

(2013) 05 ITAT CK 0001
In the Income Tax Appellate Tribunal
Case No : 5642 (Delhi) of 2010

Dorling Kindersley India (P.) Ltd

APPELLANT

Vs

Income-tax Officer

RESPONDENT

Date of Decision : 17-05-2013

Acts Referred:

Income Tax Act, 1961, Section 144, Section 144, Section 144, Section 144, Section 143(2), Section 143(2)

Citation : (2013) 05 ITAT CK 0001

Hon'ble Judges : S.V. Mehrotra, Diva Singh

Advocate : Tarangdeep, peeyush Jain

Final Decision : Appeal allowed

Judgement

1. This is an appeal filed by the assessee against the order dated 30.09.2010 passed by the CIT(A), New Delhi u/s 143(3)/144 of the Income Tax Act pertaining to the assessment year 2006-07 on the following grounds:- 1. "That on facts and in law the orders passed by the Assessing Officer [hereinafter referred as the "AO"]/Dispute Resolution Panel (hereinafter referred as the "DRP")/ Transfer Pricing Officer [hereinafter referred as the "TPO"] are bad in law and void ab-initio.

2. That on facts and in law the DRP/AO erred in upholding/making an addition of Rs.2,84,01,593/- under Chapter-X of the Income Tax Act, 1961.

3. That on facts and in law the DRP/TPO erred in: (a) computing the Profit Level Indicator (PLI) of the assessee (i.e the tested party) at 17.02% as against 24.30% computed by the assessee in its Transfer Pricing Report.

(b) Rejecting the claim of the assessee that while computing its PLI total sales be adopted at Rs.37,70,52,414/- i.e net of turnover discount of Rs.2,47,80,113/-.

(c) Upholding/rejecting M/s HT India Ltd as a comparable.

(d) Upholding/rejecting M/s MacMillan India Ltd as a comparable.

(e) Not making appropriate adjustments to the PLUI of M/s Naveen Publications India P. Ltd to make the same functionally comparable.

4. That without prejudice on facts and in law the AO/DRP erred in not granting the benefit for adjustment of the Arms Length Price ("ALP") by + as per the proviso to section 92C(2).

5. That on facts and in law the DRP erred in not passing a speaking order while adjudicating upon the grounds of objection raised by the assessee. That the appellant prays for leave to add, alter, amend and/or vary the ground(s) of appeal at or before the time of hearing."

2. A perusal of the record shows that the assessee furnished a return electronically on 30.11.2006 by declaring NIL income and claimed a refund of Rs.41.04.516/- out of TDS and self assessment tax. On the basis of selection of case under scrutiny notice u/s 143(2) was issued, the record shows an information through AIR was also received that the company was registered with the Sales Tax Department with a turn over of Rs.7,82,93,491/-. Another information showed that the company had paid Rs.24,89,799/- to Galaxy Auto Pvt. Ltd. and Prime Honda, Delhi for purchase of cars. On the basis of audit report furnished by the assessee, the matter was referred to the TPO for determining the Arm's Length Price of the transaction. The TPO vide his order dated 30.09.2009 determined a sum of Rs.2,84,01,593/- being the difference between the arm's length margin. Accordingly a show-cause notice was issued why an addition, of the said amount not to be made to the assessee's income. The assessee moved the alternative dispute resolution panel against the additions proposed by the TPO. The objections of the assessee were not allowed; consequently the impugned assessment order was passed. Aggrieved by this, the assessee is in appeal before the Tribunal.

3. Ld. AR, at the time of hearing submitted that the objections passed by the assessee were disposed by the DRP in a cursory manner and various objections on facts and law were raised before the DRP. The comparables which were suggested by the assessee namely M/s HT Media Ltd. and M/s MacMillan India Ltd. were not accepted by the TPO and the assessee had addressed copious arguments in support of the comparables. It was his submission that neither the objections of the assessee have been considered nor the reasoning for upholding the action of the TPO has been brought out in the order. In these circumstances, it was submitted that the issue may be restored to the DRP following the judgement of the Jurisdictional High Court in the case of Vodafone Essar Ltd. v. Dispute Resolution Panel-II [2012] 340 ITR 352/[2011] 196 Taxman 423/[2010] 8 taxmann.com 297 (Delhi).

4. Ld. CIT DR, on a perusal of the DRP's order though placed reliance on the same fairly submitted that he would have no objection if the issue is restored as the judgement of the Hon'ble High Court is very clear.

5. We have heard the rival submissions and perused the material available on record. It is seen that the assessee raised specific objections on rejection of its comparables as under:-

On Objection No.3.1: Rejection of Comparables :-

"13. HT Media was selected as a comparable because the company is in the business of publishing of Newspapers & Magazines, though not entirely into a similar business line as the tested party from the point of view of functionality, but it still has a reasonable similarity in the business functions considering the fact that HT Media Ltd besides publishing Newspapers is also publishing magazines, which is comparable with the function performed by the tested party, viz publishing of books. The core point that needs to be understood here while using HT Media as a comparable is that the major Income of the Comparable is from Publishing activity, whether it is publishing of Newspapers or whether it is publishing of Magazines. This fact is further strengthened from the information given by the Company in its Audited Accounts for the Financial Year 2005-06, which is reproduced below:-

In the Notes to the accounts of HT Media Ltd for the Financial Year 2005-06 "Schedule 23" (Copy of relevant pages Enclosed - Annexure "E"), the Company has detailed its Nature of Operations:

Nature of Operations

The Company publishes "Hindustan Times", an English daily and "Hindustan", a Hindi daily and two monthly Hindi magazines, "Kadambini" and "Nandan". The company derives revenue from the sale of the above mentioned publications, advertisements published therein, and by undertaking printing jobs. The company also derives revenue from the internet business, by displaying advertisements on its website, hindustantimes.com".

Ht Media Ltd. is reporting its Revenues from Printing & Sale of Newspapers & Sale of magazines/ Publications under one segment, which is confirmed from its note no.-4 to the Notes to the Accounts as reproduced below:

Segment Information

The Company is engaged in the Printing and Publication of Newspapers and Periodicals. The entire operations are governed by the same set of risk and returns, hence, the same has been considered as representing a single primary segment. The said treatment is in accordance with the guiding principles enunciated in the Accounting Standard -17 on Segment Reporting.

On Objection No.3.2: Rejection of Comparables :-

14. MacMillan India Ltd as a comparable was rejected by the learned TPO for the simple reason that the financials of Macmillan India Ltd were for the year ended 31st December 2005 whereas the Financials of the tested party are for 31st March 2006. We would like to reiterate that the annual closure of the companies

can in no way hamper the comparability of the results as long as the results are for a uniform period. In this case the Annual results of both the Companies are for a period of 12 months as such both the companies have gone through the normal annual business cycle.

MacMillan India Ltd. operates in 3 major segments. The operating Margin of MacMillan in the publishing segment for the 12 month period ending 31st Dec 2005 is 5.67%.

If the TPO's logic is used for comparing results, then the results of no international Company can be used as a comparable, since all the international Companies close their accounts on dates other than 31st March each year & most international Companies use calendar year as their year end.

Based on the above, financial data of MacMillan India Ltd. can be used as a comparable.

5.1 On a consideration of the same, we are of the view that the issues has been disposed by the Id. DRP in a very cursory manner and it is most definitely not in a manner which can be said to be as contemplated in law as absence of discussion on the issues involved cannot be termed to be a fair and speaking conclusion on the objections posed before the Appellate forum. It is seen that vide its order dated 19.08.2010, the issue was considered in the following manner:-

"The objection to draft assessment order was filed before the DRP on 29.1.2010. In response to notice for hearing of the case Shri Vidur Puri attended and argued the case. The assessee has objected to the reference by the AO to TPO, computation of operating profit ratio of gross turnover of Rs.40,18,32,527/- without excluding trading discount, rejection of M/s H.T. India Ltd. as a comparable on ground of difference of functional profile and rejection of M/s MacMillan India Ltd. on the ground that accounting year is different, as also not considering the additional cost incurred by the assessee in getting work done by third party.

We have considered the draft assessment order, written submission of the assessee as also the arguments put forth by the assessee's representative. We do not find any infirmity in reference by the AO to TPO for determination of arm's length price in respect of international transaction of the assessee.

The TPO has argued that AS.9 is not relevant in this case and based on OECD guidelines which has been found to be more relevant has computed profit margin of gross sale and has thus worked out the ratio of OP upon sales.

As regards comparables relied upon by the assessee, the TPO has after giving detailed reasons rejected two of the comparables one being M/s H.T. Media Ltd. by distinguishing the business being different from the assessee's and in the case of MacMilan India Ltd., he has been pointed out the differences in accounting period. The other comparable of the assessee has been accepted by

the TPO and the arm's length price has been worked out on that basis.

We, therefore, do not find any infirmity in the draft order and decide that no interference with the proposed order is warranted."

5.2 Section 144C of the Act envisages that the DRP shall act in the following manner:-

"[Reference to dispute resolution panel]

****144C. (1), (2), (3) and (4) ** ****

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:-

- (a) draft order;
- (b) objections filed by the assessee;
- (c) evidence furnished by the assessee;
- (d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;
- (e) records relating to the draft order;
- (f) evidence collected by, or caused to be collected by, it; and
- (g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),-

- (a) make such further enquiry, as it thinks fit; or
- (b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

[Explanation-For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.]

(9) If the members of the Dispute Resolution Panel differ in opinion on any point,

the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 [or section 153B], the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

The following sub-section (14A) shall be inserted after sub-section (14) of section 144C by the Finance Act, 2012, w.e.f. 1-4-2013:

(14A) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Commissioner under sub-section (12) of section 144BA.

5.3 On a perusal of the order of the DRP which has been reproduced in the earlier part of this order. We are of the view that in the peculiar facts and circumstances of the case and position of law, the impugned order which has been passed consequent to the DRP's order has to be set aside. We find support from the judgement of the Hon''ble High Court in the case of Vodafone Essar Ltd. (supra) which has very categorically held that when a quasi Judicial Authority like the DRP deals with lis u/s 144C of the Act then it is obligatory on its part to ascribe cogent and germane reasons as reasons are the heart and soul of the matter and facilitate the appreciation of the order when the order is called in question either before a superior forum or an Appellate forum. It is an admitted position on record that in support of its comparables various assertions and facts have been made which has been not dealt with by the Ld. DRP. Accordingly, the DRP's order along with the impugned order is set aside and the issue is restored back to the file of the DRP with the direction to pass a speaking order in accordance with law.

6. Accordingly for the reasons given hereinabove, the appeal of the assessee is allowed for statistical purposes.