

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, BENGALURU**

**BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER
and
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

IT(TP)A No.1327/Bang/2010
(Assessment year: 2006-07)
and
IT(TP)A Nos.231/Bang/2012
(Assessment year: 2005-06)

M/s. TE Connectivity India Pvt. Ltd.,
(In the matter of erstwhile M/s.Tyco
Electronics Systems India Pvt. Ltd.,
amalgamated with TE Connectivity India Pvt.
Ltd.,
TE Park, 22B, Doddenakundi, 2nd Phase
Industrial Area, Whitefield Road,
Bengaluru-560 048.
PAN:AABCT 3357 R

... Appellant

Vs.

Assistant Commissioner of Income-tax,
Circle 12(4),
Bengaluru.

... Respondent

AND

IT(TP)A No.311/Bang/2012
(Assessment year: 2005-06)
(By the Revenue)

Assessee by : S/Shri P.K.Prasad & Umashankar,
Advocates.

Revenue by : Shri C.H.Sundar Rao, CIT(DR)

Date of hearing : 21/01/2019
Date of pronouncement : 25/01/2019

O R D E R

Per PAVAN KUMAR GADALE, JM :

Appeals No. IT(TP)A 231/Bang/2012 and 311/Bang/2012 are
cross appeals filed by the assessee and the revenue directed against the

order of the CIT(A)-IV, Bengaluru, in Appeal No.40/Rang-12/2008-09 dated 19/12/2011 for the assessment year 2005-06. Appeal bearing IT(TP)A No.1327/Bang/2010 is the appeal filed by the assessee directed against the assessment order passed u/s 143(3) r.w.s. 144C of the Income-tax Act,1961 ['the Act' for short] for the assessment year 2006-07. Since common issues are involved, all the appeals were heard together and consolidated order is being passed.

2. For the sake of convenience, first we take up the assessee's appeal in IT(TP)A No.231/Bang/2012 and the acts narrated therein. The assessee has raised as many as 6 grounds of appeal. But at the time of hearing, learned AR has not pressed ground Nos.3, 4(a), 4(c), 5 and 6. Accordingly, made endorsement in the grounds of appeal. Ground Nos.1 and 2 are general in nature and do not require adjudication. The only effective ground 4(b) is as under:

"4(b) Upholding application of Transactional Net Margin Method('TNMM') as the most appropriate method as against application of Cost Plus Method ('CPM') with ratio of Gross Profit to Input Cost as the relevant Profit Level Indicator by the Appellant in the Transfer Pricing documentation."

3. Brief facts of the case are that the assessee is in the business of manufacture and sale of transmission line, hardware and accessories and filed the Return of income on 31/10/2005 declaring total loss of Rs.2,49,97,309/-. As per the CBDT guidelines, the case was selected for scrutiny and notices u/s

143(2) and 142(1) were issued. The case was discussed. In the course of assessment proceedings, the AO found that the assessee has international transactions. Therefore, with the approval of the Commissioner of Income-tax, the AO has referred the matter to the Transfer Pricing Officer (TPO) for computation of Arm's Length Price (ALP) u/s 92CA of the Act. The TPO passed order u/s 92CA of the Act dated 31/10/2008 suggesting adjustment of Rs.34,42,024/- u/s 92CA of the Act. The AO noticed that the TPO selected TNMM for determining ALP of international transaction and profit to sales as Profit Level Indicator (PLI) in the case of assessee's power segment and the ALP determined by way of adjustment u/s 92CA being Rs.20,07,188/- whereas in respect of energy system segment the ALP adjustment was made by the TPO to the extent of Rs.14,34,836/- aggregating to Rs.34,42,024/-. The AO made additions in respect of foreign exchange loss provision of warranty claim and addition of TP adjustment and determined total loss at Rs.1,47,80,285/- vide order u/s 143(3) r.w.s. 144C of the Act, dated 28/11/2008.

4. Aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) having considered the grounds raised and the findings by the AO and the arguments put forth by the assessee, confirmed the TP adjustments along with disallowance of provision for warranty and partly allowed the appeal of the assessee.

5. Aggrieved by the CIT(A)'s order, the assessee has filed appeal before the Tribunal. Before us, learned AR reiterated the submissions made before the assessing authority and appellate authority and argued grounds. The main contention of the learned AR is that the CIT(A) has not considered the submissions and the legal decisions filed by the assessee for applicability of cost plus method instead of TNMM method adopted by the TPO. The learned AR referred to para.2.2 of the appellate order where the assessee's contentions were considered. The CIT(A) has dealt on the observations of the TPO in respect of methodology adopted and since the TPO has rejected the TP study in selection of most appropriate method and use of data for relevant financial year, the CIT(A) has only affirmed the action of the AO as the TPO rejected the assessee's contention of adoption of cost-plus method. The learned AR further referred to the ground No.2(c) raised before the CIT(A), on the particular issue that the TPO has rejected the cost plus method selected by the assessee for determining ALP and has only considered TNMM as the most preferable method. Further, the CIT(A) has not given any findings on the reasons or methodology. Further, the learned AR substantiated with paper book in respect of submissions made on TP adjustment at page 27 of the paper book where the assessee has filed written submissions and in particular to para.13 of the submissions where these facts has been brought on record. The

learned AR relied on page 80 of the paper book to substantiate the comparable and details of tested parties is supported by judicial decisions in the case of

- (i) *ACIT vs. M/s.L'oreal India Pvt. Ltd.* In ITA No.6745/M/2008 dated 28/01/2011 (ITAT, Mumbai)
- (ii) *ACIT vs. MSS India Pvt. Ltd.* (ITA No.393/PN/07 dt.29/05/2009)
- (iii) *M/s.Kirloskar Toyota Textile Machinery Pvt. Ltd. Vs. Deputy Commissioner of Income-tax* in IT(TP)A No.485/Bang/2015 dt.18/05/2016

Therefore, learned AR prayed that the assessee be provided with an opportunity to explain in detail before the income-tax authorities with supporting documents to substantiate the applicability of cost plus method instead of TNMM.

6. Contra, learned DR objected to this submission and stated the TPO has considered these facts and the business profile and financial results and the transactions of manufacture by the assessee company and international transaction as per 92CA report. The learned DR made inferences in respect of turnover and manufacturing cost and sale in assessee's two units of power systems and energy systems. The assessee, instead of making application before the appellate authority, should have filed the details before the TPO and supported the order of the TPO.

7. We heard rival submissions and perused material on record. Prima facie, the sole crux of the issue revolves on the method

adopted by the TPO for determining ALP of international transaction where assessee claims that cost plus method be applied whereas the TPO found that TNMM is the correct method on the facts of assessee's business. The learned AR before us vehemently argued that the assessee was not provided an opportunity before the TPO in respect of considering TNMM and after receiving the assessment order, the assessee has given elaborate submissions in the appellate proceedings. Learned AR referred to the submissions at page 27 of the paper book. On perusal of the CIT(A)'s order, as rightly pointed out by the learned AR, the CIT(A) has only dealt with findings of the TPO and submissions of the assessee have been given a lighter weight. Further the CIT(A) accepted that the assessee has been maintaining proper documentation but since assessee could not substantiate with details as referred at page 6 and ultimately relied on the observations of the TPO referred at page 6, para.3.3 as under:

“III. Having heard the contention of the appellant on perusal of the Order of the Transfer Pricing Officer, it is evident that the Transfer Pricing Officer has rejected the TP Study submitted by the appellant on 2 accounts i. e. selection of most appropriate method and use of the data for the relevant financial year. There is no infirmity in the application of the TNMM In the facts of the case of the appellant and also the TPO was justified in using the financial year data relevant to the assessment year for the comparability analysis as per Rule 10B(4) of the Income Tax Rules and therefore the contentions taken by, the appellant are not found acceptable, the same are accordingly rejected.”

8. On considering the overall factual aspects and the submissions, we found that there is strength in the arguments of the learned AR that the assessee has made elaborate submissions in the appellate proceedings whereas the CIT(A) has neither given any finding on the submissions made by the assessee nor passed a reasoned order. Therefore, considering the principles of natural justice, we are of the substantive opinion that the revenue will not be at loss if one more opportunity is provided to the assessee before the appellate authority. Accordingly, in the interest of substantial justice, we restore this disputed issue for limited purpose to the file of the CIT(A) who, shall consider the assessee's submissions and the documentation and pass reasoned and speaking order. Further, the assessee shall also co-operate in submitting information as called for expeditiously.

9. In the result the assessee appeal (IT(TP)A No.231/Bang/2012) is partly allowed for statistical purposes.

10. The revenue has filed the appeal in IT(TP)A No.311/Bang/2012 for assessment year 2005-06 raising the following grounds of appeal:

1. "The order of the Learned CIT(A) in so far as it relates to the following grounds is opposed to law and facts of the case.
2. The Id. CIT(A) erred in holding that the assessee is eligible for a standard deduction of 5% from the Arm's Length Price (ALP) under the proviso to Section 92C(2) of the I.T.Act, 1961

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3. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.”
4. The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above.

11. Before us, learned DR argued that the CIT(A) erred in considering the facts that the assessee is eligible for standard deduction of 5% from ALP u/s 92C(2) of the Act. We find that the CIT(A) has relied on the decision of the co-ordinate bench of Tribunal and other Tribunal decisions referred at page 13 of the order which are as under:

(i) Decision of the ITAT Bangalore in the case of *TNT India Pvt Ltd* ITA No.1442 (BNG)/08- (AY: 2002-03).

(ii) The decision of the Honourable Mumbai ITAT in the case of *Emersons Process Management India Pvt. Ltd.*, (ITA No. 8118/Mum/2010).

(iii) The decision of the Honourable ITAT Bangalore Bench in case of *Phillips Software Center Private Limited v. ACIT* (2008-(026)-SOT-0226-TBAN, 2008-(119)-TTJ-0721-TBAN)

(iv) The decision of the Honourable Delhi ITAT in case of *iPolicy Network Pvt. Ltd.* (Appeal no. ITA 5504/Del/2010)

(v) The decision of the Honourable Mumbai ITAT in case of *M/s. Tecnimount ICB Pvt. Ltd.* ITAT No. 7098/Mum./2010 (AY 2006-07)

(vi) The decision of the Honourable ITAT Bangalore in the case of *Genisys Integrating Systems (India) Pvt Ltd* in ITA No. 1231(Bang)/2010.

(vii) *Genisys Integrating Systems (India) (P.) Ltd. Vs. Deputy Commissioner of Income-tax (152TTJ 215)(Bang)*

12. Before us learned DR argued that the CIT(A) has erred in granting standard deduction but could not be controvert the findings of the CIT(A) with any new facts or evidences but only reiterated the findings of the AO.

13. Considering the facts and circumstances, we are of the opinion that the CIT(A) having considered the submissions, judicial decisions and the decisions of co-ordinate bench, has passed reasoned order which, according to us, should not be

interfered. We do note that as per retrospective amendment of section 92(c), by Finance Act, 2012 with retrospective effect from 01/10/2009, an Explanation was inserted which says that Provisions of the second Proviso shall also be applicable to all assessment pending before the AO as on 01/10/2009. In the present case, assessment order is dated 28/11/2008 and hence assessment proceedings were not pending on 1/10/2009 and as a consequence, 2nd proviso is not applicable in the present case. In this situation, there is no infirmity in the order of the CIT(A). Accordingly, we uphold the action of the CIT(A) on this ground and dismiss the ground of appeal of the revenue.

14. In the result, the revenue's appeal is dismissed.

15. Now, we shall take assessee' appeal bearing IT(TP)A No.1327/Bang/2010 for assessment year 2006-07 against the order of assessment passed u/s. 143(3) r.w.s. 144C in pursuance to the directions of the directions of the DRP dated 13/08/2010.

16. The assessee has raised as many as 7 grounds of appeal. At the time of hearing, learned AR has not pressed grounds No.1, 2, 3, 4(a), 4(c), 4(d) and 5 and accordingly made endorsement in the grounds of appeal. Therefore, the effective grounds of appeal are 4(b), 6 and 7 which read as under:

- b) Upholding the conclusions reached by the learned TPO, as regards selecting Transactional Net Margin Method as the most appropriate method, as against the Cost Plus Method applied by the Appellant and in doing so have grossly erred in:
 - i) Disregarding the internal comparable data (sales made to non-AEs) as considered by the Appellant under the Cost plus Method.
 - ii) Disregarding the segmental information as submitted and provided per the audited financial statements of the Appellant.
- support of the warranty claim.
- 6) That the Learned AO erred in disallowing unrealised foreign exchange losses amounting to Rs 241,000 on the ground that it is a notional loss and an unascertained liability.
 - 7) That the Learned AO erred in disallowing an amount of Rs 3,195,095 on account of advances written off and thereby adding it back to total income.

17. Learned AR has argued that the TPO erred in considering the TNMM as the most appropriate method instead of cost-plus method and disregarding internal comparable data with respect to sales made to non-AE and non-submission in respect of financial statements.

18. Contra, learned DR referred to chart and explained that the assessee two segments being power segment and energy segment in respect of AE and non-AE and the combined GP percentage on input cost. Learned AR contended that the TPO's contention that AE segment is less than non-AE segment and substantiated with charge explaining the operating revenue cost, raw materials, GP on input cost and operating profit and PLI. The assessee emphasized on the audit report in respect of manufacturing of goods and cost. The contention of the learned AR that cost plus method is most appropriate method than TNMM and referred to page 7 of the TPO order. Whereas assessee has made submissions on financial data which has been filed in the proceedings and prayed that cost plus method be considered. Further, the allocation by the TPO on ALP is based on two segments, sales in proportion to raw material and sales to AE and both methods cannot be adopted for making adjustment supported with judicial decisions. Learned DR vehemently objected to the submissions and explained that TPO has very correctly made analysis and assessee has not submitted details as required and the TPO observed in this regard. The assessee could not substantiate with any supporting evidence in respect of usage of methodology. Further no bifurcation was provided for use of raw material from AE and non-AE or in respect of sales of AE and non-AE sales. Learned DR also emphasized on para. 4.1 of TPO order where TPO has considered comparable for both power segments and energy segment and prayed for dismissal of the assessee's appeal.

19. Learned AR made submissions in respect of disallowance confirmed by the CIT(A) on unrealized foreign exchange loss amounting to Rs.2,41,000/-. Learned AR's contention that this loss is to be allowed whereas the AO, having considered the accounting standards, judicial decisions and came to conclusion that loss on account of foreign exchange fluctuation cannot be allowed whereas when the transaction is settled within the same accounting period as it occurred same to be allowed. Whereas assessee could not substantiate the nature of loss before the lower authorities. Learned AR relied on the decision in the case of *CIT vs. Woodward Governor India (P) Ltd.*, (312 ITR 254). Whereas learned DR supported the order of the AO.

20. The assessee has argued third ground of appeal No.7 in respect of disallowance made by the assessing authority on account of advances written off. The contention of the learned AR that these advances are given earlier and could not be recovered. Therefore, entries have been passed whereas the AO found that the amount has not been considered as doubtful in the books of account and also no provision has been made and could not prove the advances given have become irrecoverable. The AO found that the assessee could not substantiate the reasons with any supporting documents to claim. Whereas, CIT(A) confirmed the action. Learned AR submitted that entries are made in books of account, and the claim has to be allowed. Contra, learned DR supported the orders of the lower authorities.

21. We heard rival submissions and perused material on record. On the first ground in respect of addition made by TPO in respect of cost-

plus method after considering the submissions and data submitted before us and TPO calculations, we could not understand the reasons why TPO has considered the ALP for raw materials and also sale to AE. When a query was raised to the learned DR to explain reasons, the explanations are not satisfactory. Even learned AR could not substantiate with any reasons or the basis or any documentary evidence filed in the course of TPO on this issue. We are of the opinion that one more opportunity be provided to the assessee to substantiate and the department shall work out the modalities in calculation of ALP considering the judicial decisions as referred by the assessee and the fact of determining ALP by the TPO. Even before the DRP, the assessee could not substantiate the reasons and the DRP also referred to various facts at page 6 & 7 and came to conclusion that the assessee has not clarified the reasons for different method with supporting details. Accordingly, we remit this issue to the file of the TPO to recalculate the ALP which is not clear and accordingly we restore this matter to the file of the TPO.

22. In respect of second ground of appeal raised by the assessee in respect of foreign exchange loss our view is supported by the decision in *Woodward Governor India (P) Ltd.*, (supra). Accordingly, we allow this ground of appeal.

23. The last ground of appeal with regard to write off of advances. Learned AR has argued that advances written off has to be allowed but could not substantiate with any evidence as raised by the lower authorities in respect of modes of recovery or any details and whether these advances pertain to revenue or capital. Even before us, learned

DR could not substantiate or file any evidence in respect of these advances and whereas the case-laws relied on by the assessee are in respect of write off of Bad debts. Learned AR has mentioned that these advances are not grouped under sundry debtors but under separate advances. Therefore, we are of the substantive opinion that the assessee cannot write off advances without making any effort of recovery and reasons could not be submitted for debiting P&L account. Accordingly, we are not inclined to interfere with the order of the CIT(A) on this ground and uphold his action and the assessee's ground of appeal on this issue is dismissed.

24. The assessee's appeal is partly allowed for statistical purposes.

25. In the result, the assessee's appeal for assessment year 2005-06 is allowed for statistical purposes whereas the revenue appeal for assessment year 2005-06 is dismissed and the assessee's appeal for assessment year 2006-07 is partly allowed for statistical purposes.

Order pronounced in the open court on 25th January, 2019.

Sd/-

(A.K.GARODIA)
ACCOUNTANT MEMBER

Place : Bengaluru
Dated : 25/01/2019
srinivasulu, sps

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore