

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 4783/Mum/2019

(Assessment Year: 2012-13)

Pr. CIT-9
Room No.65A, 6th Floor,
Aaykar Bhavan,
M.K. Road,
Churchgate-400 020

(Appellant)

M/s Best Seller Fashion India
Pvt. Ltd.

Lalit Residency, 1st Floor,

Vs.

The Lalit Mumbai,

Sahar Airport, Sahar,

Andheri(E), Mumbai-400 059

(Respondent)

PAN No. AAECB2906M

Assessee by : Shri Harsh Kumar &
Shri Jabir contractor, AR
Revenue by : Shri B.K. Bagchi, DR

Date of hearing: 30.01.2024

Date of pronouncement : 29.02.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by Asst. Commissioner of Income Tax, Circle 1(2)(1), Mumbai-400020, in case of BEST Seller Fashion India Pvt. Ltd. for A.Y. 2012-13, against the appellate order passed by the Commissioner of Income-tax (Appeals)-55, Mumbai [the learned CIT (A)], wherein the appeal filed by the assessee against the assessment order dated 16th March, 2016, by the Asst. Commissioner of Income Tax, Circle 9(2)(1), Mumbai (the learned Assessing Officer) under Section 143(3) read with section

144C (3) of the Act, was partly allowed for statistical purposes.

02. The learned Assessing Officer is aggrieved and has raised several issues on transfer pricing adjustment as under: -

"A) Relation of TNMM applied by TPO

1) The Ld. CIT (A) erred on facts and in law in holding that in rejecting the Transactional Net Margin Method (TNMM) adopted by the TPO as the most appropriate method and directing to adopt Resale Price Method (RPM) without appreciating the fact that assessee itself had adopted TNMM for its benchmarking analysis method in subsequent years i.e. A.Y. 2013-14 and 2014-15.

2) The Ld. CIT (A) erred on facts and in law in holding that RPM as the Most Appropriate Method without appreciating the functional difference between the assessee and the comparables selected for analysis ignoring the fact that the assessee is a full fledged high risk distributor performing marketing and distribution functions with great intensity and is creating marketing intangibles.

3) The Ld. CIT (A) erred on facts and in law erred in relying the decision of in the case of Loreal India (P) Ltd. (ITA No. 1046 of 2012 dated 07/11/2014) ignoring the difference of function emerging from the financials of the assessee that the assessee has incurred AMP expenses at 12.63% of sales and without appreciating the fact that RPM when used as

the Most Appropriate Method, requires greater similarity of functions than TNMM.

(B) Introduction of Fresh comparables:

1) The Ld. CIT (A) erred on facts and in law in considering/introducing/accepting the fresh comparables viz. S. Kumar & Co. (Traders) Pvt. Ltd., Santowin Corporation Ltd., Vijay Silk House Mumbai Ltd., Visagar Polytex Ltd, which were introduced by the assessee as per the updated data as on 31/03/2012 at the appellate stage (as mentioned in Para 7.11 of order of CIT(A) under consideration)

(i) without offering any opportunity to the TPO to submit his comments and fulfillment of filters as applied by TPO during Transfer pricing audit and

ii) Without giving detailed reasons for accepting the fresh comparables submitted by the assessee during appellate proceedings.

2) The Ld. CIT (A) erred on facts and in law in accepting the new search data introduced by the assessee, ignoring the decision of Chennai ITAT in the case of SL Lumax Ltd. [2012] 22 taxmann.com 15 (Chennai) whereby it has been held that "assessee cannot be allowed to bring in a new set of comparables, for if allowed, it will result in an unending exercise since endeavour of all assessee's would be to bring the ALP within comparable range."

3) *The Ld. CIT (A) erred on facts and in law in introducing certain fresh/new comparables of the assessee in her final working, viz. S. Kumar & Co. (Traders) Pvt. Ltd., Santowin Corporation Ltd., Vijay Silk House Mumbai Ltd., Visagar Polytex. Ltd., without discussing the functional comparability.*

(C) Removal of 3% Filter:

1) *The Ld. CIT (A) erred on facts and in law in removing the filter viz, "very low AMP to sales ratio of less than 3% are not selected as comparables" without appreciating the fact that assessee is performing marketing and distribution functions with great intensity and creating marketing intangibles.*

(D) Reintroduction of Comparables and Application of Filters:

1) *The Ld. CIT (A) erred on facts and in law in rejecting the contention of the TPO regarding the comparables viz. Birla Cotsyn (India) Ltd., Brandhouse Retails Ltd. and Pearl Global India Ltd. and reintroducing those three comparables ignoring the functional difference of these companies and that of the assessee."*

03. The brief fact shows that assessee is a company engaged in the business of wholesale trading of garments and fashion accessories, under the Bestseller trademarks Vero Moda, ONLY and Jack & Jones. The assessee was incorporated on 27th September, 2010 and is a wholly owned subsidiary of BEST Seller united NL BV, Netherland.



The assessee has filed his return of income declaring total **income of ₹2,73,59,442/-**. The assessee has also filed form no.3CEB, wherein international transaction of import of goods from Associated Enterprises of ₹43.73 crores and reimbursement of expenditure of ₹7.73 crores were entered into. The return of income was picked up for scrutiny. The reference was made to the transfer pricing officer being Addl. Commissioner of Income Tax (Transfer Pricing)-1(2) Mumbai, to determine the Arm's Length Price of the international transaction.

04. Assessee entered into international transaction of import of goods of ₹43,73,14,940/- benchmarked it by the using resale price method as most appropriate method, compared the gross profit as ratio of direct cost of goods sold as PLI, used prowess data base, selected five comparable companies whose markup on cost was **determine at 17.73% and assessee's markup was 15.93%** and therefore, it was stated to be at Arm's Length Price.
05. With respect to the expenses incurred by the assessee which were reimbursed by the Associated Enterprises, it is the claim of the learned Transfer Pricing Officer that these expenses were incurred for the brand promotion expenses and same were reimbursed by the Associated Enterprises as the assessee has not separately benchmarked the brand promotion expenditure but claim it as a reimbursement and adopted Comparable Uncontrolled Price (CUP) **method to say that it is at Arm's Length.**

06. With respect to the import of goods, the learned Transfer Pricing Officer rejected resale price method as most appropriate method, stating that the assessee is performing the marketing and distribution functions with great intensity whereas the comparable selected by the assessee are not performing the same in the same intensity. The learned TPO noted that assessee has **incurred advertisement and sales promotion expenses of ₹ 117,405,335/-** out of which it has got a reimbursement of **₹ 77,347,207 from its associated enterprises and debited the net amount of ₹ 40,058,128 in the profit and loss account.** Therefore, the learned transfer-pricing officer asked that whether the comparable companies selected by the assessee were also performing the advertisement marketing and distribution expenses with the same intensity. On analysis of the details submitted by the assessee, the learned transfer pricing officer found that except only two comparables, all other three comparable selected are having either very low marketing expenses or the companies are functionally not comparable. Therefore, the learned transfer-pricing officer held that due to intensive advertisement and marketing functions performed by the assessee, the comparable cases are not closely similar to the assessee in terms of functions performed and assets employed. He therefore rejected the resale price method as the most appropriate method. After rejecting the resale price method, the transfer-pricing officer adopted transactional net margin method as the most appropriate method and adopted profit level

indicator of operating profit/operating revenue. He found that assessee has AMP to sales ratio of 12.16% and comparables with very low AMP expenditure to sales ratio of less than 3% are to be rejected. Therefore out of the five companies selected by the assessee, the TPO retained only two comparables namely JK investors Bombay Ltd and Lee Cooper India Ltd. The mean of the PLI of these two comparables was determined at 13.54% whereas the margin of the assessee was 6.12%; he made an **adjustment of ₹ 71,600,000. Transfer pricing order was passed on 21/1/2016.**

07. The draft order was passed on 12th February 2016. The assessee submitted that they do not want to file objections before the learned Dispute Resolution Panel, consequently, assessment order was passed on 16th march, 2016, wherein the addition under Section 92CA(3) of the Act of **₹7.16 crores were retained. The total income was assessed at ₹ 12,97,48,273/-.**
08. Aggrieved assessee preferred the appeal before the learned CIT (A). The main argument of the assessee is that the resale price method is most appropriate method and Transactional Net Margin Method adopted by the assessee is not the most appropriate method. It is also the claim that if the Transactional Net Margin Method is applied PLI of the assessee is 6.12% and PLI of the comparable is 5.41% and even otherwise no adjustment can be made.

09. The learned CIT (A) held that assessee is merely purchasing and selling the products without adding any value to the core product, the assessee is a pure routine distributor and therefore, according to him, resale price method is the most appropriate method. He also relied upon the decision of Hon'ble Bombay High Court in case of Loreal India (P) Ltd.. In the alternative he found that the assessee himself and selected the transactional net margin method as the most appropriate method in subsequent years and transfer pricing officer has also accepted the assessee is arm's-length price and no adjustment were made. He further found that the benchmarking under transactional net margin method was made by selecting the nine companies. He also rejected the finding of the learned transfer-pricing officer that the assessee has AMP to sales ratio of 12.16% and the comparable company with a very low AMP to sales ratio of less than 3% should not be selected. He held that in the transactional net margin method the net profit indicator is less affected by the transactional difference. He further noted that the AMP to sales ratio in assessee's case is also 4.14% after reimbursement. Therefore, he rejected the filter adopted by the TPO of AMP/sales while applying transactional net margin method and selection of comparable. Accordingly, he found nine comparable companies whose average margin was 5.41% and the margin of the assessee was 6.12% and therefore as the operating margin of the assessee is better than the average comparable

companies' margin and therefore he deleted the adjustment made by the learned TPO.

010. Aggrieved, the learned AO is in appeal before us. The AO is aggrieved by holding that resale price method is the most appropriate method in case of the assessee held by the learned CIT – A. It is also the claim that the reliance on the decision in the case of Loreal India private limited is also incorrect for the reason that there is a functionality difference. The learned TPO is further aggrieved by introduction of fresh comparables by the learned CIT – A which was introduced by the assessee as per updated data on 31/3/2012 at the appellate stage. It was further claimed that the learned TPO was not granted any opportunity of hearing. The learned AO further challenged the removal of 3% filter of advertisement marketing and promotion expenditure to sales ratio by the learned CIT – A.
011. The learned departmental representative reiterated the same arguments.
012. The learned authorized representative supported the order of the learned CIT – A.
013. We have carefully considered the rival contention and perused the orders of the lower authorities. Here in this case the assessee has adopted the resale price method as the most appropriate method which has been upheld by the learned CIT – A but the learned transfer pricing officer has adopted the transactional net margin method as the



most appropriate method holding that assessee is incurring huge expenditure for advertisement marketing and promotion expenditure. Here, in subsequent years the assessee itself has adopted the transactional net margin method as the most appropriate method. The learned CIT – A held that resale price method is the most appropriate method but looking at the subsequent adoption of most appropriate method of transactional net margin method by the assessee itself, he computed the arm's-length price of the international transaction adopting the transactional net margin method. Therefore now the grievance of the learned assessing officer that the learned CIT – A has held that the resale price method is the most appropriate method does not hold any water. Further we also do not decide ground number A of the appeal of the AO whether in such case what should be the most appropriate method as the method adopted by the learned transfer pricing officer of transactional net margin method has been upheld for deleting the addition by the learned CIT – A.

014. While computing the arm's-length price adopting the transactional net margin method, nine comparables were selected whose average PLI of operating profit/sales was 5.41% and the assessee's margin was 6.12%, the addition was deleted. The learned departmental representative's objection is that the comparable is introduced by the assessee before the learned CIT – A where in some of the cases very low margin of 1% and 2% is shown and therefore such low margin entities could not have been selected. However, he could not show that those entities



are functionally not comparable with the assessee. May be in the comparability analysis some of the companies may have a lower margin but those have to be included in the comparability analysis if they are functionally comparable with the functions of the assessee. In view of this, we do not find any infirmity in the order of the learned CIT – A in deleting the addition of adjustment in arm's-length price **of international transaction of ₹ 71,600,000. Accordingly,** we confirm the order of the learned CIT – A and dismiss ground number B, C and D of the appeal.

015. In the result, appeal of the AO is dismissed.

Order pronounced in the open court on 29.02.2024.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 29.02.2024

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai