IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1", NEW DELHI

BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.575/Del/2014
Assessment Year: 2005-06

DCIT, Circle- 11(1), New Delhi.	**Vs.**	Fresenius Kabi Oncology Ltd., (Earlier known as M/s Dabur Pharma Ltd.), Echelon Institutional Area, Plot No.11, Sector- 32, Gurgaon-122001
		PAN : AABCD7720L
(Appellant)		**(Respondent)**

ITA No.3495/Del/2014
Assessment Year : 2007-08

DCIT, Circle- 11(1), New Delhi.	**Vs.**	Fresenius Kabi Oncology Ltd., (Earlier known as M/s Dabur Pharma Ltd.), B-310, Som Dutt Chambers- I, Bhikaji Cama Place, New Delhi-110066
		PAN : AABCD7720L
(Appellant)		**(Respondent)**

Department by : Shri Sanjay I. Bara, CIT-DR
Assessee by : Shri K. M. Gupta, Adv.

Date of hearing : 5.7.2018
Date of pronouncement : 3.10.2018

O R D E R

PER SUDHANSHU SRIVASTVA, JM :

ITA No. 575/Del/2014 has been preferred by the Department against the order dated 25.11.2013 passed by the Ld. Commissioner of Income Tax (Appeals)-XXIX, New Delhi for

assessment year 2005-06. ITA No. 3495/Del/2014 is also the department's appeal which has been preferred against the order dated 3.3.2014 passed by the Ld. Commissioner of Income Tax (Appeals)-XXIX, New Delhi for assessment year 2007-08. Both these appeals were heard together and for the sake of convenience, they are being disposed of by this common order.

ITA No.575/Del/2014 :

2.0 This appeal pertains to assessment year 2005-06. Facts of the case, in brief, are that the assessee is a company engaged in the business of manufacturing of pharmaceuticals and drugs. The assessee company was incorporated in the year 2003. In the initial stages, it was the pharmaceutical business arm of Dabur India Limited. In the year 2003 it was demerged from Dabur India Limited in order to position Dabur Pharma Limited as a specialty pharmaceutical company based on allopathic form of medicine. It filed its return of income declaring income of Rs.2,81,80,075/-. Since the assessee had entered into international transactions during the year as defined u/s 92B of the I.T. Act, 1961, the Assessing Officer (AO) referred the matter

to the Transfer Pricing Officer (TPO) for determining of the Arm's Length Price (ALP) of the international transactions.

2.1 During the year, the assessee had entered into international transactions with two Associated Enterprises (AEs) namely Dabur Oncology PLC and Dabur Neparl Private Limited. Dabur Oncology Private Limited is a 100% subsidiary of Dabur Pharma Limited and Dabur Nepal Limited is a 80% subsidiary of Dabur Pharma Limited. During the year, the assessee had undertaken the following international transactions:-

S.No.	Description of transaction	Method	Value
1	Purchase of goods	TNMM	104.00 lacs
2	Sale of goods	TNMM	203.87 lacs
3	Purchase of capital goods	TNMM	213.50 lacs

2.2 The assessee had adopted Transactional Net Margin Method (TNMM) with Operating Profit (OP) earned on Sales as the Profit Level Indicator (PLI). The assessee company had selected 9 companies as comparables. The mean operating profit earned on

sales was 8%. Since the Operating Profit margin on sales of the assessee was at 9% as per the Transfer Pricing (TP) report, it was contended by the assessee that the international transaction undertaken by the assessee with its Associated Enterprises (AEs) were at arm's length. However, the TPO was not satisfied with the arguments advanced by the assessee. He observed that the assessee, while applying the Most Appropriate Method (MAM) chosen by it had used the overall company margins and hence arrived at the figure of 9%. He observed that the in the case of the assessee the international transactions relating to purchases was Rs.317.5 lacs and that relating to sales was Rs.203.87 lacs. It was further observed by the TPO that out of the purchases an amount of Rs.213.5 lacs was related to purchase of capital goods which was not part of the profit and loss account and was capitalized in the schedule of assets. He, therefore, held that the quantum of international transactions in this case did not merit a companywide TNMM. Since the TNMM adopted by the assessee was not acceptable to the TPO and the re-sale price method, cost plus method or the profit split method could not be applied in the instant case, he held that the only method that could be explored

in this case was the CUP method. He, therefore, asked the assessee specifically to search for external comparables. However, the assessee was unable to produce anything on record. The TPO, therefore, proceeded to determine the arm's length price of the international transactions.

2.2.1. The TPO observed that the assessee had purchased one Lipholiser from Dabur Oncology PLC, which is its subsidiary, on 09.08.2004. This product was purchased by Dabur Oncology PLC from an unrelated company by the name of USIFROID on 31.10.2000. USIFROID had invoiced Dabur Oncology PLC for an amount of Rs.27,75,000/- FRF (French Francs). Dabur Oncology PLC had, in turn, invoiced the assessee for an amount of GBP 2,50,000/-. After converting the same to Indian Rupees, the purchase price of the Lipholiser in the hands of Dabur Oncology PLC came to Rs.1,66,22,250/-. Dabur Oncology PLC had sold the Lipholiser to the assessee on 09.08.2004 whose conversion rate in Indian Rupee came to Rs.2,13,62,500/-. Thus, as per the TPO, the said Lipholiser was produced at a higher value by the assessee than paid by the overseas enterprise to the unrelated

party. He further observed that the Lipholiser was in the hands of Dabur Oncology PLC from 31.10.2000 till 09.08.2004. The relative block related to three full financial years viz. 2001-02, 2002-03 and 2003-04. On being questioned by the TPO, it was explained by the assessee that the machine was not put to use by the overseas associate. However, nothing was brought on record to show that the lipholiser was not put to use. The TPO noted that as per the corporate taxation structure of the United Kingdom, depreciation was allowable on such plant and machinery @ 20%. Since the said machine (Lipholiser) was purchased at a price of Rs.1,66,22,250/-, he computed the depreciation of the said instrument year-wise and arrived at a figure of Rs.85,10,592/- being the depreciated value in the year 2003-04. Since there was no submission by the assessee on this issue except stating that the said product was used by the overseas associate from 2000 till 2004 and no capital allowance was taken thereon and the item was sold at the value at which it was procured, the TPO, rejecting the submissions made by the assessee determined the value of the Lipholiser at Rs.85,10,592/- as against Rs.2,13,50,000/- determined by the assessee and

made upward adjustment of Rs.85,10,592/- on account of purchase of Lipholiser.

2.3 The TPO further observed that the assessee had sold Paclitaxel of 3.6 kg for Rs.173.36 lacs to its associated enterprise namely Dabur Oncology Plc. Since the assessee had not given any comparative rates, the TPO tried to find out the export rates of Paclitaxel from India during the relevant period and used the data from the database of the export rates maintained by M/s International Business Information Services, East Bombay – 400068. After analyzing the rates with that of the assessee at FOB value, he determined the corresponding FOB rates, which are as under:-

Party	Date	Quantity	FOB Value (INR)	FOB Value per unit (INR)
Dabur Oncology PLC	17.05.2004	1200 grams	44,74,954	3729
Dabur Oncology PLC	25.08.2004	1200 grams	46,94,590	3912
Dabur Oncology PLC	27.12.2004	1200 grams	45,72,425	3810
		Total	1,37,41,969	

2.3.2 Since the FOB value for unit of export sales made by the assessee were less than the export rates of the third parties, he issued a show-cause notice asking the assessee to explain the same. Thereafter, the TPO computed the differences in rates of export made by the assessee and that made by the unrelated parties as under:-

Date of controlled sale	Date of uncontrolled sale	Quantity of controlled sales	FOB per gram of controlled sale (Rs.)	FOB per gram of uncontrolled sale (Rs.)	Difference (Difference in FOB per unit x quantity)
17.05.2004	06.05.2004	1200 grams	3729	6491.53	3315036
25.08.2004	20.07.2004	1200 grams	3912	6596.36	3221232
27.12.2004	20.07.2008	1200 grams	3810	6596.36	3343632
		Total			98,79,900

2.3.3 The TPO, accordingly, made an adjustment of Rs.98,79,900/- on account of sale of Paclitaxel.

2.4 With reference to the international transaction related to sale of Disodium Pamidronate, the TPO observed that the assessee had sold 4.55 kgs of the same for Rs.9.95 lacs to its AEs. As the assessee was not able to give any comparative rates, the TPO obtained the data from the database of export rates

maintained by M/s International Business Information Services and determined the upward adjustment of Rs.67,35,902/- being the arm's length price of the international transactions on account of Disodium Pamidronate.

2.5 Similarly, the TPO observed that the assessee had purchased 2000 kg of MCS (Methylene Chloride Soluble Extract) at Rs.5200 per kg from its Associated Enterprise, Dabur Nepal and paid Rs.1,04,00,000/- for the same. Since no substantial details were submitted by the assessee, the TPO again resorted to the taking date from the data base of International Business Services nd determined the landed cost of purchase at Rs.6048/- per kg. After considering the pro-rata price, the TPO determined the arm's length price of the international transaction at Rs.1,03,43,105/-.

2.6 Thus, the TPO made addition of Rs.3,97,98,315/- to the international transactions. The Assessing Officer, thereafter made addition of Rs.3,97,98,315/- on account of adjustment to the arm's length price of the international transaction.

2.7 In appeal, the Ld. CIT (Appeals) deleted the upward adjustments made by the TPO/Assessing Officer in respect of the purchase of lipholiser machine as well as the addition on account of sale of Paclitaxel drug and Disodium Pamidronate. The Ld. CIT (A) also deleted the addition made on account of MCS Extract.

2.8 Aggrieved with such order of the Ld. CIT (A), the Revenue is in appeal before the Tribunal by raising the following grounds:-

> *"1. On the facts and circumstances of the case and in law, the CIT (A) has erred in deleting the addition of Rs.3,97,98,315/- made by adjustments to the Arm's Length Price.*
>
> *2. The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing.*
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> *It is prayed that the order of the Ld. CIT(A)- XXIX, New Delhi being contrary to the facts on record and the settled position of law, be set aside and that of the Assessing Officer be restored."*

3.0 The Ld. CIT DR strongly supported the order of the TPO. He submitted that there was no proper compliance before the Assessing Officer. It was submitted that although the Ld. CIT (A) had called for a remand report from the Assessing Officer, he did

not properly consider the same. It was submitted that the order of the Ld. CIT (A) be reversed and that of the Assessing Officer/TPO be restored. In his alternate contention, he submitted that the matter may be restored to the file of the Assessing Officer/TPO.

4.0 The Ld. counsel for the assessee, on the other hand, heavily relied on the order of the Ld. CIT (A). Referring to page 167 of the Paper Book, he submitted that the report of the Accountant to Fresenius Kabi Oncology Ltd. was brought to the notice of the Ld. CIT (A) according to which, the Lyophiliser machine was capitalized by Dabur Plc under tangible fixed assets and that no depreciation was charged on the Lyophiliser. He submitted that full details were given before the Ld. CIT (A) and the Ld. CIT (A) had called for the remand report from the Assessing Officer and after considering the remand report had deleted all the four additions. It was prayed that the grounds raised by the Revenue be dismissed.

ITA No.3495/Del/2014 :

5.0 This appeal pertains to assessment year 2007-08. For this year, the return was filed declaring income of Rs. 5,58,74,312/-. Since the assessee had entered into international transaction during the year as defined u/s 92B of the Act, the Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) u/s 92CA(1) of the Income Tax Act, 1961 (hereinafter called "the Act"). The TPO recommended transfer pricing adjustment of Rs. 9,25,91,742/- on account of the following transactions:-

(i) Corporate Guarantee given to ABN AMRO Bank for Foreign AEs – Rs. 7659.70 lakh. Arm's Length Price (ALP) computed by the assessee was Nil under TNMM Method but the TPO proposed an adjustment of Rs. 3,63,83,575/- by adopting interest rate of 4.75%.

(ii) Loan given to foreign AEs – Rs. 5735.76 lakh. The assessee had computed the ALP by applying interest rate of 7% but the TPO proposed an addition of Rs. 5,62,088,167/- by adopting interest rate of 14%. Apart from this, the Assessing Officer also made a disallowance of Rs. 20,92,221/- depreciation on fixed

assets on account of capital subsidy received by holding that the fixed assets were to be reduced by the amount of subsidy.

(iii) The Assessing Officer also made certain additions/ disallowances on account of late deposit of PF/ESI rates amounting to Rs. 46,519/-, disallowance of depreciation on UPS amounting to Rs. 63,803/- and difference in valuation of closing stock amounting to Rs. 30,4,6090/-.

5.1 Aggrieved, the assessee approached the Ld. Commissioner of Income Tax (A) challenging the transfer pricing adjustments as well as the additions and disallowances on corporate tax grounds. The Ld. Commissioner of Income Tax (A) partly allowed the assessee by restricting the adjustment on account of corporate bank guarantee and interest on loan to the tune of Rs. 66,76,850/- out of the total addition of Rs. 9,25,91,742/-. The Ld. Commissioner of Income Tax (A) also deleted another disallowance of Rs. 20,92,221/- which had been made by the Assessing Officer by reducing the written down value of the assets by the amount of capital subsidy received by the West Bengal Government.

5.2 Aggrieved with this order of the Ld. Commissioner of Income Tax (A), the department is before the ITAT and has raised the following grounds of appeal:-

> *"1. On the facts and circumstances of the case and in law, the CIT(A) has erred in restricting the addition to the tune of Rs. 66,76,850/- out of total addition of Rs. 9,25,91,742/- made on account of adjustment in ALP in respect of Corporate bank guarantee and interest on loan.*
>
> *2. On the facts and circumstances of the case and in law, the CIT (A) has erred in deleting the disallowance of Rs. 20,292,221/- made by reducing the WDV of assets by the amount of subsidy received from the West Bengal Government.*
>
> *3. The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing.*
>
> *It is prayed that the order of the Ld. CIT(A)-XXIX, New Delhi being contrary to the facts on record and the settled position of law, be set aside and that of the Assessing Officer be restored."*

6.0 The Ld. CIT DR submitted that the assessee had provided corporate guarantee to Dabur UK for which it had not charged any guarantee fee and the assessee had benchmarked the said transaction under TNMM. It was further submitted that the TPO had called for information u/s 133(6) of the Act from the State Bank of India which had submitted that it would charge a fee of 2.75% on similar transaction. It was further submitted

that the TPO had also determined that additional charge of 2% should be levied for the risk profile of Dabur UK considering the fact that the assessee had not taken any security in return for providing guarantee to its AE. Accordingly, an adjustment of 4.75% was made. However, the Ld. Commissioner of Income Tax(A) held that Dabur UK had saved interest of 1% on account of taking corporate guarantee from the assessee and was of the opinion that 0.5% should be charged by the assessee as guarantee fee. It was submitted that by adopting 0.5% as corporate guarantee fees, the Ld. Commissioner of Income Tax (A) had erred because he had not considered the risk profile of Dabur UK/Thailand and also had not taken into consideration the financial performance and credit rating of the AEs. It was further submitted that the Ld. Commissioner of Income Tax (A) had also arbitrarily split the interest saving of 1% between AEs and the assessee without analysing the functions performed, assets utilized and risk assumed by each of the transacting entities. Reliance was placed on the decision of ITAT Mumbai Bench in Maroco Ltd. reported in TS-411-ITAT-2016 (Mum)-TP for the proposition that there was no difference between a bank

or a corporate entity as far as corporate guarantee is concerned and both have to consider the functions performed, assets employed and risks assumed.

6.1 With reference to the interest on loan, it was submitted that the assessee had provided loan to its AEs at LIBOR +1.1% to Dabur UK and at 7% to Dabur Thailand. It was submitted that the TPO had rejected the approach adopted by the assessee as the loan transaction was benchmarked using fixed deposits/corporate deposits etc. which were highly liquid in nature as against the loan given to the AEs. It was submitted that the TPO had been correct in taking the prevailing interest rate of foreign currency @400 bps and in also adding a transaction of 300 bps towards premium payable on entering into forward contracts. It was submitted that the interest rate of 14% had been correctly applied but the Ld. Commissioner of Income Tax (A) had erred in rejecting the approach of the TPO by stating that foreign loan to resident person cannot be compared with foreign loan to a non-resident person. It was further submitted that the Ld. Commissioner of Income Tax (A) had erred in relying on just one rate given by ABN AMRO Bank and in not considering

the general market rate. It was also submitted that the Ld. Commissioner of Income Tax (A) had not given due consideration to facts like purpose of loan, tenure of loan, currency etc.

6.2 Coming to the second issue regarding deletion of disallowance of Rs.20,92,221/- by reducing the written down value of the assets by the amount of subsidy received from the West Bengal government, it was submitted that the assessee had received a state capital investment subsidy which was receivable on expansion of industrial units and this amount had been credited by the assessee to the capital reserve account in the books of accounts. It was submitted that the Assessing Officer had analysed whether such subsidy was to be considered as revenue in nature or capital in nature. It was also submitted that the assessee had not credited the subsidy either to its income account nor had reduced the subsidy from the capital cost and, therefore, the Assessing Officer treated the same as revenue receipt. It was submitted that the Ld. Commissioner of Income Tax (A) had erred in deleting the adjustment because the approach of the assessee was against the accepted accounting

treatment for subsidies. It was submitted that the Assessing Officer was correct in considering the same as revenue receipt.

7.0 In response, the Ld. AR submitted that as far as the department's ground challenging the restriction of addition with respect to corporate guarantee was concerned, the assessee had provided a letter from RBS Bank (formerly ABN AMRO Bank) wherein it had been mentioned that the same loan could have been taken at LIBOR +1.5% in the absence of corporate guarantee and, thus, Dabur UK got the benefit of 1% and therefore, guarantee fee should not exceed 0.5%. The Ld. AR placed extensive reliance on the order of the Ld. Commissioner of Income Tax (A) and also placed reliance on a number of judicial precedents/decisions of the ITAT in favour of his contention that the corporate guarantee @ 0.5% had been correctly adjudicated by the Ld. Commissioner of Income Tax (A).

7.1 With reference to the interest on loan, it was submitted that the Ld. Commissioner of Income Tax (A), while allowing relief to the assessee, had pointed out that the TPO had not satisfied the conditions for applying the CUP method and had also duly considered the rate quoted by the ABN AMRO Bank with and

without corporate guarantee and had accordingly held that the loans advanced to Dabur UK and Dabur Thailand were to be benchmarked using LIBOR +1.5%. It was submitted that the order of the Ld. Commissioner of Income Tax (A) deserved to be upheld on this issue.

7.2 With respect to the department's ground challenging disallowance of Rs. 20,92,221/- made by recomputing the written down value of the assets by the amount of subsidy received from the West Bengal government, it was submitted that during the assessment year under consideration, the assessee had received subsidy of Rs. 150 lakh under the West Bengal Incentive Scheme 2000 and the assessee had treated this subsidy as capital receipt which was very much in accordance with the nature of subsidy and also by placing reliance on various judicial precedents. The Ld. AR placed reliance on a number of decisions of the ITAT as well as judgments of the Hon'ble High Courts in support of his contention that the subsidy in question was appropriately considered as being capital in nature by the assessee and the same should not have been deducted from the

written down value of assets. It was prayed that the department's appeal be dismissed.

8.0 We have heard both the parties and have also perused the material on record. We take up ITA No. 575/Del/2014 pertaining to assessment year 2005-06 first. The first limb of dispute before us in the transfer pricing adjustment pertains to purchase of Lipholiser machine. It is a fact borne out from records that the assessee had imported Lipholiser machine in 2004 and had paid custom duty thereon as per the prevailing custom rates. The assessee had submitted before the Ld. Commissioner of Income Tax (A) that this Lipholiser was never put to use by Dabur UK and the same was in absolutely new condition. It was also highlighted by the assessee that the custom authorities had not disputed the declared import price of the machine. The claim of the Lipholiser having not been put to use in UK was also supported by a certificate from the UK based Chartered Accountant and the Ld. Commissioner of Income Tax (A) has accepted the same after calling for comments from the AO. Apart from this, the Ld. Commissioner of Income Tax (A) has also considered the fitness certificate of the Lipholiser from a UK

based Chartered Engineer wherein it has been mentioned that this machine could be used for a further period of 15 or more years. The Ld. Commissioner of Income Tax (A) has also held that the custom valuation was an acceptable method of valuation and, accordingly, found no reason to uphold the transfer pricing adjustment as proposed by the TPO. Although the department has argued at length against the action of the Ld. Commissioner of Income Tax (A) in deleting transfer pricing adjustment with regard to the import of Lipholiser machine, no defect could be pointed out in the documents which had been relied upon by the Ld. Commissioner of Income Tax (A) while deleting the adjustment. The department also does not have any comparative case to support its stand on the issue and, therefore, it is our considered opinion that the Ld. Commissioner of Income Tax (A) took a reasoned and logical view of the whole issue by placing reliance on the various evidences which had been accepted by him as additional evidences under Rule 46A of the Income Tax Rules. It is also undisputed that the Ld. Commissioner of Income Tax (A) had duly obtained the comments of the Assessing Officer through a remand report on these additional evidences before

proceeding to adjudicate the issue. Since there is nothing on record which would justify drawing an adverse inference, we find no reason to interfere with the findings of the Ld. Commissioner of Income Tax(A) on this issue and we uphold the action in deleting the transfer pricing adjustment on this account.

8.1 Coming to the second limb of the transfer pricing adjustment which pertains to sale of Paclitaxel drug and Disodium Pamidronate, it is seen that the assessee had applied the TNMM as the most appropriate method and the net margin was computed at 9% whereas the net margin of the comparable companies was 8% only. However, the TPO went on to reject the TNMM method and applied CUP method after obtaining information from International Business Information Services (IBIS) and proceeded to compute the FOB price of Paclitaxel and Disodium Pamidronate sold by third party to Argentina and Brazil. The Ld. Commissioner of Income Tax (A), while allowing relief to the assessee, has noted that no comparison had been done by the TPO in relation to the sale of Paclitaxel and Disodium Pamidronate with uncontrolled transaction. The Ld. Commissioner of Income Tax (A) observed that a mere price

comparison of uncontrolled transaction of assessee with another uncontrolled transaction as taken from data base was a gross error as far as the application of CUP method was to be considered. The Ld. Commissioner of Income Tax (A) has further observed that the TPO has used the data base of export rates maintained by IBIS which do not satisfy stringent condition of comparability regarding CUP method. Ld. Commissioner of Income Tax (A) has also taken into account the fact that the pricing of a particular drug is greatly influenced by the factor that whether it is generic or otherwise as well as quantity of drugs, geographical location of the buyer etc. The Ld. Commissioner of Income Tax (A) has also noted that the assessee was able to demonstrate that by applying TNMM that its margin was better than those of the comparable companies. The relevant observations of the Ld. CIT (A) are reproduced here in under for a ready reference:

> *"14.1 The Appellant has applied TNMM Method for justification of arm's length price for sale of Paclitaxel drug and Disodium Pamidronate for Rs 173,36,291/- and Rs.9,95,076/- respectively to its foreign AE. As per TP Report of the Appellant, the Appellant had earned a net margin of 9%*

which is higher than average net margins of 8% earned by comparable companies. It is seen that the Ld. TPO had chosen to apply CUP Method as against TNMM Method applied by the Appellant and he has used data of export rates maintained by M/s International Business Information Services (IBIS), 104-A, Raj Umang, Ashokvan, Dahisar, East Bombay-400068. At the stage of application of method, it is important to adhere to Rules on Selection of Most Appropriate Method (MAM). The Appellant contended that application of CUP Method requires high degree of comparability and FAR determination for proper application of CUP. It is stated that the Ld TPO failed to conduct the comparability of controlled transaction with uncontrolled transaction within the requirement of Rule 10(B)(2). The Rule 10(B)(2) requires comparison on following factors:

> *"For the purposes of sub-rule (1), the comparability of [an international transaction or a specified domestic transaction] with an uncontrolled transaction shall be judged with reference to the following, namely:-*
>
> *(a) the specific characteristics of the property transferred or services provided in either transaction;*
>
> *(b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;*

(c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

(d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail. "

14.2 The Appellant contended that the Ld TPO has not demonstrated through analysis within norms of Rule 10(B)(2) as to how the CUP method which requires high degree of comparability has been taken as MAM. The Appellant further contended that Ld. TPO has not shown that the data taken from International Business Information Services is uncontrolled transaction. Besides this, there were differences on account of following factors which TPO could not reconcile before applying CUP:

- *Profile of customer whether reseller, distributor or end user is not confirmed;*

- *Pricing terms as to trade discounts, turnover discounts, cash discounts, return policy as such has not been compared;*
- *Pricing impact on geography of UK versus Argentina has not been determined;*
- *Quality of Product whether generic or otherwise and other variables have not been determined.*

14.3 Given the above factors and non reconciliation of some of basic comparability norms, the Appellant contended that the CUP cannot be appropriately applied. The submissions of the Appellant have been duly considered. It is true that CUP method which calls for direct comparison of price is far more stringent method and requires for accurate information to make accurate comparison and adjustment. Admittedly, it seems that no comparison has been done by the Ld. TPO in relation to sale of Paclitaxel and Disodium Pamidronate with uncontrolled transaction. A mere price comparison of controlled transaction of Appellant with uncontrolled transaction as taken from database is gross error as far as application of CUP method is considered. Given the difficulty in application of CUP method, the Appellant conceded that they had applied a more tolerant TNMM Method where most of differences on account of functions and risks are ironed out at net level. The Appellant submitted that its net margins are higher than the average of net margins as earned by

independent comparable companies. Besides the overall margin comparison of Appellant Company, the Appellant also produced as additional evidence regarding segmental net margin analysis of its UK branch through which sale of Paclitaxel and Disodium Pamidronate happened. The net margin analysis of UK Branch is reproduced below:

TABLE

From above table, it can be seen that the net margins earned from sale of Paclitaxel and Disodium Pamidronate is higher at 14.10% versus other sales at 10.90%.

14.4 I find force in the submissions of the Appellant, as it has supported its arguments with proper analysis and facts. The TPO has simply used database of export rates maintained by IBIS which satisfying the stringent conditions of comparability regarding CUP method. It is well known fact that pricing of a drug is greatly influenced by fact whether it is generic or otherwise. Quantity of drug and geographical location of buyer are other very crucial factors which determine pricing. TPO has not satisfied even these basic requirements. In view of these facts and circumstances, TNMM is considered as MAM and the appellant has demonstrated by applying TNMM that its margin is better that that of comparables. In light of the above evidences and circumstances of the case, I am of view that international transaction of sale of Paclitaxel and Disodium Pamidronate

satisfy the arm's length principle and it does not warrant an addition as done by the Ld. AO/TPO. Accordingly, I hold that the addition of (Rs.98,79,900 + 67,35,902) Rs.1,66,15,802 deserve to be deleted. The ground of appeal is accordingly allowed."

8.1.1 Although the department has vehemently argued against the deletion of the transfer pricing adjustment in this regard, no factual or legal infirmity in the finding so arrived at by the Ld. Commissioner of Income Tax (A) could be pointed out. Accordingly, in view of the facts of the case, we find no reason to interfere with the findings of the Ld. Commissioner of Income Tax (A) on this issue also and we dismiss the ground raised by the department in this regard.

8.2 The third limb of the transfer pricing adjustment in this year is pertaining to MCS (Methylene Chloride Soluble Extract) from its Associated Enterprise Dabur Nepal. In this regard also, the assessee had applied TNMM as the Most Appropriate Method but the TPO rejected the assessee's method and applied CUP method to determine the ALP for the transaction pertaining to the purchase of MCS extract. The Ld.

Commissioner of Income Tax (A) while deleting the proposed transfer pricing adjustment held that a Cost Certificate was submitted by the assessee to establish the pricing of the MCS Extract. The Ld. Commissioner of Income Tax (A) noted that the cost price per kg as per Cost Certificate was Rs. 4648 per kg as compared to the price of Rs. 32 per kg which was taken by the TPO for computing proposed adjustment. The Ld. Commissioner of Income Tax (A) also noted that the TPO had not provided any material on the basis of which the price of Rs. 32 per kg was to be supported whereas the assessee had justified the ALP by usage of TNMM method. Thus, the Ld. Commissioner of Income Tax (A) found the working and data of the assessee more reliable than the working of the TPO in this regard and thereafter proceeded to allow relief to the assessee. The relevant observations of the Ld. CIT (A) are as under:

> *"17.1 I have considered the manner in which the Appellant had benchmarked the international transaction of purchase of MCS Extract. As per TP Report of the Appellant, the Appellant had earned a net margin of 9% which is higher than average net margins of 8% earned by comparable companies. It is seen that Ld TPO had chosen to apply CUP*

Method as against TNMM Method applied by the Appellant. At the stage of application of method, it is important to adhere to Rules on Selection of Method. The Appellant contended that application of CUP Method requires high degree of comparability and FAR determination for proper application of CUP. It is stated that the Ld TPO failed to satisfy comparability of controlled transaction with uncontrolled transaction within the requirement of Rule 10(B)(2). The Appellant submitted that no data whatsoever was supplied to it by the TPO to offer its rebuttal on basis on which import price of Rs 32 per kg of MCS extract was arrived at.

17.2 The Cost Certificate submitted by the Appellant throws some light upon the pricing of MCS Extract. The Cost Certificate cannot be brushed aside simply on account of it having been unverified. The Cost Certificate clearly shows that cost price per kg to produce MCS extract is Rs 4,648 per kg which is far higher than Rs 32 per kg as proposed to be applied by the Ld. TPO. On the other hand, the Ld. TPO has not provided any material on basis of which he supports the price of Rs 32 per kg. The Appellant whereas has justified the arm's length price of MCS Extract by usage of TNMM method where its net margin was higher than comparable companies and also has later on corroborated the cost of production of MCS Extract which shows cost of production per kg of MCS Extract at Rs 4,648 per kg, which seems more reliable versus Rs 32 as applied by the TPO.

> *17.3 In view of facts and circumstances of the case, I am of the view that the TPO has not satisfied strict comparability criteria before applying CUP method. The appellant has demonstrated arm's length status of its transaction by applying TNMM. Hence, I am of the view that additions made by the TPO of Rs.1,03,43,105/- deserves to be deleted. Accordingly, the ground of appeal is allowed."*

8.2.1 Although the Department has argued vehemently against the action of the Ld. Commissioner of Income Tax (A) in this regard, it remains undisputed that the provision for applying CUP require strict compliance and the same was not done by the TPO. Accordingly, we find no reason to interfere with the findings of the Ld. Commissioner of Income Tax (A) on this issue also and we dismiss the objections of the revenue in this regard.

9. In the result, ITA No. 575/Del/2014 stands dismissed.

10.0 Coming to the department's appeal for assessment year 2007-08, it is seen that the transfer pricing adjustment comprise of two limbs viz. corporate guarantee fee and interest on loan. As far as the issue of corporate bank guarantee is concerned, the issue arose because the assessee had failed to

charge service fee for the corporate guarantee given to its UK subsidiary and the TPO, after obtaining information u/s 133(6) of the Act from State Bank of India regarding rate of bank guarantee, proposed the ALP adjustment at 4.75% as against nil being claimed by the assessee. It is well settled that providing bank guarantee is an international transaction and the same needs to be benchmarked as per provisions of Section 92(1) of the Act. The Ld. Commissioner of Income Tax (A) has also held so and thereafter he proceeded to compute the corporate guarantee fee @ 0.5%. While doing so, the Ld. Commissioner of Income Tax (A) observed that the assessee had given corporate guarantee to a foreign bank for providing loan to its foreign AE in foreign currency whereas the TPO had considered the quote for giving guarantee in India. The Ld. Commissioner of Income Tax (A) also took into account the fact that the assessee's bank was ABN AMRO whereas the TPO had used the quote from the SBI. The Ld. Commissioner of Income Tax (A) thereafter placed reliance on the quote from Royal Bank of Scotland (RBS) (formerly ABN AMRO Bank) and held that there was a saving of 1% in this regard, the benefit of which was attributable both to the assessee

as well as the foreign AE. Thereafter by splitting the benefit between the two, the Ld.CIT (A) arrived at corporate bank fee of 0.5%. We agree with the observation of the Ld. Commissioner of Income Tax (A) that this letter from RBS Bank has more evidentiary value as it is from the very same bank which gave loan to Dabur UK. The Ld. Commissioner of Income Tax (A) has also recorded a finding that he has also examined the terms and conditions of the loan agreement dated 17.3.2006 between ABN AMRO Bank, Dabur UK and that Dabur UK has provided adequate security collaterals to the satisfaction of the Bank. The Ld. Commissioner of Income Tax (A) has also mentioned that the bank had the first charge on the assets of the borrower as security for the loan. The Department was not able to point out any factual infirmity in this categorical observation of the Ld. Commissioner of Income Tax (A). However, we do not fully agree with the findings of the Ld. Commissioner of Income Tax (A) in this regard that the benefit of interest saving of 1% should be shared between the AE and the assessee equally as no cogent reasoning has been given for the same and, accordingly, we deem it fit to modify the order of the Ld. Commissioner of Income Tax

(A) in this regard to the extent that corporate guarantee fee @1% should be applied in the case of the assessee in place of 0.5% as has been applied by the Ld. Commissioner of Income Tax (A). We accordingly direct the Assessing Officer to re-compute the ALP for corporate guarantee fee @1%. Thus, this ground stands partly allowed.

10.1 Coming to the second limb of the transfer pricing adjustment which pertains to interest on loan, it is seen that the assessee had given loan to two foreign subsidiaries in UK and Thailand and had charged interest rate of LIBOR plus 1.1% and 7% respectively whereas the TPO had applied the interest rate at 14%. The reason for the TPO in applying interest rate of 14% was that since the assessee has chosen itself as the tested party, the rate to be applied was to be seen from the perspective of the tested party in the Indian bank and further for the reason that the loan advance of Dabur Thailand was from borrowed capital. While allowing relief to the assessee, the Ld. Commissioner of Income Tax (A) took into consideration the submission of the assessee that the loan advanced to the UK subsidiary was at

LIBOR plus 1.1% and the loan taken by the UK subsidiary from ABM AMRO Bank was at LIBOR +1.5% with the corporate guarantee of the assessee and further the corporate guarantee loan was available to the UK subsidiary at LIBOR plus 1.5%. With respect to the loan to Dabur Thailand @7%, the Ld. Commissioner of Income Tax (A) was of the view that LIBOR plus 1.5% could be used as the basis for arriving at the ALP for the loan transaction. Accordingly, the Ld. Commissioner of Income Tax (A) held that interest of both the loans was to be charged at LIBOR plus1.5%. We also note that the Ld. DRP for immediately preceding assessment year 2006-07 has held that the foreign loan given to UK subsidiary was to be benchmarked at LIBOR plus 100 bps plus certain risk adjustment and accordingly, rate of LIBOR plus 300 bps was proposed by the Ld. DRP. Although the Ld. Commissioner of Income Tax (A) has duly made a mention of this direction of the Ld. DRP for assessment year 2006-07, it is apparent that he has not considered the directions of the Ld. DRP while deciding this issue. We also note that the assessee has not filed any appeal against this direction of the Ld. DRP for assessment year 2006-07. Accordingly, in view of the factual

matrix, this issue needs to be restored to the file of the Ld. Commissioner of Income Tax (A) to be decided afresh after considering the directions of the Ld. DRP in this regard in assessment year 2006-07 and after giving the assessee a proper opportunity present its case. Accordingly, this ground stands allowed for statistical purposes.

10.2 Coming to the remaining issue which is the deletion of disallowance of Rs 20,92,221/- pertaining to capital subsidy, it is seen that the assessee had, in terms of West Bengal Incentive Scheme 2000, expanded its existing industrial unit at Kalyani, West Bengal and was accordingly eligible for a state investment subsidy of Rs. 1.50 crore in terms of the West Bengal industrial policy. This payment was received on 23.09.2006 and the assessee credited the same to its capital reserve account treating the same as capital receipt. However, the Assessing Officer treated the same as revenue receipt and reduced the same from the fixed cost of assets and, thereafter allowed depreciation post the offset of subsidy. The Ld. Commissioner of Income Tax (A) has noted that he has examined the documents relating to West

Bengal Incentive Scheme, 2000 and that further this subsidy is a one-time receipt. It has also been mentioned that nowhere on the perusal of the documents it was found that the subsidy was to be related to the reduction of the cost of fixed assets and, further the recipient of the subsidy was free to use the subsidy in any manner. We find that an identical issue had arisen before the Kolkata Bench of the ITAT in Bhagwati Sponge (P) Ltd. vs. DCIT reported in (2016) 72 taxmann.com 40 (Kolkata –Trib.) and the co-ordinate Bench held that the capital investment subsidy received from state government could not be reduced from the cost of capital asset for allowing depreciation. Accordingly, respectfully following the order of the co-ordinate Bench as afore said, we find no reason to interfere with the findings of the Ld. Commissioner of Income Tax (A) on this issue and we dismiss the grounds raised by the department in this regard.

11. Accordingly, ITA No. 3495/Del/2014 stands partly allowed.

12. In the final result, ITA No. 575/Del/2014 stands dismissed and ITA No. 3495/Del/2014 stands partly allowed.

Order pronounced in the open Court on this 3rd day of October, 2018.

Sd/- Sd/-

(R. K. PANDA)
ACCOUNTANT MEMBER

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 3rd OCTOBER, 2018
'GS'

Copy forwarded to:-

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

By Order

Assistant Registrar
ITAT, New Delhi