

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES, "I-2" New Delhi**

**BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER
AND
SHRI. LALIT KUMAR, JUDICIAL MEMBER**

**ITA No. 3425/Del/2016
Assessment Year: 2010-11**

Nissin Brake India Pvt. Ltd. B-37/38, HIP Japanese Business Centre IDC, Mehrauli Road, Sector-14, Gurgaon	Vs.	DCIT Circle-3 Gurgaon
PAN-AACCN3633K		
(Appellant)		(Respondent)

Assessee by	Sh. Himanshu Sinha, Adv
Respondent	Sh. Sanjay Kumar Yadav, Sr. DR
Date of hearing	20.09.2017
Date of pronouncement	22.09.2017

ORDER

PER LALIT KUMAR, J.M. :

1. The present appeal is arising after the order passed by the Commissioner (Appeals)-II vide order dated 13th March, 2016 for the following effective grounds:

1. That on the facts and in the circumstances of the case, the order passed by the Ld. CIT(A) u/s 250(6) of the Income Tax Act, 1961 ["the Act"] upholding the order passed by Deputy Commissioner of Income Tax, Circle-2, Gurgaon ["Ld. AO"] u/s 143(3) of the Act and the order passed by Ld. Transfer Pricing Officer [Ld. TPO] u/s 92CA of the Act is bad in law.

2. The Ld. CIT(A)/Ld. AO/Ld. TPO erred on facts and circumstances of the case in determining the arm's length adjustment to the Appellant's international

transaction from Associated Enterprises (“AEs”), thereby computing the total income of the Appellant at Rs. 71,163,895/- (Taxable income 17,411,958 considering the brought forward losses) as against total loss of Rs. 31,195,218 claimed by the Appellant in its tax return for the AY 2010-11.

3. That Ld. CIT(A) erred in upholding the reference made by the Ld. AO without recording any reasons in the assessment order based on which he reached the conclusion that it was “expedient and necessary” to refer the matter to the Ld. TPO for computation of the arm’s length price, as in required under section 92CA(1).

4. That Ld. CIT(A) erred in upholding the orders of the Ld.AO/Ld. TPO determining the arm’s length price of the Appellant’s international transactions from associated enterprises in the following manner-

4.1 By disregarding the multiple year data selected by the Appellant in the TP documentation and in selecting the current year (i.e. financial year 2009-10) data for comparability despite the fact that at the time of comparison done by the appellant, the complete data for financial year 2009-10 was not available within the public domain;

4.2 By rejecting 3 out of 4 comparable companies selected by the Appellant in the transfer pricing documentation and selecting only 1 company as comparable for determining arm’s length price.

5. The Ld. CIT(A) has erred in rejecting the alternative approach of considering PBDIT/Sales as the appropriate PLI which would address.

5.1 The difference in the depreciation policies adopted by Appellant vis-a-as comparable companies and

5.2 The inconsistency in disclosing licensed/installed capacity and actual capacity by comparable companies in order to reliably perform capacity utilization adjustment.

6. Without prejudice to the above grounds Ld. CIT(A) erred in upholding the action of the Ld. AO and the Ld. TPO by:

6.1 treating foreign exchange gain as non-operating in nature while re-computing the arm’s length price and

6.2 taking entire foreign exchange gain related to both trading and manufacturing segment as non-operating in nature while re-computing the arm’s length price in relation to the manufacturing segment.

7. That on the facts and circumstances of the case, the Ld. CIT(A) erred in not examining the validity of initiation of penalty proceedings u/s 271(1)(c) of the Act.

2. At the time of hearing, it was submitted by the learned AR for the assessee that the assessee is not pressing ground no. 3, 4.1 and 6. As the assessee has not pressed these grounds, these grounds 3, 4.1 and 6 are

dismissed as not pressed. It was also submitted by the learned AR for the assessee that the ground no. 1 and ground no. 7 are general in nature and therefore no adjudication is required in respect of these grounds. Therefore, the only grounds left before us are ground no. 4.2 and ground no. 5.

3. In respect ground no. 4.2, it was submitted by the ld AR that assessee is engaged in manufacturing and trading of various types of automotive and aluminum and/or non-automotive brake and aluminum components, spare parts and other related accessories. During the assessment year under consideration, the assessee international transaction that during the years under consideration is as under:

The international transactions undertaken by the assessee company with its associated enterprises are summarized in the table below:

Types of international transaction	Method selected	Nissin India		Comparables	
		(Tested Party)		Type of companies	Finding
		Total value of transaction	PLI		Avg. PLI
Import of finished goods for resale	TNMM with OP/OR as PLI	32,30,48,100	6.40%	Companies with similar trading activity	4.40%
Import of raw material and intermediaries	TNMM with OP/OR as PLI	33,33,16,565	0.82%	Companies with similar manufacturing activity	2.04%
Import of capital goods		63,09,548			
Payment of royalty		32,83,626			
Availing of technical services		1,72,28,906			
Availing of product development services		1,46,58,966			
Receipt of inspection charges		52,46,523			
Sales of finished goods		2,82,628			
Receipt of loan repayable after 3 years	No Benchmarking required	7,66,60,993	NA	NA	NA
Interest on term loan	CUP	6,29,284	1.25%		2.53%

4. The assessee has benchmarked the ALP of international transaction pertaining to manufacturing segment by applying the TNMM method using operating profit margin on revenues OP/OR as PLI. There is no dispute about the selection of TNMM method as Most Appropriate Method among the parties. The AR submitted that in TP Study the assessee had selected four comparables as under:

- i. Allied Nippon Limited*
- ii. Hindustan Composites Limited*
- iii. Rane Brake Lining Limited and*
- iv. Brakes India Limited.*

5. The TPO has examined the TP study of the assessee and thereafter issued show cause notice dated 15th January, 2013. In response to the show cause notice assessee filed the reply to it before TPO, learned Transfer Pricing Officer, was not satisfied with reply of the assessee and accordingly rejected three comparable out of four comparables namely i. Allied Nippon Limited ii. Hindustan Composites Limited iii. Rane Brake Lining Limited. In the TP order it was by TPO in para 4.1.7 (at page 69 of the appeal book) is as under:-

“The working was examined to see why there is such high capacity utilization. It was seen that figures of installed capacity and production are not in same units. For example, in Allied Nippon, installed capacity of Friction Material (Brake lining, Clutch, Facing, clutch plates, Bonded Brake Shoe etc.) is in MT while the production is given in numbers. Taxpayer has divided the figures in different units to calculate the capacity utilisation. This is entirely incorrect and is leading to absurd figures. The taxpayer was asked vide noting dated 03.01.14 to give capacity utilization taking figures of production as well as installed capacity in same units. However, the assessee has not furnished the same. It is seen these figures in same units are not available in case of three comparables viz. Allied Nippon Ltd., Hindustan Composites Ltd. and Rane Brake Linings Ltd. The figures in same units are available only in case of Brakes India Ltd. Hence, only this comparable is being taken as proper comparables.”

6. Hence TPO has determined the ALP on the basis of the only one comparable only namely Brakes India Limited. While doing so, the

learned TPO rejected the submission of the assessee with respect to capacity utilization adjustment. The DRP had confirmed the order without dealing with the contention of Assessee, hence the Assessee is before us.

7. At the outset, the learned AR has drawn our attention to page 595 of the paper book where our specific attention was drawn to the installed capacity of the tested party and also of the comparables and further our attention was drawn to capacity utilization ratio. We would like to reproduce the comparative table from the part of the paper book which is as under:-

Nissin India-Tested Party

Class of Goods	Installed Capacity (Unit Nos.)	Actual Production (Unit Nos.)	Value Per Unit	Installed Capacity (Value)	Actual Production (Value)	Reference
Tandem Master Cylinder Assembly	136,136	54,206	1,912	260,227,356	103,616,120	Annexure 3 of submission dated Jan 03, 2014. Point 14.1 & 14.6 of notes to accounts
Caliper Assembly	134,775	105,880	1,392	187,642,902	147,413,322	
Prefilled Clutch Assembly	68,068	47,117	2,237	152,247,999	105,386,804	
Engine Mount Bracket	204, 204	48, 193	308	62,830,046	14,828,154	
Disk Brake System Assembly	17,017	2,894	3,304	56,229,088	9,562,613	
Total	560,200	258,290		719,177,391	380,807,012	
Capacity Utilization Ratio		46.11			52.95%	

Comparable companies

1.) Allied Nippon Limited

Class of Goods	Installed Capacity (Unit based)	Actual Production (Unit Nos.)	Value Per Unit	Installed Capacity (Value based)	Actual Production (Value based)	Reference
Friction Material	4,000,000	28,249,523	35	138,322,376	976,885,284	Point 8(i) & (iii) of notes
Disc pad, Brake Shoe & lining	12,800,000	17,240,112	46	594,301,013	800,454,377	
Total	16,800,000	45,489,635		732,623,389	1,777,339,661	
Capacity Utilization Ratio		270.77%			242.60%	

2.) Brakes India Limited

Class of Goods	Installed Capacity (Unit Nos.)	Actual Production (Unit Nos.)	Value Per Unit	Installed Capacity (Value)	Actual Production (Value)	Reference
Complete Brake Systems	9,500,000	6,340,470	1357	12,887,700,744	8,601,482,099	Page No. 18 & 19 Point No. 14 & 15 of notes to accounts.
Total	9,500,000	6,340,470		12,887,700,744	8,601,482,099	
Capacity Utilization Ratio		66.74%			66.74%	

3.) Hindustan Composites Limited

Class of Goods	Installed Capacity (Unit based)	Actual Production (Unit based)	Value Per Unit	Installed Capacity (Value based)	Actual Production (Value based)	Reference
Brake Linings	5,100	5,034	91,211	465,177,322	459,157,380	Page No. 32 & 33. Point No. 15 & 16 of notes to accounts.
Clutch facings	3,000	2,751	45,838	137,513,666	126,100,032	
Industrial Textiles	576	314	219,710	126,553,203	68,989,073	
Jointings/Limest sheets	1,490	963	79,012	117,727,241	76,088,143	

Compestos	50	39	1,905	95,269	74,310
Others	180	161	89,168	16,050,262	14,356,068
Total	10,396	9,262		863,116,964	744,765,005
Capacity Utilization Ratio		89.09%			52.95%

4.) Rane Brake Lining Limited

Class of Goods	Installed Capacity (Unit Nos.)	Actual Production (Unit Nos.)	Value Per Unit	Installed Capacity (Value)	Actual Production (Value)	Reference
Automotive parts	18,988	31,288	75	1,428,757	2,354,274	Page No. 29 & 39 Schedule N of P & L A/c and Point No. 18 of notes to accounts
Total	18,988	31,288		1,428,757	2,354,274	
Capacity Utilization Ratio		164.78%			164.78%	

Summary

Company	Capacity Utilization ratio
Allied Nippon	242.60%
Brakes India	66.74%
Hindustan Composites	86.29%
Rane Brake Linings	164.78%
Average	140.10

8. On the basis of the above, it was submitted that the learned Assessing Officer, had erred in concluding that the assessee failed to submit the production and installed capacity *in same units*. It was submitted before us that from the perusal of the above noted chart the capacity utilization of various comparables, is discernible as the capacity of Allied Nippon, Brakes India, Hindustan Composites and Rane Brake Lining which are reproduced hereunder:

Particulars	Capacity Utilization % (Refer Pg. 594 of PB)
Tested party	52.95%
Comparable companies	
Allied Nippon	242.60%
Brakes India	66.74%
Hindustan Composites	86.29%
Rane Brake Linings	164.78%
Average	140.10%

9. Further it was submitted that the company which are in existence, for the last 30 to 40 years and are utilizing the capacities, the necessary adjustment as contemplated under Rule 10-B are required to be granted

to the assessee. Our attention in the written submissions was drawn to the judgment of Mumbai Tribunal in *M/s Kiara Jewellery P. Ltd.* and also a message to *Mando India Steering* in *ITA No. 2092/Mds/2012*. On the basis of the above two judgment it was submitted that if the information pertaining to capital capacity utilization of the comparables are discernible from the annual reports or other document, then the issue is required to be adjudicated by the TPO.

10. On the other hand, the learned DR had relied upon the order passed by the lower authority.

11. We have heard the contention of the parties and perused the record. There is no quarrel for the applicability of Rule 10-B of the Income Tax Rules which clearly provides that the reasonable accurate adjustment can be made to eliminate the material facts of such differences into international transactions which are making the comparable as functionally similar to the tested party. The capacity utilization by the comparable as well as of the assessee is an important difference arising on account of technology, usage and age of set up etc. therefore the TPO is under an obligation to iron out the differences arising on account of difference in capacity utilization of tested party and comparables while determining the ALP.

12. Having said so, the TPO is under an obligation to work out the capacity utilization and its effect on the profit earned by the comparable as well as by the assessee. Further it was the duty of the assessee and TPO to find out the suitable comparables and conduct his own study after rejecting the three comparables of the assessee in TP Study. In the present case, the learned Transfer Pricing Officer has rejected the three comparables on the premise that the assessee has not furnished the

details, though said information was ascertainable and discernable from the record reproduced hereinabove but the TP Officer, has rejected the three comparables on the premises that the capacity utilization figures of production as well as of the installed capacity are not available in the same units. We are of the opinion that firstly if the TPO is rejecting three comparables on account of non availability of the capacity utilization and installed capacity in the same unit, it does not debar the TPO from using his powers under the Act. The TPO is duty bound to move a step forward and issue a notice under Section 133 to seek the information of capacity utilization of installed as well as production in the same unit which is not done by the TPO. Moreover, the TPO was under obligation in law to conduct his own TP study , if rejected the three comparable were rejected by him by bringing more comparable which are comparable with the profile of the assessee.

That exercise of bring more comparables in the form of TP study had not been done by TPO and TPO had determined the ALP adjustment based on only one comparable and further notice under section 133 were not issued to the comparables for seeking the necessary information on capacity utilization . The case in hand is not one case, where it is not possible for TPO to find out the other suitable comparable after rejecting the comparables of the assessee. But no efforts were made by the TPO to find out the more comparable so as to make the ALP adjustment based on mean profit margin of the comparables. In our view, the making adjustment on the basis of standalone comparable is not a healthy practice, unless the comparable available is internal one and is therefore required to be dissuaded.

Accordingly the adjustment made by the TPO on the basis of one comparable is not sustainable in the eye of law and accordingly we have

no hesitation to reject the orders passed by lower authorities however we deem it appropriate to direct the TPO to conduct a fresh TP study after taking into consideration the above said observation and also the profile of the assessee. Accordingly, this issue is decided in favour of the assessee for the statistical purposes and entire Tp grounds are remanded back to the file of TPO.

13. The next ground urged before us is with respect to the depreciation policy adopted by the appellant viz a viz the comparable which is reproduced as under:

The appellant has also advocated an alternative approach of considering cash profit upon sales margin (PBDIT/Sales) as the PLI wherein the depreciation cost would be taken out from the computation of PBDIT.

The summary of results after performing working capital adjustment is tabulated below:

Comparable Companies	Unadjusted PBDIT/Sales	WC Adjustment Factor (%)	PBDIT/Sales After Working Capital Adjustment
Allied Nippon Limited	8.73%	-6.49%	2.24
Brakes India Limited	10.29%	-4.00%	6.29%
Hindustan Composites Limited	6.86%	-4.47%	2.39%
Rane Brake Lining	12.29%	-3.74%	8.55%
	9.54%	-4.68%	4.87%
Nissin India (Tested Party)	3.77%		

14. On the other hand, the learned DR relied upon on the orders of the authorities below.

15. We have heard the rival contention of the parties and perused the record as we are remanding back the TP issue to be the file of the Transfer Pricing Officer for conducting the fresh TP study after

searching the fresh comparables in accordance with law, therefore no purpose would be served to adjudicate the present ground as it will be of academic in nature. Accordingly this ground is dismissed as being infructuous.

16. In the light of the above, the appeal of the assessee is partly allowed for statistical purposes.

17. **The order is pronounced in the open court on .09.2017.**

Sd/-

(B.P. JAIN)
ACCOUNTANT MEMBER

Sd/-

(LALIT KUMAR)
JUDICIAL MEMBER

Dated: 22.09.2017

SH

Copy of order to: -

- 1) The Appellant;
- 2) The Respondent;
- 3) The CIT;
- 4) The CIT(A)-, New Delhi;
- 5) The DR, I.T.A.T., New Delhi;

By Order

Assistant Registrar
ITAT, New Delhi

S.No.	Details	Date	Initials	Designation
1	Draft dictated on			Sr. PS/PS
2	Draft placed before author			Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement on			Sr. PS/PS
7	File sent to Bench Clerk			Sr. PS/PS
8	Date on which the file goes to the Head Clerk			
9	Date on which file goes to the A.R.			
10	Date of Dispatch of order			