IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

IT(TP)A no.1453/Mum./2017
(Assessment Year : 2013–14)

Imperial Mark Trade (I) Pvt. Ltd.
Shop no.48, First Floor, Dattani Square Mall
Bhagola Naka, Vasai Gaon Road ..... Appellant
Vasai (West), Thane 401 202
PAN – AAACI5213L

v/s

Dy. Commissioner of Income Tax
Central Circle–7(2), Mumbai ..... Respondent

Assessee by : Shri Ajay R. Singh
Revenue by : Shri Manoj Kumar

Date of Hearing – 19/07/2023	Date of Order – 31/08/2023

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the Official Liquidator on behalf of the assessee challenging the impugned final assessment order dated 30/01/2017, passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 (*"the Act"*), pursuant to the directions dated 23/12/2016, issued by the learned Dispute Resolution Panel–1(WZ), Mumbai, [*"learned DRP"*], under section 144C(5) of the Act, for the assessment year 2013–14.

2. The present appeal has been listed for hearing before us pursuant to the order dated 23/10/2020, passed by the coordinate bench of the Tribunal in Imperial Mark Trade (I) Pvt. Ltd. vs DCIT, M.A. no. 43/Mum./2020 (in ITA no. 1453/Mum./2017, for the assessment year 2013-14), whereby, the earlier order dated 07/01/2020, passed under section 254(1) of the Act was recalled and the appeal was directed to be re-fixed for hearing.

3. In this appeal, the assessee has raised the following grounds:–

"1.0) ***Jurisdiction exercised by the learned Transfer Pricing Officer is bad in law***

On the facts and circumstances of the case and in law the Hon'ble DRP-1, Mumbai (DRP') erred in confirming the determination of the Arm's Length Price ('ALP') at NIL by the learned Transfer Pricing Officer ('TPO') in his order under section 92CA by treating the specified domestic transactions ('SDT') as bogus and sham transactions. The reference made to the learned TPO by the leamed Assessing Officer under section 92CA is merely for the purpose of verification and determination of the ALP of the SDT and therefore, the learned TPO exceeded his jurisdiction by characterizing the SDT as bogus transactions without undertaking any benchmarking / functional analysis of the same.

Therefore, the transfer pricing adjustments aggregating to Rs.245,45,18,050, confirmed by Hon'ble DRP is bad in law and needs to be deleted.

2.0) ***Disallowance / transfer pricing adjustment of high seas purchases of Crude Palm Oil amounting to Rs. 1,22,70.68,280***

2.1) On the facts and circumstances of the case and in law, the Hon'ble DRP erred in rejecting the objection raised by the Appellant that the date of entering into contract for purchase of crude palm oil and the actual date of import mentioned in the tax invoice were interchanged by the learned TPO based on which the purchases were held to be non-genuine and sham transactions.

2.2) Hon'ble DRP erred in confirming that the purchase of crude palm oil was in the nature of bogus purchase merely based on the observation of learned TPO in relation to the dates of purchases, ignoring the submission and following documentary evidences produced by the Appellant before the learned TPO in support of the genuineness of the SDT:

a) Copies of contract of purchases

b) Copies of tax invoices

c) Copies of bill of lading

d) Confirmations from the parties to whom the goods so imported were subsequently sold on high seas basis.

e) Quantitative analysis and reconciliation of purchase and sales
f) One-to-one nexus of purchases vis-à-vis sales

Therefore, the transfer pricing adjustment on purchase of crude palm oil amounting to Rs.1,22,70,68,280 confirmed by Hon'ble DRP is bad in law and needs to be deleted.

3.0) ***Disallowance / transfer pricing adjustment of purchase of guar gum (split) amounting to Rs. 1,00,82,50,230***

3.1) On the facts and circumstances of the case and in law, the Hon'ble DRP erred in dismissing the objection raised by the Appellant that the learned TPO has treated the date of entering into contract for purchase of guar gum i.e. 1 March 2013 as the actual date of purchase instead of the date of delivery and purchase as mentioned in the tax invoice i.e. 31 March 2013 based on which the purchases were held to be non-genuine and sham transactions.

3.2) Hon'ble DRP erred in confirming that the purchase of guar gum was in the nature of bogus purchase merely based on the observation of learned TPO in relation to the dates of purchases, ignoring the submissions and following documentary evidences produced by the Appellant in support of the genuineness of the SDT:

a) Copies of tax invoices of buyer (appellant) as well as the seller i.e. Stride Multitrade Pvt. Ltd.

b) Copy of acknowledged intimations to the Godown in relation to transfer of goods by the buyer (Appellant) as well as the seller (Stride Multitrade Pvt Ltd)

c) Quantitative analysis and reconciliation of purchase and sales.

Therefore, the transfer pricing adjustment on purchase of guar split (gum) amounting to Rs.1,00,82,50,230 confirmed by Hon'ble DRP is bad in law and needs to be deleted.

4.0) ***Disallowance/transfer pricing adjustment of sales return of guar seeds amounting to Rs. 21,91,99,540***

On the facts and circumstances of the case and in law, the learned Assessing Officer erred in making protective addition of the sales returns amounting to Rs. 21,91,99,540 by stating that the learned TPO has not verified the details of sales return upon reference made to him even after specific direction issued by the Hon'ble DRP. Accordingly, the transfer pricing adjustment of sales return of guar seeds amounting to 21,91,99,540 is bad in law and needs to be deleted.

5.0) ***Disallowance of loss on high sea sales of crude palm oil amounting to Rs. 8.82.90.741/-***

5.1) On the facts and circumstances of the case and in law, the Hon'ble DRP erred in confirming the disallowance of the alleged loss on high seas sales of Rs.8,82.90,741 made by the learned Assessing Officer ignoring the submissions of the Appellant that the figures considered by the learned Assessing Officer does not pertain to the Appellant's case and ignoring the fact that the Appellant has actually earned profit of Rs. 13.05.01,658 from the high seas of crude palm oil.

5.2) Hon'ble DRP erred in confirming the observations made by the learned Assessing Officer ignoring the several documentary evidences produced in support of the high seas transactions by the Appellant.

Therefore, the addition of alleged loss on high sea sales of crude palm oil mounting to Rs. 8,82,90,741 is bad in law and needs to be deleted.

6.0) The appellant company craves leave to add, to amend, alter/delete and/or modify the above grounds of appeal on or before the final hearing."

4. Ground no. 1, raised in assessee's appeal, is general in nature. Therefore, the same needs no separate adjudication.

5. The issue arising in grounds no. 2-4, raised in assessee's appeal, is pertaining to transfer pricing adjustment in respect of specified domestic transactions entered into by the assessee with its associated enterprises.

6. We have considered the submissions of both sides and perused the material available on the record. We find that the Co-ordinate Bench of the Tribunal in Mahindra Two Wheelers Ltd. v/s DCIT, ITA no.519/Mum./2018, vide order dated 28/04/2022, for the assessment year 2013-14, while dealing with the similar issue, observed as under:-

"017. We have carefully considered the rival contention and perused the orders of the lower authorities. In the present case there is an adjustment made to the income of the assessee by determining arm's-length price of specified domestic provisions by invoking the provisions of Section 92BA (1) of the act. The impugned assessment year before us is assessment year 2013 14. The above provision i.e. 92BA (i) of the act was inserted by The Finance Act, 2012 with effect from 1/4/2013 and is omitted by The Finance Act, 2017 with effect

from 1/4/2017. The issue whether the adjustment can be made to the total income of the assessee by invoking the provisions of Chapter X of The Income Tax Act to the transactions covered by provisions of Section 92BA (1) for assessment year 2013-14 till it was omitted. This issue has been dealt with by the honourable Karnataka High Court in case of Texport overseas (supra) in favour of the assessee holding that as the provisions of Section 92BA (1) has been omitted from the Income Tax Act without any saving clause therefore the natural corollary would be that it did not exist at all in the statute book. Accordingly, we allow the additional ground of appeal and hold that the impugned transfer pricing adjustment of 2,196,447,328/- made by the learned assessing officer is not sustainable.

018. However we are also conscious that the provisions of Section 40A (2) of the act still exists in the statute book. The decision of the Texport overseas Ltd of the coordinate bench, which was partly challenged by the revenue before the honourable High Court, also held so. In that case, the coordinate bench held that the adjustment on account of examination of the arm's-length price of the specified domestic transactions is not valid because of deletion of the provisions of Section 92BA (1) of the act with effect from 1/4/2017 without any saving clause, but it held that provisions of Section 40A (2) of the act governs the allowability of those expenditure and therefore coordinate bench set-aside the matter back to the file of the learned assessing officer. The decision of the coordinate bench setting aside the issue back to the file of the learned assessing officer for examination of allowability in accordance with the provisions of Section 40A (2) of the act has not been challenged by either of the parties before the honourable High Court. Further, the decision of the coordinate bench in case of Sobha City (supra) also held so. In view of this we set-aside ground number 5 of the appeal of the assessee back to the file of the learned assessing officer to examine allowability of expenditure in terms of provisions of Section 40A (2) of the act.

019. We do not agree with the argument of the learned authorised representative that it amounts to giving a second chance to the revenue and therefore no remand is warranted for verification of provisions of Section 40A (2) of the act. Very heavy reliance was placed on the decision of the honourable Bombay High Court in CIT versus VS Dempo and Co (private) Ltd 336 ITR 29 (Bombay). We find that in that particular decision the honourable Bombay High Court has given a categorical answer that the provisions of Section 40A (2) was not attracted in that particular cases because the subsidiary company was not at all related person of the assessee within the meaning of the provisions of Section 40A (2) (b) of the act. No such facts exist in the case. Contrary to that, in the present case the assessee, itself has stated in its TP study report as well as Report of Accountant in 3CEB stated that these transactions are covered by the provisions of Section 40 (A) (2) of the act. Even otherwise, it is not the fact that revenue is given a second chance. In the present case earlier the impression of the revenue prior to the decision of the coordinate bench and of the honourable Karnataka High Court, was that specified domestic transaction l.e. transactions that are covered by the provisions of Section 40 A (2) are required to be tested in accordance with the provisions of chapter X of the act. However when the judicial precedents show that no such provision exist in the law, the natural corollary would be to examine the allowability of these expenses u/s 40A (2) of the act.

020. In view of this ground number 5 of the appeal of the assessee is partly allowed."

7. As a similar issue is arising in the present appeal, we see no reason to deviate from the view so taken by the Co-ordinate Bench of the Tribunal in the aforesaid decision. Accordingly, respectfully following the aforesaid decision the transfer pricing adjustment of Rs.245,45,18,050, made by the AO/TPO in respect of specified domestic transactions is not sustainable. However, the AO is directed to examine the allowability of the expenditure in terms of provisions of section 40A(2) of the Act. As a result, grounds no.2-4, raised by the assessee in the present appeal are allowed in the terms indicated above.

8. The issue arising in ground no. 5, raised in assessee's appeal, is pertaining to the disallowance of loss on high seas sales of crude palm oil.

9. The brief facts of the case pertaining to this issue are: The assessee is engaged in the business of trading of commodities both physical and futures. For the year under consideration, the assessee filed its return of income on 30/11/2013 declaring a total loss of Rs. 27,05,09,761. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) as well as section 142(1) of the Act were issued and served on the assessee. During the assessment proceedings, on perusal of the details of the purchase and sale submitted by the assessee, it was observed that the assessee has made transactions of high seas purchase and sale of commodities. The AO vide draft assessment order dated 29/03/2016 passed under section 143(3) read with section 144C(1) of the Act disallowed loss on high seas sales of Rs. 8,82,90,741 on the basis that the same is bogus as the assessee has

purchased the crude oil on high seas at a higher price and sold the same to the sister concern at a lower price. In its objections filed before the learned DRP, the assessee specifically submitted that it has made a profit in the high seas transactions and the loss as computed by the AO doesn't arise from the facts of the present case. The learned DRP vide its directions rejected the objections filed by the assessee without considering the aforesaid submission. In conformity, the AO passed the impugned final assessment order, inter-alia, disallowing the loss of Rs. 8,82,90,741 on high seas sales. Being aggrieved, the assessee is in appeal before us

10. We have considered the submissions of both sides and perused the material available on record. As per the assessee, the figures considered by the AO for computing the loss don't pertain to the present case and in fact the assessee actually earned profit from the high seas sale of crude palm oil. From the perusal of details of purchases and sales, forming part of the paper book on pages 370-371, we find that during the year the assessee purchased crude palm oil of Rs. 654,01,27,652 and sold the crude palm oil for Rs. 667,06,29,310. Thus, as per the assessee, it has earned a profit of Rs. 13,05,01,658. However, as is evident from page no. 3 of the draft assessment order, the AO considered the purchase amounting to Rs. 327,19,29,222 and sales amounting to Rs. 318,26,38,481. Accordingly, the AO arrived at a loss of Rs. 8,82,90,741 and disallowed the same. Since the amount of purchase and sales considered by the AO and submitted by the assessee are different, we deem it appropriate to restore this issue to the file of the AO for *de novo* adjudication after considering and verifying the correct amount of purchase

and sales. We also direct the assessee to furnish all the details in support of its claim and as may be directed by the AO for proper and complete adjudication of this issue. Accordingly, the impugned final assessment on this issue is set aside, and ground no. 5 raised by the assessee is allowed for statistical purposes.

11. In the result, the appeal by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 31/08/2023

Sd/-	**Sd/-**
PRASHANT MAHARISHI	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 31/08/2023

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai