

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव,लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.155/PUN/2013

निर्धारण वर्ष / Assessment Year : 2008-09

Intervet India Private Limited.
Briahnagar, Off Pune-Nagar
Road, Wagholi,
Pune-412 207.
PAN : AAACH1671F

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income tax,
Circle-1(2), Pune.

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.722/PUN/2014

निर्धारण वर्ष / Assessment Year : 2004-05

Intervet India Private Limited.
Briahnagar, Off Pune-Nagar
Road, Wagholi,
Pune-412 207.
PAN : AAACH1671F

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income tax,
Circle-1(2), Pune.

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.801/PUN/2014

निर्धारण वर्ष / Assessment Year : 2004-05

The Deputy Commissioner of Income tax,
 Circle-1(2), Pune.

.....अपीलार्थी / Appellant

बनाम / V/s.

Intervet India Private Limited.
 Intervet House, 33, Pune-Nagar
 Road, Pune-411 014.
 PAN : AAACH1671F

.....प्रत्यर्थी / Respondent

Assessee by : Shri Danesh Bafna
 Revenue by : Smt. Nirupama Kotru

सुनवाई की तारीख / Date of Hearing : 24.04.2018
 घोषणा की तारीख / Date of Pronouncement : 29.06.2018

आदेश / ORDER

PER VIKAS AWASTHY, JM

ITA No.722/PUN/2014 has been filed by assessee assailing the order of Commissioner of Income Tax (Appeals)-IT/TP, Pune dated 22.01.2014 for the assessment year 2004-05. The Revenue has filed cross appeal against the said order of Commissioner of Income Tax (Appeals) in ITA No. 801/PUN/2014.

In ITA No.155/PUN/2013, the assessee has assailed the assessment order dated 25.10.2012 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. Since, the issues involved in these appeals are similar and are arising from same set of facts, these appeals are taken up together for adjudication and are disposed of vide this common order.

3. For the sake of convenience, we will first take up cross appeals by the assessee and Revenue for the assessment year 2004-05. The brief facts of the case as emanating from records are: The assessee is engaged in the business of manufacturing and trading of animal health and veterinary products. The assessee is a wholly owned subsidiary of Intervet Holdings BV, Netherlands which is part of Akzo Noble Group. The assessee has two production centres in India, located at Hyderabad and Pune. During the period relevant to the assessment year under appeal, the assessee entered into various international transactions with its Associated Enterprises (AEs) which inter alia includes export of finished goods, export of raw material and purchase of finished goods. The activities of the assessee can be categorized in two segments i.e. "manufacturing" and "trading". To bench-mark its international transaction with its AEs, the assessee adopted Transactional Net Margin Method (TNMM) as the most appropriate method in respect of both the segments. During transfer pricing proceedings, the Transfer Pricing Officer (TPO) rejected assessee's application of TNMM qua manufacturing segment. The TPO held that since there are direct comparables available, the assessee should have used Comparable Uncontrolled Price (CUP) method to bench-mark its transactions. The TPO observed that the assessee has benchmarked its transactions relating to export of finished goods to its AEs and import of

raw material from its AEs by applying TNMM. The TPO also found that there are several instances where assessee has sold similar products to AEs at lower price than to third parties. The TPO compared the price of similar goods that have been sold by assessee to its AEs vis-à-vis third party by applying CUP method and proposed adjustment of Rs.34,36,260/-.

4. In respect of trading segment, the assessee benchmarked the transactions with its AE after including 'Sacox' (Anti-coccidal drug). The assessee had suffered operating loss of more than 58% on import of 'Sacox' for resale. Apart from above, the TPO rejected assessee's argument to treat foreign exchange gain/loss and provisions for doubtful debts as 'non-operating' in nature. The TPO computed margin of the assessee at 4.39% as against average margin of 3.52% of the comparables entities. Thus, the TPO made an adjustment of Rs.1,11,65,000/- in respect of trading segment.

5. On the basis of order dated 18.12.2006 passed by the TPO proposing adjustment in respect of international transactions, the Assessing Officer passed assessment order dated 26.12.2006 inter alia making additions /disallowances on account of provisions for slow moving and expired stocks and treating relocation expenditure of the factory as capital in nature. Aggrieved by the assessment order dated 26.12.2006, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax(Appeals) vide impugned order granted part relief to the assessee by deleting some of the additions. In respect of additions/disallowances confirmed by the Commissioner of Income Tax (Appeals), the assessee is in appeal before the Tribunal by raising following grounds:

“ 1. Ground No 1

On the fact and circumstances of the case, and in law, the Ld CIT(A), erred both on facts and in law in confirming the addition of Rs.1,36,09,580 to the total income of the Appellant, on account of the transfer pricing (TP) adjustment under section 92CA(3) of the Income- tax Act, 1961 ('the Act') by holding that the international transactions does not satisfy the arm's length principle envisaged under the Act.

The Appellant prays that the arm's length price of the international transaction as computed by the Appellant be accepted and consequently the TP adjustment of Rs.1,36,09,580 be deleted.

2. Ground No 2

On the facts and circumstances of the case, and in law, the Ld.CIT(A), with respect to the transaction of export of certain finished goods, erred both on facts and in law, by considering Comparable Uncontrolled Price ('CUP') as the most appropriate method for determining the arm's length price, and thereby disregarding Transactional Net Margin Method ('TNMM'), which was based on a detailed benchmarking analysis conducted by the Appellant.

The Appellant prays that the benchmarking analysis as conducted by the Appellant be accepted, and TNMM method as considered by the Appellant be adopted to compute the arm's length price of the transaction of export of finished goods, instead of CUP method as adopted by the Ld. CIT(A).

3. Ground No 3

On the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in assuming that the transactions are comparable for application of CUP method, despite the fact that adjustment for geographical differences could not be quantified.

The Appellant prays that in case reasonably accurate adjustments cannot be made to eliminate the differences between international transaction of export of finished goods and the comparable uncontrolled transactions, the application of CUP method fails, and TNMM ought to be considered as the most appropriate method.

4. Ground No 4

On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in disregarding the fact that the sale price realized by the AEs on sales made to third parties in their country was lesser than the price at which the product is sold by the Appellant to third parties located in other countries.

The Appellant prays that in case CUP method is considered as the most appropriate method, then the TP adjustment, if any, ought to be made with reference to the ultimate selling price at which the product is sold by the AEs to the third parties.

5. Ground No 5

On the facts and circumstances of the case, and in law, the Ld. CIT(A), with respect to the international transaction of import of finished goods for resale, erred in:

5.1. *Disregarding the business and commercial rationale for exclusion of losses from the sale of 'Sacox' product while comparing the operating margin from the trading segment with that of the comparable companies;*

5.2 *Disregarding the Appellant's arguments that the provision for doubtful debts of Rs.21,77,000 was extra-ordinary in nature and thus ought to have been excluded for computing the operating margin for the trading segment.*

The Appellant prays that the book value of the international transaction be accepted to be the arm's length price, and the TP adjustment of Rs.1,01,73,320 be deleted.

6. Ground No. 6

On the facts and circumstances of the case, and in law, the Ld. CIT(A) has erred in disallowing the provisions for slow moving and expired stocks of Rs.80,98,427/-

The Appellant prays that provision for slow moving and expired stocks ought to be allowed as business expenditure under section 37(1) of the Act.

The appellant craves leave to add, alter, amend, substitute 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 so as to enable the Hon'ble Tribunal members to decide these according to the law."

The assessee has also raised additional grounds of appeal.

Additional Ground No. 1

On the facts and in the circumstances of the case and in law, the Learned Assessing Officer ('Ld. AO')/Learned Transfer Pricing Officer (Ld.TPO) has erred in considering the comparable companies with respect to the trading segment of the appellant, having different financial year ending.

The appellant humbly prays that the comparable companies having different financial year ending ought to be excluded while computing the arm's length price of the trading segment of the Appellant.

Additional Ground No. 2

On the facts and in the circumstances of the case and in law, the ld. AO/TPO has erred in considering the incorrect margins of the comparable companies in computation of arm's length price for the trading segment of the Appellant.

The Appellant humbly prays that the correct margins of the comparable companies ought to be considered while computing the arm's length price of the trading segment of the Appellant.

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

6. Shri Danesh Bafna appearing on behalf of assessee submitted at the outset that grounds No. 1 to 4 raised in appeal by assessee are in respect of replacing TNMM with CUP as the most appropriate method for benchmarking its international transactions with its AEs in manufacturing segment for determining Arm's Length Price (ALP). The ld. AR submitted that for the assessment years 2002-03 and 2003-04, TNMM applied by the assessee to benchmarking its international transactions was disturbed by the TPO and was replaced with CUP. The assessee carried the matter in appeal before the Tribunal. The Tribunal in ITA No.720/PN/2014 for the assessment year 2002-03 decided on 18.04.2016 upheld the contentions of the assessee and held the TNMM as the most appropriate method for benchmarking transactions. Similar view was taken by the Tribunal in assessee's own case in ITA No.721/PUN/2014 for the assessment year 2003-04 decided on 21.12.2017. The ld. AR pointed that the Tribunal while upholding the contentions of the assessee in selecting TNMM as the most appropriate method placed reliance on the decision of Co-ordinate Bench in the case of Amphenol Interconnect India Pvt. Ltd. Vs. DCIT, in ITA No. 1548/PUN/2011 for the assessment year 2007-08 decided on 30.05.2014. The decision of Tribunal in the case of Amphenol Interconnect India Pvt. Ltd. Vs. DCIT (supra.) has been upheld by the Hon'ble Bombay High Court in appeal filed by the Department titled Pr. CIT Vs. Amphenol Interconnect India Pvt. Ltd. in Income Tax Appeal No. 1102 of 2015 decided on 07.03.2018.

7. In respect of ground No. 5 and additional ground No. 1 and 2, the ld. AR submitted that TPO and Commissioner of Income Tax (Appeals) have erred in including 'Sacox' disregarding the fact that it does not fall with the same segment as other products. The Authorities below have failed to take into consideration the fact that 'Sacox' was one of the product imported by the

assessee for resale and belongs to very competitive segment. The depreciation of rupee as compared to Euro during financial year 2003-04 has resulted in reduced margin of the product.

7.1 The ld. A.R. further submitted that the TPO computed average margin of the comparables at 3.52% after including Sharon Bio-Medicines Ltd. & Amar Remedies Ltd. in the list of comparable entities. Both these companies have financial year ending as on 30th June, 2004, whereas; the financial year of the assessee company ended on 31st March, 2004. Hence, on account of different financial year endings, these companies have to be rejected from the list of comparables. In support of his submissions, the ld. AR has placed reliance on the following decisions.

i) CIT Vs. PTC Software (I) Pvt. Ltd., in ITA No.337 of 2014 dated 10.10.2016 by Hon'ble Bombay High Court.

ii) Dover India (P.) Ltd. Vs. DCIT, in ITA No.408/PN/2013 for the assessment year 2008-09 decided on 27.05.2015.

iii) ITO Vs. Avalara Technologies (P.) Ltd., in ITA Nos. 1800/PN/2013 and 299 & 399/PN/2015 for the assessment year 2010-11 decided on 31.03.2016.

7.2 The ld. AR further submitted that as regards other comparables i.e. Bijoy Hans Ltd., Victor Impex Ltd. and Jindal Drugs Ltd., the TPO has incorrectly computed the margin. The margin taken by the TPO and correct margin of the companies are as under:

<i>Sr. No.</i>	<i>Comparables</i>	<i>Margin computed by the TPO</i>	<i>Margin as per assessee</i>
<i>1.</i>	<i>Bijoy Hans Ltd.</i>	<i>1.03%</i>	<i>-9.40%</i>
<i>2.</i>	<i>Victor Impex Ltd.</i>	<i>3.59%</i>	<i>2.41%</i>
<i>3.</i>	<i>Jindal Drugs Ltd.</i>	<i>3.63%</i>	<i>4.10%</i>

The ld. AR submitted that after excluding two companies i.e. Sharon Bio-Medicines Ltd. & Amar Remedies Ltd from the list of comparables and computing correct margins of other comparables as mentioned above, average margin of comparables would be -0.96%. Thus, margin earned by assessee i.e. -4.39% would be within $\pm 5\%$ of tolerance limit. Hence, no TP adjustment would be required for trading segment. The ld. AR contended that in case ground No.5 and additional grounds No. 1 and 2 are allowed, the appeal of the Revenue would become infructuous.

8. In respect of ground No. 6 raised in appeal, the ld. AR submitted that the assessee has regularly followed the method of accounting for creating provisions of slow moving and expired stock under Accounting Standard (AS)-2. No addition was made in the preceding assessment years and in the subsequent assessment years up to assessment year 2011-12. The assessee had furnished necessary documents along with procedure of making the provision before the Authorities below. The ld. AR submitted that where method of accounting has been regularly followed and accepted by the Revenue Authorities, no disallowance is to be made. In support of his submissions, the ld. AR has placed reliance on the following decisions:

i) *Emerson Process Management (India) Private Limited Vs. ACIT, reported as 47 SOT 157.*

ii) *Inspecting Assistant Commissioner Vs. Consolidated Pneumatic Tool (India) Ltd. reported as 15 ITD 564.*

The ld. AR asserted that the "Rule of Consistency" demands, the provision which has been accepted by the Department in the earlier

assessment years and the subsequent assessment years, the same should not be disturbed.

9. On the other hand, Smt. Nirupama Kotru representing the Department vehemently defended the findings of Commissioner of Income Tax (Appeals) in respect of grounds raised in the appeal by assessee. The ld. DR prayed for dismissing the appeal of the assessee.

10. We have heard the submissions made by representatives of rival sides and have perused the orders of Authorities below. In so far as grounds No. 1 to 4 raised in the appeal in respect of manufacturing segment are concerned, the ld. AR has pointed that in the immediately two preceding assessment years i.e. assessment years 2002-03 and 2003-04, the TPO in similar manner had replaced TNMM as most appropriate method with the CUP and the same was upheld by the Commissioner of Income Tax (Appeals). We find that the impugned order passed by the Commissioner of Income Tax (Appeals) is common for assessment years 2002-03, 2003-04 and 2004-05. While deciding the issue of benchmarking of transactions under manufacturing segment in assessment year 2004-05, the Commissioner of Income Tax (Appeals) relied on its findings in assessment year 2002-03 and held as under:

“Findings :

4.5.6 I have carefully considered the arguments raised by the Appellant. I have elaborately discussed this issue in my appellate order of A.Y 2002-03. The same findings will be applicable here. Accordingly, I confirm the adjustment of Rs.34,46,260/-.”

11. The Co-ordinate Bench of the Tribunal while adjudicating the appeal of assessee for assessment year 2002-03 upheld the TNMM as most appropriate

method applied by assessee for benchmarking ALP and has reversed the findings of Commissioner of Income Tax(Appeals). The relevant extract of the findings of the Tribunal on this issue are as under:

“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.”

12. In the assessment year 2003-04, the TPO again disregarded TNMM applied by assessee as most appropriate method and replaced with CUP. The Tribunal in assessee's appeal in ITA No.721/PUN/2014 for assessment year 2003-04 (supra.) reiterated that TNMM selected by assessee is the most appropriate method for benchmarking international transaction under manufacturing segment. No contrary material has been brought to our notice by the Revenue to controvert the findings of Tribunal in immediately two preceding assessment years in the case of assessee. Thus, following the decision of the Co-ordinate Bench of Tribunal in assessee's own case, we hold TNMM as the most appropriate method for benchmarking international transactions for determining ALP in manufacturing segment. Accordingly, **grounds No.1 to 4 raised in appeal by the assessee are allowed.**

13. In ground No.5, sub ground No. 5.1 of the appeal, the assessee has assailed inclusion of 'Sacox' one of the finished product imported by the assessee for resale. The ld. AR of the assessee before us submitted that

'Sacox' is one of the items in trading segment in India which is a very competitive in nature on account of availability of multiple cheaper generic substitutes. We find that the Commissioner of Income Tax (Appeals) without dealing with the contentions raised by assessee in respect of inclusion of 'Sacox' has rejected the submissions of assessee. Accordingly, we deem it appropriate to remit this issue back to the file of the Commissioner of Income Tax(Appeals) for fresh adjudication by passing a speaking order. Accordingly, **ground No. 5.2 raised in appeal by assessee is allowed for statistical purpose.**

14. In sub ground No. 5.2, the assessee has assailed the findings of Commissioner of Income Tax (Appeals) in treating provisions for doubtful debts as 'operating' in nature. We do not find any infirmity in the order of Commissioner of Income Tax (Appeals) in holding provision for doubtful debts as 'operating' in nature. Our view is supported by the decision of Co-ordinate Bench in the case of Haworth (India) (P) Ltd. Vs. DCIT, in ITA No. 281/PUN/2014 for assessment year 2009-10 decided on 30.10.2017. Accordingly, **ground No. 5.2 raised in appeal by assessee is dismissed.**

15. The assessee in additional ground No.1 has sought exclusion of Sharon Bio-Medicines Ltd. & Amar Remedies Ltd. from the list of comparable entities. The objection of the assessee is that both these companies have financial years different from financial year followed by the assessee. The financial year of above said two companies end on 30th June, whereas financial year closing of the assessee is on 31st March. We find merit in the submissions of ld. AR of assessee. It is well settled position that when comparables are to be selected, they should have the same financial year ending as that of the assessee company. The Co-ordinate Bench of the Tribunal in the case of Dover India

(P.) Ltd. Vs. DCIT (supra.) has held that where the financial year of the comparable company is not contemporaneous to that of the assessee, the comparable has to be rejected. The relevant extract of the findings of the Tribunal reads as under:

“13. Another objection raised by the assessee was against the selection of Rolta India Limited, while benchmarking the international transaction with respect to design engineering services provided by the assessee to its AEs. The learned Authorized Representative for the assessee pointed out that the margins of Rolta India Limited could not be applied as it had different year end as against the assessee's year end 31.03.2008. The said company's year end was 30.06.2007. It was pointed out by the learned Authorized Representative for the assessee that since the data of comparables concerned does not correspond to the financial year of the year, the same was un-comparable. We find merit in the plea of the assessee as even the provisions of Rule 10B(4) of the Income-tax Rules, 1962 provided that the data to be used in analyzing the comparability of an un-controlled transactions with an international transaction, shall be the data relating to the financial year, in which the international transaction had been entered into. In the present case, the data adopted by Rolta India Limited does not relate to the financial year, in which the international transaction has been carried on by the assessee and hence, the said concern is to be excluded from the list of comparables. Similar view has been taken by Pune Bench of Tribunal in PTC Software (India) (P) Ltd. v. ACIT [IT Appeal No. 1605 (Pune) of 2011, relating to assessment year 2007-08, order dated 30.04.2013]. Accordingly, we direct the Assessing Officer to exclude Rolta India Limited from the list of comparables while benchmarking the arm's length price with respect to design engineering services provided to the AEs by the assessee. The Assessing Officer shall re-compute the adjustment, if any, to be made in the hands of assessee. The grounds of appeal raised by the assessee are partly allowed.”

Similar view has been taken by the Tribunal in the case of Bobst India Private Limited Vs. DCIT in ITA No.2231/PUN/2013 for assessment year 2009-10 decided on 24.05.2017. In view of the facts of the case and the decisions referred above, we direct the Assessing Officer to exclude Sharon Bio-Medicines Ltd. and Amar Remedies Ltd. from the list of comparables.

Thus, additional ground No. 1 raised in appeal by assessee is allowed.

16. In additional ground No. 2 of the appeal, the assessee has assailed incorrect computation of margin of comparable companies. The TPO while

determining ALP of the international transactions has selected (i) Bijoy Hans Ltd. (ii) Victor Impex Ltd. and (iii) Jindal Drugs Ltd. apart from other companies as comparable entities. The contention of the assessee is that the margin computed by the TPO of the above said companies is incorrect. The assessee has given working of the correct margin which reads as under:

<i>Sr. No.</i>	<i>Comparables</i>	<i>Margin (As per Annual Report)</i>
1.	<i>Bijoy Hans Ltd.</i>	<i>-9.40%</i>
2.	<i>Victor Impex Ltd.</i>	<i>2.41%</i>
3.	<i>Jindal Drugs Ltd.</i>	<i>4.10%</i>
	<i>Mean</i>	<i>-0.96%</i>

This fact requires verification. Accordingly, we deem it appropriate to remit this issue back to the file of TPO for correct computation of margin of the comparables companies and thereafter, determine ALP of the assessee. Accordingly, **additional ground No.2 raised in appeal by the assessee is allowed for statistical purpose.**

17. In ground No.6 of the appeal, the assessee has assailed findings of the Commissioner of Income Tax (Appeals) in disallowing provision for slow moving and expired stock amounting to Rs.80,98,427/-. The contention of the assessee is that the assessee is following this method of accounting regularly since long and the Revenue has not raised any objection in the manner of making provision for slow moving and expired stock. The Commissioner of Income Tax(Appeals) in his order has not decided the allowability of provisions of such stock. The only reason for disallowing assessee's claim is that the assessee has not given scientific reason for creating such provision. The ld. AR of the assessee has pointed hat

unsalable/ obsolete stock for which the assessee has created provision is only 0.6% of the total sale consideration. The Revenue has disallowed the entire provision. It is an undisputed position that the provision for such stocks is to be allowed. It is only the subject of quantification of dead stock which is in dispute. We are of considered view that this issue needs revisit to the file of TPO/Assessing Officer. The assessee shall explain the manner and basis for quantification of such slow moving and obsolete stocks. The TPO/Assessing Officer after taking into consideration the submissions of the assessee and the case laws on which reliance has been placed by assessee, shall decide the issue afresh, after affording reasonable opportunity of hearing to the assessee. Thus, **ground No. 6 raised in appeal by assessee is allowed for statistical purpose.**

18. In the result, appeal of the assessee is partly allowed in the terms aforesaid.

ITA No. 801/PUN/2014 (By Revenue)
A.Y.2004-05

19. The solitary ground raised by Revenue in cross-appeal (ITA No. 801/PUN/2014) read as under:

“1. On the facts and in the circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in directing to exclude loss on account of foreign exchange fluctuation for computing the Profit Level Indicator of the trading segment as per Safe Harbour Rule, 2013, when those were clearly not applicable to the facts of the case.

2. The appellant craves leave to add, alter or amend any or all the grounds of appeal.”

20. A perusal of the impugned order shows that the Commissioner of Income Tax (Appeals) has held foreign exchange loss as ‘non-operating item’.

To support his findings, the Commissioner of Income Tax (Appeals) has placed reliance on the draft "Safe Harbour Rules". We are of considered view that the Commissioner of Income Tax(Appeals) has erred in holding foreign exchange loss as 'non-operating' item. Further, reliance on "Safe Harbour Rule" by the Commissioner of Income Tax (Appeals) is erroneous. The "Safe Harbour Rule" came into existence from September, 2013. They do not apply retrospectively and hence, have no application in the assessment year 2004-05. Our this view find support from the decision of Hon'ble Delhi High Court in the case of Pr. CIT Vs. M/s. Cashedge India Pvt. Ltd in Income Tax Appeal No. 279 of 2016 decided on 04.05.2016. The Co-ordinate Bench of the Tribunal in the case of Approva Systems Pvt. Ltd. Vs. CIT(A)-IT/TP ITA No.1788 & 1803/PN/2013 for assessment year 2009-10 decided on 13.01.2015 has held that foreign exchange gain/loss is part of operating income of assessee. The relevant extract of the order of Tribunal is reproduced herein below:

"22. We have considered the rival arguments made by both the sides. As reproduced above in para 20 in the arguments advanced by the Ld. Counsel for the assessee, we find the Delhi Bench of the Tribunal in the case of Westfalia Separatator India Pvt. Ltd., (Supra) following various decisions has held that foreign exchange loss/gain is a part of the operating revenue/cost. In the following decisions also (filed in the paper book by the assessee), it has been held that foreign exchange fluctuation cannot be excluded from the computation of the operating margin of the assessee company:

1. *SAP Labs India P. Ltd. Vs. ACIT – 44 SOT 156 (bang)*
2. *Prakash I Shah reported in (2008) 115 ITD 167 (Mum) (SB)*
3. *Smt. Sujata Grover Vs. Dy.CIT (2002) 74 TTJ (Del) 347*
4. *M/s. S. Narendra Vs. Addl.CIT – ITA No.6839/Mum/2012 – Mumbai Tribunal*
5. *M/s. Mercedes Benz Research & development India Pvt. Ltd. Vs. DCIT (IT/TP A.No.1222/Bang/2011 –Bangalore Tribunal*
6. *M/s. Trilogy E-Business Software India Private Ltd., Vs. DCIT, ITA No.1054/Bang/2011 – Bangalore Tribunal*
7. *Sumit Diamond (India) Pvt. Ltd. Vs. ACIT – ITA No.7148/Mum/2012 – Mumbai Tribunal*
8. *M/s. Foursoft Ltd. Vs. The Dy.CIT – ITA No.1495/Hyd/2010*

9. *Techbooks International Pvt. Ltd. Vs. ACIT – ITA No.722 – Delhi Tribunal*
10. *M/s. CISCO Systems (India) Private Ltd. Vs. The Dy.CIT-IT/TP A.No.271/Bang/2014 – Bangalore Tribunal*
11. *M/s. Midteck (India) Ltd. Vs. The Dy.CIT-IT(TP) A.No.70/Bang/2014 – Bangalore Tribunal*
12. *M/s. Petro Araldite Pvt. Ltd. The Dy.CIT – ITA No.1538/Mum/2014 – Mumbai Tribunal*
13. *ACIT Vs. NGC Network India Pvt. Ltd. – ITA No.5307/M/2008*

22.1 Respectfully following the decisions of the different Benches of the Tribunal, we set aside the order of the CIT(A) on this issue and direct the Assessing Officer to consider foreign exchange fluctuation gain as part of the operating income of the assessee.”

In view of our above findings, the solitary ground raised in appeal by the Revenue is allowed.

21. In the result, appeal of the Revenue is allowed.

ITA No. 155/PUN/2013 (By Assessee)
A.Y.2008-09

22. The assessee in appeal (ITA No.155/PUN/2013) has assailed the assessment order dated 25.10.2012 passed u/s.143(3) r.w.s.144C(13) of the Act by raising following grounds:

“1. On the facts and circumstances of the case and in law, the Deputy Commissioner of Income-tax 1 (2), Pune (Ld AO), under the directions of the Dispute Resolution Panel (Ld DRP) erred both on facts and in law in confirming the addition of INR 3,61,419 to the total income of the Appellant, on account of the transfer pricing (TP) adjustment under section 92CA(3) of the Income-tax Act, 1961 (‘the Act’), by holding that the international transaction of ‘export of finished goods’ does not satisfy the arm’s length principle envisaged under the Act.

The Appellant prays that the arm’s length price of the international transaction of export of finished goods as computed by the Appellant be accepted and consequently the TP adjustment of INR 3,61,419 be deleted.

2. The Ld DRP and the Ld AO (following the directions of the Ld DRP), erred on facts and in law, by considering Comparable Uncontrolled Price Method (‘CUP’) as the most appropriate method for determining the arm’s length price of export of certain finished goods, and thereby disregarding Transactional Net Margin Method (TNMM), which was based on a detailed benchmarking analysis conducted by the Appellant.

The Appellant prays that the benchmarking analysis as conducted by the Appellant be accepted, and TNMM method as considered by the Appellant be adopted to compute the arm's length price of the transaction of export of finished goods, instead of the CUP method as adopted by the TPO.

3. On a without prejudice basis, the Ld DRP and the Ld AO (following the directions of the DRP), erred in not making reliably accurate adjustments for the differences between the international transaction of export of finished goods and the comparable uncontrolled transaction when applying the CUP method.

The Appellant prays (on a without prejudice basis) that in case CUP method is considered as the most appropriate method then reliably accurate adjustments should be made for the differences between international transaction of export of finished goods and the comparable uncontrolled transaction.

The Appellant craves leave to add, alter, vary, omit, substitute or amend one or more of the above grounds at any time before or at the time of the proceedings so as to enable the Hon'ble Tribunal members to decide these according to the law."

23. The ld. AR for the assessee has pointed that the issues raised in the present appeal are identical to the one raised in the ground No. 1 to 4 of the appeal by assessee for assessment year 2004-05.

24. The ld. DR has not disputed the statement made by the ld. AR.

25. We observe that the issues raised by the assessee in ground No. 1 to 3 of the appeal for assessment year 2008-09 are identical to the grounds No. 1 to 4 raised in the appeal for assessment year 2004-05. While adjudicating these issues in the appeal for assessment year 2004-05, we have given our detailed findings. The findings given by us on the issue of replacing TNMM with CUP as the most appropriate method while benchmarking international transactions to determine ALP in manufacturing segment would apply mutatis-mutandis to the grounds raised by the assessee in assessment year 2008-09. Accordingly, grounds No. 1 to 3 raised in appeal by assessee are allowed in the same terms.

26. In the result, appeal of the assessee for assessment year 2008-09 is allowed.

27. To sum up,

<i>Appeal No.</i>	<i>Appeal by</i>	<i>Assessment Year</i>	<i>Result.</i>
ITA No.722/PUN/2014	Assessee	2004-05	Partly allowed
ITA No.801/PUN/2014	Revenue	2004-05	Allowed
ITA No.155/PUN/2013	Assessee	2008-09	Allowed

Order pronounced on Friday, the 29th day of June, 2018

Sd/-
 (डी. करुणाकरा राव/D. KARUNAKARA RAO)
 लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-
 (विकास अवस्थी /VIKAS AWASTHY)
 न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 29th June, 2018

SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-13, Pune.
4. The CIT-IT/TP, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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आदेशानुसार / BY ORDER,

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