

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT),
'K' BENCH MUMBAI**

BEFORE SHRI M.BALAGANESH, AM

&

SHRI RAM LAL NEGI, JM

**ITA No.1689/Mum/2017
(Assessment Year :2012-13)**

M/s. Basell Polyolefins India Private Ltd., 303/305, Delphi B Wing Hiranandani Business Park Hiranandani Gardens Powai, Mumbai – 400706	Vs.	Asst. Commissioner of Income Tax-15(1)(2), Room No.483A, Aayakar Bhavan, M.K.Road Mumbai – 400 020
PAN/GIR No. AACCB5368D		
(Appellant)	..	(Respondent)

Assessee by	Shri Madhur Agarwal
Revenue by	Shri Shreenivasaraghava Iyengar
Date of Hearing	18/12/2020
Date of Pronouncement	30/12/2020

आदेश / ORDER

PER M. BALAGANESH (A.M.):

This appeal in ITA No.1689/Mum/2017 for A.Y.2012-13 preferred by the order against the final assessment order passed by the Assessing Officer dated 31/01/2017 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 Id. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 25/11/2016 for the A.Y.2012-13.

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

“1. The order of the Learned Transfer Pricing Officer ("Id. TPO") u/s. 92CA(3) of the Income-tax Act, 1961 ("the Act") and the consequent assessment order of the Learned Assessing Officer ("Ld. AO") u/s. 143(3) read with section 144(13) of the Act, passed in pursuance of the directions of the Hon'ble Dispute Resolution Panel ("Hon'ble DRP"), is bad in law and void ab initio as it has been passed in gross violation of principle of natural justice and without complying with the mandatory conditions of section 92CA(3) r.w.s. 92C(3) of the Act for the reason that the Ld. TPO did not serve upon the Appellant any written show cause notice as required and mandated in terms of proviso to Section 92C(3) r.w.s. 92CA(3) of the Act.

2. The Ld. AO / Ld. TPO, in pursuance of the directions of the Hon'ble DRP under section 144C(5) of the Act, grossly erred in making an upward transfer pricing adjustment of Rs. 1,12,40,803/- in respect of impugned international transaction of provision of business facilitation services by the Appellant to its Associated Enterprises ('AEs') and in doing so,

2.1 The Ld. AO grossly erred in not excluding 'Mahindra Insurance Brokers Ltd' from the set of the comparable uncontrolled companies selected by the Appellant for benchmarking the impugned international transaction of provision of business facilitation services despite this company having related party transactions exceeding 15% and has earned extra-ordinary high profit margin.

2.2 The Ld. AO / Ld. TPO grossly erred in rejecting Allcheckdeals India Private Limited on the basis of unavailability of the annual report and on account of loss made by this company in the financial year 2011-12 corresponding to A.Y. 2012-13.

2.3 The Ld. AO / Ld. TPO grossly erred in rejecting following companies selected by the Appellant as comparable companies for benchmarking the impugned international transaction of provision of business facilitation services:-

- a. 3I Infotech BPO Ltd,
- b. Caliber Point Business Solutions Ltd.
- c. Datamatics Financial Services Ltd.
- d. Firstsource Dialog Solutions Pvt. Ltd.
- e. ICRA Online Ltd.
- f. Jindal Intellicom Ltd.
- g. MCS Ltd.
- h. PL Worldways Ltd,

i. Professional Management Consultants Ltd.

j. Sparsh B P O Services Ltd.

2.4 The Ld. AO / Ld. TPO grossly erred in adding 'Killick Agencies and Marketing Ltd as comparable company treating it as functionally comparable to the business facilitation service segment of the Appellant.

2.5 The Ld. AO / Ld. TP.O grossly erred in not considering the infrastructure cost reimbursement received by the Appellant as "Operating Revenue" and thereby grossly erred in computing OP/OC margin of the "Business Facilitation Service" segment of the Appellant at 11.67 percent instead of 15.27 percent as worked out by the Appellant.

2.6 The Ld. AO / Ld. TPO grossly erred in not allowing working capital adjustment whereas such comparability adjustment is appropriate and necessary while applying the Transactional Net Margin Method (TIMMM') to eliminate material differences in working capital deployed by the Appellant vis-a-vis comparables and is also permitted by law.

2.7 The Ld. AO / Ld. TPO grossly erred in not allowing the comparability adjustment for material difference in risk profile and functional profile of the Appellant vis-a-vis the comparable companies when such comparability adjustments are mandated by law.

The Ld. AO grossly erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The Appellant craves leave to add, alter, amend or delete all or any of the grounds of appeal before or during the course of hearing."

3. The only issue to be decided in this appeal is with regard to transfer pricing adjustment made on account of business facilitation service provided to AE by the assessee.

4. We have heard rival submissions and perused the materials available on record. The assessee, Basell Polyolefins (India) Private Limited is engaged in the multiple business activities namely provision of business facilitation services to Associated Enterprises (AE), trading in polyolefins products and manufacturing of polyolefins products. The assessee is subsidiary of LyondellBasell Group LyondellBasell Group is one of the world's largest independent chemical group with more than 14,000

employees worldwide. LyondellBasell is a global manufacturer of chemicals and polymers including polyolefins and advanced polyolefins, a refiner of heavy, high sulphur crude oil and leading developer and licensor of technologies for the production of polymers, LyondellBasell has vertically integrated facilities, broad product portfolio, manufacturing flexibility, superior technology base and operational excellence to deliver exceptional value to customers across the petrochemical chain – from refining to advanced product applications. LyondellBasell’s petrochemical products are the basic building blocks used to manufacture goods such as personal care products, fresh food packaging, lightweight plastics, construction materials, automotive components, durable textiles, medical applications, biofuels and many others. The uses of its products are practically unlimited. The assessee provides business facilitation services to certain business entities of the group. Business facilitation services provided by assessee include marketing and promotion of polyolefin products, provision of administrative and customer support, supply of manpower etc., Further, in addition to business facilitation services, the assessee is also into trading and manufacturing of polyolefin products operations. The details of international transactions entered into with AEs as mentioned in form 3CEB entered with AEs are as under:-

Sr. No.	Nature of International Transaction	Amount (Rs.)
1.	Business facilitation services – receipt	180,865,010
2.	Purchase of finished products for resale-payment	66,139,723
3.	Purchase of raw materials for manufacture of finished products payment	43,924,505
4.	Reimbursement of infrastructure cost –	5,827,628

	receipt	
5.	Subscription of equity share capital	50,000,000

4.1. What is relevant to be discussed here is only with regard to business facilitation services provided to the AE by the assessee and whether the same was transacted at arm's length price. It would be relevant to describe the nature of service provided herein:-

The assessee acts as captive business facilitation services centre for the following AEs within the LyondellBasell Group (a) Basell Polyolefin GmbH, Germany (b) Basell Asia Pacific Limited, Hong Kong and (c) Basell International Trading FZE, UAE and provides business facilitation services (including supply of manpower, marketing and promotion of polyolefin products, provision of administrative support and customer support) to respective AEs.

4.2. The assessee had selected itself as the tested party for benchmarking the international transaction of provision of business facilitation services. The assessee in its transfer pricing study report applied Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) for benchmarking the business facilitation services transaction with its AE. The assessee had adopted Profit Level Indicator (PLI) of Operating Profit / Operating Cost (OP/OC), since the revenue of the assessee was directly affected by the transfer prices it receives from AEs, net operating profit on total cost was selected as PLI.

4.3. The PLI of service segment of assessee was computed as under:-

Particulars	Rs.
<u>OPERATING INCOME</u>	
Revenue from operations	180,865,010
Other operating income	
Infrastructure cost reimbursement	5,827,628
Total Operating Income (A)	186,692,639
<u>OPERATING EXPENSES</u>	
Employee benefits expenses	97,467,277
General and administrative expenses	64,498,779
Total Operating Cost (B)	161,966,056
Operating Profit [C=(A)-(B)]	24,726,582
Return on total cost	15.27%

4.4. The Id. TPO observed that the assessee while calculating OP/OC margin had included the reimbursement of infrastructure cost which was towards cost of fixed assets and hence, required to be netted off from the fixed assets and cannot be considered as operating revenue. He also observed that similar inclusion carried out by the Id. TPO for the A.Y.2011-12 was upheld by the Id. DRP. Accordingly, the revised OP/OC margin of the business facilitation service segment was worked out at 11.67% as under:-

Particulars	Amount (Rs.)
Operating Income (w/o. reimbursement of infra cost)[A]	18,08,65,010
Total Operating Costs (B)	16,19,66,056
Operating Profit (C-(A)-(B))	1,88,98,954
Return on Total Cost (C)/(B)	11.67%

4.5. The Id. TPO took the final comparable companies as under and arrived at the arithmetic mean margin of 18.61% which was compared with assessee's margin of 11.67%.

Sr. No.	Name of the Company	PLI as per Assessee(%)
1.	Spectrum Business Solutions Ltd.,	7.57
2.	Genius India TPA Ltd.,	23.78
3.	Killick Agencies and Marketing Ltd.,	9.03
4.	IIT Insurance Broking & Risk Mgmt. Pvt. Ltd.,	26.78
5.	Mahindra Insurance Brokers Ltd.,	61.91
6.	Tata Motors Insurance Broking & Advisory Services Ltd.,	6.96
7.	Aditya Birla Insurance Brokers Ltd.,	32.57
8.	Almondz Insurance Brokers Pvt. Ltd.,	8.45
9.	Bajaj Capital Insurance Broking Ltd.,	4.90
10.	India Infoline Insurance Brokers Ltd.,	4.13
	Mean Margin	18.61

4.6. The arm's length price adjustment in respect of business facilitation services was made to the extent of Rs.1,12,40,803/- by the Id. TPO by working out in the following manner:-

Particulars	Amount (Rs.)	Amount (Rs) (105%)
Operating Income (w/o. reimbursement of Infra cost)(A)	18,08,65,010	18,99,08,261

Operating costs (B)	16,19,66,056	16,19,66,056
Operating Profit (C)	1,88,98,954	2,79,42,205
OP/OC (actual)	11.67%	17.25%
Arm's length OP/OC	18.61%	18.61%
Arm's length operating profit (D)=B x 18.61%	3,01,39,757	3,01,39,757
Arm's length operating income (E)=D+B	19,21,05,813	19,21,05,813
Adjustment = E-A	1,12,40,803	21,97,552

4.7. This action of the Id. TPO was upheld by the Id. DRP and accordingly, the Id. AO passed the final assessment order u/s.143(3) r.w.s.144C(13) of the Act on 31/01/2017.

4.8. We find originally that assessee in its TP study report had selected 19 comparables with average PLI of 6.10% and the margin of assessee's business facilitation service commission was 15.27% by considering reimbursement of infrastructure cost as operating revenue at 15.27% and since the assessee's margin was higher than the arithmetic mean margin of the 19 comparable companies, the assessee had submitted that its price was at arm's length. Moreover, in the TPO study report, the assessee firmly asserted that it is a captive business facilitation service center for its AEs and is remunerated on cost plus profit mark up basis including reimbursement on all fixed costs. Hence, it was submitted that assessee was operating in a risk mitigating environment. The comparable selected by it are full fledged entrepreneur service provider plus operating in open market and also undertaking selling and marketing activities. We find that the assessee had pleaded before the Id. DRP that there are

material differences in the risk and functional profile of assessee's business facilitation service segment vis-à-vis the comparables selected by the assessee itself, which necessitates comparability adjustments favourable to the assessee.

4.9. We also find that the assessee in para 5.7 of the TP study report had reserved its right to apply the following comparability adjustments i.e. a) for differential risk profile b) for functional profile c) working capital adjustment. We find that the Id AR submitted before us that if Icra Online Ltd alone is included in the final list of comparables chosen by the Id. TPO, the assessee would be well within +/- 5% tolerance range permitted in the statute and hence no adjustment would be required to be made to international transaction of the assessee. He further submitted that once this is done, the adjudication of other grounds on comparables for both inclusion and exclusion would become academic. We find that the PLI of Icra Online Ltd., was considered at 1.87% as per page 4 of the order of the Id. TPO. We find that this Tribunal in assessee's own case for A.Y.2011-12 in ITA No.2659/Mum/2016 dated 19/12/2018 had directed the Id. TPO to include Icra Online Ltd., in the final list of comparables, among others. The relevant operative portion is enclosed in para 14 of the order which is reproduced hereunder:-

"14. We are of the considered view that in the backdrop of the aforesaid observations and the settled position of law, the whimsical rejection of the aforementioned companies viz (i) Cyber Media Research Ltd; and (ii) ICRA Online Ltd. by the TPO for benchmarking the ALP of the international transactions of the assessee with its AEs during the year under consideration not being justified, thus cannot be sustained and is liable to be vacated. In terms of our aforesaid observations we direct the AO/TPO to re-workout the ALP in the hands of the assessee after including the aforementioned companies i.e. (i) Cyber Media Research Ltd; and (ii) ICRA Online Ltd. as comparables in the final list of comparables. In case, the claim of the assessee that after including the aforementioned companies its ALP would fall within the range of is found to be

in order then no adjustment to the ALP would be called for in the hands of the assessee.”

4.10. Respectfully following the aforesaid judicial precedents in assessee's own case and considering the argument of the assessee that it would be well within the +/-5% tolerance range after inclusion of I cra Online Ltd., in the final list of comparables, we direct the Id. TPO to include the same in the final list of comparables and in view of this decision, the adjudication of other grounds would become academic and infructuous. Hence, no opinion is given hereunder in respect of other grounds raised by the assessee and they are left open. Accordingly, the grounds raised by the assessee are allowed.

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

Order pronounced on 30/12/2020 by way of proper mentioning in the notice board.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 30/12/2020
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