IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'C' KOLKATA

[Before Hon'ble Shri S.S.Godara, JM & Shri M.Balaganesh, AM ]

**ITA No.418/Kol/2015**
Assessment years : 2010-11

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| Indian Explosives Limited<br>16C, Bepin Paul Road<br>Kolkata – 700 026<br>(PAN: AAACI 6548 N)<br>(Appellant) | Vs | D.C.I.T. Circle-11(1), Kolkata<br><br><br><br>(Respondent) |

**ITA No. 85/Kol/2016**
Assessment Year : 2011-12

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| Indian Explosives Limited<br>16C, Bepin Paul Road<br>Kolkata – 700 026<br>(PAN: AAACI 6548 N)<br>(Appellant) | Vs | J.C.I.T. Range-11, Kolkata<br><br><br><br>(Respondent) |

For the Appellant: Shri Ravi Sharma, AR
For the Respondent: G. Mallikarjuna, CIT, D/R

Date of Hearing: 24.05.2018.
Date of Pronouncement : 27.06.2018

**ORDER**

**PER S.S.GODARA, JM**

These two assessee's appeals for Assessment Years 2010-11 & 2011-12 are directed against the DCIT, Circle-11, Kolkata's assessment order dt. 31/03/2014, passed u/s 143(3) r.w.s. 144C of the Income Tax Act, 1961 (in short the 'Act') in the former and the JCIT Range-11, Kolkata's assessment dt. 23/11/2015 framed u/s 143(3) r.w.s. 144C(13) of the Act in the later Assessment Year; respectively.

We proceed assessment year wise for the sake of convenience and brevity.

3. Former Assessment Year 2010-11 involves assessee's appeal ITA No. 418/Kol/2015. It pleads ten grounds in the instant appeal. The same appears to be

giving rise to five issues in all The taxpayers first and foremost grievance is that the lower authorities have erred in law as well as in facts in making the arm's length price 'ALP' adjustment of Rs.16,24,110/-, pertaining to international transaction in the nature of royalty payments made to associate enterprise 'AE', in the impugned assessment year.

3.1. This taxpayer is a company manufacturing commercial explosives as well as ancillary items & systems. It paid royalty sum of Rs. 15,64,201/- to its AE M/s Orica International PTE Limited (Singpore). The impugned assessment year appears to be the first year of the payment in question. The Assessing Officer made Section 92CA reference for determination of 'ALP' thereof. The Transfer Pricing Officer 'TPO' took up consequential proceedings. He issued section 92CA (2), notice dated 18/9/2013 *interalia* pointing out the arithmetic discrepancy in the impugned payment of Rs.1 5,64,201/- in Form 3CEB shown as Rs.16,24,110/- in Form 3CD relevant to the royalty agreements dated 27/6/2007 and 02/11/2008 as well as the corresponding price in question.

3.2. The TPO's order dated 29/01/2014 (pages 904 to 931) compiled in case records suggests that he thereafter examined assessee's trademark license agreement(s) dated 29/9/1999, 27/06/2005, 02/01/2008 and lastly dt. 14/12/2009. He formed his opinion in question that the payee's products had already been established in India since it had permitted the usage of the logo till 2003, as continued in succeeding period allowing the said usage along with 'ICI' Brand. The TPO treated the same to be indicative of sufficient brand awareness in India. He proposed 'nil' ALP by adopting comparable uncontrolled price 'CUP' method as the value was created in association with ICI Brand and its successor. He took into account various e-visuals available in the public domain in the website of Department of Industrial Policy and Promotion 'DIPP', Ministry of Commerce and Industry *vis-à-vis,* the corresponding products namely POWERGEL, PRIMEX and CORDTEX etc. and proposed the impugned ALP adjustment of Rs.16,24,110/- as follows:-

*"Thus it is evident that 'orica' is a new and constructed name and an assurance was given at the time of separation of ICI Australia from ICI PLC that a name change will take place. However, in India, due to the joint venture in form of the assessee, there was a continuity and the products continue to be sold with ICI logo and after complete separation in 2003-04, the products bearing the names which were associated with the ICI products are being sold. Accordingly, during the years that followed the separation, the Orica name got associated with the products. Thus, it is held that no direct benefit has been receive by the assessee from the brand name 'Orica' as the products were always associated with ICI, and Orica Australia itself was a part of the ICI Group. Accordingly, the arm's length price of the Royalty is computed at Rs.Nil under the CUP Method and accordingly, the total income of the assessee is required to be upwardly adjusted by* ***Rs.16,24,110/-*** *"*

3.2.1. The Assessing Officer framed the draft assessment on 31/03/2014 on the same lines. The assessee preferred its statutory objections. The Dispute Resolution Panel 'DRP' upheld the TPO's findings available by applying benefit test as under:-

*"4.2.2. We have considered the facts of the case. The assessee was incorporated as a joint venture of ICI India Ltd. and Orica, Australia in 1999 and was manufacturing and selling its products under ICI trade mark. In the year 2003, ICI sold its entire stake to Orica, Australia. However, even though the assessee entered into agreement with Orica, Australia in the year 2005 and started using the said trade mark from year 2005. such use was without any payment of royalty till the year 2009. However, in the year 2009, Orica informed the assessee that the assessee had to pay royalty @ 5% of sale done using the trade mark. Accordingly, the assessee passed a Board resolution in December, 2009 and. started payment of royalty. It has been informed by the assessee in the course of hearing that Orica, Singapore (to whom intellectual property rights were transferred from Orica, Australia) had conducted a third party valuation of its intellectual property based on which it is considered it proper to levy a charge for use of Orica trade mark. However, as pointed out by the TPO, the brand value of the products of the assessee in India was long established. The products were earlier identified with the reputed ICI name. On the contrary, the brand name 'Orica' was not well established in India. Therefore, benefit accruing to the assessee by using name Orica is nebulous. It has been claimed by the assessee, that, Orica, Australia transferred" its intellectual properties to Orica, Singapore, which got them valued, based on which the charge was levied. However, it has not been clarified whether such study covered valuation of Orica trade mark in India specifically. As mentioned by the TPO, so far as Indian market is concerned, brand value of the assessee was much higher than that of Orica. It is also Significant to note that the assessee was using Orica brand name in the period from 2005-2009 without making any payment of royalty to Orica, Australia. It is not clear as to how the value of benefit derived by the assessee from use of name 'Orica' suddenly got enhanced which would justify payment of royalty. Since the assessee has not been able to establish that any tangible, not to talk of commensurate, benefit was derived by it from using the name*

*Orica, (which it in any case was using for a number of years without any payment), the TPO and the assessing officer were correct in making adjustment by disallowing royalty of Rs. 16,24,110/-. The objection is, therefore, rejected."*

The Assessing Officer has accordingly made adjustment in his assessment under challenge. In his assessment order.

4. We have given our thoughtful consideration to the rival submissions. The short question that arises for our apt adjudication is as to whether action of the lower authorities right from the TPO, DRP to Assessing Officer holding the assessee not to have derived any tangible and commensurative benefit of paying any of the interest sales thereby culminating in the impugned adjustment of the entire payment of Rs.16,24,110/- is sustainable or not. Learned CIT D/R vehemently supports the above extracted findings under challenge that the payee's products in question had long been established in India. He points out the fact that this is the first year of the impugned royalty outgo forming the point of dispute as international transaction under the Act. whereas the assessee had been using the very brand name/trademark in the past without incurring any such expenditure. He terms the lower authorities action under challenge to be strictly as per law.

We see no reason to accept the same. Hon'ble Delhi High Court's judgement in *Commissioner of Income-tax v. EKL Appliances Ltd. [2012] 24 taxmann.com 199 (Delhi),* as well as this Tribunal's decision in *Deputy Commissioner of Income-tax, Circle- 1(1), Kolkata v. Landis+ Gyr Ltd. [2017] 86 taxmann.com 109 (Kolkata - Trib.), Deputy Commissioner of Income-tax, Circle -1(1), Hyderabad v. Air Liquide Engineering India (P.) Ltd. [2014] 43 taxmann.com 299 (Hyderabad - Trib.), Dresser-Rand India (P.) Ltd. v. Additional Commissioner of Income-tax, Range - 6(2), Mumbai [2011] 13 taxmann.com 82 (Mumbai) interalia* conclude that Chapter-X, provisions in the Act do not require the tax payer to prove any expenditure to have been incurred out of necessity or for the purpose of business or that it should actually result in profits, an ALP cannot be NIL amount where the TPO's order nowhere records that the relevant conditions incorporated in section 92C(3) of the Act, are satisfied, the TPO would not sit in judgement on a taxpayers business expediency so

as to conclude its ALP of international transactions as unreasonable thereby adopting nil ALP and that it is wholly irrelevant that these are no corresponding benefit since the real question in transfer pricing regime is as to what would be the price to be paid by an independent enterprise *vis-à-vis* the one shown by the concerned tax payer; respectively. The very legal position is reiterated in tribunal's other decisions in *Merck Ltd. vs. DCIT 2016 139 DTR 1 (Mum.), as well as in L.K. India Pvt. Ltd. vs Dy.Cit, Circle-1(2)in ITA No. 209/Ahd/2015, decided on 31st May, 2017.* The co-ordinate bench(es), hold therein that it is an assessee's call as to whether or not the services availed in question are commercially expedient rendering same benefits being derived from its business.

4.1 We keep in mind the said case-law to revert back to the relevant facts before us. It is clear first of all that the lower authorities have been very fair in not holding the assessee's royalty transactions to be a sham ones. They have applied benefit and commercial expediency test in the instant case whilst computing nil ALP. We see no reason to approve the same these two tests of benefits and commercial expediency are not to be invoked as per the above legal position. The impugned action of the lower authorities under challenge is therefore held to be not sustainable.

5. Next comes the quantification aspect of the impugned ALP. The TPO admittedly applied 'CUP' method in his order (*supra).* He appears to have treated the tax payer itself as a valid comparable as it had not paid any royalty to the very payee in earlier assessment years. This made him to adopt nil price of the impugned royalty so as to make the adjustment in question. We see no reason to concur with such a course of action since the assessee itself having paid Nil amount in the past to the AE, cannot be taken as a valid comparable. This tribunal in the case of *Technimont ICB India (P) Ltd. v. Addl. CIT (2012) 138 ITD 23(Mumbai TM)* has concluded long back that a transaction between payee and its AE is not an uncontrolled one so as to be taken as a comparable. We accept the assessee's instant first substantive ground both on legality as well as on quantification therefore. The impugned ALP adjustment stands deleted accordingly.

6. Both the learned representatives state *qua* the assessee's next substantive grievance with regard to the leave encashment provision of Rs. 15,97,944/- made u/s 43B(f) of the Act deserves to be remitted back to the Assessing Officer for taking a fresh call after the hon'ble apex court's decision in the Revenue's special leave petition converted to appeal staying operation of hon'ble jurisdictional high court's judgment in *Exide Industries Ltd. vs. UOI, 292 ITR 470,* deleting identical disallowance as well as holding the statutory provision itself to be unconstitutional.

We accept this fair stand and direct the Assessing Officer to keep the instant issue in abeyance to be decided after the hon'ble apex court's final verdict in the department's appeal hereinabove. This second substantive ground is taken as allowed for statistical purposes.

7. The assessee's next substantive grievance challenges correctness of the lower authorities action in disallowing a sum of Rs.12,12,157/-, claimed as commission charges on the ground that the same is raised on accrual basis without any details being submitted.

8. The learned Counsel for the assessee vehemently contends that the payees in question have issue their respective bills in later assessment years. He relies on assessee's mercantile system of accounting to stress the point that the impugned commission expenses is very much allowable on accrual basis. It thus transpires that the dispute herein is that of year of allowability than genuineness. Learned Departmental Representative, fails to dispute that the assessee's stand throughout is of having filed all the relevant details before the Assessing Officer. We therefore conclude that in absence of any material doubting accrual of the impugned expenditure in the relevant previous year, the same has to be held allowable in the assessment year in question only as per the hon'ble apex court's land mark decision in the case of *Bharat Earth Movers v.Commissioner of Income-tax [2000] 245 ITR 428 (SC)*. The assessee succeeds in its instant substantive ground.

9. The assessee's last grievance pleaded in this appeal challenges the disallowance of Rs.1,03,896/- while computing book profit u/s 115JB of the Act, when Section 14A r.w.r 8D disallowance pertaining to its exempt income.

9.1. Learned counsel's only plea during the course of hearing is that the assessee has already offered the very sum in its return at the first instance. We therefore leave it open for the Assessing Officer to carry out necessary verification in order to avoid double disallowance. This substantive ground is taken as accepted for statistical purposes.

Assessee's former appeal in ITA No. 418/Kol/2015, for AY 2010-11, partly succeeds.

11. We now advert to Assessment Year 2011-12 involving tax payer's appeal ITA No. 85/Kol/2016.

12. Its first four substantive grounds seeks to delete trade-mark royalty fee's upward ALP adjustment of Rs.1,66,27,119/- incurred in case of M/s. Orica International PTE Ltd. Singapore. Both the learned representatives, agree very fairly that our discussion qua identical adjustment at nil ALP in the preceding Assessment Year on both legality as well as on quantification would apply *mutatis mutandis* in the impugned assessment year as well. We accept assessee's instant substantive grievance therefore as per our foregoing detailed discussion the ALP upward adjustment under challenge forming the subject matter of the instant issue to the tune of Rs.1,66,27,119/- is deleted.

13. The tax payers next substantive ground is that the lower authorities have erred in law on facts in making transfer pricing 'TP' Adjustment of Rs.18,84,152/-, in respect of goods exported to Associate Enterprises outside India forming subject matter of international transactions.

13.1. The TPO's order dt. 30/01/2015, first of all compared ' FOB' Price to those in case of assessee's sales made to domestic independent parties. The tax payer quoted multiple factors such as non-similarity of the said price because of geographical

difference between the two kinds of rate forming the subject matter of comparison, difference in volumes, state wise domestic dynamics in case of two related parties, more sale prices charges in each cases in the months of August and January and the fact that instances of lower prices in question stood at around 1% *vis-à-vis,* those compared in case of third parties. It filed a comparative chart as well. The TPO rejected all the said pleas in his order as follows:-

*"It needs to be mentioned here that within India, the geographical differences are not be taken into account as carriage and transportation are considered separately as would be the case when considering the carriage to the port in case of FOB prices for exports. As mentioned above, the assessee does no export to its non-AEs. Secondly, any supply to its AEs, a controlled transaction, is at the request of the AE and in uncontrolled conditions needs to be at the price which the assessee extracts from independent parties. Accordingly, taking the data for prices in the month of transaction and arriving at the ALP of the product by taking the average of the uncontrolled prices pertaining to the month of transaction under the CUP Method, it is seen that in some instances the arm's length price of the transactions is different from the amount reflected in the books of the assessee. This is show below:*

| ***S No.*** | ***Month*** | ***Quantity*** | ***Unit*** | ***Basic Value*** | ***Average rate of the month for arriving at basic value*** | ***AE/Rate*** | ***Difference in ALP*** |
|---|---|---|---|---|---|---|---|
| *1* | *Sep10* | *60000* | *M* | *1077812* | *32.89* | *Emirates Explosives LLC/18* | *8,95,58/-* |
| *2* | *Sep 10* | *60000* | *M* | *1199818* | *32.89* | *Orica Singapore Pte Ltd./20* | *7,73,502/-* |
| *3.* | *Feb 11* | *16,800* | *PC* | *339330* | *33* | *Orica Explosives Phillipines Inc.* | *2,15,070/-* |
| *Total* | | | | | | | *18,84,152/-* |

*Based on the above, the total income of the assessee is required to be adjusted by Rs.18,84,152/-"*

The DRP confirmed the same in extempore which has culminated in the impugned adjustment made in the final order.

We have given our thoughtful consideration to the rival submissions. There is no dispute that the authorities below right from the TPO to the DRP have all taken assessee's domestic sales of the very products to be valid comparables for applying CUP Method in case of its export sales to AEs giving rise to the impugned adjustment. Mr. Mallikarjuna's case before us is that there is a definite product similarity in the instant case which attracts application of CUP method. He, therefore, vehemently contends that the authorities below have rightly made the impugned ALP adjustment. We find no substance in the Revenue's instant arguments. There is no dispute that Rule 10B(1)(a)(i), stipulates application of CUP method by which the price charged or paid for property transferred or services provided in the comparable uncontrolled transactions, is identified; such a price is adjusted on account of differences, if any, arising from factors materially affecting the price in open market which in turn to be finally taken as the ALP as per clause (iii) thereof. The question before us is as to whether such domestic sales in case of independent parties *vis-à-vis* export sales to AEs could be taken as comparables or not. A co-ordinate bench in *M/s. Wrigley India Private Limited, vs. Addl. CIT, ITA No.5648/Del./2005,* decided on 31/12/2014 declined the Revenue's similar arguments applying CUP Method in identical circumstances as under:-

> *"13. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.*
>
> *14. The question that we must decide at the threshold is as to which is the most appropriate method of determining arm's length price on the facts of this case. On this aspect of the matter, the dispute is confined to even narrower a question, i.e. whether or not CPM is the most appropriate method on the facts of this case, because neither revenue authorities have justified any other method of determining the ALP, nor is it in dispute that, if the CPM fails, the TNMM, as canvassed by the assessee, is the only method which can be applied.*
>
> *15. Rule 10B(1)(c) defines the cost plus method, i.e. CPM, as follows:*
>
> *Cost plus method, by which,-*

*(i) the direct and indirect costs of production incurred by the enterprise in respect of property transferred or services provided to an associated enterprise, are determined;*

*(ii) the amount of a normal gross profit mark-up to such costs (computed according to the same accounting norms) arising from the transfer or provision of the same or similar property or services by the enterprise, or by an unrelated enterprise, in a comparable uncontrolled transaction, or a number of such transactions, is determined;*

*(iii) the normal gross profit mark-up referred to in sub-clause (ii) is adjusted to take into account the functional and other differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect such profit markup in the open market;*

*(iv) the costs referred to in sub-clause (i) are increased by the adjusted profit mark-up arrived at under sub-clause (iii);*

*(v) the sum so arrived at is taken to be an arm's length price in relation to the supply of the property or provision of services by the enterprise*

*16. The fundamental input for application of CPM method, next only to ascertainment of historical costs, is ascertainment of the normal mark-up of profit over aggregate of such direct costs and indirect costs in respect of same or similar property or services in a "comparable uncontrolled transaction" or, of course, a number of such "comparable uncontrolled transactions". When compared with CUP method, as against the "price" of a comparable uncontrolled transaction, one has to find out "normal mark up of profit" in a comparable uncontrolled transaction. Whether it is "price" or "normal mark up of profit", the starting point of both these exercises in the CUP and the CPM is finding a "comparable uncontrolled transaction". In order for such comparisons to be useful, the economically relevant characteristics of the situations being compared must be sufficiently comparable. It is only elementary, as is also noted in the OECD Transfer Pricing Guidelines, that "t o be comparable means that none of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin), or that reasonably accurate adjustments can be made to eliminate the effect of any such differences".*

*17. Let us, in the light of the above discussions, take a look at the situation before us. What the assessee is doing for its AEs is manufacturing the products, and, as noted elsewhere in this order, it is an uncontroverted position that the assessee's AEs, collectively constituting Wrigley group, deal" in FMCG sector which is characterized by impulsive buying by the consumers, heavy expenditure is required to be made on planning and execution of sales promotion" and that "these expenditure were incurred by the Wrigley Group to penetrate new market as well as to retain share in the existing market". It is also an uncontroverted position that "in respect of sales promotion, both Wrigley India and the AEs carry out this function in their respective market". What in effect, thus, assessee does is that the assessee manufactures the products and sells those products to the AEs but sales promotion is required to be done by the respective AE in its respective market. To this extent, there is no dispute whatsoever on factual aspects by the parties before us.*

*18. The question that arises is whether these transactions can be compared with the sales of similar product to distributors or other entities in the domestic market and particularly in a situation in which not only the market is geographically different but also entire business model is different vis -à-vis transactions with the AEs, inasmuch as the sales in domestic market necessitates substantial expenditure by the assessee for marketing support and sales promotion strategy. In other words, whether "export price of product simplictor, without any marketing support in the related market" can have a "comparable uncontrolled transaction" in "domestic sale price of a product in a situation in which entire marketing function and sales promotion is seller's responsibility".*

*19. In our humble understanding, the answer has to be an emphatic 'No'. The two situations, i.e. sale simplictor of a FMCG product for an overseas AE without any costs being incurred on the marketing and sales promotion amongst the end users, and sale of a FMCG product to a domestic independent enterprises with full responsibilities for marketing and sales promotion amongst the end users, are not 'comparable transactions' in the sense that profitability in the latter cannot be a proper benchmark for profitability in the former. It i s not only in the marketing and sales promotion that the difference lies, but it extends to the fundamental business model itself particularly as the sale is not to an end user, such as in the cases of plant and equipment etc, but to an intermediary who, i n turn, has to sell it to, through yet another tier or tiers of intermediaries, the end user. The sale of products to the non-resident AEs is more akin to contract manufacturing arrangement, while the sale of products to independent enterprises domestically is a regular business entrepreneurial venture. As a matter of fact, it has been one of the arguments of the assessee before us, and the assessee has also filed some documents and copies of contracts in support of that contention, that the assessee had done the contract manufacturing for its overseas AEs as it had idle and underutilized capacity, but, as there are no findings by the authorities below on this aspect of the matter and as we can anyway dispose of the matter without giving any categorical find ings on that aspect of the matter, we see no need to deal with that contention at this stage. Suffice to say that whether contract manufacturing or not, as long as the business models of sales to AEs and sales to non AEs are different, the transactions under these business models cannot be "comparable transactions" for the purposes of transfer pricing. In the first business model, creation of market in the end users is not the responsibility of the vendor, but in the second business model, it is job of the vendor to create and maintain the market of end users as well. The product may be the same but the FAR profile is materially different and it is this FAR profile which governs the profitability. The basic notions of transfer pricing recognize the impact of FAR profiling on the profitability. When profitability levels in two business situations, due to significant differences in FAR profiles of two situations, are expected to be different, such transactions cease to be comparable transactions for the purposes of transfer pricing analysis.*

*20. In OECD Transfer Pricing Guidelines, this aspect of the matter, so far as comparability analysis is concerned, has been explained thus:*

*1.47 The functions carried out (taking into account the assets used and the risks assumed) will determine to some extent the allocation of risks between the parties, and therefore the conditions each party would expect in arm's length transactions. For example, when a distributor takes on responsibility for marketing and advertising by risking its own resources in these activities, its expected return from the activity would usually be commensurately higher and the conditions of the*

*transaction would be different from when the distributor acts merely as an agent, being reimbursed for its costs and receiving the income appropriate to that activity. Similarly, a contract manufacturer or a contract research provider that takes on no meaningful risk would usually expect only a limited return.*

*[Emphasis, by underlining, supplied by us]*

*21. The UN Transfer Pricing Manual, elaborating upon the comparability analysis and which is broadly on the same lines as OECD Transfer Pricing Guidelines in this respect, states as follows:*

*5.1.5. A controlled and an uncontrolled transaction are regarded as comparable if the economically relevant characteristics of the two transactions and the circumstances surrounding them are sufficiently similar to provide a reliable measure of an arm's length result. It is recognized that in reality two transactions are seldom completely alike and in this imperfect world, perfect comparables are often not available. It is therefore necessary to use a practical approach to establish the degree of comparability between controlled and uncontrolled transactions. To be comparable does not mean that the two transactions are necessarily identical, but instead means that either none of the differences between them could materially affect the arm's length price or profit or, where such material differences exist, that reasonably accurate adjustments can be made to eliminate their effect. Thus, in determining a reasonable degree of comparability, adjustments may need to be made to account for certain material differences between the controlled and uncontrolled transactions. These adjustments (which are referred to as "comparability adjustments") are to be made only if the effect of the material differences on price or profits can be ascertained with sufficient accuracy to improve the reliability of the results.*

*5.1.6 The aforesaid degree of comparability between controlled and uncontrolled transactions is typically determined on the basis of a number of attributes of the transactions or parties that could materially affect prices or profits and the adjustment that can be made to account for differences. These attributes, which are usually referred to as the five comparability factors, include:*

*¬ Characteristics of the property or service transferred; ¬ Functions performed by the parties taking into account assets employed and risks assumed, in short referred to as the "functional analysis";*

*¬ Contractual terms;*

*¬ Economic circumstances; and ¬ Business strategies pursued.*

*[Emphasis, by underlining, supplied by us]*

*22. On the facts of the present case, however, the comparability analysis has been confined to the first segment itself, i.e. characteristic of the property transferred. Undoubtedly, the product comparability is an important factor but its certainly not the sole or decisive factor. The assessee was producing the same products for its AEs as it was producing for independent enterprises but that was all so far as similarities were concerned. The FAR profile was not the same, the contract terms were not the same, the economic circumstances were not the same and the business strategies were not the same. Viewed thus, necessary precondition*

*for application of CPM, i.e. finding normal mark up of profit in comparable uncontrolled transactions, could not have been fulf illed. When uncontrolled transactions were not comparable, the normal mark up on profit on such transactions could not have been relevant either.*

*23. In view of the above discussions, in our considered view, the authorities below were not justified in holding that the cost plus method was the most appropriate method on the facts of this case. One of the necessary ingredient for application of CPM, i.e. normal mark up of profit in the comparable uncontrolled transactions- whether internal or external, was not available as no comparable uncontrolled transactions were brought on record by the authorities below. What was brought on record as an internal comparable uncontrolled transaction, i.e. manufacturing for the domestic independent enterprises, was uncomparable as the FAR profile was significantly different. Undoubtedly, direct methods of determining ALP, including cost plus method, have an inherent edge over the indirect methods, such as TNMM, but such a preference can come into play only when appropriate comparable uncontrolled transactions can be identified and analysed accordingly. That has not been done in the present case. There is, therefore, no good reason to disturb the TNMM method adopted by the assessee. We have also noted that the TPO himself has accepted the TNMM for the assessment years 2007-08, 2008-09 and 2009-10. Learned Departmental Representative does not dispute that the facts for all these assessment years are similar in material respects. For this reason also, there was no good reason to disturb the ALP determination on the basis of TNMM in respect of the assessment years before us, i.e. 2003-04, 2004-05, 2005-06 and 2006-07.''*

We adopt the very reasoning hereinafter to restore the instant issue back to the TPO for fresh adjudication as per law. It shall be open for the assesse to raise all legal and factual pleadings available in consequential proceedings.

The assessee's instant substantive ground is treated as accepted for statistical purposes.

14. Both the learned representatives inform that the assessee's next substantive ground challenging correctness of both the lower authorities action in disallowing the assessee's leave encashment provision of Rs.44,21,000/- by invoking Section 43B(f) of the Act is to be restored back to the assessing officer in line of our discussion on the very issue in preceding year (supra). We, therefore, adopt judicial consistency *qua* the instant issue and remit the impugned disallowance back to the Assessing Officer in the same terms.

15. The assessee's last substantive ground pleads that the lower authorities have erred in disallowing/adding its club expenditure of Rs.2,06,838/- by invoking Section 40(9) of the Act. We find that there is no dispute about genuineness of the impugned expenditure to have incurred in a club set up at IEL, Gomia for entertainment and seminars. We observe in this backdrop that the lower authorities have wrongly invoked Section 40(9) as the same is attracted in case of specified purpose only and not qua a claim raised u/s 37 of the Act. The DRP has deleted the very disallowance in the preceding assessment year. The same has attained finality. We thus adopt judicial consistency to delete the impugned disallowance as well.

16. These two assessee's appeals are partly allowed.

**Order pronounced in the Court 27.06.2018**

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| Sd/- | Sd/- |
| [M.Balaganesh] | [ S.S.Godhara ] |
| Accountant Member | Judicial Member |

Dated : 27.06.2018

[SC Sr.PS]

Copy of the order forwarded to:

1. Indian Explosives Limited
16C, Bepin Paul Road
Kolkata – 700 026
2. D.C.I.T. Circle-11(1), Kolkata

3. J.C.I.T. Range-11, Kolkata
4. C.I.T.(A)- 5. C.I.T-
6. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary
Head of Office/D.D.O, ITAT Kolkata Benches