

आयकर अपीलीय अधिकरण "K" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

श्री पी.एम. जगताप, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI P.M. JAGTAP, AM AND SHRI VIJAY PAL RAO, JM

आयकर अपील सं./I.T.A. No.9010/Mum/2010
(निर्धारण वर्ष / Assessment Year : 2006-2007)

Parle Biscuits Pvt. Ltd., North Level Crossing, Vile Parle (East), Mumbai - 400 057.	बनाम/ Vs.	Dy. Commissioner of Income Tax - 9(2), Aayakar Bhavan, M.K. Marg, Mumbai - 400020.
स्थायी लेखा सं./PAN : AAACP0485D		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Appellant by	Shri Girish Dave & Shri Madhav Khandelwal
Respondent by :	Shri Ajeet Kumar Jain

सुनवाई की तारीख / **Date of Hearing** : 20-02-2014

घोषणा की तारीख / **Date of Pronouncement** : 11-04-2014

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आदेश / ORDER

PER P.M. JAGTAP, A.M. :

पी.एम. जगताप, लेखा सदस्य

This appeal filed by the assessee is directed against the order of DCIT 9(2), Mumbai (Assessing Officer) dated 18-10-2010 passed u/s 143(3) of the Income tax Act, 1961 in pursuance to the direction given by the Dispute Resolution Panel (DRP) -II Mumbai u/s 144C(5) of the Act.

2. The issue involved in ground No. 1 of this appeal relates to the addition of Rs. 92,02,660/- made by the A.O. to the total income of the assessee on account of excess consumption of raw material.

3. The assessee in the present case is a company which is engaged in the business of manufacturing biscuits under the name of "Parle-G, Krackjack, Monaco, Nimkin" etc. Besides having its own manufacturing unit at Bahadurgarh, Neemrana and Rudrapur, the assessee also gets the manufacturing done through its various contract manufacturing units (CMUs) which manufacture Parle-G, Cream Biscuits and Marie. The return of income for the year under consideration was filed by it on 30-11-2006 declaring total income of Rs. 76,96,42,872/-. During the course of assessment proceedings, it was noticed by the A.O. that addition was made to the total income of the assessee in the earlier years on account of difference between actual consumption of raw materials and the standard consumption treating the same as excess consumption. He therefore proceeded to examine the consumption of raw materials claimed by the assessee during the year under consideration and found that the standard formula for working out the consumption of raw materials was taken by the assessee for its CMUs at 110.607 kg for 100 kg of final products as against the standard formula of 108.19 kg for 100 kgs of final product taken for its own units at Bahadurgarh, Neemrana and Rudrapur. In this regard, the explanation offered by the assessee that the higher ratio of 110.607 kgs was taken in case of CMUs in order to give effect to the burnt biscuits as well as excess weight packed in biscuits was not found fully acceptable by the A.O. As regards the reliance placed by the assessee on the Tribunal's order for A.Y. 1989-90 in its own case, the A.O. noted that the Id. CIT(A) in his appellate order for A.Y. 2003-04 passed in assessee's own case had held that the order of the Tribunal was only in respect of excess consumption of raw materials of assessee's own units and not in respect of CMUs. He also noted that it was held by the Id. CIT(A) in his appellate order for A.Y. 2003-04 that the excess/short consumption in case of CMUs is required to be computed after making adjustment on account of wastages. Accordingly, the consumption of raw materials of CMUs was worked out by the A.O. at Rs. 2,69,43,415/- by

adopting the consumption ratio of 108.190 kgs instead of 110.607 kgs and after adjusting the short consumption of raw material of its own units at Rs. 1,46,73,200/-, the excess consumption of raw material of the assessee was worked out by him at Rs. 1,22,70,215/-. After giving deduction of 25% for wastages etc., the net excess consumption of raw materials was arrived at by him at Rs. 92,02,660/- and addition to that extent was made by him to the total income of the assessee. Before the DRP, it was pointed out on behalf of the assessee that the ITAT has already allowed relief to it on the issue of excess consumption of raw materials. However, keeping in view that this issue was being contested before the Hon'ble Bombay High Court, the DRP directed the A.O. to make the addition of Rs. 92,02,660/- to the total income of the assessee as proposed in the draft assessment order.

4. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that although the issue decided by the Tribunal in assessee's own case for the years prior to A.Y.2000-01 was in respect of excess consumption of raw materials of assessee's own manufacturing units and not in respect of CMUs as rightly observed by the A.O. in the assessment order, the issue in respect of excess consumption of raw materials of the CMUs came for consideration of the tribunal in A.Ys. 2000-01 to 2003-04 and vide its common order dtd. 31-8-2010 passed in ITA No. 5320/Mum/2006 and Others, the Tribunal decided the same vide para 25 which reads as under:-

"25. As regards the issue relating to the manufacturing of biscuits through CMUs is concerned, we find the Assessing Officer noted that the input-output ratio in the CMUs are shown by the assessee at 110.60:100 as against 108.19:100 in case of own factory. We find the Assessing Officer rejected the various submissions given by the assessee and applied the ratio of 108.19:100 for the CMUs also. We find the CIT(A) directed the Assessing Officer to make the same adjustments to the CMUs which are applicable to own factory. Based on the figures given by the assessee, he directed the Assessing Officer to verify these figures subject to the condition that no adjustment in

the case of left over maida is to be made. Admittedly, the assessee has no full control over the CMUs. At the same time it cannot be blindly accepted as to whatever figures given by the assessee on account of manufacturing of biscuits through the CMUs has to be accepted. Some sort of control, in our opinion, is required as there is every possibility of leakage of revenue through excess consumption of raw material in absence of any control mechanism. Under the peculiar facts and circumstances of the case, we find merit in the submission of the learned counsel for the assessee that if the input-output formula of 108.19:100 for the CMIJs is applied then necessary adjustment which are allowed to the own manufacturing units should also be allowed to the CMUs. We, therefore, set aside the order of the CIT(A) on this issue and restore the matter to the file of the Assessing Officer directing him to make necessary verification and give appropriate relief to the assessee. We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed for statistical purposes and the grounds of appeal No. 2 by the Revenue is dismissed.”

5. As held by the Tribunal in assessee's own case for assessment years 2000-01 to 2003-04, if the formula of 108.190 is to be applied for the CMUs, then it is necessary that adjustments which are allowed in case of own manufacturing units of the assessee should also be allowed in case of the CMUs. The issue accordingly was restored by the tribunal to the file of the A.O. to allow such adjustments after making necessary verification. As the issue involved in the year under consideration as well as all the material facts relevant thereto are similar to that of assessment years 2000-01 to 2003-04, we respectfully follow the order of the Tribunal for the said year and restore this issue to the file of the A.O. for deciding the same afresh as per the same direction as given in assessment years 2001-01 to 2003-04. Ground No. 1 of assessee's appeal is accordingly treated as allowed for statistical purpose.

6. The issue raised in ground No. 2 relates to the addition of Rs. 5,45,840/- made by the A.O. and sustained by the ld. CIT(A) on account of TP adjustment made in respect of various international transactions of the assessee company with its AEs.

7. In the T.P. study report filed along with the its return of income, the assessee had reported three international transactions involving loans given by it to the AEs on interest. When the reference was made by the A.O. u/s 92CA(1) of the Act for determining the Arm's Length Price (ALP) of these transactions, the TPO found that there are certain more international transactions of the assessee company with its AEs which were not reported in the TP study report. He, accordingly, proceeded to determine the ALP of these reported as well as un-reported international transactions. In this regard, he found that the assessee had paid share application money of Rs. 22,07,147/- to its AE Pardee Foods Nigeria Ltd. on 19-8-2005 whereas the share certificates were actually issued by the said company only on 14-6-2006. As the explanation offered by the assessee for this delay in issue of certificates which was not found acceptable by the A.O., he treated the amount of share application money up to the date of allotment of certificates as loan and made TP adjustment of Rs. 69,843/- on account of interest on such loan calculated at LIBOR 4% plus 300 basis point for the period from 19-8-2005 to 31-3-2006. The TPO has also found that the assessee had extended a loan of Rs. 6,83,78,989/- to its AE in Nigeria at 6% interest and taking LIBOR 4% plus 300 basis point at arm's length rate, the TP adjustment of Rs. 2,39,062/- was made by the TPO for the difference amount. In another international transaction, the assessee company had paid share application money of Rs. 3,13,276/- to its AE Parlite Foods SARL, Cameroon on 22-8-2005 whereas the shares were issued by the said company only on 22-7-2007. The share application money paid by the assessee therefore was treated as loan given to its AE till the date of issue of shares and TP adjustment of Rs. 9733/- was made by him on account of interest at LIBOR plus 300 basis point for the period 22-8-2005 to 31-3-2006. Similarly, the share application money of Rs. 242.44 lacs paid by the assessee from time to time to its AE Arctic Biscuits, Bangladesh was treated by the A.O. as loan amount given by the assessee company to its AE till the issue of respective shares and TP adjustment of Rs.

4,74,263/- was made by the TPO on account of interest on such loan calculated at LIBOR plus 300 basis point. The assessee company had also given a loan to Arctic, Bangladesh amounting to Rs. 53,42,326/- on interest at 5% and taking LIBOR rate of 4% plus 300 basis point as the arm's length rate of interest, the TP adjustment of Rs. 89,916/- was made by the TPO in respect of all these international transactions. Accordingly, total addition of Rs. 8,82,817/- was proposed on account of TP adjustment in respect of various international transactions as summarized below:-

Sr. No.	Nature of transaction	AE	Para	Amount (Rs)
1	Share Application money	Nigeria	5.1	69,843
	Interest on loan	Nigeria	5.2	2,39,062
2	Share Application money	Cameroon	6	9,733
3	Share Application money	Bangladesh	7.1	4,74,263
	Interest on loan	Bangladesh	7.2	89,916
	Adjustment			8,82,817

8. When the above TP adjustments suggested by the TPO were proposed by the A.O. in the draft assessment order, the assessee company raised its objections before the DRP by making the following submission:-

- i. Share application money remitted to the subsidiaries cannot partake the character of interest-free loan.
- ii. The interest charged by Parle to its subsidiaries on the loans granted are at arm's length.
- iii. The TPO has erroneously contended that the share application monies remitted by Parle and interest free loans given to the subsidiaries.
- iv. The TPO failed to consider the submissions made by Parle that interest charged to subsidiary in Bangladesh were determined not only taking into consideration the LIBOR prevailing on the dates but also other business considerations like the local laws in the country, ability to pay, future benefits that the company foresees from the subsidiary etc.
- v. The TPO rejected the Parle's contention that the interest charged on loans to subsidiary in Bangladesh and Nigeria are at arm's length.
- vi. Parle submits that if at all adjustment needs to be done, Libor being an international standard, be used instead of taking an adhoc number of 4%.

- vii. There was only a procedural delay in issuance of physical share certificates by the company. The TPO himself had accepted the fact that the date of allotment of shares was prior to the date of remittance of monies by Parle.
- viii. Thus assuming (but denying) that adjustment need to be done on account of delayed allotment /issue of shares, that adjustment recomputed using LIBOR as on the relevant dated and the spread of 200 bps and considering the effect of submission of share certificates would work out to the following:

Subsidiary	As computed by TPO (4%+300 bps)	Using LIBOR+200 bps	Difference (A-B)
Arctic Biscuits, Bangladesh	474,263.61	150,820.98	323,442.63
Pardee foods, Nigeria	69,843	60,264.18	9,578.82
Parlite Foods, Cameroon	9,733.01	5,777.07	3,955.94
Total			336,977.39

The proposed Transfer Pricing Adjustment is thus overstated to the tune of Rs.3,36,977/- by the TPO.”

9. The DRP did not find merit in the first seven of the eight points raised by the assessee. The DRP, however, found merit in the point No. 8 raised by the assessee and taking the LIBOR plus 200 basis point as the arm's length of interest, he directed the A.O. to reduce the TP adjustment of Rs. 8,82,817/- to Rs. 5,45,814/- thereby giving a relief of Rs. 3,36,977/-.

10. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that the TP adjustments of Rs. 8,82,817/- proposed by the A.O./TPO in respect of various international transactions have been restricted by the Id. CIT(A) to Rs. 5,45,814/- as under:-

Sr. No.	Nature of transaction	AE	TP adjustment by AO/TPO(Rs)	TP adjustment restricted by CIT(A) (Rs)
1	Share Application money	Nigeria	69,843	60,264
	Interest on loan	Nigeria	2,39,062	2,30,062
2	Share Application money	Cameroon	9,733	5,777
3	Share Application money	Bangladesh	4,74,263	1,50,821
	Interest on loan	Bangladesh	89,916	89,916
	Adjustment		8,82,817	5,45,840

11. At the time of hearing before us, the contention raised by the Id. Counsel for the assessee is that the clear transactions involving payment of share application money cannot be treated as international transactions of loans given by the assessee company to its AE merely because there was a delay in allotment of shares. It is observed that this contention of the Id. Counsel for the assessee is duly supported by the latest decision of Delhi Bench of this Tribunal in the case of Bharati Airtel Ltd. Vs. ACIT rendered vide its order dated 11-3-2014 passed in ITA No. 5816/Del/2012 wherein a similar issue has been decided by the Tribunal in favour of the assessee vide para 47 which reads as under:-

“47. We find that in the present case the TPO has not disputed that the impugned transactions were in the nature of payments for share application money, and thus, of capital contributions. The TPO has not made any adjustment with regard to the ALP of the capital contribution. He has, however, treated these transactions partly as of an interest free loan, for the period between the dates of payment till the date on which shares were actually allotted, and partly as capital contribution, i.e. after the subscribed shares were allotted by the subsidiaries in which capital contributions were made. No doubt, if these transactions are treated as in the nature of lending or borrowing, the transactions can be subjected to ALP adjustments, and the ALP so computed can be the basis of computing taxable business profits of the assessee, but the core issue before us is whether such a deeming fiction is envisaged under the scheme of the transfer pricing legislation or on the facts of this case. We do not find so. We do not find any provision in law enabling such deeming fiction. What is before us is a transaction of capital

subscription, its character as such is not in dispute and yet it has been treated as partly of the nature of interest free loan on the ground that there has been a delay in allotment of shares. On facts of this case also, there is no finding about what is the reasonable and permissible time period for allotment of shares, and even if one was to assume that there was an unreasonable delay in allotment of shares, the capital contribution could have, at best, been treated as an interest free loan for such a period of 'inordinate delay' and not the entire period between the date of making the payment and date of allotment of shares. Even if ALP determination was to be done in respect of such deemed interest free loan on allotment of shares under the CUP method, as has been claimed to have been done in this case, it was to be done on the basis as to what would have been interest payable to an unrelated share applicant if, despite having made the payment of share application money, the applicant is not allotted the shares. That aspect of the matter is determined by the relevant statute. This situation is not in *pari materia* with an interest free loan on commercial basis between the share applicant and the company to which capital contribution is being made. On these facts, it was unreasonable and inappropriate to treat the transaction as partly in the nature of interest free loan to the AE. Since the TPO has not brought on record anything to show that an unrelated share applicant was to be paid any interest for the period between making the share application payment and allotment of shares, the very foundation of impugned ALP adjustment is devoid of legally sustainable merits.

Respectfully following the decision of the Tribunal in the case of Bharati Airtel (supra) on a similar issue, we delete the addition made by the A.O./TPO and sustained by the Id. CIT(A) on account of T.P. adjustment to the extent it is in relation to the transactions involving share application money given by the assessee company to its AE which was treated as in the nature of loans given by the assessee to its AE till the date of issue of shares.

12. As regards the TP adjustment made in respect of interest bearing loan given by the assessee to its AE in Nigeria and Bangladesh, it is observed that the TP adjustment on this count was made by the A.O./TPO by taking the arm's length rate of interest at LIBOR of 4% plus 300 basis point as against 6% and 5% charged by the assessee company. While dealing with the similar adjustment made in respect of share application money treating the same as loans, the Id. CIT(A) has adopted the arm's length rate of interest at LIBOR plus 200 basis point and the same has not been disputed by the Department.

In our opinion, the interest rate of LIBOR plus 200 basis point therefore should be taken as arm's length rate of interest to bench-mark the international transactions of the assessee company with its AE involving giving the loans on interest. Accordingly, we direct the A.O./TPO to recompute the TP adjustment to be made in respect of the loan transactions by applying the arm's length rate of interest of LIBOR plus 200 basis point. Ground No. 2 of the assessee's appeal is accordingly treated as partly allowed.

13. As regards the issue raised in ground No. 3 relating to granting short credit of TDS of Rs. 59,91,009/-, the ld. Counsel for the assessee has sought only a direction from the Tribunal to the A.O. to give such credit after necessary verification. Accordingly, we direct the A.O. to grant credit of TDS, if any, after necessary verification.

14. The issue involved in ground No. 4 relating to granting interest u/s 244A of the Act is consequential and the A.O. is accordingly directed to given consequential relief to the assessee.

15. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 11th April, 2014.

आदेश की घोषणा खुले न्यायालय में दिनांक: 11-04-2014 को की गई ।

Sd/-
(VIJAY PAL RAO)
न्यायिक सदस्य JUDICIAL MEMBER

sd/-
(P.M. JAGTAP)
लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 11-04-2014

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व.नि.स./ RK , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT/DIT..... Mumbai.
4. आयकर आयुक्त / TPO/AO..... Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai K Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai