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

BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.7417/Mum/2018
(**Assessment Year :2014-15**)

M/s. B. Braun Medical (India) Private Limited A-601, 6th Floor Boomerang, A-Wing Main Chandivali Farm Studio Near Chandivali Studio Andheri (E), Mumbai-400072	Vs.	The Deputy Commissioner of Income Tax-9(2)(1) Room No.665A, Aayakar Bhavan, M.K.Road Mumbai – 400 020
PAN/GIR No.AAACB7394M		
(**Appellant**)	..	(**Respondent**)

Assessee by	Shri Ketan Ved and Ms. Urvi Mehta
Revenue by	Dr. Yogesh Kamat
Date of Hearing	**07/02/2022**
Date of Pronouncement	**20/04/2022**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.7417/Mum/2018 for A.Y.2014-15 preferred by the order against the final assessment order passed by the Assessing Officer dated 30/12/2018 u/s.143(3) r.w.s. 144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the ld. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 12/09/2018 respectively for the A.Y.2014-15.

2. The only effective issue to be decided in this appeal of the assessee is with regard to transfer pricing adjustment made in respect of international transaction on purchase of traded goods. During the course of hearing, the ld. AR laid more emphasis on adjudication of ground No.1.5 seeking for adoption of correct gross profit margin of the comparable company ADS Diagnostics Ltd., According to the ld. AR, the ld. TPO while giving effect to the directions of the ld. DRP did not follow the directions and proceeded to adopt the wrong margins of this comparable company ADS Diagnostics Ltd., Hence, we deem it fit to address the ground of inclusion of comparable company ADS Diagnostics Ltd., and its correct gross margins thereon to resolve the dispute before us.

2.1. We have heard the rival submissions and perused the materials available on record. We find that M/s B. Braun Medical (India) Private Limited (assessee herein) is a 100% subsidiary of B. Braun Medical Industries Sdn. Bhd., Malaysia. The assessee operates in the field of healthcare in India. It is mainly engaged in distribution of medical consumables/equipment purchased from its Associated Enterprise (AE). The products mainly include surgical equipment, intravenous administration ('IV') sets, infusion pumps, biotechnology, urology, dialysis equipment, etc. The distribution/trading segment has two streams. One is of pure distribution. In the distribution segment, the assessee is also engaged in the assembly of sutures at its facility in Chennai. Besides direct distribution of the products, the assessee also undertakes indenting activity for the same products. The assessee clubbed the distribution as well as the indenting transactions together for the purposes of benchmarking.

2.2 In its transfer pricing study report, the assessee had reported international transactions of purchase of traded goods, purchase of finished goods, commission received for marketing services, purchase of raw material, sale of finished goods, purchase of capital goods, payment of managerial remuneration and other expenses as well as recovery of expenses with its AE. For its trading activity as a whole, the assessee has selected Resale Price Method (RPM) as the 'Most Appropriate Method' (MAM) to benchmark the transactions. For its assembly activity, the assessee has selected TNMM as the MAM and for purchase of capital goods, the assessee had selected 'Other Method' to benchmark the transactions.

2.3 The assessee benchmarked the international transactions in respect of its trading activity using the Resale Price Method. The Profit Level Indicator (PLI) used was Gross Profit/Operating Income. The gross profit margin of the assessee from its trading activity was determined at 22.45%, and the three-year average GP margin of the comparable companies was taken as 11.61% and accordingly, the said international transaction was considered to be its arm's length. The single year GP margin of the assessee's comparables was 13.41%. In its TP Study Report the assessee had taken 15 independent comparable companies for the purposes of comparison. In the TP proceedings, the Ld. TPO examined the functional profile of the assessee and noted that in the business activity relating to distribution, the AEs of the assessee provide technical assistance, product & centric management support as and when required along with training to the employees of the assessee. It was noted that the assessee's field staff has to visit hospitals and institutions to procure orders. In the indenting segment, the assessee only aids the local dealers in placing direct orders with the parent company and acts merely as a facilitator or a liaison concern. The Ld. TPO held that the business activity of trading is distinct and separate from the activity of indenting and the same cannot be combined for the purposes of benchmarking. The Ld. TPO noted that as per the separate accounting of distribution segment, the Gross Margin of the assessee in respect of the distribution business comes to 20.66%. The Ld. TPO also noted that the comparables selected by the assessee are not proper and most of them are engaged in trading of computer parts & peripherals, software, mobiles etc. The Ld. TPO noted that the assessee had gone by the broad industry classification given by CMIE only to select the comparables. The Ld. TPO issued a show-cause to the assessee dated 09/10/2017 in this regard and contended that there are qualitative differences in the sales efforts required in the sale of the products dealt with by the comparable companies selected by the assessee in its TPSR vis-a-vis the medical devices which the assessee deals in. The nature of the products in which the assessee deals are highly scientific and technical and persons involved in marketing and sales thereof would be required to have deeper and factual knowledge of technical aspects vis-a-vis that of the comparable companies selected by the assessee. Hence, most of the comparables of the assessee cannot be accepted for comparability analysis. The Ld. TPO also relied upon the OECD Guidelines of 2010 in this regard and has argued for the 'product comparability' also in addition to 'functional comparability'. The Ld. TPO rejected 13 out of 15 comparable companies adopted by the assessee in its TPSR on the basis that their functional profile and business description does not match with that of the assessee. The Ld. TPO also noted that in the case of the assessee, the import content is about 70% but in the case of some of the comparables it is much less. The Ld. TPO used the filter of import content of 70% and added one new comparable of ADS Diagnostics Ltd. The Ld. TPO determined the Gross Profit Margin of the three final comparables to be 30% and held that the assessee has paid an extra amount of Rs. 31,01,53,000/- to its AEs and an adjustment was accordingly made.

2.4. The assessee raised an additional ground before the Ld. DRP stating that the gross profit margin of ADS Diagnostics Ltd., had been wrongly worked out by the Ld. TPO. The assessee submitted that the gross profit margin of ADS Diagnostics has been taken by considering erroneous value of closing stock of inventories without considering amount of diminution in the value of closing stock of inventories. The assessee requested for adoption of closing stock of inventories after reducing the diminution value. The assessee also pleaded that if the revised closing stock is considered, then even after inclusion of ADS Diagnostics Ltd., the assessee's margin would be through with the comparables margin and no TP adjustment would be warranted. This additional ground was duly admitted by the Ld. DRP and the Ld. DRP also sought for remand report from the Ld. TPO. The Ld. DRP after considering the remand report and rejoinder filed to the said remand report observed in para 5.9 at page 35 of its directions dated 12/09/2018, that the claim of the assessee has force and the Ld. TPO was directed to properly compute the gross profit margin of this comparable company ADS Diagnostics Ltd., The Ld. TPO however, while giving effect to the directions of the Ld. DRP did not adhere to the said directions though the said directions are binding on the Ld. TPO as per the provisions of the Act. Hence, the assessee is aggrieved before us.

2.5. It would be relevant to get into the financials of ADS Diagnostics Ltd., and the gross profit margins arrived thereon. The workings of the same are reproduced in the order of the Ld. DRP in page 18 are as under:-

Particulars	Amt. as per the TPO	Amt. as per Assessee	Reference to A R
Sales Revenue (A)	5,45,83,296	5,45,83,296	Note17(i), page 39
Opening Stock	2,77,84,057	2,77,84,057	Note 12(i), page 38
Add: Purchases	4,31, 51, 270	4.31,51,270	Note 19, page 39
Less: Closing Stock	-3,00, 11, 802	-2,24,02,515	Note 12(i), page 38
Cost of Goods Sold (B)	4,09,23,525	4,85,32,812	-
Gross Profit (C= A-B)	1,36,59,771	60.50,484	-
Gross Profit Margin (C/A*100)	25.02%	11.08%	-

2.6. In effect, the assessee seeks for reduction of Rs.76,09,287/- representing diminution in the value of closing stock of inventories from the value of the closing stock. If the revised closing stock of inventories figure of Rs.2,24,02,515/- is considered as against Rs.3,00,11,802/-, then gross profit margin of comparable company ADS Diagnostics Ltd., would be 11.08% as against 25.02% worked out by the Ld. TPO. We have gone through the financials of ADS Diagnostics Ltd., for the year ended 31/03/2014 relevant to A.Y.2014-15 enclosed in pages 71-118 of the paper book filed before us. We find from Note No.12 under the heading 'Inventories', closing stock of inventories had been reflected at Rs.2,24,02,515/- in the balance sheet as on 31/03/2014 of ADS Diagnostics Ltd., The said closing stock of inventories had been valued at the lower of cost or net realisable value which is in consonance with the Accounting Standard – 2 (AS-2) on 'Valuation of Inventories' issued by the Institute of Chartered Accountants of India (ICAI). Hence, the valuation adopted by the said comparable company is in accordance with generally accepted accounting principles and in consonance with accounting standards issued by ICAI which are mandatorily to be followed by every corporate in India. In view of the same, we find considerable force in the argument advanced by the Ld. AR that closing stock of inventories figure of ADS Diagnostics Ltd., should be considered only at Rs.2,24,02,515/- as against Rs.3,00,11,802/- taken by the Ld. TPO. If the revised closing stock figure of Rs.2,24,02,515/- is considered, then the gross profit margin of the comparable company as worked out in the table supra comes to 11.08%. The aforesaid tabulation has been reproduced in the order of the Ld. DRP in page 18. The workings thereon are not disputed by the Revenue before us. Hence, we direct the Ld. TPO to consider the gross profit margin of ADS Diagnostics Ltd., only at 11.08%. The Ld. AR before us stated that if the revised gross profit margin of 11.08% is considered, then even after inclusion of said two comparables by the Ld.TPO, the assessee's margin would be through and no transfer pricing adjustment is required to be made. In view of the same, we direct the Ld. TPO to delete the transfer pricing adjustment made in respect of international transaction on purchases of traded goods. Accordingly, the ground No.1.5 raised by the assessee is allowed. In view of the above decision, the other grounds raised by the assessee become purely academic in nature and hence, no opinion is rendered on the same.

3. The ground No.2.1 raised by the assessee is challenging the initiation of penalty proceedings u/s.271(1)(c) of the Act. This in our considered opinion would be premature for adjudication at this stage, hence dismissed.

4. The ground Nos. 2.2,2.3 & 2.4 are challenging the levy of interest u/s.234A, 234B and 234C of the Act which would be consequential in nature and does not require any specific adjudication.

5. In the result, appeal of the assessee is partly allowed.

Order pronounced on 20/04/2022 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(VIKAS AWASTHY)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 20/04/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :
1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai