

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: BENCH "I-2" NEW DELHI**

**BEFORE SRI R.K.PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A PILLAI, JUDICIAL MEMBER**

**ITA No. 7261 & 7262/Del/2018
A.Y. 2012-13 & 2013-14**

Sumitomo Corporation India Pvt.Ltd. vs. DCIT, Circle 24(2)
302 & 303, 3rd Floor New Delhi
World Mark-2
Asset No.8, Aerocity Hospitality District
New Delhi 110 037

PAN: AABCS1887M

(Appellant)

(Respondent)

Appellant by: Sh. C.S.Aggarwal, Sr.Adv.
Sh. Himanshu Sinha, Adv.

Respondent by: Sh. H.K.Choudhary, CIT, DR

Date of hearing : 25/02/2019

Date of Pronouncement : 21/05/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeals has been filed by assessee against order dated 29/10/18, for assessment year 2012-13 and order dated 31/10/18 for assessment year 2013-14 passed by Ld. DCIT, Circle 24 (2), New Delhi on following grounds of appeal:

ITA No. 7261/Del/2018 AY: 2012-13

1. *the Ld. Deputy Commissioner of Income Tax ('AO'), Circle 24(2), New Delhi has grossly erred both on facts and in law, in determining the income of the Appellant at Rs. 66,81,20,610 in assessment order dated October 29, 2018 framed under section 143(3) read with section 144C(13) of the Act, as against the income of Rs. 21,08,72,380, per the revised return filed by the Appellant.*

2. *That in making the aforesaid addition, the Ld. AO has erred in making a reference under section 92CA(1) of the Act to the Ld. Transfer Pricing Officer ('TPO') on the following amongst other grounds, rendering the order of the Ld. TPO as unsustainable both in law and on facts:*

- a) *as the reference made by the Ld. AO to the Ld. TPO is not in accordance with the provisions of Section 92CA(1) of the Act; and*
- b) *as no opportunity of being heard was granted at any stage of the proceedings for this purpose, whether at the proposal stage or even later at the time of grant of approval*

3. *The Ld. TPO has erred in making the transfer pricing adjustment without establishing the existence of any one of the four pre-conditions provided in section 92C(3) under section which is a mandatory requirement, for making an adjustment under section 92CA(3) of the Act.*

4. *The Ld. TPO has grossly erred in making transfer pricing adjustment and that too without giving a show-cause notice. The adjustment has been made overlooking that no opportunity to show-cause was granted for making the aforesaid addition. The*

adjustment made is highly arbitrarily and in violation of principles of natural justice.

5. The Ld. TPO erred in making an addition on protective basis in respect of an issue on which substantive addition has also been made, which is not permissible in law as the concept of substantive and protective adjustment is relevant only when an income is to be added in the hands of more than one taxpayer.

6. The Ld.TPO while applying the Bilateral Advance Pricing Agreement ('BAPA') signed by the Appellant in toto on transactions not covered by the said agreement (in making adjustment on substantive basis) has erred in respect of the following:

a) in computing the arm's length operating profit / operating expense ('OP/OPEX') as the Profit Level Indicator ('PLI') at the rate of 22.50 per cent for transactions with AEs other than Sumitomo Corporation, Japan ('SCJ'), being the profit margin negotiated in the BAPA. While doing so, the Ld. TPO failed to determine arm's length operating profit margin based on comparability analysis, as mandated under section 92C of the Act.

b) in not appreciating that the arm's length OP/OPEX as reflected in the transfer pricing report was 4.41 per cent and in the absence of any adverse finding in respect of such comparability analysis, the said rate of 22.50 per cent could not have been made the basis for the alleged adjustment.

c) in computing the segmental profitability of the Appellant by allocating expenses to the non-AE segment so as to fix the profit level (i.e. OP/OPEX) of such segment to be 26 per cent, which was

negotiated in the BAPA. While doing so, the Ld. TPO failed to allocate the operating expenses based on gross margin of the respective segment.

7. The Ld. TPO while making the adjustment on protective basis, on facts and in law, has erred in respect of the following:

- a) in making an adjustment without any justification, which is contrary to the Ld. TPO's own findings in Para 7 of the order under section 92CA(3) of the Act, where the Ld. TPO has held that Transactional Net Margin Method ('TNMM') with OP/OPEX as the PLI is the most appropriate methodology.*
- b) in disregarding the transfer pricing approach adopted by the Appellant to determine the arm's length price ('ALP') of its international transactions. The Appellant's use of TNMM with OP/OPEX as the PLI in the transfer pricing documentation, has been disregarded without any justification whatsoever.*
- c) in disregarding the Judgment of Hon'ble Tribunal in Appellant's own case for AY 2007-08 to AY 2011-12 wherein TNMM with Berry ratio (modified form of OP/OPEX) as the PLI has been accepted as the most appropriate method for benchmarking the transactions relating to the indent segment.*
- d) in disregarding the transfer pricing approach adopted by the Appellant (being TNMM as the most appropriate method with OP/OPEX as the PLI), despite the fact that this methodology has been agreed upon in the BAPA signed between the Appellant and the Central Board of Direct Taxes.*

e) *in computing ALP for indent transactions by adopting 5 per cent commission rate on arbitrary basis, thereby disregarding that the aforesaid commission rate was not based on any comparable and did not represent arm's length price.*

8. *The Ld. Dispute Resolution Panel ('DRP') has failed to comprehend that it could not have upheld such a finding of the Ld. TPO which was made without any basis and justification.*

9. *That the Ld. AO has erred in levying interest under sections 234B and 234C of the Act amounting to Rs. 13,32,89,276.*

10. *On the facts and circumstances of the case, the Ld. AO has erred in not examining the validity of initiation of penalty proceedings under section 271(l)(c) of the Act.*

The above grounds of appeal are mutually exclusive and without prejudice to each other.

The Appellant craves leave to add, alter, amend or vary any of the above grounds either before or at the time of hearing as we may be advised. The arguments taken hereinabove are without prejudice to each other."

ITA No. 7262/Del/2018 AY: 2013-14

1. *the Ld. Deputy Commissioner of Income Tax ('AO'), Circle 24(2), New Delhi has grossly erred both on facts and in law, in determining the income of the Appellant at Rs. 60,53,32,624 in assessment order dated October 31, 2018 framed under section 143(3) read with section 144C(13) of the Act, as against the income of Rs. 23,08,70,900, per the revised return filed by the Appellant.*

2. That in making the aforesaid addition, the Ld. AO has erred in making a reference under section 92CA(1) of the Act to the Ld. Transfer Pricing Officer ('TPO') on the following amongst other grounds, rendering the order of the Ld. TPO as unsustainable both in law and on facts:

- c) as the reference made by the Ld. AO to the Ld. TPO is not in accordance with the provisions of Section 92CA(1) of the Act; and
- d) as no opportunity of being heard was granted at any stage of the proceedings for this purpose, whether at the proposal stage or even later at the time of grant of approval

3. The Ld. TPO has erred in making the transfer pricing adjustment without establishing the existence of any one of the four pre-conditions provided in section 92C(3) under section which is a mandatory requirement, for making an adjustment under section 92CA(3) of the Act.

4. The Ld. TPO has grossly erred in making transfer pricing adjustment and that too without giving a show-cause notice. The adjustment has been made overlooking that no opportunity to show-cause was granted for making the aforesaid addition. The adjustment made is highly arbitrarily and in violation of principles of natural justice.

5. The Ld. TPO erred in making an addition on protective basis in respect of an issue on which substantive addition has also been made, which is not permissible in law as the concept of substantive and protective adjustment is relevant only when an income is to be added in the hands of more than one taxpayer.

6. *The Ld.TPO while applying the Bilateral Advance Pricing Agreement ('BAPA') signed by the Appellant in toto on transactions not covered by the said agreement (in making adjustment on substantive basis) has erred in respect of the following:*

a) in computing the arm's length operating profit / operating expense ('OP/OPEX') as the Profit Level Indicator ('PLI') at the rate of 22.50 per cent for transactions with AEs other than Sumitomo Corporation, Japan ('SCJ'), being the profit margin negotiated in the BAPA. While doing so, the Ld. TPO failed to determine arm's length operating profit margin based on comparability analysis, as mandated under section 92C of the Act.

b) in not appreciating that the arm's length OP/OPEX as reflected in the transfer pricing report was 5.16 per cent and in the absence of any adverse finding in respect of such comparability analysis, the said rate of 22.50 per cent could not have been made the basis for the alleged adjustment.

c) in computing the segmental profitability of the Appellant by allocating expenses to the non-AE segment so as to fix the profit level (i.e. OP/OPEX) of such segment to be 26 per cent, which was negotiated in the BAPA. While doing so, the Ld. TPO failed to allocate the operating expenses based on gross margin of the respective segment.

7. *The Ld. TPO while making the adjustment on protective basis, on facts and in law, has erred in respect of the following:*

a) in making an adjustment without any justification, which is contrary to the Ld. TPO's own findings in Para 7 of the order under

section 92CA(3) of the Act, where the Ld. TPO has held that Transactional Net Margin Method ('TNMM') with OP/OPEX as the PLI is the most appropriate methodology.

b) in disregarding the transfer pricing approach adopted by the Appellant to determine the arm's length price ('ALP') of its international transactions. The Appellant's use of TNMM with OP/OPEX as the PLI in the transfer pricing documentation, has been disregarded without any justification whatsoever.

c) in disregarding the Judgment of Hon'ble Tribunal in Appellant's own case for AY 2007-08 to AY 2011-12 wherein TNMM with Berry ratio (modified form of OP/OPEX) as the PLI has been accepted as the most appropriate method for benchmarking the transactions relating to the indent segment.

d) in disregarding the transfer pricing approach adopted by the Appellant (being TNMM as the most appropriate method with OP/OPEX as the PLI), despite the fact that this methodology has been agreed upon in the BAPA signed between the Appellant and the Central Board of Direct Taxes.

e) in computing ALP for indent transactions by adopting 5 per cent commission rate on arbitrary basis, thereby disregarding that the aforesaid commission rate was not based on any comparable and did not represent arm's length price.

8. The Ld. Dispute Resolution Panel ('DRP') has failed to comprehend that it could not have upheld such a finding of the Ld. TPO which was made without any basis and justification.

9. That the Ld. AO has erred in levying interest under sections 234B and 234C of the Act amounting to Rs. 8,82,22,041.

10. On the facts and circumstances of the case, the Ld. AO has erred in not examining the validity of initiation of penalty proceedings under section 271(1)(c) of the Act.

The above grounds of appeal are mutually exclusive and without prejudice to each other.

The Appellant craves leave to add, alter, amend or vary any of the above grounds either before or at the time of hearing as we may be advised. The arguments taken hereinabove are without prejudice to each other."

2. Brief facts of case are as under:

Assessee is a company engaged in business of facilitating import and export activities both directly and indirectly on behalf of various customers in India and overseas through provision of trade related support services and trade related advisory services. Assessee filed return of income for assessment years 2012-13 on 28/11/12 declaring total income of Rs.18,34,60,380/-. For assessment year 2013-14, return of income was filed on 27/11/13 declaring total income of Rs.23,08,70,900/-.

2.1. The case was selected for scrutiny and statutory notices were issued to assessee in response to which representative of assessee appeared before Ld.AO and filed requisite details as called for.

Ld. TPO passed draft order under section 92CA (3) on 30/01/16 for assessment year 2012-13 and 09/10/17 for assessment year 2013-14 proposing adjustment.

Subsequently it entered into Bilateral Advanced Pricing Agreement (BAPA) with CBDT on 02/08/2016, for both assessment years under consideration along with roll-over years. Accordingly, assessee revised its return of income to Rs.21,08,72,380/-, for assessment year 2012-13 to give effect to BAPA dated 18/10/2016. Thereafter, assessee filed objections before DRP for assessment year 2012-13. DRP disposed off objections vide its order dated 22/11/16 wherein, the matter was remanded back to Ld.TPO by observing as under:

"The assessee vide submission dated 19/10/2016 confirmed having modified the return of income for the AY under consideration fulfilling all the conditions prescribed under sub clause (d) of clause 10 of BAPA. As the assessee had modified the return of income acknowledging the terms of the agreement dictated under clause 10 of BAPA in respect of M/s SCJ in respect of the AY in question it applied for withdrawal of the objections filed before the Panel. Since the panel ceases to exercise jurisdiction over the assessee post modification of the Return of Income before the competent AO , in accordance with the section 92CD of the Act the dispute presented before the panel is treated as non est. Going by the above said provision of the Act, the AO is directed by us to comply interalia with clause 12 para 2, clause 13 and 14 of BAPA in toto.

For international transactions entered into by the assessee with its other AEs, i.e. apart from SCJ the AO shall follow the provisions under chapter X of the Act and relevant rules of the IT Rules 1962 to determine the ALP in respect of all such international transactions

undertaken with the AEs other than SCJ in regard to which there has not been any settlement between the assessee and the CBDT under BAPA."

2.2. Ld.TPO on 09/10/17, passed order under section 92 CA for assessment year 2012-13 and proposed an adjustment of Rs.1,16,22,485 on substantive basis and a sum of Rs.44,56,25,743/-on protective basis.

2.3. For assessment year 2013-14 Ld.AO passed draft assessment order on 26/12/17. DRP thereafter passed order on 13/09/18 for assessment years 2012-13 and 2013-14, by observing as under:

"In this fresh round of assessment after BAPA, while proposing the adjustment, the TPO applied (i) Profit margin agreed in the BAPA for making the substantive adjustment; and (ii) Commission rate of 5% for making protective adjustment by relying on the non-AE indent commission rate (i.e. 3.65%) and thereafter adding a mark-up of 1.35 per for services provided to the AEs (and not to the AEs).

The Panel has considered all aspects of the case. The matters for AY 2007-08 to AY 2010-11 are pending in Hon'ble ITAT after the issue being set aside by the Hon'ble High Court for further in-depth examination and findings thereon. Further, the case for A. Y 2011-12 is also pending in the Hon'ble ITAT. The matter involved is same in all the cases including the AYs 2013-14 which are under the current proceedings.

The TPO has brought forward that the method used in earlier years as the Hon'ble ITAT has been used to make protective assessment. For substantive assessment, the TPO has applied the rate BAPA for

transactions with the AE, SCJ to which the Panel agrees as it is the most appropriate ALP to be used. The Panel finds no reason to interfere with the order of the TPO/AO in view of the cases set are pending in the Hon'ble ITAT. The objections of the assessee are disposed off as above."

There is no substantive addition for the A.Y 2013-14, since the transactions of the assessee with the AEs other than SCJ and not covered under BAPA, were considered at ALP based on the rates agreed upon in the BAPA with SCJ. Only protective adjustment of INR 37.44 crores was made in A.Y 2013-14. Directions given for A.Y 2012-13 in this regard would apply for this year as well."

2.4. Following DRP directions, final impugned assessment orders were passed by Ld.DCIT on 29/10/18 and 31/10/18 respectively, by making protective adjustment as well as substantive adjustment in hands of assesses in respect of international transactions entered into by assessee during years under consideration.

3. Aggrieved by additions made by Assessing Officer for years under consideration in hands of assessee, appeal has been filed before this Tribunal.

3.1. It has been submitted by Ld.Counsel that facts and circumstances in years under consideration are similar and identical. Accordingly, both appeals are being disposed off by way of common order.

3.2. For sake of convenience we analyse facts regarding international transactions entered into by assessee for assessment year 2012-13.

3.3. It has been submitted that Sumitomo Corporation (AE) is ultimate parent company of Sumitomo group. It is one of largest trading companies or *sogoshosha* in Japan. A *sogoshosha* is an integrated business enterprise with fundamental role of facilitating trade between buyers and sellers market. Sumitomo Corporation is involved in a very broad range of industries and operations and there are 8 business lines as under:

- metal products
- transportation and construction systems
- infrastructure
- media, network and lifestyle retail
- mineral resources and energy
- chemical and electronics
- general products and real estate
- finance and logistic

3.4. Sumitomo Corporation undertakes its trading activities in India with support and assistance of Sumitomo India. In case of import of goods for buyers in India, Sumitomo Corporation has a contract with Japanese suppliers. Sumitomo Corporation also enters into contract with buyers in India.

3.5. Ld.TPO observed that assessee has made domestic sale of products under the head electronic parts/components, chemicals, CD changers, others. The exports undertaken by assessee are not very substantial and has been made to AEs only.

3.6. Ld. TPO observed that assessee in TP documentation has analysed the following international transaction:

Sumitomo India

| International Transaction | Transfer Pricing Method | Profit Level Indicator (PLI) | Total value of Transaction (Amount of INR) | Margin | Comparable Findings Arithmetic Mean |
|--|-------------------------|------------------------------|--|--------|--|
| Sale of goods | TNMM | OP/VAE | 5,723,620 | 20.92% | 4.03% |
| Purchase of goods | | | 170,977 | | |
| Rendering of services | | | 435,208,711 | | |
| Availment of services | | | 62,093,454 | | |
| Re-imbursment of expenses paid/payable | | | 757,438 | | |
| Purchase of computer software | TNMM | OP/VAE | 5,164,516 | 20.92% | 4.41% |
| Trade receivables | | | 121,799, | | |

3.7. During Transfer Pricing proceedings assessee entered into BAPA which covered assessment year 12-13 and 13-14 under the category, rollback years. It was observed by Ld. TPO that said agreement defined and covered transaction as under:

“The international transactions between Sumitomo Corporation India Pvt.Ltd. and Sumitomo Corporation Japan, as described

- i. SCIN’s commission income from SCJ (‘Indent Transaction’)*
- ii. SCIN’s purchase of goods from SCJ, and SCIN’s sale of goods to SCJ (Principal Transactions)*
- iii. SCIN’s service fee income from SCJ,*

shall be covered transactions for the agreement and this agreement shall apply to these international transactions."

3.8. In BAPA assessee has been considered to be the tested party and TNMM as most appropriate method and OP/OPEX as a PLI. The arm's length range was determined to be from 22.5% to 29.5%. It was also observed that, in BAPA, transactions entered into by assessee with its AE Sumitomo Corporation Japan, was only covered and transactions of assessee with other AEs during years under consideration were not covered.

3.9. Ld. TPO has detailed transaction with AE and other than AE as under:

| Particulars | SCJ | AE Others | Non AE | Total |
|----------------------------------|--------------------|--------------------|--------------------|--------------------|
| Sales | 3,040,046 | 2,865,554 | 847,356,896 | 853,262,496 |
| (-) Cost of goods sold | 2,482,102 | 2,280,362 | 630,497,509 | 635,259,973 |
| | 557,944 | 585,192 | 216,849,387 | 218,002,523 |
| (+) Commission fee | 305,848,737 | 129,359,974 | 105,383,236 | 540,591,947 |
| (-) Commission paid | - | - | - | - |
| (+) Trading Interest | 80,683 | - | - | 80,683 |
| (-) Bank Charges | - | - | - | - |
| Gross profit on Sales (A) | 306,487,364 | 129,945,166 | 322,242,623 | 758,675,153 |

3.10. Ld.TPO observed that operating profit margin of transaction between assessee and Sumitomo Japan was calculated to be at 12.44% which was not within the Arm's Length range as set under agreement. Subsequently, assessee modified return of income by proposing additional income of Rs.2,74,12,676/- in relation to its

transaction with Sumitomo Japan, as per terms and conditions of BAPA. Therefore post modified return of income filed by assessee, transaction between assessee and its AE Sumitomo Japan, was held to be at arm's length price, which was in consonance with terms and conditions laid down in BAPA.

3.11. However, in respect of transactions entered into by assessee with AEs other than Sumitomo Japan, which was not covered under BAPA, benchmarking was carried out to determine arm's length price. Ld.TPO observed that assessee used TNMM method to benchmark these transaction, and that there was no functional difference between transaction of assessee with Sumitomo Japan and other AEs were found. It was thus recorded by Ld.TPO that transactions shall be benchmarked at same rate of profitability as applied for transactions with Sumitomo Japan. Accordingly transfer pricing adjustment was calculated at Rs.1,16,22,485/-, on substantive basis in the hands of assessee, in respect of transactions entered into by assessee with AEs, other than Sumitomo Japan.

3.12. Subsequently Ld. TPO benchmarked international transactions of assessee by clubbing both transactions for purposes of ALP determination where Ld.TPO rejected TNMM adopted by assessee for ALP determination and made adjustment in respect of commission segment business by adopting margin of profit for trading with non-AE of assessee. It has been observed by Ld. TPO that similar adjustment was carried out by him for preceding assessment years 2007-08 to 2010-11. Aggrieved by

these adjustments subsequently made in the manner mentioned herein, assessee filed appeal before this Tribunal wherein the Tribunal accepted approach adopted by Ld. TPO, against which assessee preferred appeal before *Hon'ble High Court*. *Hon'ble High Court* set aside order of the Tribunal and remanded back the issue to be decided afresh. Ld.TPO accordingly for years under consideration was of opinion that unless this Tribunal after hearing assessee's and revenue's point of view does not pronounce an order it cannot be said that assessee's view has been accepted totally. At the time when final assessment order was passed the remand issues by *Hon'ble High Court* was pending before this Tribunal. Accordingly Ld.AO again computed adjustment of Rs.44,56,25,740/-to total income of assessee on protective basis by rejecting TNMM as method and applying CUP, based on corresponding average rate of commission. Ld. AO thus compared the commission earned by assessee in AE segment with that earned by it in non-AE segment, without analysing difference in segment on account of various factors including turnover.

4. Ld.Counsel at this juncture placed reliance upon order of Tribunal subsequent to remand by *Hon'ble High Court* for assessment year 2007-08 to 2011-12, wherein arguments advanced by both sides have been considered and this Tribunal observed as under:

"15. We have heard the parties at length and also perused the material referred to before us as discussed herein above. The approach of determining the ALP on the basis of average percent of

commission reported by the assessee in respect of indenting transactions with the non AEs as held by the Tribunal has not found judicial favour with the Hon'ble High Court and matter has been remanded back for further examination of similarity between the two transactions and to conduct further in depth inquiry to examine the high degree of comparability of relevant control and uncontrolled transactions. Further, if the average rate of commission on such transactions was to be applied to the FOB value of goods involved in the indenting transactions with the AEs, then this Tribunal has to satisfy itself that there is no significant variation in the rate of commission between different products. From the perusal of the indenting transactions undertaken by the assessee with AE and non AE under various product segments, it is discerned that, for instance in the product segment 'Automotive', the assessee has undertaken 249 transactions with AE and only 4 with non AE and in the Assessment Year 2007-08 the volume of transaction, FOB value wise is 'Nil' in the case of non AE; and the commission earned with the AE is Rs. 7,50,43,686/- and with the non AE it is only Rs.9,672/-. Similarly the products dealt with AE in automotive segment are entirely different and the geographies involved are Switzerland, Singapore, Thailand and Japan whereas non AE transactions are with Suzuki Motorcycle India Pvt. Ltd. and Bajaj Auto Ltd in India. Likewise under the product 'chemicals' the assessee has undertaken 1044 transaction with AE and only 112 transaction with non AE and the commission with AE is 1.28%, whereas non AE it is 2.26%. Similarly, the products dealt with AE and non AE under this segment

are quite different and geography involved with AE are Spain, Japan, Italy, Switzerland, Thailand, whereas with non AE it is India. Likewise in 'electronics' segment the transaction undertaken with the AE are 253, whereas with the non AE it is 5 and again not only the products are different but also geographical location are different with that of non-AE which are mostly with Indian parties and all AE transactions are with various foreign countries. Similar differences are noted in all across 10 to 11 products dealt by the assessee with AEs and non AEs. The total number of transactions with the AE during the year was 3,145 and with non AE it was only 371. Thus, apparently there is a huge difference in volume on FOB basis and the geographies dealt are also entirely different. The amount of average commission earned with the AE, is 1.58% whereas in the case of non AE it is 2.26. All these differences are permeating in all the Assessment Years as highlighted by the assessee in the chart submitted before us and on perusal of the same, it is quite glaring that under both the transactions, i.e., controlled transaction with the AE and uncontrolled transaction with the non AEs, there are huge dissimilarity between the products, difference in volume, difference in value, markets and geographical location.

16. *It is quite settled proposition that while applying CUP method, a very high degree of similarity has to be seen between the control and uncontrolled transactions not only in terms of products, contractual terms, volume, value but also market and geography locations. The reason being under CUP, price charged or paid for the property transferred has to be identified and the differences between*

the international transaction and the comparable uncontrolled transactions has to be seen which could materially affect the price in the open market. The price of different products cannot be the same as it depends upon the negotiation based on volumes, value and other contractual terms. Further different market and geographical location also affects the pricing factors and therefore, if there are differences on account of these factors CUP cannot be held to be the most appropriate method for bench marking the arm's length price. Here in this case, under the indenting segment there are various dissimilarities in the transaction with the AE and non AE as discussed above and for this reason alone the average commission earned cannot be the benchmarking factor for determining the ALP, and therefore, we hold that neither the CUP method can be applied nor the transaction with the AE and non AE can be taken for the purpose of comparability analysis. Thus, we reject the CUP method by taking the average commission earned in the transaction with the AE and non AE.

17. *Now, in these circumstances, we have to see whether TNMM can be considered as most appropriate method. First of all, it has been brought on record before us that right from the Assessment Years 2003-04 to 2006-07, TNMM has been accepted as the most appropriate method by the TPO. However, instead of 'berry ratio' as PLI, TPO has taken OP/TC as PLI. Further, it has been brought to our notice that from the Assessment Years 2011-12 to 2018-19 under the MAP agreement it has been agreed that TNMM should be the most appropriate method to determine the ALP of the international*

transaction of the indent keeping into the fact that assessee is a low risk service provider and there is no change in FAR right from Assessment Years 2003-04 to 2018-19. Once TNMM has been accepted under the similar FAR, we do not find any reason to deviate by adopting some other method. Otherwise also we have held that CUP method cannot be applied and other methods admittedly are incapable of capturing the true arm's length result and therefore, we hold that TNMM should be taken as a most appropriate method for benchmarking the said transaction.

18. *Now having accepted that TNMM is the most appropriate method, the second issue which needs to be clarified is what should be the base for computing the PLI. As stated above, the Hon'ble High Court has approved the permissibility of using all 'berry ratio' as PLI in a situation where the functions performed did not entail huge creation of valuable intangibles. The nature of the assessee's business is a routine business support services and there is no creation of any human capital or supply chain intangible. The Hon'ble High Court has held that 'berry ratio' can only be applied where the value of goods is not directly linked to the quantum of profits and the profits are mainly determined on expenses incurred. Here in this case, the assessee is acting as an indenting agent commission service provider, i.e., as a facilitator of a trade and has no financial risk, because assessee was not required to raise any invoice for sale and purchase in its financial commitment and risk are insignificant. As a service provider, the key business driver for the assessee is operating expenses incurred on establishment and operation of*

business, i.e., salary, rent and other such expenses and it does not employ any significant assets in the business except for routine assets like office, furniture and fixtures to run its business and also there is no intangible creation by the assessee company. Besides there is no trading capital employed as goods are neither bought nor sold by the assessee in the indenting segment. Under these facts and circumstances, the profit derived by the assessee is mainly depended on its operating expenditure as the value of goods does not enter in its financial. As a low risk service provider, it seeks to obtain adequate return on its operating expenses as the operating expenses incurred represents the value added carried on by the assessee. In other words, the operating expenses adequately and sufficiently represents the functions performed and the risk undertaken by the assessee. Thus, we hold that the 'berry ratio' should be accepted as the most appropriate PLI for taking as base under TNMM while determining the ALP of the Indian transaction for all the five years under appeal.

19. *Accordingly, we remand the matter back to the file of the TPO to examine and benchmark the international transaction by adopting TNMM as the most appropriate method by taking 'berry ratio' as PLI. The assessee has to substantiate its margin by bringing comparable uncontrolled transactions to demonstrate that its commission earned in this segment is at arm's length; and the TPO shall examine the same and decide accordingly. Needless to say that TPO shall give due and effective opportunity to the assessee to substantiate its ALP as per direction given above.*

20. *In the result, the appeal for all the Assessment Years are treated as partly allowed for statistical purposes.*

5. On perusal of aforesaid observations by this Tribunal in immediately preceding assessment year following points emerge:

- there are huge differences in volume on F.O.B. basis and the geographies dealt with in AE and non-AE segment are entirely different.
- The products involved in controlled and uncontrolled transactions are not similar and identical in volume value market and geographical location.
- The pricing factor which largely depends upon the geographical locations are different in AE and non-AE segment and therefore CUP cannot be applied in determining ALP of transaction either with AE or with non-AE.

Therefore TNMM is most appropriate method under such circumstances instead of CUP. Considering fact that assessee is a low risk service provider and that there is no change in FAR from assessment year 2003-04 to 2018-19 as has been observed by this Tribunal in preceding assessment year, we do not find any reason to deviate by adopting any other method other than TNMM. Respectfully following view taken by this Tribunal in preceding years, we remand the issue back to file of Ld. TPO to examine and benchmark international transaction by adopting TNMM as most appropriate method by taking Berry ratio as PLI, as has been approved by *Hon'ble High Court*. Needless to say that assessee shall be granted proper opportunity as per law.

5.1. Accordingly the issue raised by assessee in the appeal for assessment year 2012-13 stands allowed for statistical purposes.

6. In the result appeal filed by assessee for assessment year 2012-13 stands allowed for statistical purposes.

7. Admittedly facts and circumstances and nature of adjustment made by Ld.AO for assessment year 2013-14 are similar and identical to that of 2012-13. Ld.CIT DR has not brought any distinguishing factors before us in order to deviate from the view taken hereinabove. Respectfully following our view and placing reliance upon observations made in A.Y. 2012-13, we set aside the issue for assessment year 2013-14 to Ld.AO for examining and benchmarking international transaction by adopting TNMM as the most appropriate method by taking 'Berry ratio' as PLI.

7.1. Accordingly ground raised by assessee for assessment year 2013-14 stands allowed for statistical purposes.

8. In the result appeal filed by assessee for A.Y.2013-14 stands allowed for statistical purposes.

Order pronounced in the open court on 21st May, 2019.

Sd/-

(R.K.PANDA)
ACCOUNTANT MEMBER

Sd/-

(BEENA A PILLAI)
JUDICIAL MEMBER

Dt. 21st May, 2019

**gmv*

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

| | <i>Date</i> |
|--|----------------|
| <i>Draft dictated on Dragon</i> | <i>16.5.19</i> |
| <i>Draft placed before author</i> | <i>20.5.19</i> |
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| <i>Kept for pronouncement on & Order uploaded on :</i> | <i>21.5.19</i> |
| <i>File sent to the Bench Clerk</i> | |
| <i>Date on which file goes to the AR</i> | |
| <i>Date on which file goes to the Head Clerk.</i> | |
| <i>Date of dispatch of Order.</i> | |