

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.400/PUN/2020

निर्धारण वर्ष / Assessment Year : 2013-14

DCIT, Circle 1(1), Pune	Vs.	M/s. Bhairavanath Sugar Works Ltd., S.No. 21/2, Sawant Corner, Pune-Mumbai Bypass Road, Katraj, Pune. PAN: AADCB0529M
Appellant		Respondent

Assessee by

Shri B.C. Malakar

Revenue by

Smt. Divya Bhajpai

Date of hearing

10-06-2021

Date of pronouncement

11-06-2021

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the Revenue is directed against the order dated 23.12.2019 passed by the Id. CIT(A) u/s.143(3) read with section 144C(3) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2013-14.

2. This appeal was filed belatedly by 68 days. The Id. DR explained the lockdown due to covid-19 as the reason for the late filing of the appeal. The Id. AR did not object

to the condonation of the delay. We are satisfied with such reason. The delay is condoned and the appeal is admitted for hearing and disposal on merits.

3. The only assail in this appeal through various grounds is to the deletion of transfer pricing addition of Rs.4,91,89,500 relating to the Specified Domestic Transaction (SDT) of Rent payment to Giriraj Promoters Pvt. Ltd. (GPPL)

4. Briefly stated, the facts of the case are that the assessee has been engaged in the business of manufacturing of sugar. Major activities of the company are crushing of sugarcane and production of the refined sugar and other by-products. The assessee filed its return declaring total income at Nil but paid taxes under section 115JB of the Act. An audit report in Form No.3CEB was furnished declaring seven SDTs totaling Rs.8,64,70,983. The Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of SDTs. In this appeal, we are concerned with the SDT of Rent payment amounting to Rs.4,91,89,500. The assessee applied the Comparable Uncontrolled Price (CUP)

method for demonstrating the transaction to be at ALP. The TPO required the assessee to furnish details of the entire property in respect of which the rent was paid, that is, number of floors, area, square feet on each floor; name and address of all the persons to whom the property was let out and the details of total rent received by the owner along with rate per square feet charged to the assessee and unrelated parties; any other comparable uncontrolled transactions; market rate charged for property in similar area along with proof; and copy of agreement entered by the assessee. The assessee furnished one-paged reply, that has been reproduced on page 20 of the TPO's order, stating that its sugar factories were located at rural areas of Osmanabad and Solapur districts and for better control and supervision, its corporate office was shifted to Pune at Sawant Corner, Katraj, Pune premises on a monthly rent of Rs.40,99,125 to GPPL. The property taken on rent was claimed to be solely used as administrative/corporate office where all the business activities, such as, Sales, Marketing, Promotion, Advertisement, Market research, Accounting, Auditing, Financing credit rating, Share registry,

etc. were carried on. Meetings of board, Sales committee, Purchase committee, Audit and accounts, Finance Departments also took place at the corporate office only. The assessee also submitted that the premises taken on lease was equipped with two auto lifts and separate generators provided by the licensor. The TPO observed that building 'Sawant Corner' was located at the junction of Katraj and primarily known as Head Office of Educational institutes held by the Sawant family i.e. Jaywant Shikshan Prasarak Mandal (JSPM). Since the assessee did not furnish point-wise information as desired, he deputed an Income-tax Inspector for conducting discreet enquiries about the tenants who were using the building. The Inspector submitted his report stating that he visited 'Sawant Corner' building wherein the corporate office of the assessee was claimed to have been situated. The building consisted of five floors and name-boards appearing at the Reception of the building and also on various floors were checked but the name of assessee was found nowhere. He further gave details of name boards and occupants along with necessary photographs, all of which have been captured in the

TPO's order also. The TPO perused the Leave and licence agreement (Agreement) entered into by the assessee with M/s. GPPL on 23.05.2012 with effective date of 01.04.2011 and found that the assessee had apparently taken almost the entire building on rent, but in reality, it was occupied by the JSPM institutions. As the assessee failed to lead evidence of having derived any benefit from the premises or even actually used any space in 'Sawant Corner', the TPO held that the Leave and licence agreement was bogus. After rejecting the assessee's benchmarking under the CUP method, the TPO proceeded to determine the ALP of the SDT under 'Other method' as per rule 10AB of the Income-tax Rules, 1962 (hereinafter referred to as 'the Rules') which, *inter alia*, recognizes 'the price which would have been paid' as a valid base for determining the ALP. Accordingly, he determined the ALP of the SDT of payment of Rent at Nil, which led to the transfer pricing adjustment of Rs.4.91 crore. The AO made the above referred transfer pricing addition.

5. The assessee moved the Id. CIT(A) urging, *inter alia*, that the TPO relied on the Inspector's report for making the

addition, which was never confronted to it. The assessee submitted an album of photographs and other additional evidence before the Id. CIT(A) to substantiate its claim of having used the building. The Id. CIT(A) sent such additional evidence to the TPO/AO for comments. The TPO objected to such additional evidence and the photographs submitted by the assessee by stating that these photos were clicked in the year 2019 and hence irrelevant. The TPO also found faults with the additional evidence furnished by the assessee in his remand report. Considering the entire conspectus of material before it including the additional evidence, remand reports of the AO/TPO and rejoinders of the assessee to the remand reports, the Id. CIT(A) came to hold that the TPO violated the principles of natural justice by using the photographs without confronting the same to the assessee. He thus held that the assessee used the premises and availed economic and commercial benefits and thus deleted the addition. The Revenue has come up in appeal before the Tribunal.

6. We have heard the rival submissions through Virtual Court and scanned through the relevant material on record.

The whole controversy revolves around the fact of the assessee having used or not used the Sawant Corner premises for which it paid the rent. The TPO rejected the assessee's CUP method and proceeded to apply the 'Other method' determining Nil ALP of the SDT of payment of Rent. Rule 10AB provides that: "For the purposes of clause (f) of sub-section (1) of section 92C, the other method for determination of the arm's length price in relation to an international transaction or a specified domestic transaction shall be any method which takes into account the *price which has been charged or paid, or would have been charged or paid*, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts." A bare perusal of the rule makes it graphically clear that the 'Other method' is a one which not only encompasses the price actually charged or paid for benchmarking but also the price which *would have been charged or paid* in a comparable uncontrolled transaction. Any potential price which could be charged or paid for similar goods/services, even though not actually transacted, can also

be accepted for benchmarking the SDT. The TPO opined that since the premises was not occupied by the assessee, no independent party would have paid anything for it and thus determined Nil ALP of the transaction.

7. Let us have a brief look at the relevant facts for properly appreciating the controversy. The assessee entered into SDT of Rent payment to GPPL amounting to Rs.4.91 crore. Under the Agreement, the assessee acquired a furnished area on 1st to 4th floors at 31093 sq. ft. with attached terrace of 4000 sq. ft. and open space parking of 10000 sq. ft. in front of building and covered parking of 9360 sq.ft. totalling 54453 sq.ft. The TPO required the assessee to furnish necessary details, some of which were supplied. During the first appellate proceedings, the assessee put forth additional evidence revealing that the premises was occupied and used by it for business purpose. To substantiate its claim, the assessee filed certain evidence, in some of which the registered office of the assessee was shown as Shop nos. 11 and 12, Ground floor, Sawant Corner. The Id. CIT(A) called for the comments of the TPO, who stated that Shop nos. 11 & 12 were not let out to the assessee as per the

Agreement. In the counter comments of the assessee, it was admitted that though such shops were not officially let out to the assessee, but were in possession of JSPM and further that one of the trustees of JSPM was Chairman of the assessee company and that he was looking after the assessee's affairs from Shop nos. 11 & 12 at the ground floor. It was further submitted that, albeit, the assessee occupied the area actually taken on rent as per the Agreement, but for the sake of convenience, it used shops nos. 11 & 12 on the ground floor as its address in correspondence with certain Government authorities. Per contra, the case of the Revenue before the Tribunal is that the assessee was not at all in occupation of the Sawant Corner premises as per the Agreement, which gets proved from determination of ALP of the transaction of Rent payment at Nil.

8. The main bedrock on which the Revenue's case is founded is that certain photographs taken by the Inspector did not indicate the name of the assessee in the list of occupants of 'Sawant Corner', Katraj, Pune; and that the additional evidence placed on record by the assessee before the Id.

CIT(A) did not either pertain to the year under consideration or if at all, it mentions shop nos. 11 and 12, Ground floor, Sawant Corner, Pune, as its address, which was not let out to the assessee as per the Agreement.

9. Admittedly the photos taken by the Inspector and used by the TPO for drawing an adverse inference against the assessee were never confronted to the assessee. As such, these photos will have to be excluded from consideration in deciding the issue. Notwithstanding such photos, the assessee also filed a photo album showing the name of assessee on the Display boards of Sawant Corner. We refuse to take cognizance of the either set of the photographs.

10. On the other objection of the Revenue about shop nos. 11 & 12 at the ground floor of Sawant Corner which were not let out to the assessee as per the Agreement but used as its address, the assessee stated before the authorities below during the remand proceedings that the main trustee of JSPM was also the Chairman of the assessee company and he was looking after the work of assessee from shop nos. 11 and 12,

which were owned by GPPL and in the legal possession of JSPM.

11. The assessee filed additional evidence before the Id. CIT(A) to substantiate its case of occupation of the premises in consonance with the Agreement. The first additional evidence is the Certificate of registration of the Order of Regional Director, Ministry of Corporate Affairs, Govt. of India taking note of the transfer of registered office of the assessee company from Mumbai to Pune. A copy of this certificate dated 10.07.2009, has been given as Annexure-A in a separate paper book. This certificate records that the assessee moved into 'Sawant Corner' in 2009 and we are dealing with the financial year 2012-13. Once the assessee moved into new premises of Sawant Corner in 2009, there cannot be any question of its non-occupation in the F.Y. 2012-13. Even though the address of shop nos. 11 and 12 is given in most of the evidences filed by the assessee, it simply reaffirms that the premises 'Sawant Corner' was occupied by the assessee. It was only for the purpose of convenience that the address of shop nos. 11 and 12 on the ground floor was

given from where the Chairman of assessee company, a main trustee of JSPM, was operating. Mere mentioning of shop nos. 11 and 12 as its address, which were not let out to the assessee as per the Agreement, cannot justify the rejection of argument that the assessee did not shift to 'Sawant Corner' at all. As such shops were admittedly in the possession of JSPM and the Chairman of assessee company happened to be main trustee of JSPM, no adverse inference can be drawn from this fact.

12. The next additional evidence is a copy of Minutes of board of directors meeting of the assessee company held on 04.12.2012. Such Minutes also recognize that the meeting of board of directors took place at shop nos. 11 and 12, Sawant Corner. This evidence also goes to prove the case of the assessee.

13. The next additional evidence is in the form of a copy of Master Data downloaded from the Ministry of Corporate Affairs. Even though it is dated 15.05.2013 but the factum of assessee occupying shop nos. 11 and 12 at Sawant Corner, is duly recognized.

14. Then there are Property tax payment receipts issued by Pune Municipal Corporation in the name of landlord, furnished by the assessee as additional evidence. The Revenue has countered this evidence by stating that the property tax receipts were in the name of GPPL and not the assessee. In this regard, it is observed that property tax bill is always issued in favour of the owner, even if the building is let out. Then it is a matter of arrangement between the landlord and the tenant to share the tax. The Id. AR stated that the assessee paid its share in the property tax and duly recorded the same in its books of account.

15. Another relevant additional evidence is a letter dated 09.12.2011 from Punjab National Bank addressed to the Chairman of assessee company with the address of 3rd Floor, Katraj, Pune. This letter talks of sanctioning credit limits of Rs.100 crore in favour of assessee. This letter also fairly proves that the bank was communicating with the assessee at 3rd Floor address of Sawant Corner, which falls within the area let out to the assessee as per the Agreement.

16. The next additional evidence is a Credit Rating Certificate dated 17.02.2012 issued by Credit Analysis and Research Limited, which has again been addressed to the Chairman of assessee company with address of Sawant Corner.

17. The next additional evidence is a letter dated 1.5.2012 written by Union Bank of India to the assessee company with 3rd floor address of Sawant Corner, Katraj, Pune. This letter refers to certain Pledge loan accounts. This also reaffirms that the assessee was occupying the 3rd floor.

18. There is another important evidence showing that the assessee shifted at 'Sawant Corner', Pune. It is the Public Notice given by the assessee in the Daily Sakal Times newspaper dated 20.03.2009, as per which a Special resolution was passed in the extra-ordinary General Meeting of the company held on 23.02.2009 for shifting of the registered address to 'Sawant Corner', Pune. To the similar effect is another Public notice dated 17.03.2009 published in the regional language in the Daily Lokmat newspaper.

19. The assessee submitted certain telephone bills before the TPO to prove that the premises was in its occupation and use at the material time. The TPO issued a notice u/s 133(6) of the Act to BSNL for ascertaining if the telephone numbers given by the assessee were active in the financial year 2012-13. BSNL replied that one of the numbers, namely, 020-24317386 was working since 06.07.2011 and other numbers started in the year 2015 only. Since the bills of this number were also admittedly in the name of assessee-company, it further fortifies the case of the assessee of occupying the premises for its business purpose.

20. Taking into consideration totality of the facts and circumstances prevailing in the instant case, there remains no doubt whatsoever that the premises of 'Sawant Corner', Pune, let out to the assessee under the Agreement, was in its occupation and use during the year under consideration.

21. The TPO has observed in his remand report that the assessee, GPPL and JSPM are all related companies who arranged the entries in their books of account in such a way so as to mitigate the tax liability rightly due to the exchequer. It

was explained that JSPM actually used the premises but did not pay any rent because it was enjoying the exemption u/s.11 of the Act and for the year under consideration it had filed Nil return. GPPL was the owner of the property who had taken housing loan and interest of Rs.2.66 crore was paid, which was set off by it against rental income of Rs.4.91 crore received from the assessee and the assessee, in turn, claimed deduction of Rs.4.91 crore towards rent as business expenditure. This scenario, as per the TPO, was a tax avoidance device. We are disinclined to take cognizance of the TPO's above panorama of the resultant squeezed tax liability of the group as a whole. The *raison d`etre* is that valid and legal tax consequences of a *bona fide* transaction or a set of transactions cannot be averted even if the arrangement ends up in paying lower tax, so long as such an arrangement is within the framework of law and valid. The Department's case is that the property was, in fact, in occupation of JSPM and not the assessee and the assessee was simply paying rent without occupying the same. In such circumstances, the onus was upon the Revenue to prove that apparent was not real, which it failed to discharge. If the

Department was convinced that whatever external evidence the assessee had filed to prove its case were make-believe, it had and always has a very wide powers to unearth the reality even beyond the assessment proceedings.

22. Once it is held that the Sawant Corner property was used by the assessee for its business purpose and the Revenue brought no contrary reliable evidence on record, the case of the TPO applying 'Other method' and determining Nil ALP on the ground that no independent party would have paid any rent for not having occupied the premises, fails. Reverting to the CUP method applied by the assessee as the most appropriate method for benchmarking the SDT of rent payment, the assessee has given a comparable instance of rent paid @ Rs.112 per sq.ft. by ICICI bank under a lease agreement dated 17.02.2012 for a nearby premises. As against that, the assessee paid rent @ Rs.75.28 per sq.ft., which shows that the rent paid by the assessee was less in comparison with the comparable uncontrolled transaction. Thus, the ALP of the SDT of payment of rent cannot be disputed. Ergo, we are

satisfied that the Id. CIT(A) was justified in deleting transfer pricing addition, which view is hereby countenanced.

23. In the result, the appeal is dismissed.

Order pronounced in the Open Court on 11th June, 2021.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER
पुणे Pune; दिनांक Dated : 11th June, 2021
GCVSR

Sd/-
(R.S.SYAL)
VICE PRESIDENT

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The PCIT-1, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
“सी” / DR ‘C’, ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	10-06-2021	Sr.PS
2.	Draft placed before author	11-06-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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