

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-1' : NEW DELHI)**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.2719/Del./2014
(Assessment Year : 2009-10)**

M/s. Alcoa India Private Ltd., vs. ACIT, Circle 1 (1),
7th Floor, Meridian Commercial Tower, New Delhi.
Raisina Road,
New Delhi.

(PAN : AAFCA9777L)

(APPELLANT)

(RESPONDENT)

**ASSESSEE BY : Shri G.C. Srivastava, Advocate
Shri Parichay Solanki, CA
Shri Mayank Patawari, CA
REVENUE BY : Shri Sanjay I. Bara, Senior DR**

Date of Hearing : 18.11.2019
Date of Order : 31.12.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER

Appellant, M/s. Alcoa India Private Ltd., (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 28.02.2014 passed by the AO in consonance with the orders passed by the Id. DRP/TPO under section 143 (3) qua the assessment year 2009-10 on the grounds inter alia that :-

“1. That on the facts and in the circumstances of the case and in law, the order passed by the learned Assessing Officer ("Ld. AO") is bad in law.

2. The Ld. AO/Transfer Pricing Officer ("TPO")/Dispute Resolution Panel ("DRP") erred on facts and circumstances of the case in disturbing the arm's length price of the Appellant's international transactions with its Associated Enterprises ("AEs") which resulted in the enhancement of returned income of the Appellant by Rs. 25,811,607.

3. The Ld. AO/Ld. TPO erred on facts and in law in making an adjustment to the arm's length price of the Appellant's international transactions by :

3.1 Not accepting the analysis conducted in the TP documentation maintained by the Assessee as per section 92D of the Act read with Rule 10D of the Income Tax Rules, 1962 ("Rules") without appreciating that none of the conditions given under section 92C (3) have been satisfied.

3.2 Rejecting the Resale Price Method adopted by the Assessee for the Trading business segment and instead applied Transactional Net Margin Method without ascribing valid and cogent reasoning for the same.

3.3 Applying inappropriate filters to select comparable companies for application of Transaction Net Margin Method.

3.4 Rejecting comparable companies selected by the Assessee in its TP documentation.

4. The Ld. AO/Ld. TPO/Ld. DRP erred in making an adjustment to the entire income of the Appellant and by not confining the addition to the international transactions as mandated by law.

5. AO/Ld.TPO/Ld.DRP erred in adopting different ways of computing the profit level indicators of the Appellant and the comparable companies by according

different treatment to inventory (which was treated as revenue item for the appellant and as a cost item for the comparable companies.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Alcoa India Private Ltd., the taxpayer was established in 2006 as an Indian subsidiary of the Alcoa Group known as aluminum company of America . The taxpayer provides market support services to its Associated Enterprises (AE). It is also having trading segment that procures goods from its AE for the purpose of resale to other parties in India. The taxpayer is a subsidiary company of Alcoa International Holding Company, USA. During the year under assessment, the taxpayer entered into international transactions with its AE as under:-

<i>Nature of transaction</i>	<i>Method</i>	<i>Value (INR)</i>
<i>Import of goods</i>	<i>RPM</i>	<i>174,911,076</i>
<i>Payment of Royalty</i>	<i>CUP</i>	<i>1,353,527</i>
<i>Business Auxiliary Services</i>	<i>TNMM</i>	<i>99,625,479</i>
<i>Reimbursement of expenses paid</i>		<i>19,495,097</i>
<i>Payment of networking support services & other services</i>	<i>CUP</i>	<i>4,088,935</i>

3. The present appeal filed by the taxpayer is primarily to challenge the Transactional Net Margin Method (TNMM) with Operating Profit / Sales (OP/Sales) as Profit Level Indicator (PLI) applied by the Transfer Pricing Officer (TPO) to benchmark its

international transactions by rejecting RPM as Most Appropriate Method (MAM) with Gross Profit/Sales (GP/Sales) as the Profit Level Indicator (PLI) applied by the taxpayer to benchmark its international transactions qua trading segment. Ld. TPO, however, found remaining international transactions entered into with its AE at arm's length.

4. The taxpayer in its TP analysis applied RPM with GP/Sales as PLI as MAM to benchmark its international transactions qua trading segment at arm's length as margin earned by the taxpayer was more than the margin earned by the comparables, which is as under :-

<i>Nature of international transaction</i>	<i>Most appropriate method applied (Profit Level Indicator "PLI")</i>	<i>International Transactions (Amount in INR)</i>	<i>No. of comparable companies</i>	<i>Arm's length Margin (using multiple year data)</i>	<i>Arm's length Margin (using single year data)</i>	<i>Margin earned by the Appellant</i>
<i>Import of goods</i>	<i>Resale Price Method (RPM) ("GP/Sales)</i>	<i>174,911,076</i>	<i>8</i>	<i>16.45%</i>	<i>14.89%</i>	<i>38.29%</i>

5. However, ld. TPO, after rejecting RPM applied by the taxpayer for benchmarking the international transactions qua trading segment applied TNMM, rejected 6 of the comparables out of 8 comparables chosen by the taxpayer and introduced 4 new

comparables on the basis of modified filters applied by using current year's data only. Ld. TPO selected 6 comparables with average of 13.84% which are as under :-

<i>Name of the Company</i>	<i>OP/Sales (%)</i>
<i>Kant & Company</i>	<i>19.97</i>
<i>Manak Overseas Ltd.</i>	<i>12.69</i>
<i>MKJ Enterprises Ltd.</i>	<i>37.90</i>
<i>Modern India</i>	<i>9.29</i>
<i>Bhagwandas Metals Ltd.</i>	<i>0.83</i>
<i>SKM Steels Ltd.</i>	<i>8.33</i>
<i>Average</i>	<i>13.84</i>

6. Ld. TPO proceeded to compute the arm's length value of the international transactions entered into by the taxpayer with its AE as under :-

<i>Sales</i>	<i>226,261,335</i>
<i>Arms length margin</i>	<i>13.84</i>
<i>Operating Profit a ALP</i>	<i>31,314,569</i>
<i>Operating profit of assessee</i>	<i>16,715,901</i>
<i>Adjustment u/s 92CA</i>	<i>48,030,470</i>

7. The taxpayer carried the matter before the Id. DRP by way of filing objections, who has upheld the order proposed by the Ld. TPO but directed to correct the margin computation in case of one comparable and excluded two comparables chosen by the TPO and thereby the margin of comparables reduced to 3.96% from 13.84% and restricted the arm's length price of the transaction to

Rs.25,811,607/- . Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

8. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1 & 2

9. Grounds No.1 & 2 need no findings being general in nature.

GROUND NO.3.1

10. Ground No.3.1 is dismissed having not been pressed during the course of arguments.

GROUND NO.3.2

11. Now, the only dispute raised by the taxpayer is qua selection of TNMM with OP/Sales as PLI applied by the Id. TPO by rejecting the RPM with GP/Sales as MAM applied by the taxpayer.

12. The Id. AR for the taxpayer challenging the impugned order passed by the TPO/DRP/AO contended inter alia that since taxpayer is a pure distributor without adding any value addition to the goods sold, RPM is the MAM to benchmark the international transactions qua trading segment; that the taxpayer is maintaining very high inventory (almost 35.29% of purchases as per Note-2F of

Schedule 15 of Profit & Loss account) which shows that the products are not moving fast for correct applicability of RPM.

13. Ld. TPO rejected RPM applied by the taxpayer on the grounds inter alia that RPM is more accurate where price is realized in a short time of the resale of goods purchased, in other words period between sale and purchase should not be extended to apply the RPM; that RPM being a direct method requires high level of comparability whereas TNMM is more tolerant; that the taxpayer jointly with its overseas AE developed the market strategy in India and performs the market strategies for Indian market and also performs functions such as customers identification, meeting with customers, demonstrate the product utility etc., undertakes price negotiation with the customers and decided upon the financial terms of sales with them; and that the taxpayer maintains finished goods inventory and performs services related to the inventory control in India and thereby lot of intangibles are being added to the goods. Ld. TPO has also not opted for resale price method to determine the ALP of international transaction on the ground that financial data is not available in the public domain in case of business of a distributor, RPM is rejected and TNMM is considered as the MAM; that there are certain third party expenses made by the taxpayer as per profit & loss account like salaries and wages,

travelling and conveyance, freight outward expenses which are directed connected with the selling and distribution functions which have not been considered by the taxpayer in its own case nor in case of comparables for comparability.

14. On the other hand, it is the categoric case of the taxpayer that since it is engaged in procurement of aluminum goods e.g. fasteners, sheets, extrusions, etc. from its AE for resale to independent parties without any value addition, RPM is the MAM for the said transactions of import of goods as per Rule 10B and 10C of the Income-tax Rules, 1962 (for short 'the Rules').

15. Ld. AR for the taxpayer by relying upon the OECD Guidelines also contended that if the cost structure of the company is such that costs are affecting net profit directly without affecting the price or gross margin, then RPM is the MAM as against TNMM. Because taxpayer is a newly established company whereas comparables chosen by the TPO were well established companies with years of presence which is evident from the fact that the taxpayer's operating expenses to sales ratio were 44.67% as against 3.71% that of the comparables and as such, operating profit of the taxpayer is largely effected by administrative and operating expenses. Ld. AR further relied upon the decisions of *Hon'ble Bombay High Court in L'Oreal India P. Ltd. Appeal*

No.1046 of 2012, Hon'ble Delhi High Court in M/s. Luxottica India Eyewear Pvt. Ltd. in ITA 852/2015, M/s. Swarovski India Pvt. Ltd. ITA No.5621/Del/2014, Axalto Cards and Terminals India Ltd. vs. ACIT 131 TTJ 65 (Delhi Bench-ITAT), Sanyo India P. Ltd, (I.T(TP).A No.436/Bang/2015, M/s. OSI Systems Pvt. Ltd. in ITA No.683/Hyd/2004, M/s Delta Power Solutions India Pvt. Ltd. in ITA No.3004/De1/2013, Star Diamond Group in ITA. No.3923/Mum/2008, Mattei Toys (I) Pvt. Ltd vs. DCIT in ITA No.2476/Mum/2008, Danisco (India) Pvt. Ltd. in ITA No.5291/Del/2010, Frigoglass India Pvt. Ltd. in ITA No.463/Del/2013, M/s Luxottica India Eyewear Pvt. Ltd. in ITA No.1115/DEL/2014, L'Oreal India P.Ltd. vs. ITO (ITA no.5423/Mum/2009, M/s Sanyo India Pvt. Ltd. in ITA No. 1022(B)/2012 and M/s Tupperware India Pvt. Ltd. in ITA No. 2140/Del/2011 and 1323/Del/2012.

16. Ld. DR for the Revenue by relying upon the detailed comments given by the ld. TPO at pages 36 to 41 of the TP order contended that third party expenses mentioned by the TPO in Paras A to J at page 30 shows that the taxpayer is not a pure distributor rather adding intangibles to the products sold by its.

17. In view of the discussion made in the preceding paras and from the TP analysis made by the taxpayer, we are of the

considered view that it is proved on file that the taxpayer is a pure distributor/ trader which resale the goods after purchasing from its AE without any value addition. Reasons for rejection of RPM applied by the taxpayer given by the ld. TPO are generic in nature. When apparently there is no value addition to the goods purchased and resold by the taxpayer, RPM is the MAM. Not an iota of evidence is there on the file if the taxpayer has made any value addition to the goods purchased from the AE before the reselling the same to the third party or has created any intangible in favour of AE.

18. Coordinate Bench of the Tribunal decided the identical issue as to RPM vs. TNMM as the MAM in case of a trader who purchases and sells the goods in case of *M/s. Luxottica India Eyewear Pvt. Ltd.* (supra), which has been affirmed by the *Hon'ble High Court in ITA 852/2015* by returning following findings :-

“10.4. As the undisputed fact is that the functional profile of the assessee is that of a trader and as the characterisation of the transaction is purchase and sale of goods, we hold that RSPM is the MAM by applying the following decisions of the Co-Ordinate Bench of the Tribunal.

(i) In the case of Star Diamond Group NV Mumbai (ITA No.3923/Mum/2008), it is held as follows:

“13. This finding in our humble opinion is wrong for the reason that the CIT(A) has adopted these very comparables, along with three others while arriving at the operating margins at para 7.16 of his order. As the assessee is a trader, without value addition to the goods, we find force in the submissions of the assessee that resale price method is the most appropriate method for determining the ALV with respect to AE transaction. In fact, the Revenue has accepted this method in earlier two years. The TPO in his order dt. 7.3.2005 for the AY 2002-03 and order dt. 20.3.2006 for the AY 2003-04, has agreed with the computation of arm’s length price made by the assessee under the resale price method.”

(iii) In the case of Danisco (India) Pvt.Ltd. vs. ACIT, Circle 10(1), New Delhi (ITA no.5291/Del/2010), it is held as follows:

“22. Considering the above submissions we find that the assessee established in 1998 as a 100% subsidiary of Danisco A/S Denmark. Danisco India is engaged in the business of manufacturing and trading of food additives. The manufacturing business in respect of food flavours and the trading business is for products for falling under the category of food ingredients. The main grievances of the assessee against the order of the Ld.TPO upheld by the Ld.DRP are regarding their approach in the manner in which transfer pricing adjustment has been made, the approach adopted by the Ld.TPO in granting 17 comparable companies denying the economic adjustment claim made by the assessee, regarding computation of margins of the assessee, non consideration of supplementary transaction and denial of adequate opportunity of being heard to the assessee by the authorities below as well as their failure to examine the contentions and arguments of the assessee in this regard. Considering these grievances as discussed herein above by us in the arguments advanced by the parties/their submissions and having gone through the decision relied upon, we find substance in the submission of the assessee and thus we are of the view that it is a fit case to set aside the matter to the file of the Ld.TPO for his fresh consideration and decide the issue afresh after affording opportunity of being heard to the assessee and discussing their submissions in the order and reasons, if any, for not agreeing or agreeing with them. It is ordered accordingly with direction to the Ld.TPO to:

a) *first examine as to whether, was there any value addition on imported goods, and if answer is in negative then apply RPM as a most appropriate method for trading transactions of imported goods and in consequence examine the application of appropriate method as commission payment;*

(iv) Frigoglass India P.Ltd. (ITA no.463/Del/2013), it is held as follows:

“We have heard the rival contentions and perused the material available on record. In our considered view, once assessee has given a methodology for working of ALP on selection of a particular method supported by appropriate comparables, the working can be dislodged by TPO on the basis of cogent reasons and objective findings. In this case except theoretical assertions and generalized observations, no objective findings have been given to come to a reasoned conclusion that assessee's adoption of CPM for manufacturing segment and RPM for trading segment was Factually and objectively not correct. Thus the rejection of methods by TPO as adopted by assessee is bereft of any cogency and objectivity. The same is a work of guessing and conjectured. Similarly the TNMM method applied by the TPO suffers from the same inherent aberrations as mentioned above. In these circumstances we are of the view that Assessee's methods of CPM and RPM respectively worked by applying appropriate comparables is to be upheld. Thus the ALP working returned by the assessee is upheld. The Assessee's TP grounds are allowed.”

(v) Textronic India Pvt.Ltd. vs. DCIT (ITA no. 1334/Bang/2010), it is held as follows:

“We have considered the rival submissions. The dispute is with regard to the ALP in respect of international transactions whereby the assessee imports equipment from its AE and resells them without any value addition to the Indian customers. In similar circumstances, Mumbai Bench of the Tribunal in the case of L'Oreal India Pvt.Ltd. (supra) has taken the view that the RPM would be the most appropriate method for determining the ALP. The Mumbai Bench of Tribunal in this regard, has referred to the OECD guidelines wherein a view has been expressed that RPM would be the best method when a resale takes place without any value addition to a

product. In the present case, the assessee buys products from the AE and sells it without any value addition to the Indian customers. In such circumstances, we are of the view that the ratio laid down by the Mumbai Bench of the Tribunal in the case of L'Oreal India Pvt. Ltd. (supra) would be squarely applicable to the facts of the assessee's case. In that event, the GP as a percentage of sales arrived at by the TPO in Annexure to the TPO's order insofar as trading activity of comparables identified by the TPO at 12.90%. The GP as a percentage of sales of the assessee is at 35.6% which is much above the percentage of comparables identified by the TPO. In such circumstances, we are of the view that no adjustment could be made by way of ALP. We, therefore, accept the alternative plea of the assessee and delete the addition made by the AO. In view of the above conclusion, we are not going into the other issues on merits raised by the assessee on the approach adopted by the TPO in arriving at the ALP. Thus, ground Nos. 2 to 7 are allowed."

10.5. In view of the above discussion, we direct the TPO to adopt RSPM as the MAM in this case."

19. Similarly, coordinate Bench of the Tribunal in case of *Swarovski India Pvt. Ltd. vs. ACIT (TS-94-ITAT-2017 (Del.)-TP*) also held the RPM as the MAM for determining ALP of international transactions of import of goods from AE and resale as such by returning following findings :-

"It is clear from the command of sub-clause (i) itself that the RPM is applied when the property purchased by the assessee is resold as such. Sub-clause (ii) further provides for choosing comparable cases in which similar property is purchased and resold. Thus it is apparent that this method, by its very language, is applicable where a property purchased from an AE is resold as such. Where, however, some value addition is made to the goods before resale, the RPM ceases to be an unfailing method.

Adverting to the facts of the instant case, we find that the assessee purchased Crystal goods and Crystal components from

its AE. No value addition was made to such imports. The goods were sold as such. In the given circumstances, the RPM is the most appropriate method for determining the ALP of the international transaction of Import of Crystal goods and Crystal components.”

20. Coordinate Bench of the Tribunal in case of *Oriflame India Pvt. Ltd. vs. ACIT (TS-673-ITAT-2017 (Del.)-TP)* also held the RPM as the MAM as compared to TNMM in case of purchasing and reselling the same goods without any value addition by returning following findings :-

“The ld. AR took up another argument to the effect that the Transactional Net Margin Method (TNMM) should be considered as the most appropriate method instead of the RPM. We are disinclined to accept this contention for more than one reasons. Firstly, the assessee is engaged in purchasing and reselling the same goods without any value addition, and as such, the RPM is the most appropriate method in such circumstances. Secondly, the Tribunal in earlier years has upheld the RPM as the most appropriate method. In the absence of any change in the facts and circumstances of the instant year vis-a-vis the earlier years, we cannot order the switch over from the RPM to the TNMM.

It was submitted that the TNMM is more tolerant to functional differences and, as the sequitur, a wider range of companies can also be roped in under this method which are not strictly comparable. We are unable to accept this contention for the obvious reason that similarity of the functions performed under any of the methods for determining the ALP is essential and cannot be dispensed with even under the TNMM. The Hon'ble jurisdictional High Court in Rampgreen Solutions Pvt. Ltd. (supra) has held that the selection of comparables does not differ with the methods adopted and the comparables should be selected on the basis of similarity found even under the TNMM.”

21. So, in view of what has been discussed above, we are of the considered view that TPO/DRP/AO have erred in applying the TNMM as the MAM in case of taxpayer who is a pure distributor of goods purchased from its AE and resell the same to third party without any value addition. So, TPO/AO are directed to apply the TNMM as the MAM to benchmark the international transactions undertaken by the taxpayer qua its trading segment by providing an opportunity of being heard to the taxpayer. So, Ground No.3.2 is determined in favour of the taxpayer.

GROUND NO.3.3 & 3.4

22. Grounds No.3.3 & 3.4 are dismissed having not been pressed during the course of arguments.

GROUND NO.4

23, The grievance of the taxpayer is that the TPO has made adjustment to the entire income of the taxpayer and not confined to the addition of the international transactions as mandated by law. In view of the settled principle of law that transfer pricing adjustment is required to be restricted to the amount of international transactions only and not to the entire income of the taxpayer, the TPO is directed to make the adjustment accordingly. Ground No.4 is determined in favour of the taxpayer.

GROUND NO.5

24. Ground No.5 is dismissed having not been pressed during the course of arguments.

25. Resultantly, the appeal filed by the taxpayer is partly allowed.

Order pronounced in open court on this 31st day of December, 2019.

**Sd/-
(N.K.BILLAIYA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 31st day of December, 2019
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**