

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

**BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND  
SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA No.864/M/2016  
Assessment Year: 2011-12**

M/s. Nobel Biocare India Pvt. Ltd., Unit No.702, 7 <sup>th</sup> Floor, A – Wing, Hon'ble Supreme Court Business Park, Behind Lake Castle, Hiranandani Garden, Powai, Mumbai – 400 076 <b>PAN: AACCN0274A</b>	Vs.	The Deputy Commissioner of Income Tax 15(2)(1), Room No.403, 4 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Dhanesh Bafna, A.R  
Ms. Chandni Shah, A.R.

Revenue by : Shri N.K. Chand, D.R.

Date of Hearing : 25.05.2016  
Date of Pronouncement : 28.09.2016

**ORDER**

**Per Sanjay Garg, Judicial Member:**

The present appeal has been preferred by the assessee against the directions passed by the Dispute Resolution Panel-2, (DRP) Mumbai dated 14.12.15 on the objections filed by the assessee against the draft assessment order dated 13.03.15 of the Assessing Officer (hereinafter referred to as the AO) relating to the transfer pricing adjustments.

2. The assessee has taken the following grounds of appeal.

“On being aggrieved by the order dated January 30, 2016 of the learned Deputy Commissioner of Income Tax 15(2)(1), Mumbai (the AO) passed under section 143(3) read with section 144C of the Income tax Act, 1961 ('the Act') as also directions issued by the Dispute Resolution Panel - II, Mumbai ("DRP"), present appeal is being preferred on the following grounds amongst others which, it is prayed, may be considered without prejudice to one another.

1. On the facts and circumstances of the case and in law, the learned AO/Deputy Commissioner of Income Tax, Transfer Pricing Officer - 3(1)(1) ('the TPO') erred in determining the arm's length price in relation to the international transaction of import of dental products at Rs.16,20,00,319 instead of Rs.17,05,58,470 as determined by the Appellant, thereby computing a transfer pricing adjustment of Rs.85,58,151/-.

It is prayed that the learned AO / TPO be directed to consider the international transaction of the Appellant at arm's length, and accordingly, the transfer pricing adjustment of Rs.85,58,151/- should be deleted.

2. On the facts and circumstances of the case and in law, the Learned AO erred in disallowing provision for obsolete and non moving inventory of Rs. 94,47,108.

It is prayed that the learned AO be directed to delete the disallowance for provision for obsolete and non moving inventory of Rs.94,47,108.

3. On the facts and circumstances of the case and in law, the Learned AO erred in disallowing provision for sales return of Rs.30,00,000.

It is prayed that the learned AO be directed to delete the disallowance for provision for sales return of Rs. 30,00,000.

4. On the facts and circumstances of the case and in law, the learned AO erred in disallowing the amount of Rs. 2,00,000 on account of short deduction of tax.

It is prayed that the learned AO be directed to delete the disallowance of Rs.2,00,000.

5. On the facts and in the circumstances of the case, the Learned AO has erred in charging excess interest under section 234B of the Act.

It is prayed that the learned AO be directed to re-compute the above interest under section 234B of the Act.

6. On the facts and in the circumstances of the case, the Learned AO has erred in proposing to initiate penalty under Section 271(1)(c) of the Act for furnishing inaccurate particulars of income.

It is prayed that the learned AO be directed not to initiate the penalty proceedings.

All of the above Grounds of Appeal are independent of and without prejudice of one another.

The Appellant craves to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

**Ground No.1:**

3. Ground No.1 is relating to the transfer pricing adjustments in determining the arms length price in relation to the international transactions of the assessee company with its related/holding company. The assessee company is a wholly owned subsidiary of Nobel Bio-care Asia-Africa Holding AG (in short NBH) for undertaking wholesale trading of NBH dental products/solutions in India and for providing the requisite marketing, presale/after sale support and training to customers in India. The assessee had entered into a distribution agreement with its AEs for purchase of dental products and resale in India. As per the distribution agreement, the assessee is to be remunerated at an arm's length operating margin (4% on sales as determined for the year under consideration). In the event, the assessee does not earn a margin of 4% on sales the AE would compensate the shortfall to maintain the arms length operating margin. During the year under consideration, the assessee has, following aggregated international transactions, entered into with its AEs for the purpose of determining the arm's length price.

1.	Import of dental products/solutions	17,05,58,470/-
2.	Assistance received from the AE to maintain an arm's length margin	7,39,58,564/-

The only contention raised before us by the assessee in relation to ground No.1 is against the inclusion of one comparable i.e. "3M India Ltd.". The contention of the assessee has been that this comparable should be excluded from the comparability analysis to determine the arm's length price as this company "3M India Ltd." has related party transactions (RPT) of 38.63%. It has been the contention of the assessee that as held in various decisions of the Tribunal that the companies having related party transactions more than 15% should not be taken/included for comparative analysis for

determining the arm's length price. He, in this respect, has relied upon the following decisions:

1. Vodafone India Services Pvt. Ltd. (ITA No.7140/Mum/2012 and ITA No.7097/Mum/2012)
2. Willis Processing Services (I) P. Ltd. (ITA Nos.4547 & 4429/Mum/2012)

4. The Ld. DRP has rejected the contentions of the assessee observing that since the assessee itself had included the above company "3M India Ltd." in its Transfer Pricing Study Report, hence the assessee was then estopped from agitating that this company should not be included. The DRP further observed that even in the own case of the assessee the related party transaction has been much higher. The contention of the assessee was, thus, rejected.

5. Before us, the Ld. A.R. of the assessee, has placed reliance on the Special Bench of this Tribunal in the case of "DCIT vs. Quark Systems Pvt. Ltd." 132 TTJ 1 (Chd. Tribunal Special Bench) decision dated 22.10.09. We have gone through the said decision. In the said case also it was the contention of the assessee that since one of the comparable suggested by it had shown extraordinary profits, hence it should be rejected/excluded. The Tribunal, after considering the relevant submissions of both the parties, observed that merely because the assessee itself had selected that comparable it would not be an estoppel to the assessee from pointing out a mistake in the assessment though such mistake is the result of evidence adduced by the assessee. The Special Bench of the Tribunal further observed that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. For the other side cannot claim to have a vested right in injustice being done due to some mistake on its part.

6. Further, in the case of BT Ltd. vs. Dy. Director of Income Tax (International Taxation) (2014) 151 ITD ITD 0072 (Del) wherein, in somewhat identical circumstances, on the limited issue of inclusion of a comparable due

to a very high percentage of significant related party transaction of about 36%, the Tribunal held that the comparable company has to be excluded from the list of comparables where comparable though offered by the assessee as a functional comparable becomes a tainted comparable due to a very high percentage of significant related party transaction. The Tribunal had also taken into consideration the case laws namely in the case of “Soni India Pvt. Ltd.” 114 ITD 448; “ADP Pvt. Ltd.” 45 SOT 172 Hyderabad; “Global Logic India P. Ltd.” (2011) 46 SOT 285 and observed that in the said cases 15% and 25% related party transactions respectively were held to be acceptable which position has been affirmed in the order of the co-ordinate Bench of the Tribunal in the case of “Hapeg Lloyd Global Services” wherein also related party transactions to the extent of 25% has been held as comparable by necessary implication and the related party transaction beyond this threshold has to be excluded. In view of this, since the assessee has stated that the related party transactions in the case of “3M India Ltd.” are of 38.63%, we therefore direct the AO to verify this aspect and if the contention of the assessee is found correct, then to exclude the company “3M India Ltd.” from the list of comparables. This issue is accordingly treated as allowed in favour of the assessee.

### **Ground Nos.2 & 3**

7. The Ld. Representatives of the parties have submitted that the issues raised vide ground Nos.2 & 3 are squarely covered by the decision of the Tribunal in the own case of the assessee for A.Y. 2009-10 vide order dated 03.11.14 passed in ITA No.1008/M/2014 and that the issues had been restored to the file of the AO for examination of facts in the light of the propositions laid down/directions given by the tribunal. Both the Ld. Representatives have, therefore, requested that these issues be restored to the file of the AO with similar directions. We, accordingly, direct the AO to examine the issues raised vide ground Nos.2 & 3 as reproduced above in the light of the directions of the

Tribunal vide order dated 03.11.14 in the own case of the assessee for A.Y. 2009-10 and decide accordingly.

#### **Ground No.4**

8. The issue raised in this ground is regarding the disallowance on account of short deduction of tax at source. The AO noted that the assessee had short deducted the TDS on the payment made to the contractors. The assessee was required to deduct tax at the rate of 2% and tax deductible was Rs.4000/- whereas the assessee company had deducted tax of only Rs.2000/-. The AO, therefore, disallowed the entire payment of Rs.2 lakhs made to the contractors and added back to the income of the assessee.

9. Before us, the Ld. A.R. of the assessee relied upon the decision of the co-ordinate Bench of the Tribunal dated 19.02.16 in ITA No.746/M/2014 in the case of “ACIT vs. Hindustan Thompson Associates Ltd.” wherein the Tribunal has considered the contrary decisions of the two different non jurisdictional High Courts. It has been noted that the Hon’ble Kerala High Court in the case of “PVS Memorial Hospital” reported in 60 taxmann.com 69 has held that the disallowance is attracted in case of short deduction of TDS whereas the Hon’ble Calcutta High Court in the case of “SK Tekriwal” 260 CTR 73 has held that no disallowance of expenses is attracted under section 40(a)(ia) on account of short deduction of tax. The Hon’ble Jurisdictional High Court has not decided the issue. The Tribunal relying upon the decision of the Hon’ble Bombay High Court in the case of “Ashok Kumar Parekh” 186 ITR 212 has held that where two contrary decisions of non jurisdictional High Courts are available, then the Tribunal must take the view which is in favour of the assessee. The relevant part of the findings of the Tribunal as given in para 5 of the order are reproduced as under:

“5.We have heard the rival submissions and perused the material before us.We find that the Hon’ble Kerala High Court in the case of P V S Memorial Hospital(supra),has held that deduction of TDS under wrong provision of law will not save assessee from disallowance u/s. 40(a)(ia)of the Act.However,the Kolkata

High Court in the matter of Samir Tekriwal(supra), has held that expenses are not liable to be disallowed u/s.40(a)(ia)on account of short deduction of tax.The Hon'ble jurisdictional High Court has not decided the issue.Thus,we are faced with two diagonally opposite views about applicability of the provisions of section 40 (a)(ia)of the Act.We find that the Hon'ble Bombay High Court has in the case of Ashok Kumar Parekh(186 IT R212)has dealt with the binding precedence of the High Court judgments.Here,we would also like to reproduce the a portion of the judgment delivered by the Hon'ble Bombay High Court in the case of Siemens India Ltd.(156ITR11) and same reads as under :

“ So far as the legal position is concerned, the ITO would be bound by a decision of the Supreme Court as also by a decision of the High Court of the State within whose jurisdiction he is (functioning), irrespective of the pendency of any appeal or special leave application against that judgment. He would equally be bound by a decision of another High Court on the point, because not to follow that decision would be to cause grave prejudice to the assessee. Where there is a conflict between different High Courts,he must follow the decision of the High Court within whose jurisdiction he is (functioning), but if the conflict is between decisions of other High Courts, he must take the view which is in favour of the assessee and not against him. Similarly, if the Tribunal has decided a point in favour of the assessee,he cannot ignore that decision and take a contrary view, because that would equally prejudice the assessee.”

Considering the above,we are taking the view which is in favour of the assessee.We are following the judgment of Samir Tekriwal (supra)of the Hon'ble Kolkata High Court as well as the orders of the Mumbai Tribunal delivered by it for the earlier years. Effective ground of appeal is decide against the AO.

Respectfully following the above decision of the Tribunal, this issue is decided in favour of the assessee.

10. In view of our observations made above, the appeal of the assessee is hereby treated as allowed for statistical purposes.

**Order pronounced in the open court on 28.09.2016.**

**Sd/-**  
**(D. Karunakara Rao)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(Sanjay Garg)**  
**JUDICIAL MEMBER**

Mumbai, Dated: 28.09.2016.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai

The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.