

आयकर अपीलिय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री अनिल चतुर्वेदी, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI ANIL CHATURVEDI, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.635/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

Tetra Pak India Pvt. Ltd.,
B-53, MIDC Phase II,
Chakan Industrial Area,
Village-Vasuli, Taluka-Khed,
Pune

PAN : AAAC3467B

.....अपीलार्थी / Appellant

बनाम / V/s.

Dy. Commissioner of Income Tax,
Circle – 7, Pune

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.665/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

Dy. Commissioner of Income Tax,
Circle – 7, Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. Tetra Pak India Pvt. Ltd.,
Mayfair Towers, Mumbai-Pune Road,
Shivaji Nagar, Pune-411005

PAN : AAAC3467B

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.521/PUN/2017
निर्धारण वर्ष / Assessment Year : 2012-13

Tetra Pak India Pvt. Ltd.,
 Plot No. 53, MIDC Chakan Phase II,
 Village-Vasuli, Taluka-Khed,
 Pune - 410501

PAN : AAAC3467B

.....अपीलार्थी / Appellant

बनाम / V/s.

Dy. Commissioner of Income Tax,
 Circle – 7, Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
 Revenue by : Shri Rajeev Kumar

सुनवाई की तारीख / Date of Hearing : 19-02-2018
 घोषणा की तारीख / Date of Pronouncement : 23-03-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

The assessee in ITA No. 635/PUN/2016 has assailed the assessment order dated 29-01-2016 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for the assessment year 2011-12. The Revenue in ITA No. 665/PUN/2016 has filed cross appeal against the aforesaid assessment order.

ITA No. 521/PUN/2017 by the assessee is directed against the assessment order dated 30-01-2017 passed u/s. 143(3) r.w.s. 144C(13) of the Act for the assessment year 2012-13.

Since, the issues involved in all these appeals are similar, these appeals are taken up together for adjudication and are being disposed of vide this common order.

2. For the sake of convenience the gist of facts are taken from assessment year 2011-12. The assessee is a wholly owned subsidiary of Tetra Laval Holding & Finance SA, Switzerland. The assessee is engaged in manufacturing and supply of packaging material based on aseptic technology which helps in preserving perishable liquid foods without refrigeration or added preservatives. The assessee is also engaged in import and distribution of filling machines, distribution equipments and related spares. The assessee also provides services for installation and maintenance of equipments after sales. The assessee has two main divisions viz. Carton Division and Processing Division. In Carton Division, the assessee undertakes sale and supply of aseptic packaging material, installation and maintenance of equipment's supplied. In Processing Division the assessee carries on business of sale and supply of milk processing modules and aseptic processing equipment. During the period relevant to the assessment year 2010-11, the assessee entered into following international transactions with its Associated Enterprise (AE).

S. No.	Description of the transactions	Amount (Rs.)
1	Import of Raw materials. Spares and Consumables	1,806,008,662
2	Purchase return of Raw Materials	27,451,963
3	Export of Packaging Material. Machines and Spare Parts	1,620,131,615
4	Import of Traded Goods and Spare Parts	1,421,871,025
5	Import of Capital Goods and Machinery	73,975,858
6	Technical Services rendered	58,491,805
7	Technical Services received	191,654,869
8	Cost Allocation Received	15,126,588
9	Reimbursement received from Associates	38,032,427
10	Reimbursement paid to Associates	57,686,719

2.1 To benchmark international transactions the assessee applied Transactional Net Margin Method (TNMM) as the most appropriate method. The Profit Level Indicator (Operating Profit/Sales) of the assessee and comparables for Packaging solutions segment and Processing solutions segment was computed by assessee as under :

Particulars	Operating margin of the assessee	Average operating margin of comparables
International transactions pertaining to the packaging solutions segment	11.35%	6.49%
International transactions pertaining to the processing solutions segment	16.85%	7.94%

The assessee followed aggregation approach to benchmark its international transactions. However, the Assessing Officer bifurcated international transactions into various segments viz. Straws segment, Capital Equipment segment, Packaging Material segment and Import of Packaging Material segment.

2.2 The Transfer Pricing Officer (TPO) accepted TNMM applied by assessee in respect of substantial international transactions entered into by the assessee. However, in respect of small portion of packaging material segment, the TPO held CUP to be most appropriate method. The TPO thus, made following upward adjustment.

Trading Segment

Packaging Material Traded	Rs.3,96,69,788/-.	
Import of Straws	Rs.3,53,24,572/-.	
Import of Capital Equipment	<u>Rs.12,80,72,077/-.</u>	
	Rs.20,30,66,437/-.	(A)
Manufacturing Segment	<u>Rs.14,99,10,572/-.</u>	(B)
Total	Rs.35,29,77,009/-.	(C) = (A+B)

Thereafter, the Assessing Officer passed draft assessment order making additions/disallowances on following counts :

i.	Adjustment on International Transactions	Rs.35,29,77,009/-.
ii.	Provision for warranty expenses	Rs.8,43,35,166/-.
iii.	Bad debts written off	Rs.71,38,611/-.
iv.	Disallowance u/s. 40a(i)	Rs.9,44,43,764/-.

Aggrieved by the additions/disallowances made in draft assessment order, the assessee filed objections before Dispute Resolution Panel (DRP). The DRP vide directions dated 17-12-2015 deleted the adjustments made by TPO and accepted assessee's aggregation method for determination of ALP of international transactions. In so far as the other additions/disallowances made by Assessing Officer the same were upheld by the DRP. Based on the directions of DRP the Assessing Officer passed assessment order dated 29-01-2016 against which, both, the assessee and the Revenue are in appeal.

3. The assessee has assailed the assessment order by raising following grounds of appeal :

“1.1 The learned Assessing Officer/DRP erred in disallowing the incremental provision for warranty of Rs.2,95,36,591/-.

1.2 The learned Assessing Officer / DRP erred in not appreciating that the provision for warranty was properly ascertained and was not in the nature of Contingent Liability.

1.3 The learned Assessing Officer / DRP erred in not following the below mentioned decisions:

i) Rotork Controls India P. Ltd. Vs. CIT (2009) 314 ITR 62(SC)

ii) CIT V Ericsson Communications P. Ltd. (2009) 318 ITR 340 (Delhi)

2.1 The learned Assessing Officer / DRP erred in disallowing the claim of bad debts of Rs.71,38,611/- which were written off and debited to Profit & Loss account of the year under assessment. The learned AO

/DRP erred in not allowing the above claim of bad debts u/s.36(1)(vii) r.w.s 36(2) of the Income Tax Act, 1961.

- 2.2 The learned Assessing Officer/ DRP erred in not appreciating that the bad debts written off during the year under assessment satisfied all the conditions prescribed u/s.36(1)(vii) r.w.s. 36(2) of the Income Tax Act 1961.
- 3.1 The learned Assessing Officer/DRP erred in disallowing Rs.9,44,43,764/- u/s.40(a)(i) based on order u/s.201 passed by the Deputy Director of Income Tax - (IT) - II, Pune wherein the Dy. DIT held that the Appellant Company was required to deduct tax on the basis of Explanations 5 and 6 to Section9(1)(vi) which were introduced by Finance Act, 2012 w.r.e.f. 01.06.1976. The learned Assessing Officer/ DRP erred in not appreciating that an amendment which is introduced with retrospective effect cannot be the basis for disallowance u/s.40(a)(i). The details of Rs.9,44,43,764/- comprise of the following:

Sr. No.	Particulars	Amount Rs.
i.	Software License and IT Support Services	7,51,02,411/-
ii.	Software Licenses	15,34,941/-
iii.	Payment for Training	72,72,116/-
iv.	Services- Consultancy	6,71,833/-
v.	Repairs and Maintenance, testing and Technical Consultation	98,62,173/-
	Total	9,44,43,764/-

- 3.2.1 The learned Assessing Officer / DRP erred in holding that the assessee should have deducted TDS u/s.195 on the amount of Rs.7,51,02,411/- paid to AB Tetra Pak Sweden on account of Provisions of IT Support Services on the ground that the said payment made by the assessee company was in the nature of royalties and hence, chargeable to tax in India.
- 3.2.2 The learned Assessing Officer / DRP erred in not appreciating that the amount of Rs.7,51,02,411/- comprising of the following payments made to AB Tetra Pak Sweden was not covered under Royalties and I or fees for technical services of the DTAA between India and Sweden and that the Appellant Company was not required to withhold tax u/s. 195 on above amounts –

Sr. No.	Nature of Payment	Amount (Rs.)
1	Payments made for right to access third party software	1,12,77,313/-
2	Payments made for right to use internally developed software	1,34,81,469/-
3	Lease Line Charges	1,77,02,023/-
4	Support services	83,87,425/-
5	Support services for ISP	2,42,54,182/-
	Total	7,51,02,411/-

- 3.2.3 The learned Assessing Officer /DRP ought to have appreciated that the payments made to AB Tetra Pak Sweden were on account of

reimbursement of software license fees and IT support services and since there was no income earned by the said entity, no TDS was required to be deducted on such reimbursement of expenditure.

- 3.2.4 The learned Assessing Officer / DRP erred in holding that payment for lease line charges / internet connectivity charges of Rs.1,77,02,023/- (i.e. Rs.1,45,18,198/- and Rs.31,83,825/-) is taxable as "Royalty" under the DTAA as well as per Regular provisions of the Income Tax Act, 1961. He erred in not appreciating that:
- (a) the payment of lease line charges / internet connectivity charges of Rs.1,77,02,023/- to AB Tetra Pak Sweden was in the nature of reimbursement of expenses and no tax was deductible at source.
 - (b) the payment of lease line charges / internet connectivity charges of Rs.1,77,02,023/- to AB Tetra Pak Sweden was not covered under clause "Royalty and / or Fees for Technical services" of the ADTA between India and Sweden and hence the Appellant Company was not required to withhold tax u/s.195 on above amounts;
 - (c) the payment of lease line charges / internet connectivity charges of Rs.1,77,02,023/- to AB Tetra Pak Sweden were not covered under the definition of 'royalty' in Section 9(1)(vi) of the Act and hence, the assessee company was not required to deduct any TDS on the said payments.
- 3.2.5 The learned Assessing Officer / DRP erred in not appreciating that the payment of Rs.1,12,77,313/- for right to access third party software application and Rs.1,34,81,469/- for right to access internally developed software application cannot be regarded as "Use of copyright in the software" and hence the said remittances represented business Profits or Commercial Income for AB Tetra Pak Sweden and not "Royalty" under India and Sweden tax treaty and hence, the assessee company was not required to deduct TDS on the said payments.
- 3.2.6 The learned Assessing Officer / DRP erred in not appreciating that the payment of support service charges to AB Tetra Pak Sweden was in the nature of reimbursement of expenses and no tax was deductible at source. He erred in not appreciating that the above payment was not covered under clause "Royalty and / or Fees for Technical services" of the ADTA between India and Sweden and hence the Appellant Company was not required to withhold tax u/s.195 on above amounts;
- 3.3 The learned Assessing Officer / DRP erred in not appreciating that the payment of Rs.15,34,941/- for Software Licences was not covered under Royalties and /or Fees of Technical Services of the DTAA between India and Sweden / Saudi Arabia / Singapore and hence the Appellant Company was not required to withhold tax u/s.195 on above amounts.
- 3.4.1 The learned Assessing Officer / DRP erred in holding that the assessee company should have deducted TDS on payment of Rs.72,72,116/- for training and Rs.6,71,833/- paid for Individual Career Continuation Program without appreciating that the said amount was not taxable in India and accordingly, the assessee was not required to deduct any TDS on the said payments.

- 3.4.2 *The learned Assessing Officer / DRP erred in not appreciating that in most of the remittances no Technical Knowledge, plan or design is given and hence the amount remitted is not covered under Article "fees for technical services"/"fees for included services" under the respective DTAA's.*
- 3.4.3 *The learned Assessing Officer / DRP erred in not appreciating that the remittances towards training were in the nature of reimbursement or alternately charged under cost allocation agreement and that no tax was deductible at source thereon.*
- 3.4.4 *Without prejudice to above, the learned Assessing Officer / DRP erred in not appreciating that the remittance of Rs.72,72,116/-included various reimbursements of air fare, hotel and other actual expenses which were grouped under this head and that the said reimbursements had to be excluded for the purpose of working of the tax deductible at source.*
- 3.5 *The learned Assessing Officer / DRP erred in not appreciating that the payment of Rs.98,62,173/- for repairs and maintenance, testing and technical consultation was not covered under "Fees for Technical services" of the ADTA and hence the Appellant Company was not required to withhold tax u/s.195 on above amounts.*
- 3.6 *The learned Assessing Officer/ DRP erred in not appreciating that the Appellant Company had already made the payment before the retrospective amendments were introduced and thus, it was impossible for the assessee to deduct TDS on such payments and therefore, the assessee submits that no disallowance should be made u/s.40(a).*
- 3.7 *The learned Assessing Officer/DRP erred in not appreciating that disallowance of payments to non-residents without TDS violates deduction neutrality non-discrimination clause in DTAA as there is no similar bar for residents as per Merilyn Shipping 136 ITD 23 (SB).*
- 3.8 *Without prejudice to above, the learned Assessing Officer /DRP erred in not restricting the addition u/s.40(a)(i) to Rs.5,08,44,199/- (being the difference between Rs.9,44,43,764/- less Rs.4,35,99,565/- being the relief granted by the learned CIT – IT/TP - Pune in the appeal order against the Order u/s.201).*
4. *The Appellant Company craves leave to add to, alter, amend, modify and / or delete any or all of the above Grounds of Appeal."*

4. The Revenue in appeal has raised following grounds against the assessment order :

- “1. *Hon'ble DRP has erred while directing that all International transactions of Tetra Pak India Pvt. Ltd. be aggregated, whereas as per section 92(1) and Rule 10C(1), 'Income arising from an International Transaction' has to be calculated with regards to Arm's Length Pricing, when clear segments were identified from the financial information by revenue and aggregation of such international transaction is allowed only as an exception as per Rule 10A(d).*
2. *Hon'ble DRP erred in not appreciating the approach of the TPO for benchmarking the trading segment separately wherein Imports of*

traded packaging material, import of straws and import of capital equipment were treated as functionally different segments of International transactions of the assessee.

3. *Whether the Transaction Net Margin Method adopted by the assessee is the most appropriate method envisaged under 92C (2) of the Income Tax Act, 1961 read with Rule 10C of the Income Tax Rules, 1962 for benchmarking the transaction related to export packaging material to its AE when the transaction could have been benchmarked by using Comparable Uncontrolled Price Method as the most appropriate method.”*

5. Shri Nikhil Pathak appearing on behalf of the assessee submitted that the assessee has been consistently following aggregation method in respect of international transactions. The Department never raised any objection qua the method followed up to assessment year 2008-09. The TPO raised objection for the first time in assessment year 2009-10 against the aggregation of various segments. During the assessment proceedings for assessment year 2009-10 the TPO bifurcated the transactions into three segments i.e. Straws segment, Capital segment and Packaging material segment. In assessment year under appeal, the TPO carved out fourth segments i.e. Import of Packaging Material. The assessee raised objections before the DRP against bifurcation of segments. The DRP accepted aggregation approached followed by assessee. The Revenue carried the matter in appeal before the Tribunal in ITA No. 359/PUN/2014. The Tribunal dismissed the ground raised by Revenue against aggregation of international transactions and upheld the findings of DRP. In the subsequent assessment year i.e. assessment year 2010-11 the Tribunal again affirmed the aggregation approach followed by assessee. The ld. AR submitted that the ground Nos. 1 and 2 raised by Department are thus, squarely covered in favour of assessee by the order of Tribunal in assessee's own case in ITA No. 359/PUN/2014 for assessment year 2009-10 decided on 20-09-2017 and ITA No. 282/PUN/2015 for assessment year 2010-11 decided on 27-10-2017.

5.1 In respect of ground No. 3 in the appeal by Department, the ld. AR submitted that the TPO has accepted TNMM as the most appropriate method in respect of majority of international transactions. It is only small segment of packaging solutions that the TPO rejected TNMM and applied CUP to benchmark the transactions. The TPO granted ad hoc adjustment of 5% for marketing function and 5% for royalty component without specifying the basis for quantifying 5% ad hoc adjustment. The ld. AR further submitted that the Pune Bench of Tribunal in the case of Amphenol Interconnect India (P.) Ltd. Vs. Deputy Commissioner of Income Tax reported as 53 taxmann.com 83 and in the case of Intervet India (P.) Ltd. Vs. Deputy Commissioner of Income Tax reported as 70 taxmann.com 163 have held that CUP method cannot be applied for small segment of transaction where TNMM has been accepted by TPO for majority of transactions.

6. As regards grounds raised by assessee in its appeal, the ld. AR submitted that the ground No. 1 raised in appeal is with respect to disallowance of provision for warranty Rs.2,95,36,591/-. Similar disallowance was made by Assessing Officer in earlier assessment years. The Tribunal in assessee's appeal for assessment year 2009-10 in ITA No. 537/PUN/2014 decided on 20-09-2017 and thereafter in ITA No. 412/PUN/2015 for assessment year 2010-11 decided on 27-10-2017 deleted the addition on account of warranty provisions. The ld. AR to further buttress his submissions placed reliance on the decision of Hon'ble Supreme Court of India in the case of Rotork Controls India (P) Ltd. Vs. Commissioner of Income Tax reported as 314 ITR 62.

6.1 In respect of ground No. 2 relating to disallowance of bad debts written off Rs.71,38,611/- the ld. AR submitted that similar disallowance

was made in assessment year 2010-11 in assessee's own case. The Tribunal deleted the disallowance by following decision of Hon'ble Apex Court in the case of T.R.F. Ltd. Vs. Commissioner of Income Tax reported as 323 ITR 397.

6.2 In respect of ground No. 3 relating to disallowance of Rs.9,44,43,764/- u/s. 40(a)(i) of the Act, the ld. AR reiterated the submissions made in exhaustive grounds of appeal. The ld. AR submitted that separate proceedings u/s. 201 were initiated against the assessee. The assessee has filed appeal u/s. 201 before the Commissioner of Income Tax (Appeals) which is still pending for final disposal. The ld. AR prayed that the directions may be given to Assessing Officer to decide the issue following the order of Commissioner of Income Tax (Appeals).

7. On the other hand Shri Rajeev Kumar representing the Department vehemently defended the assessment order qua the grounds raised by assessee in its appeal. In so far as the grounds raised in appeal by the Department, the ld. DR fairly admitted that the issue raised in ground Nos. 1 and 2 of appeal is identical to the one adjudicated by Tribunal in assessee's own case in assessment years 2009-10 and 2010-11.

Findings : ITA No. 635/PUN/2016 (A.Y. 2011-12)

8. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. We have also considered the decisions on which the ld. AR of assessee has placed reliance. The ground No. 1 in appeal by assessee is with respect to disallowance of provision for warranty Rs.2,95,36,591/-. We find that identical disallowance was made by Assessing Officer in assessment years 2002-03, 2004-05 and 2010-11. The Co-ordinate Bench of Tribunal

deleted the disallowance in appeal by assessee in ITA No. 1587/PUN/2014 for assessment year 2004-05 decided on 24-08-2017 by observing as under :

“21. Regarding Ground No.2 relating to allowing of **warranty provisions** it is the submission of the Ld. Counsel for the assessee that the said issue now stands covered in **assessee's own case** in favour of the assessee by the order of the Tribunal vide ITA No.1545/PUN/2014 order dated 23-12-2016. Bringing our attention to Para No.9 of the order of Tribunal (Supra) the allowability of warranty provision was said to have been decided in favour of the assessee in the said paragraph.

22. After hearing both the sides and on perusing the facts of the present case, we now find the decision of the Tribunal given in Para No.9 held the assessee and the issue has to be decided in favour of the assessee. For the sake of completeness of the order, we proceed to extract the same as under :

“9. We have heard the rival contentions and perused the record. The issue arising in the present appeal is against the claim of deduction on account of provision made for warranty. The assessee was engaged in the manufacture and sale of processing equipments and filling machines for both dairy and bread processing industries. The machineries which were being manufactured by the assessee were heavy packaging machineries and for the supply of same, the assessee was entering into agreement with the prospective buyers. The copy of one such agreement is placed on record by the assessee at pages 70 to 79 of the Paper Book. As per warranty clause 7 of the agreement, it is provided that the equipment is sold subject to express warranty, wherein the seller warrants that the equipments shall be free from material defects in workmanship, materials and design for period of 12 months from the date of commencement of use or period or 18 months from the delivery, whichever is shorter. It was undertaken by the assessee to repair or replace free of charge to the purchaser any part of equipment which contains a defect or actual refund to the purchaser the portion of price attributable to the defective part. The replacement or repair price were also subject to some warranty for the remainder of original warranty period or six months from the date of repair or installation of replacement part, whichever is shorter. It was agreed that the purchaser had to bear the cost and risk of transport of defective part to the seller, who in turn, had to repair or replace the same on the same terms as the equipment was supplied. As per clause 7.4, the seller i.e. the assessee had no liability for any defect in the equipment because of ordinary wear and tear, misuse or abuse and other conditions. In view of undertaking given by the assessee by way of warranty on the equipment sold by it to the prospective purchasers, the assessee was maintaining a systematic method, wherein the provision was made on account of warranty. In case any part of the warranty was utilized, then the same was so debited or / and the balance on expiry of period of warranty was written back. This method was regularly and systematically followed by the assessee. The CIT(A) has referred to the factual aspects of the case and pointed out that the machinery

sold by the assessee was in the range of Rs.4-6 crores and there were limited buyers of said machinery. In view of said facts and circumstances, where the assessee was engaged in the manufacture of specialized machinery for packaging and the assessee had warranty clause against supply of the said machinery, then the recognition of application of warranty by way of making the provision in the books of account is accepted accounting practice and such a liability recognized by the assessee is Contingent Liability. Following the ratio laid down by the Hon'ble Supreme Court in Rotork Controls India P. Ltd. Vs. CIT (supra), we hold that the value of Contingent Liability by way of recognizing the warranty liabilities, by making a provision and also following systematic method of its write back and / or utilization is an accepted accounting method adopted by the assessee and the provision made by the assessee is to be allowed as deduction in the hands of assessee. It may be clarified herein that the CIT(A) had rejected the claim of assessee in assessment year 2008-09 observing that the assessee had made provision to the extent of Rs.32.74 crores, whereas none of the provisions made in the earlier years were much utilized. The learned Authorized Representative for the assessee in this regard has clarified that inadvertently, the same was created at Rs.32.74 crores but Rs.31.07 crores was written back and the deduction by way of provision of warranty was claimed only at Rs.1.67 crores. The Assessing Officer had also disallowed sum of Rs.1.67 crores only. In view thereof, we find no merit in the observations of CIT(A) in denying the claim of assessee. Applying the ratio laid down by the Hon'ble Supreme Court in Rotork Controls India P. Ltd. Vs. CIT (supra), the assessee having fulfilled the conditions laid down by the Apex Court, we find merit in the claim of assessee and accordingly, we direct the Assessing Officer to allow the deduction on account of provision for warranty made at Rs.1.67 crores. The grounds of appeal raised by the assessee are thus, allowed."

23. *From the above, it is evident that the claim of the assessee on account of warranty provision is allowed by the Tribunal in assessee's own case in the A.Y. 2003-04. Ld. Departmental Representative has not brought anything on record to controvert the above finding of the Tribunal. Therefore, we find that the order of CIT(A) is in tune with the decision of the Tribunal. Therefore, the decision of the CIT(A) given in Para No.3.5.3 is fair and reasonable and it does not call for any interference. Accordingly, Ground No.2 raised by the Revenue is dismissed."*

Following the aforementioned order of the Tribunal, the Tribunal deleted similar disallowance in respect of provision for warranty in the appeal by assessee in ITA No. 412/PUN/2015 for assessment year 2010-11. No material has been placed on record by Revenue to show any change in facts and circumstances in the assessment year under appeal,

following the order of Tribunal in assessee's own case in the earlier assessment years, disallowance in respect of provision for warranty is deleted. Thus, ground No. 1 raised in appeal by assessee is allowed.

9. The ground No. 2 of appeal by assessee is with respect to disallowance of claim of bad debts written off of Rs.71,38,611/-. We find that this issue is also covered in favour of assessee by the order of Co-ordinate Bench of Tribunal in assessee's own case in assessment year 2010-11 (supra). The relevant extract of the findings of Tribunal reads as under :

“18. On hearing both the parties on this issue, we find that the DRP has not appreciated the fact that the assessee complied with the condition of writing off of the debts in the books of account of the assessee as irrecoverable. They made an elaborate discussion distinguishing the Supreme Court judgment in the case of T.R.F. Ltd Vs. CIT (supra.). In our view, the decision of DRP is required to be reversed on this issue considering the binding of judgments of Hon'ble Supreme Court (supra) read with Section 36(1)(vii) of the Act. Accordingly, Grounds No. 2.1 & 2.2 raised by the assessee are allowed.”

No distinguishable facts have been brought to our notice by Revenue in assessment year under appeal. It is not the case of Revenue that the assessee has not written off bad debts in the books of account. Thus, in view of the law laid down by the Hon'ble Apex Court in the case of TRF Ltd. Vs. Commissioner of Income Tax (supra) and the facts of case, ground No. 2 raised in the appeal by assessee is allowed.

10. The ground No. 3 in appeal by assessee is with respect to disallowance of Rs.9,44,43,764/- u/s. 40(a)(i) of the Act. The contention of assessee is that the provisions of section 40(a)(i) have been invoked in the assessment year under appeal on the basis of amendment introduced by the Finance Act 2012 to section 9(1)(vi) by insertion of Explanations 5 and 6 to the section with retrospective effect from 01-06-1976. No such disallowance can be made when at the relevant point of time the provisions were not in existence. The ld. AR has further submitted that the appeal of assessee arising out of proceeding u/s. 201 is pending before Commissioner of Income Tax (Appeals). The directions may be given to Assessing Officer to follow the order of Commissioner of Income Tax (Appeals) in aforesaid proceedings while making disallowance u/s. 40(a)(i) of the Act. In view of the prayer made by ld. AR, the ground No. 3 raised in appeal is remitted back to the Assessing Officer with a direction to re-compute disallowance u/s. 40(a)(i) in line with outcome of appeal of assessee pending before the Commissioner of Income Tax (Appeals) in proceedings u/s. 201 of the Act. Accordingly, ground No. 3 raised in appeal by assessee is allowed for statistical purpose.

11. The assessee has also raised additional ground of appeal as alternate to ground raised in ground No. 3.1. The ld. AR has stated at the Bar that additional ground is not pressed. Thus, in view of statement made by the ld. AR, additional ground raised in appeal by assessee is dismissed.

12. In the result, the appeal of assessee in assessment year 2011-12 is partly allowed in the terms aforesaid.

ITA No. 665/PUN/2016

13. Now, we proceed on to decide the appeal of Revenue. The ground Nos. 1 and 2 of appeal are in respect of aggregation approach accepted by Commissioner of Income Tax (Appeals). We observe that identical grounds were raised by Revenue against aggregation approach adopted by assessee and approved by Commissioner of Income Tax (Appeals) in assessment year 2009-10. The Revenue agitated this issue before Tribunal in ITA No. 359/PUN/2014 (supra). The Co-ordinate Bench of Tribunal after taking into consideration the facts of the case, US transfer price regulations, guideline notes issued by ICAI and OECD transfer pricing guidelines passed a detailed order upholding the order of Commissioner of Income Tax (Appeals) and dismissed the grounds raised by Revenue. The Tribunal finally concluded :

“21. In view thereof, we uphold the business strategy adopted by the assessee which would follow that sale of machinery, packaging material and straws, etc. were closely interlinked and the same could not be evaluated separately. The aggregation approach adopted by the assessee in benchmarking its international transactions of closely interlinked transactions is thus, accepted.”

The ld. DR has not placed on record any decision contrary to the decision of Tribunal in assessee's own case in the immediately preceding assessment years. Thus, following the order of Tribunal in assessee's own case for assessment year 2009-10 (supra), we uphold the aggregation approach adopted by assessee and dismiss ground Nos. 1 and 2 raised in appeal by the Revenue.

14. In ground No. 3 the Revenue has assailed the order of Commissioner of Income Tax (Appeals) in accepting TNMM adopted by assessee for benchmarking its international transactions in Export packaging material segment. The TPO accepted TNMM applied by assessee for benchmarking majority of international transactions with its AE. Only on small segment

of packaging solutions the TPO disputed TNMM and applied CUP for benchmarking international transactions. Further, the TPO granted ad hoc adjustment of 5% for marketing functions and another ad hoc adjustment of 5% for royalty component without specifying the basis for granting such adjustments. Once, the TPO has accepted TNMM as the most appropriate method for benchmarking substantial section of international transactions, the TPO cannot dispute application of the most appropriate method in respect of marginal segment of same transaction. The Co-ordinate Bench of Tribunal in the case of Intervet India (P.) Ltd. Vs. Deputy Commissioner of Income Tax (supra) rejected such approach of TPO in applying CUP for determining ALP on small segment of transaction. The relevant extract of the findings of order of Tribunal reads as under :

“9. De hors, the differences discussed above, a perusal of the documents on record show that more than 80% (83.55%) of exports which have been benchmarked by the assessee under TNMM has been accepted by the authorities below. Where substantial part of the exports made to AEs have been accepted by the TPO and the reason has been given by the assessee for the price difference in respect of one product, we find no valid reason for adopting CUP method as the most appropriate method for benchmarking the transactions. The assessee has discharged its onus by giving the detailed reasons for difference in price. Thereafter, the onus is on the TPO to show that the method adopted by the assessee for benchmarking the transactions with AEs is not the most appropriate method.

10. In the case of Amphenol Interconnect India Pvt. Ltd. Vs. DCIT (supra) similar issue had come up before the Co-ordinate Bench of the Tribunal. In the said case the assessee had entered into an international transaction for purchase of raw material and export of finished goods. In the TP study report the assessee had applied TNMM as the most appropriate method for computing the ALP of international transactions. The TPO did not accept the contention of the assessee and applied CUP method. The assessee contended that the difference in the price is on account of volume, geographical locations, time difference, risk factor, functional difference etc. The Tribunal after considering the facts of the case observed as under:

“3.3 Considering the above differences, CUP method was claimed to be not the most appropriate method to determine ALP. The suitable adjustments were not possible for the above differences and therefore, the TPO was not justified in adopting CUP for exports of `1.40 Crs. to the AEs specially when in respect of some of the products, the assessee has charged higher price to the AEs as compared to the prices charged to Third Parties. This fact was clarified by the assessee to the TPO by the details as mentioned on page 161 of the

Paper Book. Considering the above fact, we find that in respect of some of the instances, the assessee has charged higher prices to the AEs as compared to Third Parties. This fact itself indicates that the pricing of the products is influenced by economic circumstances and underlying transactional differences. The assessee has charged higher amount of `16,18,244/- to the AEs in respect of the same products which were also sold to third parties as referred on page 198 of the Paper Book. Considering the above differences, the CUP method was not the most appropriate method since suitable adjustments were not possible to be made for the various differences. The TPO has applied CUP only on the basis of product similarity without appreciating the various other differences as discussed above.”

The Tribunal further held :

“4.1According to us, as general proposition, there is no dispute to the fact that the CUP method is a more direct method and hence, it should be preferred over TNMM method when comparable transactions are available. However, it is to be appreciated that in the instant case, where there are various differences like geographical differences, volume differences, different market conditions, etc. etc. in the transactions entered by the assessee with its AEs and the third parties. It is not possible to make suitable adjustments in respect of such differences, hence, CUP method is not the most appropriate method in the instant case. In the course of the hearing, the learned CIT DR submitted that the TPO has rightly adopted CUP for the products in respect of which comparable transactions were available. While raising this contention, the learned CIT DR has not controverted the various differences between the transactions entered into by the assessee with its AEs and third parties. Considering the various differences as discussed above between the two transactions, CUP method is not applicable to the facts of the present case. The learned CIT DR had also stated that the onus is on the assessee to demonstrate that the method selected by it, was most appropriate. There is no dispute regarding this proposition as well. However, once, the TPO has tried to select a different method, the onus is on the TPO to demonstrate that the other method is the most appropriate method. This principle has been laid down by Special Bench in the case of Aztec Software Ltd. [107 ITD 141 (Bang)(SB)].”

11. The Co-ordinate Bench after considering various decisions relied upon by both the sides concluded that the TPO had wrongly applied CUP method for determining ALP in respect of some of the transactions pertaining to export of finished goods especially when the TPO had accepted more 90% of the export to the AEs. The Tribunal deleted the additions made by applying CUP method. In the present case, we find that the TPO has accepted substantial part of the transactions with AEs (more than 80%), it is only on the minor part of the transactions in respect of one product that the TPO has applied CUP method even though the reasons were given by the assessee for difference in the rate at which the products are supplied to AE in the one country (Thailand) and the third party in other (Vietnam). Thus, in view of the facts of the case and the decision of Co-ordinate Bench in the case of

Amphenol Interconnect India Private Limited, we accept ground no. 2 raised in the appeal.”

Thus, in view of the facts of the case and the decisions discussed above, we uphold the findings of DRP/Assessing Officer on this issue and dismiss ground No. 3 raised in appeal by Revenue.

15. In the result, appeal of Revenue is dismissed.

ITA No. 521/PUN/2017 (A.Y. 2012-13)

16. In assessment year 2012-13, the assessee has assailed the order of DRP in rejecting aggregation approach adopted by assessee for benchmarking its international transactions in respect of trading of packaging material, packaging material Straws and capital equipment. The ld. AR submitted that ground Nos. 1 to 6 of appeal are directed against the action of DRP/Assessing Officer in rejecting aggregation approach. In the earlier assessment years the DRP has accepted the same. The DRP has rejecting the aggregation approach in the assessment year under appeal primarily for the reason that after amendment to section 253(2)(A) by the Finance Act, 2016 w.e.f. 01-06-2016 the Revenue will have no right to appeal against the directions issued by DRP. Hence, merely to keep the issue alive DRP has rejected contentions of the assessee in assessment year 2012-13, though, in earlier assessment years the DRP had accepted and approved aggregation approach followed by assessee.

17. The ld. AR further submitted that in ground No. 7 of appeal the assessee has assailed disallowance of Rs.9,28,29,036/- u/s. 40(a)(i) of the Act. This ground is similar to ground No. 3 raised in appeal for assessment year 2011-12.

18. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. Undisputedly, in earlier assessment years i.e. assessment years 2009-10 to 2011-12 the DRP has accepted aggregation approach to benchmark international transactions entered into by the assessee with its AE. In the assessment year under appeal the DRP has deviated from the consistent stand only to give leverage to the Department to contest the issue at higher appellate forum. The reason given by DRP for rejecting aggregation approach is that consequent to amendment by the Finance Act, 2016 in section 253, the Revenue does not have the right to appeal against the directions of DRP. In this changed scenario the DRP can deviate from directions issued in earlier years. We are of considered view that the DRP/Assessing Officer cannot take a different view from the settled position which they have endorsed in earlier assessment year(s) merely for the reason that amendment in the provisions of a section has taken away the right of Department to appeal against the directions of DRP. The DRP for the last several assessment years have been consistently allowing aggregation approach. There has been no change in nature of international transactions entered into by the assessee and there has been no change in method of remuneration or AEs involved in the international transactions. Thus, we do not find any reason for DRP/Assessing Officer to take diagonally opposite view from the settled and consistent stand. Accordingly, ground Nos. 1 to 6 raised in appeal by assessee are allowed.

19. In ground No. 7 of appeal, the assessee has assailed disallowance of Rs.9,28,29,036/- u/s. 40(a)(i) of the Act. Identical issue has been raised by assessee in its appeal in ITA No. 635/PUN/2016 for assessment year 2011-12 as ground No. 3. We have remitted the issue back to the file of Assessing Officer. The findings given by us while adjudicating ground No.

3 of appeal by the assessee for assessment year 2011-12 would mutatis mutandis apply to ground No. 7 raised in present appeal. Accordingly, ground No. 7 raised in appeal is allowed for statistical purpose.

20. In the result, the appeal of assessee for assessment year 2012-13 is partly allowed in the terms aforesaid.

21. To sum up, the appeals of assessee are partly allowed and the appeal of Revenue is dismissed.

Order pronounced on Friday, the 23rd day of March, 2018.

Sd/- (अनिल चतुर्वेदी / Anil Chaturvedi) लेखा सदस्य / ACCOUNTANT MEMBER	Sd/- (विकास अवस्थी / Vikas Awasthy) न्यायिक सदस्य / JUDICIAL MEMBER
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पुणे / Pune; दिनांक / Dated : 23rd March, 2018

RK

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Dispute Resolution Panel, Pune
4. The Pr. Commissioner of Income Tax, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune