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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 889/2016 & CM APPL. 45967/2016

RAYBAN SUN OPTICS INDIA LTD.

..... Appellant

Through Mr. Nageshwar Rao, Advocate with
Mr. Purushottam Anand, Advocate.

versus

CIT-V

..... Respondent

Through Mr. Zoheb Hossain, Sr. Standing
Counsel with Mr. Deepak Anand, Jr.
Standing Counsel

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE PRATHIBA M. SINGH

ORDER

11.07.2017

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Dr. S. Muralidhar,J

1. This is an appeal by the Assessee under Section 260A of the Income Tax Act, 1961 ('Act') directed against an order dated 19th April, 2016 passed by the Income Tax Appellate Tribunal, Delhi ('ITAT') in ITA No. 4203/Del./2010 for the Assessment! Year ('AY') 2004-05.

2. **Admit.** The following questions of law are framed for consideration:

(i) Whether the impugned order passed by ITAT is perverse and unsustainable in law as it is based on an erroneous assumption of fact that CUP method was approved by CIT(A) for benchmarking the transaction of "import of raw material, components and semi-finished goods" under Class I segment?

(ii) Whether the impugned order passed by ITAT is perverse and unsustainable in law as it is based on an erroneous assumption of fact that RPM method was approved by CIT(A) for benchmarking the transaction of "import of finished goods" under Class II segment?"

3. The facts in brief are that the Appellant, a public limited company incorporated under the provisions of Companies Act 1956, is primarily engaged in the business of manufacturing, importing and selling of sunglasses and prescription frames in India besides exporting raw and semi finished sunglass frames to Luxottica Group. 44.15% shares of the Appellant company are held by Ray Ban Indian Holdings Inc. USA, which in turn is indirectly held 100% by Luxottica Group SPA Italy. It is not in dispute that the Luxottica Group is the Associated Enterprise ('AE') of the Appellant.

4. In the Transfer Pricing Study, ('TP Study') submitted by the Appellant before the Transfer Pricing Officer (TPO) it set out the following classification of the functions and international transact[^] undertaken by it with its AE during the AY in question:

Class	Nature of International Transaction
I	Manufacturing segment a) Import of raw materials and components. b) Export of semi-finished goods. c) Import of semi-finished goods. d) Import of capital goods. e) Import of advertising material.
II.	Trading Segment a) Import of finished goods. b) Import of advertising material.

III.	Sale of capital goods
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5. For the benchmarking of the transactions undertaken under the Class I as well as Class II segments i.e. 'Manufacturing Segment' and 'Trading/Distribution Segment' the Appellant in its TP Study adopted the Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) for the purposes of Section 92 (C) of the Act.

6. The Appellant filed its return for the AY in question disclosing the international transactions in the above segments with its AE. The Assessing Officer (AO) made a reference to the TPO under Section 92(C)(A)(3) of the Act for the determination of the Arm's Length Price (ALP) of the international transactions undertaken by the Appellant under Class I, II and III segments with its AE.

7. It requires to be noted that the fact that the Appellant adopted the Comparable Uncontrolled Price (CUP) method for benchmarking the Class III segment transactions was accepted by the TPO. That is therefore not the subject matter of the present appeal. As far as the Class I and Class II segment transactions are concerned, the TPO declined to accept the benchmarking of the Appellant adopting TNMM. By the order dated 17th November 2006, the TPO held that the CUP method is the most direct and reliable method for the Class I segment transaction and that the Re-sale Price Method (RPM) is the MAM for determining the ALP of the transactions under Class II segment. On that basis, the TPO recommended the additions to be made to the returned income of the Assessee.

8. On the basis of the order of the TPO an assessment order was passed, aggrieved by which the Appellant went before the Commissioner of Income Tax (Appeals) [GIT (A)]. Before the CIT(A) the following questions were urged by the Appellant:

- "i Whether the reference made by the AO to the TPO is bad in law making the TPO's order void-ab-initio Also, whether the mechanical acceptance of TPO's recommendation by the AO makes the assessment order bad in law.
- ii. Whether the TPO is correct in rejecting the TNMM method for transactions related to import of raw material, components and semi-finished goods and instead applying the CUP as the most appropriate method.
- iii. Whether the TPO is correct in rejecting the TNMM method for transaction related to import: of finished goods and instead applying the RPM as the most appropriate method.
- iv. Whether the Appellant is entitled to the benefit of $\pm 5\%$ range mentioned in Proviso 92G (2) while computing the ALP."

9. As regards questions (ii) and (iii), by the order dated 30th January 2010, the CIT (A) held in favour of the Assessess In other words, the CIT(A) disagreed with the TPO and upheld the contention of the Assessee that TNMM was the MAM as regards the transactions under Class I as well as Class II segments.

10. Aggrieved by the order of the CIT(A), the Revenue went in appeal before the ITAT. By the impugned order the ITAT set aside the impugned order of the CIT (A) deleting the additions made by the AO. The ITAT remanded the matter to the TPO/AO for determining afresh the ALP of Class I international transactions under the CUP method and of Class II international transactions under the RPM as per law.

11. Mr. Nageshwar Rao, counsel for the Assessee at the outset pointed out that the ITAT has committed certain glaring factual errors in understanding the order under appeal before it i.e. the order of the CIT (A).

12. In para 5 of the impugned order it is observed by the ITAT that:-

“As the Id. CIT(A) has also upheld the application of CUP as the most appropriate method, which aspect has not been challenged by the Assessee, we hold that the TPO was right in applying the CUP method for determining the ALP of the international transaction of import of raw materials, components and semi finished goods....”

13. In para 12 of the impugned order, the ITAT observes:-

“The TPO applied the RPM, which has not been disturbed by the Id. CIT(A) and further there is no challenge to it by the Assessee. In our considered opinion, the RPM is quite a useful method where the goods purchased by the Indian sold without doing any value enhancement. We, therefore, approve the application of RPM as the most appropriate method....”

14. The Court fails to understand how the ITAT could have made the above two obvious factual errors in its understanding the order of CIT (A). It is apparent from a plain reading of order of the CIT (A) that it agreed with the Assessee that the transactions both in Class I and II segments had to be benchmarked by applying the TNMM. Therefore, it was factually erroneous on the part of the ITAT to observe to the contrary.

15. Likewise, the ITAT proceeded on an erroneous assumption of fact that the RPM method was approved by CIT(A) for benchmarking the class II segment transactions.

16. The further question arises is whether this Court should now remit the matter to ITAT in view of the above factual errors.

17. In this context, Mr. Nageshwar Rao, counsel appearing for the Assessee, relied on the decision dated 19th February 2016 of this Court in ITA No. 157 of 2016 (*Commissioner of Income Tax Del II v. Cargill Food India Ltd.*) whereby this Court dismissed the Revenue's appeal and upheld the order dated 10th April 2015 of the ITAT in ITA No. 1460/PN/2010. He further pointed out that the said judgment of this Court has been upheld by the Supreme Court by the dismissal of the Revenue's SLP (CC 1900/2007) titled *Commissioner of Income Tax, Delhi v, Cargill Food India Limited* on 28th November 2016. In the said order, the Supreme Court while dismissing the SLP noted that in the AYs subsequent to the AY in question, the Revenue had accepted the said Assessee's adoption of a certain method as the MAM for working out the ALP of international transactions for the purposes of transfer pricing.

18. Mr. Zoheb Hossain, learned Senior Standing Counsel for the Revenue submitted that the rule of consistency was relevant for later years whereas in the present case it was sought to be argued that the assessment of an earlier year should not be disturbed in view of the orders in the subsequent years. According to Mr. Hossain an important issue that required to be examined in the present case was whether the type of transaction in the preceding years as well as in the subsequent years were similar and whether there was a change in the functional profile of the business of the Assessee in the subsequent years.

19. In this context, it must be recalled that in the present appeal we are concerned with AY 2004-05. Mr Rao has placed before the Court a compilation of the orders passed by the TPO for AYs 2007-08 to 2010-11. A perusal of these detailed orders of the TPO for each of the above subsequent AYs reveals that in each of the TP Studies submitted for those years before the TPO, the Assessee set out its functional profile which involved the same transactions in the three segments, viz.. Class I 'the manufacturing segment'. Class II 'trading segment' and Class III 'the capital goods segment'. There is factually no change in the classification or the nature of international transactions "undertaken or the functional profile of the Assessee. In other words, the functional profile of the Assessee for the AY in question i.e. AY 2004-05 has not changed in the subsequent AYs i.e. 2007-08 to 2010-11. The TPO has in each of the subsequent AYs i.e. 2007-08 to 2010-11 accepted the TP Study .of the Assessee insofar as the determination of ALP for the Class' T Class II segment international transactions are concerned.

20. Consequently, the Court is unable to accept the plea of the Revenue in the present case that the Court should proceed on the assumption that the Assessee "had changed his business profile and functions." If there is, in fact, no change in the business profile of the Assessee in all these years i.e. in AY 2004-05 as well as subsequent years, there is no warrant for the Court to uphold the order of the ITAT remitting the matter to the TPO/AO or for this Court to remand the appeal to the ITAT for a fresh consideration. That will be a sheer waste of time and would serve no purpose.

21. There is one more issue raised by the Revenue regarding transfer by the Assessee of its advertising, marketing and promotion (AMP) functions to its AE. However, that is not the subject matter of the present appeal. It is pointed out by Mr Rao that the said issue is still pending at various levels in the subsequent years.

22. Questions (i) and (ii) are answered in the affirmative i.e., in favour of the Assessee and against the Revenue. Accordingly, this Court sets aside the impugned order of the ITAT and affirms the order of CIT (A). The appeal is allowed and the application is disposed of but with no orders as to costs.

S.MURALIDHAR, J

PRATHIBA M. SINGH, J

JULY 11,2017

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