आयकर अपीलीय अधिकरण पुणे न्यायपीठ "सी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA No.2300/PUN/2017

निर्धारण वर्ष / Assessment Year : 2013-14

Amphenol Interconnect India Pvt. Ltd.,
105, Bhosari Industrial Estate,
Pune – 411026 …. अपीलार्थी/Appellant

PAN: AACCA3419J

Vs.

The Dy. Commissioner of Income Tax
Circle 8, Pune …. प्रत्यर्थी / Respondent

Assessee by : S/Shri Nikhil Pathak & Mahavir Jain
Revenue by : Shri M.K. Gautam, CIT

सुनवाई की तारीख / **Date of Hearing : 29.04.2019**		घोषणा की तारीख / **Date of Pronouncement: 03.05.2019**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by assessee is against the order of DCIT, Circle-8, Pune, dated 03.08.2017 relating to assessment year 2013-14 passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

On facts and in law,

1] The learned AO / DRP erred in recomputing the transfer price of the international transactions relating to exports and import of goods despite the fact that none of the conditions as prescribed in Section

92C(3) of the Income Tax Act, 1961 ('the Act'), had been violated by the appellant and thus, thereby, erred in making an addition of Rs.2,97,46,406/- u/s. 92C on the basis of the order of the TPO u/s. 92CA(3) dated 18.01.2016 in the case of the appellant company.

2] The learned AO / DRP erred in making an adjustment of Rs.2,96,64,875/- by adopting the Comparable Uncontrolled Price (CUP) Method for determining the Arm's Length Price (ALP) in respect of some of the international transactions pertaining to export of finished goods.

2.1] The learned AO / DRP erred in holding that the CUP method was the most appropriate method for determining the ALP in respect of some of the transactions of export of goods merely on the basis that the data pertaining to similar transactions with third parties were available.

2.2] The learned AO / DRP failed to appreciate that there were various differences on account of functional, transactional, geographical, volume, timing, business risks, etc. in respect of alleged comparable transactions which ought to have been considered and since suitable adjustments were not possible, there was no reason to adopt the CUP method for determining the ALP.

2.3] The learned AO / DRP failed to appreciate that the Transactional Net Margin Method ('TNMM') was the most appropriate method for determining the ALP in respect of export of goods to AE and the net profit margin of the assessee was comparable to the net profit margin of the comparable companies and hence, the transactions with the AEs were at ALP.

2.4] Without prejudice to the above grounds, the assessee submits that if at all, the CUP method was to be adopted for determining the ALP, suitable adjustments ought to have been made for differences on account of volume, timing, geographical, business risks, etc between the alleged comparable transactions.

3] The learned AO / DRP erred in making an adjustment of Rs.81,531/- by adopting the Comparable Uncontrolled Price (CUP) Method for determining the Arm's Length Price (ALP) in respect of some of the international transactions pertaining to import of goods.

3.1] The learned AO / DRP erred in holding that the CUP method was the most appropriate method for determining the ALP in respect of certain transactions of import of certain goods merely on the basis that the data pertaining to similar transactions with third parties were available.

3.2] The learned AO / DRP failed to appreciate that there were various differences on account of transactional, functional, geographical, volume, timing, business risks, etc. in respect of alleged comparable transactions which ought to have been considered and since suitable adjustments were not possible, there was no reason to adopt the CUP method for determining the ALP.

3.3] The learned AO / DRP failed to appreciate that the TNMM was the most appropriate method for determining the ALP in respect of import of goods from the AE since the net profit margin of the assessee company was comparable to the net profit margin of the comparable companies and hence, the transactions with the AE were at ALP.

3.4] Without prejudice to the above grounds, the assessee submits that if at all, the CUP method was to be adopted for determining the ALP, suitable adjustments ought to have been made for differences on account of volume, timing, geographical, business risks, etc between the alleged comparable transactions.

4] Without prejudice to the above grounds, the assessee submits that the learned TPO / DRP failed to appreciate that in respect of certain products exported by the assessee, it had charged higher price to the AE as compared to non AE and hence, this amount should have been adjusted and only the net amount could be added.

5] Without prejudice to the above grounds, the assessee submits that the learned TPO / DRP failed to appreciate that in respect of certain products imported by the assessee, it had paid lesser price to the AE as compared to non AE and hence, this amount should have been adjusted and only the net amount could be added.

6] The learned AO / DRP erred in not appreciating that in the earlier years, Hon'ble ITAT had rejected the CUP method as the most appropriate method for determining the ALP of the international transactions of export of finished goods and import of goods and since all the facts are similar in this year, there was no reason to adopt the CUP method in this year for determining the ALP.

7] The learned AO / DRP has erred in disallowing an amount of Rs.33,67,695/-, being a claim of additional depreciation u/s. 32(1)(iia) of the Act on Tooling, without appreciating that Tooling was integral part of 'Plants & Machinery' and hence, entitled for additional depreciation u/s. 32(1)(iia).

7.1] The learned AO / DRP erred in not appreciating that the various assets like tools, dyes, moulds castings etc. which formed part of Tooling are part and parcel of 'Plant and Machinery' owned by the appellant company and simply because these items are shown separately under the head 'Tooling' in the fixed asset schedule did not mean that these items are not 'Plant and Machinery' and accordingly, there was no reason to disallow the additional depreciation u/s 32(1)(iia).

3. The learned Authorized Representative for the assessee pointed out that ground of appeal No.1 raised by assessee is general and does not need any adjudication.

4. The issue raised vide grounds of appeal No.2 to 2.4 is against transfer pricing adjustment made with respect to exports to associated enterprises, whereas the issue raised vide grounds of appeal No.3 to 3.4 is the transfer pricing adjustment made with respect to imports from associated enterprises.

The learned Authorized Representative for the assessee pointed out that the issues in grounds of appeal No.4 to 6 are consequential. In respect of grounds of appeal No.7 and 7.1, he stated that the issue of allowability of additional depreciation on tools is raised. Drawing our attention to the order of TPO, he pointed out that total exports made to associated enterprises by the assessee were ₹ 149.21 crores and total imports from associated enterprises for sale in domestic market were ₹ 44.66 crores. The assessee had applied TNMM method and found the transactions at arm's length price. However, the TPO separated few transactions out of total turnover and applied CUP method as most appropriate method. He however, accepted the application of TNMM method on balance transactions. The TPO at page 11 though comments that the Tribunal in earlier years had decided the issue in favour of assessee but since the appeal was pending before the Hon'ble High Court, the issue was being decided against. The learned Authorized Representative for the assessee pointed out that similar issue has arisen in the case of assessee in earlier years starting from assessment year 2005-06 onwards. First, he referred to the decision of Tribunal in assessment year 2009-10, wherein at page 11 vide paras 8 and 11, both issues in respect of transfer pricing adjustment have been decided in favour of assessee. He further referred to the decision of the Hon'ble Bombay High Court placed at page 28 onwards of Paper Book relating to assessment years 2006-07 to 2008-09 and pointed out that the Hon'ble High Court has held that CUP method in such scenario cannot be applied. The Hon'ble High Court had affirmed the aggregation approach applied by the assessee and also in holding that TNMM method was most appropriate method. He then, pointed out that in case grounds of appeal No.2 and 3 are decided in favour of assessee, then grounds of appeal raised vide grounds of appeal No.4 to 6 would become academic in nature. Vis-à-vis

ground of appeal No.7, it was case of assessee that it was engaged in the manufacture of connectors and had purchased certain tools, which admittedly were part of plant & machinery. The assessee had sought additional depreciation under section 32(1)(iia) of the Act. However, the Assessing Officer had disallowed the claim of assessee. He further pointed out that while disallowing the same, the Assessing Officer had followed the decision in earlier year i.e. assessment year 2011-12. He then, referred to the order of CIT(A) relating to assessment year 2011-12 and pointed out that the claim of additional depreciation on tools was allowed by him holding it to be same as in the case of plant & machinery. The CIT(A) also referred to the amendment by Finance Act, 2005 and pointed out that there was no requirement of any expansion for allowing the claim of additional depreciation. The learned Authorized Representative for the assessee fairly pointed out that because of low tax effect, no appeal was filed against order of CIT(A) in assessment year 2011-12. However, the issue is being raised in the present appeal.

5. The learned Departmental Representative for the Revenue fairly admitted that the issue of transfer pricing adjustment stands covered by the order of the Hon'ble Bombay High Court. However, in respect of additional depreciation, he placed reliance on the order of Dispute Resolution Panel (DRP) at page 10 para 6.3.

6. We have heard the rival contentions and perused the record. Briefly, in the facts of the case, the assessee was wholly owned subsidiary of Amphenol Corporation, USA. The assessee had entered into various international transactions with its associated enterprises totaling ₹ 200.43 crores, which included export of finished goods to associated enterprises to the extent of

₹ 149.21 crores and import of raw material / consumables / components to the extent of ₹ 44.66 crores. The assessee had applied TNMM method for benchmarking its international transactions and had declared that its margins were higher than with mean margins of comparables. The said TNMM method was applied on aggregation approach. However, the TPO on perusal of product-wise details observed that the goods which were exported and imported in respect of associated enterprises and third parties were different. The TPO further analyzed the transactions and concluded that where the assessee exports same products to third parties and also sells the same in domestic market, then comparability by applying CUP method would give better results. The TPO thus, applied CUP method in respect of exports to associated enterprises and worked out an adjustment of ₹ 2.16 crores. The TPO acknowledges that similar adjustment made in earlier year has been decided by the Tribunal in favour of assessee. However, since the Department has preferred an appeal to the Hon'ble Bombay High Court for assessment years 2005-06 and 2006-07 to 2008-09, the plea of assessee was not accepted. Further, in respect of imports from associated enterprises, the TPO noted that the said raw materials were used for manufacture and also sold to third party and associated enterprises. On total turnover of about ₹ 41 lakhs, the TPO suggested an upward adjustment of ₹ 81,531/-.

7. We find that similar issue has arisen in the case of assessee starting from assessment year 2005-06. The Tribunal vide order dated 06.11.2015 in ITA No.449/PN/2014, relating to assessment year 2009-10 on similar issue had referred to the order of Tribunal in earlier years relating to assessment years 2006-07 to 2008-09 decided vide consolidated order dated 30.05.2014 and had extensively deliberated upon the issue whether CUP method is to be applied for

benchmarking international transactions of assessee and / or whether the assessee was correct in aggregating the transactions under the head 'Manufacturing Segment' and by applying TNMM method on aggregation basis compared the margins with other comparables picked up by the assessee.

8. Similar principle was also applied by the Tribunal in assessment year 2005-06 in ITA No.678/PN/2013, order dated 27.04.2015. The Tribunal while deciding the appeal of assessee in assessment year 2008-09 has referred to the findings of Tribunal in earlier year in paras 13 and 14 at pages 8 to 17 and had held that since the issue was identical to the issue decided in earlier years and following the same parity of reasoning, the Assessing Officer was directed to delete the said adjustment made in the hands of assessee.

9. Further, the Tribunal in assessee's own case in ITA No.477/PUN/2015, relating to assessment year 2010-11, vide order dated 12.05.2017 dismissed the appeal of Revenue on similar issue, copy of which is placed at pages 6 to 10 of Paper Book. The learned Authorized Representative for the assessee has also pointed out that the Hon'ble Bombay High Court vide order dated 07.03.2018 in Income Tax Appeal Nos.1100, 1102 & 1131 of 2015, relating to assessment years 2006-07 to 2008-09 had also dismissed appeal of Revenue and upheld the order of Tribunal on both the issues. The issues which were raised before the Hon'ble High Court were as under:-

(i) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in considering TNMM and MAM, without considering the FAR analysis of the transactions to determine the ALP of the export sales to AEs.?

(ii) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in differentiating CUP analysis on the basis of geographic difference and volume difference in respect of sale commission, especially when the commission is earned on the basis of percentage of sales?

10. The Hon'ble High Court after analyzing the issues at length has held that CUP method would not be the most appropriate method in view of various adjustments, which would have to be made due to differences in FAR, in order to arrive at the arm's length price of finished goods. The Hon'ble High Court notes that the Tribunal had taken into account the fact that for overwhelming majority of exports to associated enterprises, the TPO has accepted the TNMM method for arriving at the arm's length price and hence, there was no reason why for balance of export of finished goods, TNMM method should not be applied. Similar direction was also given in respect of imports of finished goods, which were sold to third parties and the associated enterprises and by applying FAR analysis, it was held that where the finished goods were customized goods and the geographical differences, volume differences, timing differences, risk differences and functional differences were there, then CUP method would not be the most appropriate method to determine arm's length price. The TNMM method was held to be most appropriate method. Further, the Hon'ble High Court has applied similar reasoning while deciding appeal of assessee relating to assessment year 2005-06 in ITA No.1388/2015, vide judgment dated 18.04.2018 and the appeal of Revenue has been dismissed. In the totality of the above said facts and circumstances, where the issue stands covered by the order of jurisdictional High Court in the case of assessee itself, there is no merit in the orders of authorities below in making aforesaid transfer pricing adjustment in the hands of assessee both with respect to exports to associated enterprises and with respect to imports from associated enterprises. It may be pointed out that majority of transactions have been accepted to be at arm's length price by the TPO by applying TNMM method, only in respect of few transactions, the TPO had applied CUP method. There is no merit in the

order of TPO in this regard and reversing the final order passed by Assessing Officer, we allow the claim of assessee and direct the Assessing Officer to delete the transfer pricing adjustment made in the hands of assessee. The grounds of appeal No.2 and 3 are thus, allowed. The grounds of appeal No.4 to 6 are academic as pointed out by the learned Authorized Representative for the assessee and the same are dismissed.

11. Now, coming to the last issue raised vide ground of appeal No.7 i.e. corporate issue is against non allowance of additional depreciation on tools purchased by the assessee. The case of assessee is that the assessee had claimed additional depreciation on plant & machinery under section 32(1)(iia) of the Act, which has been allowed in the hands of assessee. The assessee further claims that plant includes toolings and the depreciation rate on tools was similar to the rate on depreciation of plants and hence, it was entitled to claim the aforesaid additional depreciation. The Assessing Officer was of the view that since toolings could be used in many machines and have no independent existence and hence, do not qualify for additional depreciation as plant & machinery. The DRP was of the view that similar issue was pending in assessment year 2011-12 and hence, the order of Assessing Officer be upheld and however, the Assessing Officer was directed to re-compute depreciation after considering the modified opening WDV as per depreciation actually allowed in assessment year 2011-12.

12. The assessee is in appeal against final assessment order passed by Assessing Officer after applying directions issued by DRP. The scope of additional depreciation has been considered by the CIT(A) while deciding appeal in assessment year 2011-12. The relevant findings of CIT(A) are in

paras 5.2 to 5.2.2. The same are being referred to but are not being reproduced for the sake of brevity.

13. It was pointed out by the learned Authorized Representative for the assessee that because of low tax effect, the appeal of Revenue was not maintainable for assessment year 2011-12 before the Tribunal. However, the issue has been considered elaborately by the CIT(A) and the claim was allowed in the hands of assessee.

14. We find that the said issue of claim of additional depreciation on tools has been decided by the authorities below in assessment year 2012-13 relying on earlier order of Assessing Officer in assessment year 2011-12. However, the CIT(A) has considered the scheme of the Act and has pointed out that as far as Finance Act, 2002 was concerned, then the scope of additional depreciation was where capacity of the unit has been increased by minimum 25% and if the assessee fulfills such requirement, then additional depreciation was to be allowed. However, the said conditions have been withdrawn by the Finance Act, 2005 and the relevant Explanatory Note has been referred by the CIT(A) while deciding the appeal in assessment year 2011-12. The aim under the Finance Act, 2005 while allowing the additional depreciation under section 32(1)(iia) of the Act was extended to new industrial undertaking on additional investments. Once the earlier basis of allowing additional depreciation for the units where the capacity had to be increased for about 25% is no more and now additional depreciation is to be allowed on additional investments and where the plant includes tools, the assessee is entitled to the claim of additional depreciation under section 32(1)(iia) of the Act on the aforesaid tools purchased by assessee. Consequently, we direct the Assessing Officer to

allow the claim of assessee of additional depreciation under section 32(1)(iia) of the Act. The grounds of appeal No.7 and 7.1 are thus, allowed.

15. In the result, the appeal of assessee is allowed.

Order pronounced on this 3rd day of May, 2019.

Sd/-	**Sd/-**
(D.KARUNAKARA RAO)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 3rd May, 2019.

GCVSR

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

1. The Appellant;
2. The Respondent;
3. The DRP-3 (WZ), Mumbai;
4. The CIT(IT&TP), Pune;
5. The DR 'C', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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