

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "T": NEW DELHI  
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1860/Del/2009  
(Assessment Year: 2003-04)

ACIT,  
Circle-10(1),  
New Delhi  
  
(Appellant)

Vs. Dentsply India (P) Ltd,  
Plot No. 21, FEIS,  
Patparganj Industrial Area,  
New Delhi  
(Respondent)

Revenue by :	Shri Amrender Kumar, CIT DR
Assessee by:	None
Date of Hearing	12/09/2017
Date of pronouncement	06/11/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the revenue against the order of the 1d CIT (A)-XX, New Delhi dated 26.02.2009 for the Assessment Year 2003-04.

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

“On the facts and in the circumstances of the case and in law, the CIT(A) has erred in determining the purchase value of goods by holding PLI should be taken as OP/Sales instead of net operating margin as the PLI adopted by the TPO, thereby determining the value of transaction that the purchase value of goods of import value from the AE is to be reduced by Rs. 20561681/- instead of Rs. 33049635/-.”

3. The brief facts of the case is that assessee is a wholly owned subsidiary of USA company Dentsply International, engaged in manufacturing and trading of dental products. The company filed its return of income on 28/11/2003, showing loss of Rs. 10483560/-. The assessment under section 143 (3) of the income tax act was passed on 29/03/2006, wherein adjustment of Rs. 33049635/- proposed by the Ld. transfer pricing officer Vide his order dated 28/12/2005 was made and further rectified under section 154 of the income tax act on 24/ 3/ 2006. A further addition of Rs. 5687140/- on account of loss on exchange fluctuation was also made. Accordingly, the total income of the assessee was determined at Rs. 28390189/- and from that unabsorbed depreciation of Rs. 28390189/- was allowed resulting into taxable assessed income of Rs. Nil.
4. Aggrieved with the order of the Ld. assessing officer, assessee preferred appeal before the Ld. CIT (appeals) – XX, New Delhi who vide order dated 26/02/2009 reduced the adjustment on account of the arm's length price of the international transactions. He also deleted the addition on account of the corporate tax issues. Therefore, revenue, aggrieved with the order of the Ld. CIT (Appeals) has preferred an appeal before us.
5. The main contentious issue in this appeal is the direction of the Ld. CIT (Appeal) in determining arm's length price of the purchase of the goods he has held that the profit level indicator should be taken as operating profit/Total Cost instead of Operating profit/ sales adopted by the Assessee. According to this, the arm's length price of the value of the transaction of the goods imported from its AE was reduced by Rs. 20561681 instead of adjustment proposed by the Ld. transfer pricing officer of Rs. 33049635/-.

6. During the year the assessee has entered into 3, international transactions as under:-
- a. Import of finished goods of Rs. 85148691/- with its associated enterprises which was benchmarked by the assessee adopting TNMM as the most appropriate method.
  - b. Import of raw material from its associated enterprises of Rs. 1426381/- and same were also benchmarked adopting TNMM as the most appropriate method
  - c. Assessee also has the interest payable on loan of Rs. 18.82 lakhs.

In the transfer pricing documentation of the assessee, assessee has selected TNMM as the most appropriate method in determining the arm's length price of the international transaction selecting two comparable companies whose average gross profit ratios was 28.79% as against 27.70% of the appellant and therefore the appellant concluded that its transfer pricing study adopted in respect of international transaction with its associated enterprise is at arm's length.

7. The Ld. transfer pricing officer while determining the arm's length price of the International Transaction of the purchase of goods by the assessee from its associated enterprises has held that assessee must earn operating margin of 1.72% of its total cost, which is Rs. 189243041/-. As per its audited financial accounts and therefore the operating margin at the rate of 1.72% of the total cost of the assessee comes to Rs. 3254980/-, whereas the assessee has incurred loss of Rs. 29794655/- and therefore adjustment on account of the arm's length price of the imported goods was made of Rs. 33049635/-. The Ld. Transfer pricing officer further rejected all the comparable selected by the assessee and carried out fresh search and selected 9 new comparables. The Ld. Transfer pricing officer further use the net operating margin as the profit level indicator as against the gross profit margin selected by the appellant. The Ld. Assessing

officer after considering the objection of the assessee made the addition of Rs. 33049635/- to the total income of the assessee on accounts of the arm's length price of the international transaction.

8. Before the Ld. CIT (A) assessee has contested the profit level indicator of the assessee adopted by the Ld. Transfer Pricing Officer. It was the contention of the assessee that the Ld. Transfer Pricing officer has calculated the net profit margin by taking OP /TC as the profit level indicator, whereas the assessee has taken the profit level indicator of operating profit/sales. The Ld. CIT appeal held that as the assessee has made the purchases from its associated enterprise. Therefore, if the OP by TC is used as the PLI the component of controlled transaction that is the purchases will form part of the dominator and the case of TNMM method the ratio so computed will not give the proper results for the purpose of the comparability analysis. Therefore he upheld the OP by sales as the appropriate PLI instead of OP by TC as adopted by the Ld. Transfer pricing officer.
9. Aggrieved by the order of the Ld. CIT (A) revenue is in appeal before us. The Ld. departmental representative vehemently supported the order of the Ld. assessing officer and the Ld Transfer Pricing Officer and submitted that the correct PLI should have been taken as OP /TC instead of OP/ sales.
10. Despite notice, none appeared on behalf of the assessee. This appeal is filed on 26/2/2009 by revenue and after this, it was heard on 03/02/2010, but order could not be passed, thereafter it was fixed for hearing for 9 times. Hence, the matter is decided on merit based on the information available on record.
11. We have carefully considered the contention of the Ld. departmental representative as well as perused the orders of the lower authorities. The only dispute that remains to be resolved in this appeal is whether the profit level indicator adopted by the assessee of operating profit/sales is proper or PLI adopted by the Ld. Transfer Pricing Officer of operating profit/total cost is

appropriate in TNMM method for determining the arm's length price of the goods imported by the assessee from its associated enterprise. One of the three most important aspects of the application of the transaction net margin method is the selection of the profit level indicator. The profit level indicator is one of the profitability ratios that allow comparison of the profit resulting from the intercompany transactions. The widely used ratios include operating profit / sales, operating profit / total cost, gross profit / operating expenses, operating profit by capital employed, etc. The choice of the appropriate ratio must be done keeping in mind the characterization and the nature of business of the tested party, as well as, the nature of comparables selected and the quality of information available. In the present case the LD CIT (A) has given a reason that in the total cost, purchases price is included which includes the purchase from its associated enterprises. Therefore, the OP/TC is not the appropriate profit level indicator. The Ld. departmental representative also could not say that how total cost can be the better denominator quotient than sales. In view of this we do not find any infirmity in the order of the Ld. CIT (A) in directing the Ld. assessing officer to adopt the OP /TC as the PLI for determining arm's length price of the international transaction of purchase of goods by assessee from its associated enterprise. In view of this ground No. 1 of the appeal of the revenue is dismissed.

12. In the result appeal of the revenue is dismissed.

Order pronounced in the open court on 06/11/2017.

-Sd/-

(BHAVNESH SAINI)  
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated:06/11/2017

*A K Keot*

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi