INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 6555/Del/2016
(Assessment Year: 2012-13)

Roki Minda Co. Pvt. Ltd, B-64/1, Wazipur Indl. Area, Delhi PAN: AAJCA3556F	Vs.	ACIT, Circle-21(1), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Pradeep Dinodia, Adv
Revenue by:	Ms. Nidhi Sharma, Sr. DR
Date of Hearing	21/08/2020
Date of pronouncement	19/11/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the appellant/assessee Rocki Minda company private limited for assessment year 2012 – 13 against the order passed by the Asst Commissioner of income tax, Circle 21 (2), New Delhi (the learned assessing officer/AO) u/s 143 (3) read with Section 92CA (4) read with Section 144C (5) of The Income Tax Act 1961 (the Act) dated 26/10/2016 wherein the returned loss of ₹ 7,875,898 as per return of income dated 29/11/2012 was assessed at loss of ₹ 6,328,382/– by making addition on account of the arm's-length price of the international transaction of mark up on purchase of fixed of ₹ 1,547,516 was made in pursuance to the direction of the learned Dispute Resolution Panel. Assessee is aggrieved with that order and has filed this appeal.

2. The assessee has raised the following grounds of appeal:-

"1. The Ld. DRP/TPO and consequently the Ld. AO have grossly erred in law and on facts and circumstances of the assessee's case in making an adjustment of ? 15,47,516/- being the mark-up charged by the AEs from assessee in relation to the international transaction of purchase of assets by the assessee from the its associated enterprises (AEs) amounting to ? 2,23,88,782/-.

2. *The Ld AO has grossly erred in law and on facts in not considering the relief of ? 65,613/-granted by Id TPO by appeal effect dt.16.11.2016 pursuant to DRP's directions.*

3. *The Ld. DRP/TPO and consequently the Ld. AO have grossly erred in law and on facts and circumstances of the case by rejecting the benchmarking analysis performed by the assessee using the Resale Price Method (RPM) by: -*

   (a) not appreciating the fact that the assessee has duly carried out the search process applying all the relevant quantitative and qualitative filters and performing the functional analysis of comparables relevant to the international transaction in the nature of purchase of assets.

   (b) incorrectly holding that comparables selected by the assessee (engaged in trading of assets) are functionally different from the AE (entity level) and thus ignoring that AE's functional profile in respect of international transaction under consideration is relevant instead of AE's entity level's functional profile.

4. *The Ld. DRP/TPO and consequently the Ld. AO have grossly erred in law and on the facts and circumstances of the case in considering CUP as the Most Appropriate Method without affording any plausible reasons on account of following reasons:*

   a) CUP method relies upon availability of internal and external comparable data and the same was neither available nor provided to the assessee.

   b) contention that there was no reason for the assessee to purchase the assets from AE including that AE has expertise or no services have been provided by AE, is based on surmises and conjectures.

5. *Without prejudice to the above, the Ld. DRP/TPO and consequently the Ld. AO have grossly erred in law and in facts of the case, by determining the ALP mark-up at NIL by contending that AE had not expertise or knowledge of trading in items purchased by the assessee.*

6. *The Ld. DRP/TPO and consequently the Ld. AO have grossly erred in law and in facts of the case in not appreciating that the mark-up charged by the AEs is commensurate with the services performed (viz. procurement, testing etc) by the AEs.*

6.1 *The Ld. DRP/TPO and consequently the Ld. AO have grossly erred in law and in facts of the case by questioning the expertise of the AEs in respect of the performance of testing services on moulds and other machines provided by it to the assessee.*

7. *The Ld. DRP/TPO and consequently the Ld. AO have grossly erred in law and in the facts of the case by not granting the effect of credit facilities extended by the AE to the assessee in respect of procurement of assets on assessee's behalf.*

8. *Without prejudice, the Ld. DRP/TPO and consequently the Ld. AO has erred in law and on facts of the case in not considering the working of administrative cost of the AE @ 5% which has been charged by AE from the assessee.*

9. *The Ld. DRP/TPO and consequently the Ld AO has erred in facts and circumstances of the case by not providing the benefit of second proviso of section 92C (2) to the assessee.*

10. *That the penalty proceedings initiated u/s Sec 271 (1)(c) are on wholly illegal and untenable grounds since there was no concealment of any income nor submission of inaccurate particulars of income, nor any default according to law by the assessee.*

11. *That each ground of appeal is independent and without prejudice to other grounds of appeal raised herein.*

12. *That the order of the Ld. Assessing Officer dated 26th October 2016 is bad in law.*

13. *The above grounds are without prejudice to each other."*

3. Brief facts of the case show that assessee is a company engaged in the business of manufacturing and sale of automobile parts. The operations of the company primarily involve production of auto Mobile parts like a filter, air intake system, air cleaner assembly, gas heat pump filters and other automotive parts of all types of vehicles.

4. Assessee filed its return of income on 29/11/2012 declaring loss of ₹ 7,875,898/–. The case of the assessee was picked up for scrutiny. The assessee has also entered into seven types of international transactions with its associated enterprise which are as Under:-

serial number	nature of international transactions	Amount in Rs.	Method used for benchmarking
1	Purchase of assets	2,23,88,782	Resale price method
2	Payment of interest	35,093	CUP
3	Purchase of traded goods	2,52, 408	Not benchmarked
4	Purchase of raw material	3,98,465	Not benchmarked
5	Cost recharges	38,62,578	Not benchmarked
6	Issue of shares	13,25,49,000	No benchmarking
7	Loan taken from	25,46,50,000	No benchmarking

	associated enterprise		

The assessee in its transfer pricing study report benchmarked the international transactions relating to purchase of assets using the resale price method as the most appropriate method with gross profit/cost of goods sold as profit level indicator. The assessee has purchased capital asset machinery from its associated enterprise who have charged 8% markup at cost from the assessee wherein 5% was towards administration costs and 3% was profit of the associated enterprise. Assessee selected eight comparable companies and found there average gross profit/cost of goods sold margin at 11.06%. Therefore the assessee stated that its international transactions are at arm's-length. However during the course of transfer pricing assessment it was found that assessee has not provided any supporting documents regarding the mark up charged by the associated enterprise. Assessee submitted the invoices raised by the associated enterprises but the mark up charged by the associated enterprise has not been shown in the invoices. Therefore the learned assessing officer/transfer pricing officer was of the view that assessee has not been able to prove with supporting evidences that the actual markup as was charged by the associated enterprise of the assessee for the said assets was justified. Thereafter the learned assessing officer/transfer pricing officer issued the showcause notice dated 13th of January 2016 stating that as assessee is not in the regular business of selling case Air, C Separator , ultrasonic welding machines et cetera therefore why it has charged the profits on the same is not justified. According to the learned TPO no independent entity would pay to any entity for the said assets which such extra markup is paid by the assessee because in the instant case the profit charged by the associated enterprise is after and above the cost on profits charge by the third parties from whom the assets were purchased by the associated enterprise. The TPO was also of the view that assessee has not provided any cogent reasons for importing the goods of capital in nature to the assessee from its associated enterprise. In view of this the learned TPO was of the view that ALP of the said transaction should be considered as Nil and adjustment should be made.

5. Assessee submitted its reply stating that the resale price method used by the assessee should be accepted as the most appropriate method. The learned TPO rejected the contentions of the assessee and computed the arm's-length price of the international transaction relating to margin charged by the associated enterprise on the purchase of the asset of ₹ 1,547,516/– as nil and adjustment was proposed. Thus the learned transfer pricing officer was not satisfied with the margin charged by the associated enterprise in supplying moulds/tools, ultrasonic welding machine by Rocki Thailand Co Ltd and moulds supplied by Rocki Japan Co Ltd by charging the margin of 8% over the actual cost of the asset. Therefore the margin charged by the associated enterprise to the assessee for supply of those goods was considered as an international transaction having nil value.

6. Assessee approached Dispute Resolution Panel – 2 raising objections against the adjustment to ALP. Assessee objected that the learned transfer pricing officer has grossly erred in rejecting the benchmarking analysis performed by the assessee using the resale price method. The learned dispute resolution panel held that RPM requires strict functional comparability of functions and contractual terms. It was held those contractual terms with the AE and that of the comparables are not available, risk undertaken by the comparables are also not available. It was held that AE in the present case have acted more like a facilitator then distributor. The learned DRP referred to the functions performed by the associated enterprise and the functions performed by the respective comparables. Learned DRP gave reason to reject functional comparability of all the eight comparable selected by the assessee. Accordingly it held that there is no infirmity in the order of the learned transfer pricing officer in rejecting the resale price method adopted by the assessee. The learned dispute resolution panel held that the assessee choose to procure machines through its associated enterprise for the reasons best known to it as the associated enterprise was neither manufacturer and nor trade of the goods procured by assessee. He also did not have any previous expertise in trading of goods traded. The DRP further noted that during the course of hearing the AR was specifically asked to list of the services rendered by the AE for which it was charging 8% markup, The learned that AR failed to

provide any details to the learned DRP except stating that the associated enterprise had conducted testing of the machinery to be sent to the assessee in Japan. Assessee has filed testing report as an additional evidence which are in Japanese and Chinese and herefore no cognizance of such report were taken. The DRP further noted that as per the statement of the AR goods were sent from Japan and China and how testing of goods shipped from from China was done could not be explained. The AR also could not explain what are the expertise of the associated enterprise for testing of the machines purchased by the assessee. The DRP noted that the machines purchased were a different type of moulds and ultrasonic welding machines which are purchased from China remaining moulds were purchased from Japan. Admittedly nobody from AE went to China for testing and Moulds are used for casting. DRP noted that one requires expert for testing moulds and AE had the requisite expertise has not been established. Therefore the DRP upheld finding of the learned TPO that no independent party would have paid 8% to an entity for facilitating sale of machinery. Therefore the objection of assessee were disposed of upholding the action of the TPO with respect to the excess addition made by the learned TPO, the learned DRP directed the TPO to verify the calculation with respect to access adjustment to the extent of ₹ 6 5613/–

7. Based on the above direction the learned AO passed the assessment order wherein the addition on account of international transactions' Alp was made of ₹ 1 547516/– and accordingly the loss was assessed at ₹ 6,328,382.

8. The learned authorised representative adverting to the various grounds of appeal submitted that international transaction of purchase of fixed assets from its associated enterprise is of capital items which does not otherwise gives rise to any income or relevance of any expenses in itself then even though it's ALP is different than the actual transaction value but no adjustment can be made for the difference between the declared value and the ALV. He further submitted that assessee has not claimed any depreciation on this machinery. Therefore according to him the transfer pricing adjustment is uncalled for. He relied on the decision of the coordinate bench in case of Honda Motorcycle And Scooter India Private Limited Versus Acit (2015) 56 Taxmann.Com 237 wherein it is held that the

addition made by the transfer pricing officer due to the determination of the ALP of the international transaction of purchase of fixed assets was deleted and only the depreciation on such fixed assets to be computed on the adjusted value. The learned authorised representative further submitted that the assessee company has not put to use aforementioned plant and machinery and therefore even the depreciation cannot be adjusted. It was further argued that those imported assets assessee has paid the custom duty and the arm's-length price as per the Customs act is undisturbed. He therefore referred to the decision of the coordinate bench in case of Coastal Energy Private Limited Versus ACIT wherein it is ruled that comparable prices can be used for computing arm's-length price for import of products. He therefore submitted that even the honourable Supreme Court in case of Vadilal Chemicals Ltd versus state of Andhra Pradesh (2005) 6 SCC 292 held that one arm of the government must respect the law laid down by the other arm of the same government. Therefore he submitted that when the customs authorities have accepted the ALP for levy of the custom duty, same should be accepted by the income tax department. He otherwise submitted that the arm's-length price of any transaction cannot be determined at nil as has been done by the learned transfer pricing officer wherein the markup charged by the associated enterprise of 8% for the functions performed by the AE for procuring these assets from the overseas jurisdiction and supplying the same to the assessee have been rejected. He further referred to several judicial precedents on this aspect. Even otherwise he submitted that when the learned transfer pricing officer has rejected the resale price method as the most appropriate method and adopted CUP holding that margin paid by the assessee to associated enterprise is computed at nil, he should have given comparable instances for the same. He further submitted that assessee was charged markup of 8% on actual cost in respect of facilitation of arrangement of fixed assets from outside India. He submitted that in many judicial precedents the markup charged on cost for procurement of services provided by associated enterprise is upheld. He therefore submitted that the addition made by the learned transfer pricing officer and confirmed by the learned dispute resolution panel is devoid of any merit.

9. The learned departmental representative vehemently supported the order of the learned transfer pricing officer and direction of the learned dispute resolution panel. He extensively read the direction of the learned dispute resolution panel. He submitted that when assessee failed to show any services rendered by the associated enterprise, the markup so charged by the associated enterprise to the assessee cannot be held to be at arm's-length and when no services have been rendered the ALP is correctly determined at rupees nil.

10. We have carefully considered the rival contentions and perused the orders of the lower authorities. The only dispute in this case is with respect to the charge of markup by AE to assessee at rate of 8% on certain fixed assets purchased by the assessee. Whether the transaction of purchase of fixed assets is covered as an international transaction or not has been dealt with by the coordinate bench in case of Honda motorcycle and Scooter India private limited versus ACIT (56 taxmann.com 237) in paragraph number 15.3 as Under:-

> ***"15.3*** *Section 92B gives the meaning of an 'international transaction'. Sub-section (1) provides that : 'For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or.....'. The Explanation below sub-section (2) inserted by the Finance Act, 2012 w.r.e.f. 1.4.2002 clarifies, for the removal of doubts that - (i) the expression "international transaction" shall include - (a) the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing. In view of the above plain and unambiguous language of the provision read with its Explanation, it is abundantly clear that the purchase of fixed asset is also an international transaction. The moot question is whether the difference in the value of such international transaction and its ALP would call for making a transfer pricing adjustment. In our considered opinion, the answer to this question has to be given in negative. The*

main substantive provision of the Chapter–X of the Act is section 92, which provides through sub-section (1), that any income arising from an international transaction shall be computed having regard to the ALP. To put it simply, section 92 is not a charging but a procedural provision for recomputing the income arising from an international transaction having regard to its ALP. Before applying the mandate of this provision, it is of utmost importance that there should be some existing income chargeable to tax, which is sought to be recomputed having regard to its ALP. If there is an international transaction which in itself gives rise to income that is chargeable to tax, then its ALP shall constitute a basis for making of addition on account of difference between the assigned value and ALP of such international transaction as per the relevant provisions. ***But if there is an international transaction in the capital field, which does not otherwise give rise to any income in itself, then even though its ALP may be computed in consonance with the provisions, but no adjustment can be made for the difference between the declared value and the ALP of such international transaction. . In our present context, the international transaction of purchase of fixed assets is required to be benchmarked as per the most appropriate method. The application of the ALP, if required, will give rise to the recomputation of the revised value of the purchase of fixed assets. Such an increase in the value of the fixed assets, being a capital transaction in itself, will not give rise to any addition towards transfer pricing adjustment, but the depreciation on such assets, being a revenue offshoot of the capital transaction, will be required to be recomputed on such revised value.*** *Ergo, we set aside the addition made by the TPO due to the determination of the ALP of the international transaction of purchase of fixed assets and direct that the depreciation on such fixed assets be computed on the adjusted value, if permissible, as per the relevant provisions. Needless to say, the assessee will be allowed a reasonable opportunity of being heard in such fresh proceedings."*

11. Therefore, in view of the above finding of the coordinate bench, respectfully following the same , we also hold that there cannot be adjustment in the hands of the assessee with respect to the arm's-length price of the international transaction of purchase of fixed assets per se. In the present case the arm's-length price adjustment is only on account of purchase of fixed assets. Admittedly the assessee has not claimed any depreciation during the year. However whenever assessee claims depreciation on that the adjustment with respect to the above transaction would impact the actual cost of the asset. Therefore, in absence of any claim of depreciation by the assessee we direct the learned transfer pricing officer/assessing officer to delete the above adjustment to the total income of the assessee.

12. In the result appeal of the assessee is allowed on the above contentions keeping all other issues open. Accordingly appeal of the assessee is allowed.

Order pronounced in the open court on 19/11/2020.

Sd/-	Sd/-
(BHAVNESH SAINI)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 19/11/2020
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	19.11.2020
Date on which the typed draft is placed before the dictating member	19.11.2020
Date on which the typed draft is placed before the other member	19.11.2020
Date on which the approved draft comes to the Sr. PS/ PS	19.11.2020
Date on which the fair order is placed before the dictating member for pronouncement	19.11.2020
Date on which the fair order comes back to the Sr. PS/ PS	19.11.2020
Date on which the final order is uploaded on the website of ITAT	19.11.2020
date on which the file goes to the Bench Clerk	19.11.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	