

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1049/PUN/2017
निर्धारण वर्ष / Assessment Year : 2012-13

MAN Diesel & Turbo India Private Limited, E-73, MIDC, Waluj, Aurangabad – 431 136 PAN : AAACM0320L	Vs.	ACIT, Circle-1 Aurangabad
Appellant		Respondent

Assessee by Shri Dinesh Supekar
Revenue by Shri T. Vijaya Bhaskar Reddy

Date of hearing 06-12-2019
Date of pronouncement 09-12-2019

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the final assessment order dated 28-02-2017 passed by the Assessing Officer (AO) u/s.143(3) r.w.s.92C & 144C of the Income-tax Act, 1961 (hereinafter called 'the Act') in relation to the assessment year 2012-13.

2. Briefly stated, the facts of the case are that the assessee was incorporated in the year 1989 and is a part of MAN Diesel & Turbo group, which is a world market leader for large diesel engines for

use in ships and power stations. The assessee, an Indian company, is engaged in the trading of spare parts, installation/erection and commissioning of DG sets and is also acting as a commission agent by facilitating the sales of DG sets on behalf of its Associated Enterprises (AEs). Earlier, the assessee was engaged only in trading operations but in the preceding year, a manufacturing unit came to be set up by it, which became operational for some time of the preceding year. The instant year is the full first year of the assessee's manufacturing operations. The assessee filed its return declaring total income of Rs.10,46,63,900/-. Certain international transactions were reported in Form No.3CEB. The AO made a reference to the Transfer Pricing Officer (TPO) for determining the Arm's Length price (ALP) of the international transactions. For benchmarking, the assessee clubbed all the international transactions concerning the manufacturing and trading segments except Design Engineering services. The TPO observed from the Transfer Pricing study report that the assessee claimed to have incurred losses in the Production activity for which import of raw material was made from its AEs and sale of diesel engines was also made to the AEs. He did not accept the aggregation of Distribution and Production segments for the purpose of benchmarking. It was

opined that both the Distribution and Production segments ought to have been benchmarked separately. Thereafter, he proceeded to benchmark the international transaction of Manufacturing segment, in which the assessee had reported loss at the rate of (-)7.79%. The TPO selected two companies as comparable giving their average OP/OC at 9.38%. Considering such profit margin as a benchmark, he proposed transfer pricing addition of Rs.3,25,27,859/-. The AO passed the draft order with the above addition. The assessee's contention before the Dispute Resolution Panel (DRP) for aggregation of the Distribution and Production segments was repelled. However, the DRP got convinced with the assessee's submission on inclusion of one more company, namely, UMS Technologies Ltd. (Engine Segment), which had the effect of reducing the amount of transfer pricing addition to Rs.2,74,71,715/-, which has been assailed in the instant appeal.

3. We have heard the rival submissions and gone through the relevant material on record. Though the assessee has raised five grounds, but the thrust of the arguments of the Id. AR was only to the aggregation of Production and Distribution segments. We have gone through the Statement of Profit and loss of the assessee for the

year under consideration, a copy of which has been placed at page 106 onwards of the paper book. Total 'Revenue from operations' stands at Rs.78.94 crore, whose bifurcation has been given in Note no. 19. In addition to Commission income and Revenue from sale of services, the assessee earned Revenue from sale of finished goods at Rs.18.03 crore (i.e. Manufacturing segment) and Revenue from traded goods at Rs.30.20 crore (i.e. Trading segment). Whereas the assessee wants aggregation of its Manufacturing and Trading segments, the TPO has segregated them and made transfer pricing adjustment in the Manufacturing segment by considering operating revenues therefrom at Rs.18.23 crore. The ld. AR submitted that the difference in two figures, namely, Rs.18.03 crore and Rs.18.23 crore is because of exclusion of taxes from the former.

4. It is an admitted position that sale of finished goods in the Manufacturing segment at Rs.18.03 crore represents exports of diesel engines made exclusively to the AEs, in which the assessee has shown loss. In so far as the sale of traded goods in the Trading segment is concerned, it consists only of sale of spare parts to third parties in India, in which the assessee has shown profit. The view point canvassed by ld. AR is that there is a close link between the

‘sale of diesel engines’ and ‘sale of spare parts’ because it is only with the help of traded goods, namely, spare parts that the assessee can survive in the years to come by providing parts of the diesel engines sold by it as and when getting faulted. It was, therefore, urged that because of the close nexus between the sale of diesel engines manufactured by the assessee and sale of the related spare parts traded by the assessee, both should be aggregated for the purpose of benchmarking.

5. Section 92(1) of the Act provides that any income arising from ‘*an international transaction*’ shall be computed having regard to the arm’s length price. Section 92C(1) provides for the computation of the ALP and mandates to follow one of the prescribed methods as the most appropriate method, which, *inter alia*, include the TNM method, as has been applied by the assessee on aggregate basis and the TPO on segregate basis. The term ‘*transaction*’ has been defined in section 92F(v) to include an arrangement or understanding or action in concert, whether or not such arrangement etc. is reduced in writing or is intended to be enforceable by legal proceeding. The mechanism for determination of the ALP under the TNMM has been provided in Rule 10B(1)(e) of the Income-tax

Rules, 1962. The term '*transaction*' has been defined in Rule 10A(d) as including '*a number of closely linked transactions*'. Whereas the definition of the term 'transaction' in section 92F(v) is meant for identifying a transaction, the term 'transaction' in rule 10A(d) is meant for determining the ALP of international transaction under the relevant rules.

6. In the present context, we are concerned only with the definition of 'transaction' as given in rule 10A(d). It, therefore, boils down that in so far as the determination of the ALP under the machinery of computation under the methods as given in Rule 10B is concerned, the term 'transaction' also includes a plural of transactions. However, the caveat is that in order to be aggregated within the term '*transaction*' under Rule 10A(d), it is *sine qua non* that such number of transactions must be closely linked. If these are not closely linked transactions, then they cannot be aggregated for determination of the ALP under the IT Rules.

7. The moot question is whether the transactions of the assessee in Production and Distribution segments can be construed as '*closely linked transactions*'? At the cost of repetition, it is mentioned that whereas the Production segment covers the full

diesel engines manufactured by the assessee in India and exported to its AEs, the traded goods segment covers spare parts purchased by the assessee from its AE for the purpose of sale in India to non-related parties. There is another significant aspect of the matter. The assessee exported diesel engines to its AEs and there is no sale of spare parts to the AEs as the entire sale of spare parts is in India to the third parties. It is only the import of such spare parts, which has been occasioned from the AEs. It is ergo evident that the sale of traded spare parts does not extend to its customers to whom the goods manufactured by it were sold. In our considered opinion, the two sets of the transactions, can by no stretch of imagination, be considered as '*closely linked transactions*'. The mere fact that spare parts sold by the assessee in Indian market would be of some help in subsequent years when the manufactured diesel engines would require servicing, cannot now make the transactions as '*closely linked transactions*', so as to come up for consideration in an aggregate manner.

8. In one sense, closely linked transactions means similar or alike transactions of purchase or sale etc. of goods or services. To put it simply, if there are several international transactions of, say,

purchase of similar goods or with some variations, then instead of finding the ALP of such international transactions separately, if these are combined and benchmarked in an aggregate manner, it satisfies the prescription of closely linked transactions. The Hon'ble Punjab & Haryana High Court in *Knorr Bremse India (P) Ltd. Vs. ACIT (2016) 380 ITR 307 (P&H)* considered the question of aggregation of international transactions in another sense. Their Lordships held that several transactions between two or more AEs can form a single composite transaction if they are closely linked transactions and the onus remains always on the assessee to establish that such transactions were part of an international transaction pursuant to an understanding between various members of a group. The Hon'ble High Court observed that in case of a package deal where each item is not separately valued but all are given a composite price, these are to be taken as one international transaction. Further, where a number of transactions are priced differently but on the understanding that the pricing was dependent upon the assessee accepting all of them together (i.e. either take all or leave all), then also it is one international transaction. In that case, it will be on the assessee to prove that although each is priced separately, but they were provided under one composite agreement.

It still further held that aggregation can be done when albeit each transaction is priced differently, but they are so inextricably linked that one cannot survive without other.

9. When we test the facts of the instant case on the touchstone of the principles enunciated by the Hon'ble High Court, it becomes overt that the transactions of Production and Distribution segments cannot be clubbed because it is neither a case of package deal nor the two sets of transactions are structured in such a manner that the assessee has no option to accept one and reject the other nor they are so inextricably linked that one cannot survive without other. In fact, in all the earlier years, the assessee was exclusively in the trading of components and the manufacturing activity started at the fag end of the preceding year only.

10. The assessee in *Magneti Marelli Powertrain India Pvt. Ltd. vs. DCIT (2016) 389 ITR 469 (Delhi)* entered into agreement with its A.E. for acquiring technology required for the purpose of manufacturing. It applied the TNMM to benchmark its international transactions of import of raw materials, sub-assemblies and components, payment of technical assistance fees, payment of royalty, payment of software and purchase of fixed assets. All these

were categorized under one broad head, that is, “Manufacturing of automotive components” and shown to be at ALP. The TPO rejected the assessee’s entity level approach applied to benchmark the international transactions including Technical assistance fees and proceeded to determine the ALP of the Technical assistance fees separately. The Tribunal approved the TPO’s stand on segregation of payment of Technical assistance fee. The Hon’ble Delhi High Court admitted the question in this regard - ‘Whether the Income Tax Appellate Tribunal was right in holding that royalty and technical assistance fee did not form part of a composite transaction and have to be treated as two separate transactions for the purpose of benchmarking and computing arms length price?’ Answering this question against the assessee, the Hon’ble High Court countenanced the view of the Tribunal that aggregation of the transaction of payment of Technical fees with other international transactions under the common TNMM, was not correct. Restoring the matter to the TPO/AO, it held that the TNMM should be separately applied for determining the ALP of the international transaction of payment of Technical fee.

11. We note that the facts of the extant case are on a rather weak footing. In that case, the Hon'ble High Court did not approve the clubbing of 'Technical fees' with other transactions under the Manufacturing segment as without technical know-how even the production could not have been possible. Instantly, we are dealing with a situation in which the assessee is trying to club the transaction of Production of finished goods with Trading of spare parts, which is a step further away from technical know-how in the process of manufacturing. In view of the foregoing discussion, it is held that the authorities below were fully justified in holding that the Manufacturing segment cannot be aggregated with the Distribution segment and both need to be benchmarked independent of each other. We, therefore, accord our imprimatur to the view canvassed by the TPO in rejecting the aggregation approach adopted by the assessee.

12. Once it is held that the international transaction of the Production segment is required to be benchmarked separately, then the next question is the determination of the ALP. The Id. AR candidly admitted that if the aggregation is not to be done, then there is no flaw in the computation of the ALP and the

consequential transfer pricing addition in the final assessment order.

We, therefore, uphold the transfer pricing addition of Rs.2,74,71,715/- in the international transaction of Production segment.

13. In the result, the appeal is dismissed.

Order pronounced in the Open Court on 09th December, 2019.

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 09th December, 2019
सतीश

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The Pr.CIT-V, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
“C” / DR ‘C’, ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	06-12-2019	Sr.PS
2.	Draft placed before author	09-12-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
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11.	Date of dispatch of Order.		

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