followed by the assessee. In the circumstances respectfully following the appellate order passed by the Ld. CIT(Appeals)-II, Mumbai in appellant's own case for AY 2001-02 and the decisions of the Hon'ble Supreme Court (supra), it is held that the exchange fluctuation loss Rs.24,06,174/- was indeed relatable to foreign exchange loan utilized towards the working capital of the appellant company and hence allowable as deduction from the profits of the business. The Ld. AO is accordingly directed to delete the impugned disallowance in full. Ground Nos. 3 therefore stands allowed."

11. After perusing the facts on record and hearing the rival contentions, we find that loss claimed by the assessee of Rs. 24,06,174/- pertains to loss incurred upon restatement of loan in foreign currency at the year end which was attributable towards working capital. We note that the orders relied by the AO in respect of AYs 2001-02 to 2003-04 passed by his predecessor were reversed by the Ld. CIT(A) and loss pertaining to working capital was allowed. The Ld. CIT(A) has relied on the decision of *Hon'ble Supreme Court in the case of Woodward Governor Pvt. Ltd. (312*

ITR 254) and ONGC vs. CIT (322 ITR 180) while allowing the appeal of the assessee. Considering these facts and various case laws as relied by the Ld. CIT(A), we do not find any infirmity in the order of Ld. CIT(A) and accordingly, the same is affirmed by dismissing the ground no. 5 of the revenue's appeal.

12. The issue raised in ground no. 6 is directed against the order of Ld. CIT(A) deleting the addition of Rs. 14,44,089/- as made by the AO from bogus non-existent party.

13. Facts in brief are that during the course of assessment proceedings, the AO issued notice u/s 133(6) of the Act to various parties with whom the assessee had business transactions. However in respect of two parties i.e. M/s Pran Brothers & Co. and Rajesh Kapoor with whom the assessee had transactions during the year to the tune of Rs. 14,44,089/-, the notices were returned unserved with remarks 'not found' or 'left'. Accordingly the assessee was called upon to explain the transactions. The assessee did not reply during the assessment proceedings and accordingly the said amount was added by the AO to the income of the assessee Rs. 11,24,751/- paid to M/s Pran Brothers & Co. on account of repair and maintenance and Rs. 3,19,338/- paid to Rajesh Kapoor on account of commission.

14. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee by holding that the repair and maintenance were required to incur to manufacturing facility and therefore just returning of notices u/s 133(6) of the Act cannot be a basis for rejection of the claim of assessee when the assessee has incurred these expenses by way of cheque payments and bills vouchers were available and duly produced before the AO. Similarly is the position with respect to commission paid by the assessee by way of percentage of sales. The Ld. CIT(A) noted that the commission was paid by account payee cheques after deducting TDS thereon and the copies of invoices with reference to which the commission was paid were duly placed on record. The Ld. CIT(A) also referred to copies of offer contract invoices, details of payment, ledger, sales tax/CST and TDS deduction u/s 194C of the Act from the

expenditure under head repair and maintenance. The ld CIT(A) finally held that non-compliance of notices u/s 133(6) of the Act cannot be a ground for taking adverse view against the assessee when all the evidences were available on record and by relying the decision of Hon'ble Calcutta High Court in the case of *M/s Inbuilt Merchants Pvt. Ltd. (GA No. 3825 of 2013) dated 14.03.2014 and Mather & Platt (I) Ltd. vs. CIT (167 ITR 493) allowed the appeal of the assessee.*

15. Having heard rival submissions and perusing the material on record, we find that the assessee has incurred these expenses under the head repair and maintenance for which the payments were made to M/s Prab Brothers & Co to the tune of Rs. 11,24,751/- by account payee cheques. Likewise commission was paid to Rajesh Kapoor for soliciting sales of Rs. 3,19,338/- totalling to Rs. 14,44,089/-. We note that in respect of both these parties all the necessary material/evidences such as bills vouchers and rate contract etc were placed before the AO as well as Ld. CIT(A) and the payments were made by cheques after proper deduction of TDS and similarly the commission was paid to Rajesh Kapoor with reference to sales effected by him and even invoices were placed on record in respect of which the commission paid to Rajesh Kapoor after deduction of TDS. Considering these facts, we are of the view that the Ld. CIT(A) has rightly allowed the appeal of the assessee. The ground no. 6 of the revenue is dismissed.

16. In the result, the appeal of the revenue is dismissed.

Order is pronounced in the open court on 2nd November, 2022

Sd/-	Sd/-
(Sanjay Garg /संजय गर्ग)	(Rajesh Kumar /राजेश कुमार)
Judicial Member /न्यायिक सदस्य	Accountant Member / लेखा सदस्य

Dated: 2nd November, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- DCIT, Central Circle-2(4), Kolkata
2. Respondent – M/s Global Wool Alliance Pvt. Ltd., DA-14, Salt Lake Road, Kolkata-700064.
3. Ld. CIT(A)- 22, Kolkata (sent through e-mail)
4. Pr. CIT- Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata