

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I': NEW DELHI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**I.T.A. NO.364/DEL/2016
Assessment Year: 2011-12**

**DCIT, Circle-16(2), vs M/s Mitutoyo South Asia P. Ltd.,
New Delhi. C-122, Okhla Industrial Area,
Phase-I, New Delhi.
PAN: AAACM6682R**

**C.O. No.89/Del of 2016
(In I.T.A. NO.364/DEL/2016)
Assessment Year: 2011-12**

**M/s Mitutoyo South Asia P. Ltd., vs. DCIT, Circle-16(2),
C-122, Okhla Industrial Area, New Delhi.
Phase-I, New Delhi.
PAN: AAACM6682R
(Appellant) (Respondent)**

**Assessee by: S/Sh. Sunil Aggarwal, Rohan Khare &
Rahul Parashar, Advocate
Department by: Shri Sanjay I. Bara, CIT-DR**

ORDER

PER NARASIMHA K. CHARY, JM

Challenging the directions of the Dispute Resolution Panel-2
(for short 'DRP') passed on 16.10.2015 in the case of Mitutoyo South

Asia P. Ltd. (assessee), both the Revenue and the assessee preferred the appeal and the Cross Objection.

2. Brief facts of the case are that for the assessment year under consideration, the assessee filed its return of income on 19.9.2011 declaring taxable income of Rs.18,20,78,110/- under normal provisions of the Income-tax Act, 1961 ("the Act") and Rs.21,24,11,742/- under MAT provisions. The assessee reported following international transactions:

| S.No. | International Transaction | Amount | Method |
|--------------|----------------------------------|---------------|---------------|
| 1 | Purchases | 99,27,16,410 | RPM |
| 2 | Commission on sale of machinery | 95,67,012 | CUP |
| 3 | Reimbursement of expenses | 13,31,068 | NA |

In its TP study report, the assessee used RPM and MAM to benchmark its international transactions taking GP/Sales as PLI. The assessee worked out its profit margin at 17.75%. TPO rejected economic analysis of the assessee, selected his own following comparables:

| S.No. | Name of the comparables | Margin (GP/Sales)(in %) |
|--------------|--------------------------------|--------------------------------|
| 1 | AGC Networks Ltd. | 17.93 |
| 2 | Beetel Teletech Ltd. | 20.14 |
| 3 | D-link Ltd. | 28.46 |
| 4 | Ricoh India Ltd. | 24.64 |
| 5 | S Mobility Ltd. | 23.16 |
| 6 | Bose Corproation India Ltd. | 44.16 |
| 7 | Dynalog (India) Ltd. | 44.9 |
| | Simple Average | 29.06 |

He, therefore, while working the profit margin of 29.06% proposed adjustment of Rs.15,47,86,172/-. Learned AO passed the order dated 27.11.2015 u/s 143(3) of the Act making addition of Rs.15,47,86,172/- as proposed by the TPO and also the sum of Rs.28,75,000/- u/s 14A of the Act read with Rule 8D of the Income-tax Rules ("Rules").

3. Assessee filed objections before the Id. DRP. Id. DRP vide impugned directions considered the plea of the assessee as to the exclusion of two comparables, namely, Bose Corporation India p. Ltd. and Dynalog (India)Ltd. and directed that the Bose Corporation should be taken with modified g.p. rate of 14.26% in place of 44.16% and also that the comparable Dynalog (India) Ltd. be excluded.

4. Hence, the assessee is in this appeal before us challenging the order of the DRP in respect of Bose Corporation India p. Ltd. and Dynalog (India)Ltd. and also deletion of Rs.28,75,000/- by invoking Section 14A read with Rule 8D.

5. Grounds No.1, 3, 8 & 9 are general in nature and do not require any specific adjudication.

6. Grounds No.2,4 & 5 are in respect of the comparables Bose Corporation India p. Ltd. and Dynalog (India)Ltd. whereas Grounds No.6 & 7 are in respect of Section 14A of the Act.

7. First, coming to the comparables Dynalog (India) Ltd., on perusal of the accept reject matrix submitted by the assessee, learned AO found that the assessee disputes the inclusion of such comparables on trading filter, but on a perusal of the annual report of the company, it was found that the major portion of sales of the company constitute trading segment. According to the assessee, this company was into the manufacturing business and it is evident from the financials of the company.

8. Learned TPO, however, felt that from a reading of the Profit & Loss account of the company, there was no items relating to manufacturing but rather all the entries relate to the trading only. Learned TPO, therefore, rejected the contention of the assessee holding that insofar as the factory premises is considered, no manufacturing activity was being carried out.

9. Ld. DRP noticed the ISO 9001 Certificate issued by Det Norske Veritas ("DNV") a Netherland based certification agency the business profit of Dynalog (India) Ltd. which shows that the Dynalog was into the manufacturing and supply of data acquisition caress, educational trainer kits and industrial communication cards and also assembly and supply of industrial computers and work stations. Learned DRP found that this company is functionally different and cannot be a good comparable.

10. It is argued before us by the learned DR that this company is into the manufacturing also as is evident from the financials of the

company and its income comprises of the income from services and both these things are absent in so far as the assessee is concerned. Learned DR submitted that though the financials of the company speak to the possession of the factory premises, no manufacturing activity was being carried out there and even in such a case adjustment can be given to mitigate the effect of factory premises in the P&L by appropriately reducing the claim of depreciation that will only lead to the enhancement of the margin of this comparable. He further argued that the work-in-progress reported in the fixed asset schedule of Dynalog manifest that the comparable may be in process of starting some set up but the same is not relevant for the year under consideration. He, therefore, submitted that this is a good comparable to the assessee company earning major portion of income from trading activity.

11. We have gone through the record in the light of the submissions on either side. It could be seen that the schedule of fixed assets of Dynalog India Ltd. Incorporated at page No 55 of the Paper book, this company is possessing three factory premises at Gali No.111, Pune and Vikhroli respectively with plant and also machinery worth Rs.21,00,751/- in respect of which the depreciation to the tune of Rs.66,536/- was claimed. Further, the manufacturing, trading and profit and loss account for the year ending with 31.3.2011 incorporated at Page No.52 of the Paper Book show that this entity is deriving an income of Rs.49,48,468/- toward service charges. These financials are supporting the contents of ISO 9001 Certificate issued

by Det Norske Veritas (“DNV”), a Netherland based certification agency, the business profit of Dynalog (India) Ltd. showing that the Dynalog India Ltd. was into the manufacturing and supply of data acquisition caress, educational trainer kits and industrial communication cards and also assembly and supply of industrial computers and work stations.

12. We are, therefore, of the considered opinion that the company, which is in the manufacturing, assembling and servicing and software, as is evident from the website of Dynalog India Ltd., cannot be a good comparable to the assessee. We are, therefore, of the considered opinion that there is no infirmity in the finding of the learned DR that the Dynalog is not a good comparable to the assessee and the same is liable to be excluded. We accordingly, confirm the finding of the learned DRP in respect of Dynalog India Ltd.

13. Now coming to Bose Corporation India P. Ltd., the assessee contended before the learned TPO that this comparable fails the trading filters and contended that as could be seen from the website of the company, trade in sound systems, speakers etc. which were mainly for home/domestic use and is in no way comparable to the assessee which trades with the industrial product and cater to the manufacturing industrial primarily and in no way connected to the domestic concern. Assessee contended that Bose Corporation India Ltd. should be excluded solely for the difference in the products traded. On this aspect, assessee further contended that the Madura

Garments selected by the assessee was rejected by the Id. TPO for the very same reason involved in respect of Bose Corporation. Assessee further contended before the Id. TPO that the balance sheet along was supplied by the TPO without the detail of profit and loss account for the Financial year 2010-11 due to which the assessee was not in a position to calculate the g.p. of the same. Assessee also brought certain discrepancies in the financials shared by the TPO like at page no.33 of the financials trading sales were quantified at Rs.1,37,57,50,000/- whereas Note 'A' immediately below the table shows the trading sales at Rs.1,33,36,76,724/-. Lastly, assessee contended that for want of complete financial data calculated for the purposes of application of filters cannot be done and due to that reason Bose Corporation India Ltd. cannot be taken to be a good comparable.

14. Learned TPO held that the Bose Corporation India P. Ltd. trades in audio systems, speakers, sound systems which are very much electrical machinery and Bose Corporation is answering the description of trade of electrical machinery. Further, the assessee used this comparable in the earlier year also. For these reasons, Id. TPO included the same in the list of comparables.

15. Learned DRP considered the contentions of the assessee and found that the financials of Bose Corporation are not available in the public domain. Inasmuch as the Bose Corporation is engaged in trading of high-end audio system direct to customers, it cannot be said to be a good comparable with the assessee. Further, Id. DRP

found that the Bose Corporation is dealing in business to customer segment and incurring significant AMP and high rental expenses which are comparably very low in case of the assessee. Due to this degree of functional dissimilarity, learned DR was of the opinion that suitable adjustment in respect of these functional business could be made so as to enhance the comparability. Ld. DRP, therefore, directed the learned TPO/AO to reduce the Gross Profit rate of Bose Corporation by 14.26% which reflects the difference in AMP expenses and rental of Bose and those of the assessee.

16. It is the argument of the Id. AR that Bose Corporation sells high end audio systems direct to end-customers (Business to Customers), as against assessee's business of trading in industrial products on a Business to Business basis. The products traded in by assessee are classified as "Capital Goods" while the goods sold by Bose are classified as "Consumer Goods". The two are different even as per Chapter 9 of Foreign Trade Policy 2015-2020 issued by Director General of Foreign Trade, Ministry of Commerce, Govt of India. The company being a private limited company did not file its Profit and Loss Account as a public document with the Registrar of Companies (ROC or Ministry of Corporate Affairs). Therefore, even the Ministry of Corporate Affairs (MCA) had no data on business performance i.e. the Profit and Loss Account etc. of Bose. Ld. TPO also has made no efforts to obtain the same either directly from the company or from any other reliable source.

17. Bose has to and in fact incurs large amounts on Sales and Promotion of its goods i.e. 8.10% of trading sales in FY 2009-10, including on building of the "Bose Brand", against the assessee who being a trader of industrial products spends a nominal amount i.e. 1.20% of sales on sales and promotion. Bose, because of the type of goods it deals in i.e. high end consumer products, for the purposes of building its brand and image and to promote its products, has to have and in fact has its show rooms at expensive market places. Bose, during FY 2009-10 spent Rs. 9.43 Crores on rents when the assessee's business does not need any show rooms except for the limited purposes of displaying its machines (which constitute less than 10% of the total sales). In any case, assessee's rental constitutes 1.30% of Turnover compared with 8.66 % in the case of Bose.

18. It is submitted by the Ld. AR that if at all this company has to be taken as a comparable, then its GP Rate needs to be reduced by the expenses on Sales Promotion, Brand Building and Rentals to bring it at par with the assessee on functionality and risk criteria. So, seeing the trend in AY 2010-11, GP Rate of Bose at 42.42% needs to be reduced by 16.77% (Expenses on AMP 8.10% and Rent 8.66%). Thus, the correct GP rate to be included for comparison (if at all) will be 25.65%.

19. The learned AR relied upon the decisions in the case of (i) Willis Processing Services P. Ltd. (2013) 30 Taxmann.com 350 (Mumbai Trib.); (ii) Kailash Jewels P. Ltd. (2016) 156 ITD 685; (iii) Weatherford Drilling & Production Services India P. Ltd. (2015) 60 taxmann.com

238 (Ahmedabad-Trib.); and (iv) Benetton India P. Ltd. (2014) 134 ITD 229 (Delhi-Trib) for this purpose.

20. Learned DR submitted that the learned TPO rightly found that in the earlier years, the assessee had used this as a good comparable because this company is functioning similar to the assessee inasmuch as they are also trading in electric machinery. Learned DR further argued that for computation of gross margin, profit and loss account is not necessary and it could well be calculated with reference to the material available in the public domain and the annual report of the company.

21. There is no dispute that the profit and loss account of Bose Corporation is not available either to the revenue or to the assessee. Further, it is also an admitted fact that the Bose Corporation is engaged in trading of high end audio system direct to the consumer whereas the assessee is dealing in the industrial goods as per trade policy. Further, it is also not in dispute that the Bose Corporation is in the business of customer sales whereas the assessee is in the business to business sales. Order of the Id. TPO clearly shows that because Madura Garments was dealing in the apparel and garment industry and not in the nature in which the assessee is engaged i.e. trading in electric machinery, there is no comparability between the Madura Garments and the assessee. The same logic applies in the case of Bose Corporation also because Bose Corporation trades in the direct consumer audio systems whereas the assessee has been dealing with the industrial goods business to business.

22. In view of the case law relied upon by the assessee, we are of the considered opinion that Bose Corporation is not a good comparable to the assessee and the same has to be excluded. We, therefore, direct the learned TPO to exclude the Bose Corporation from the list of comparables for benchmarking the international transactions.

23. Now coming to the issue relating to the CBDT circular No.5 of 2013 dated 11.2.2014, on which Ld. AO placed reliance in his order, it is brought to our notice that in PCIT vs IL&FS Energy Development Co. Ltd. (2017) 399 ITR 483 (Del), the Hon'ble jurisdictional High Court quashed the same. In view of the same, we do not find any merit in Ground No.6 which is liable to be dismissed and is dismissed as such.

24. Lastly coming to the deletion of the disallowance amounting to Rs.28,75,000/- u/s 14A of the Act, it is contended by the assessee that Section 14A is applicable only when the exempt income is actually received or receivable during the assessment year but not on the notional income and that the value of investment which have yielded exempt income has to be separately carved out from other investment which has not yielded any income. Learned AR submitted that after applying these principles, the disallowance would not be more than Rs.3,03,958/- which the assessee disallowed suo moto and, therefore, no further disallowance is justified.

25. Learned DR submitted that Section 14A refers to such expenditure in relation to income which does not form part of the

total income and, therefore, it is irrelevant whether the assessee earned any income in this particular year, but it is enough if the expenditure was in relation to the income which would not be forming part of the total income. On this premise, learned DR submits that it is not open for the assessee to contend that barring BSL Dynamic Bond Retail, all other investments are taxable and the similar additions made in earlier years have been deleted by the CIT(A) and the revenue rejected the same without preferring any appeal to the ITAT.

26. It is an admitted fact that the assessee themselves disallowed a sum of Rs.3,03,958/-. There is no dispute on the contention of the assessee that except BSL Dynamic Bond Retail, all other investments are taxable. Further, it also remains to be an admitted fact that similar additions made in earlier years is deleted by the Id. CIT(A) and no further appeal to the ITAT was preferred by the Department. In these circumstances, we find that the directions of the DRP for deletion of this addition is in consonance with the ratio laid down by the Hon'ble Supreme Court in the case of Radhasoami Satsang, (1992)193 ITR 312 (SC), which is to the effect that when the fundamental facts relating to a particular addition or deletion are permeating through several years, the department is not justified in taking inconsistent stands for different years. We, therefore, do not find any merit in Ground No.7 and is accordingly dismissed.

27. In view of our findings in this appeal but for the issue relating to the S. Mobility, a comparable, Cross Objection becomes

infructuous. So far as the S. Mobility is concerned, it is contended by the assessee that it is not adjudicated by the learned DRP. However, a reading of the grounds before the Id. DRP clearly shows that the assessee did not challenge the inclusion of this comparable before the learned DRP and no arguments on the comparability of this entity are advanced before us. Hence, we do not find any reason to entertain this ground. This ground is accordingly dismissed.

28. In the result, appeal of the revenue as well as Cross Objection of the assessee are dismissed.

Order pronounced in the Open Court on 29th April, 2019.

**SD/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**SD/-
(K.NARASIMHA CHARY)
JUDICIAL MEMBER**

Dated: 29th April, 2019.
VJ

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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| Date on which file goes to the Head Clerk. | |
| Date of dispatch of Order. | |