

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-2', NEW DELHI**

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCING)

ITA No.8110/Del/2018
Assessment Year: 2014-15

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| Topcon Sokkia India Pvt. Ltd., Unit No.101 to 106A, ABW Tower, 1 st Floor, MG Road, IFFCO Chowk, Sector-25, Gurgaon, Haryana – 122 001 PAN No. AACCS 9107 K (APPELLANT) | Vs. | DCIT Circle- 25 (2) New Delhi (RESPONDENT) |
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| Appellant by | Sh. Neeraj Jain, Adv. Sh. Ramit Katyal, C.A. |
| Respondent by | Sh. M. Barhwal, Sr. D.R. |

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| Date of hearing: | 23/06/2020 |
| Date of Pronouncement: | 29/06/2020 |

ORDER

PER ANIL CHATURVEDI, AM:

This appeal filed by the assessee is directed against the order dated 26.10.2018 passed by the DCIT, Circle 25(2) New Delhi pursuant to the directions of DRP, relating to Assessment Year 2014-15.

2. The relevant facts as culled from the material on records are as under:

3. Assessee is a wholly owned subsidiary of Topcon Corporation, a company incorporated in Japan and is stated to be engaged in the business of trading and service of surveying instruments. Assessee filed its return of income for A.Y.2014-15 on 27.11.2014 declaring total income of Rs.6,15,40,200/-. It was noted by the AO that assessee had entered into international transaction with its Associated Enterprise (AE) and accordingly a reference u/s 92CA(3) was made to TPO to determine the 'Arms Length Price' (ALP) in respect of the "International Transactions". Thereafter TPO passed order on 31.10.2017 u/s 92CA(3) wherein he computed the ALP of the "International Transactions" and suggested enhancement of income by Rs.1,75,60,240/-. The AO thereafter, after considering the adjustment proposed by the TPO in the draft assessment order dated 16.12.2017 passed u/s 143(3)/144C of the Act determined the total income at Rs.7,91,00,440/-. Aggrieved by the draft assessment order of AO, Assessee carried the matter before DRP. The DRP after considering the submissions of the Assessee directed the AO to complete the assessment as per the directions issued u/s 144C(5), dated 17.9.2018. Pursuant to the directions of DRP, AO vide order dated 26.10.2018 passed u/s 143(3)/144C determined the total income of the Assessee at Rs. 7,95,95,210/-. Aggrieved

by the aforesaid order of AO, Assessee is now before us and has raised the following grounds of appeal:

- “1. That the impugned order of Ld. Assessing Officer [“AO”] dated 26.10.2018, passed under section 144C read with section 143(3) of the Income-tax Act, 1961 (“the Act”), is bad in law and unsustainable.
2. That on the facts and circumstances of the case and in law, the impugned order is barred by limitation, bad in law and therefore, liable to be quashed.

Transfer Pricing Adjustment on Account of Import of Finished Goods:

3. That the DRP/TPO erred on facts and in law in making addition of Rs.1,80,55,010, allegedly on account of difference in the arm’s length price of international transaction of import of finished goods undertaken by the appellant.
 - 3.1 That the DRP/TPO erred on facts and in law in applying Transactional Net Margin Method (‘TNMM’) for benchmarking the international transaction of import of finished goods undertaken by the appellant instead of the Resale Price Method (‘RPM’) applied by the appellant.
 - 3.2 That the DRP/TPO erred on facts and in law in not appreciating that RPM is the most appropriate method for benchmarking the international transactions undertaken by the appellant, a normal distributor not adding any value to the goods imported from the associated enterprise.
 - 3.3 That the DRP/TPO erred on facts and in law in not appreciating that Rule 10B(1)(b) specifically provides for application of RPM for benchmarking the international transaction of import of finished goods undertaken by a distributor.
 - 3.4 That the DRP/TPO erred on facts and in law in not appreciating that RPM being a traditional method is to be preferred over TNMM, a transactional profit method.
 - 3.5 That the DRP/TPO erred on facts and in law in upholding the application of RPM holding that the assessee has also received commission and warranty reimbursements not appreciating that such transactions have been separately benchmarked applying TNMM.

- 3.6 *Without prejudice, that the DRP/TPO erred on facts and in law in selecting functionally different companies as comparable to the appellant for the purpose benchmarking the international transaction of import of finished goods applying TNMM.*
4. *That the AO erred on facts and in law in levying interest under section 234D of the Act.*
5. *That the AO erred on facts and in law in initiating penalty proceedings under Section 271(1)(c) of the Act*

The Appellant craves leave to add to, amend, alter or vary, any of the aforesaid grounds of appeal before or at the time of hearing.”

4. Before us, at the outset, the Learned AR submitted that though assessee has raised various grounds in the appeal before the Tribunal but the sole issue that needs adjudication is with respect to the addition of Rs.1,80,55,010/- on account of ALP adjustment of international transaction of import of finished goods and his submissions are only with respect to the same.

5. TPO in the order has noted that assessee company is a wholly owned subsidiary of Topcon Corporation, a company incorporated in Japan and is engaged in the business of trading and service of surveying instruments. It was noted by him that assessee had entered into various international transactions, the details which are tabulated in para 3 of the order. With respect to purchase of trading goods amounting to Rs.34,51,82,326/-, it was noted that assessee had used “Resale Price Method” (RPM) as the most appropriate method to benchmark the transaction with Gross Profit (GP) to Sales as the Profit Level Indicator (PLI).

Assessee had selected 9 comparable companies for the purpose of benchmarking analysis. As per the assessee, the average Gross Profit Margin of the 9 comparable companies selected by it was at 13.14% as compared to its Gross Profit Margin of 24.59%. Since its gross profit margin was higher than the average gross profit margins of the comparable companies, it considered the international transaction of purchase of trading goods made by it from its AE to be at arm's length.

6. TPO rejected the RPM method followed by assessee as the most appropriate method for the reason that the assessee had not carried out any adjustment to the comparables for differences on functions affecting the gross margin, uncertainty with regard to the accounting consistency between the assessee and comparables and according to him there could be variation in the gross margins due to the differences in the level of activities performed. The TPO thereafter concluded that Transactional Net Margin Method (TNMM) to be the most appropriate method for the purpose of benchmarking the transactions. He held that OP/OR to be the Profit Level Indicator (PLI) and accordingly worked out the profit margin of the Assessee at 9.12%. He held the 5 companies (Aishwarya Technologies & Telecom Ltd, Adtech Systems Ltd, Vayam Technologies Ltd, Omega Transmission Pvt Ltd and Taegutee India P Ltd) to be comparable companies. He worked out the average gross margin of those 5 comparable companies at 13.82% and based on the average gross margin of

the comparable companies, worked out the upward adjustment to the income of the assessee towards the international transactions of the purchases of finished goods at Rs.1,75,60,240/-. The AO in the draft assessment order passed u/s 143(3)/144C dtd 16.12.2017 made the addition as directed by the TPO and computed the total taxable income at Rs 7,91,00,440/-.

7. Aggrieved by the draft assessment order, Assessee carried the matter before DRP. DRP in their directions passed u/s 144C(5) dated 17.9.2018 upheld the TNMM method adopted by the TPO to be the most appropriate method for benchmarking the transactions but however directed the TPO/AO to include/exclude certain companies as comparables and recompute the adjustments. Pursuant to the aforesaid directions of DRP, AO in the final assessment order passed u/s 143(3)/144C dtd 26.10.2018 computed the addition on account of international transactions at Rs 1,80,55,010/- and the total income was thus determined at Rs 7,95,95,210/-. Aggrieved by the order of AO, the Assessee is now before us.

8. Before us, Learned AR submitted that that the only grievance of the assessee is on account of addition made towards the purchase of finished goods undertaken by the assessee. He submitted that during the year assessee had entered into the international transactions with its associated enterprises (AEs) on account of purchase of finished goods, purchase of

promotional items, purchase of fixed assets, receipt of commission reimbursement of expenses and receipts on account of reimbursement expenses and warranty.

9. As far as the other transactions i.e. receipt of commission in respect of sales made by the associated enterprise to third party customers, purchase of fixed assets and purchase of sales promotion items are concerned, he submitted that assessee had benchmarked those transactions separately by applying TNMM method at the entity level and those have been accepted by the authorities and therefore there is no dispute with respect to it. The only dispute is with respect to the adjustment made to the purchase of finished goods (surveying instruments). He submitted that during the year assessee had purchased the surveying instruments from its associated enterprises. It had acted as the full fledged distributor and the goods that were purchased from its AE had been sold to unrelated parties without any value addition. He submitted that since the goods were purchased and resold without any value addition, RPM was the most appropriate method to establish the arm's length nature of international transaction. He submitted that the RPM method is the most appropriate method in terms of section 92C(1) and Rule 10B(1)(b) of the IT Rules because RPM method evaluates whether the gross profit earned in a controlled transaction is at arm's length with reference to the gross profit over sales earned in a comparable uncontrolled transaction. He submitted that while applying RPM

method, gross profit margin is seen with reference to items purchased and sold by an independent enterprise in comparable uncontrolled transactions vis a vis the one in controlled transactions. He submitted that RPM is primarily intended to measure the value of services performed by a buyer/reseller of goods acting as a pure distributor without adding any significant value addition. He submitted that the results derived after applying the RPM method generally are the most direct and reliable measure of an arm's length for the controlled transaction in the case of transaction of the purchase of traded goods. He submitted that it is a settled judicial position that in cases where ALP of a transaction can be determined by applying any of the direct methods namely CUP, RPM, CPM then they should be preferred over the transactional profit method namely TNMM and PSM. He thereafter submitted that when there is specific method specified in Rule 10B for determining the arm's length price of an international transaction of resale of the goods, the same needs to be applied in preference over the other methods and and in support of his aforesaid contentions he placed reliance on the decision of the Hon'ble Apex Court in the case of Britannia Industries Ltd. reported in 278 ITR 546 (SC) and in the case of New Okhla Industrial Development Authority vs. CCIT reported in (2018) 95 taxmann.com 58 (SC). He further submitted the guidance note issued by Institute of Chartered Accountants of India also mandates the application of RPM method where the reseller does not add any significant value to the product.

10. He thereafter submitted that Hon'ble Delhi High Court in case of Matrix Cellular International Services (P.) Ltd. reported in 90 Taxmann.com 54 has held the RPM method to be the most appropriate method in the case of a distributor who does not add any value to the goods. He also relied on some other decisions of the High Courts/Tribunals cited in the Synopsis that was filed by the Assessee. He thereafter, submitted that assessee has carried out similar activities of purchase of trading goods in earlier years and in subsequent year and those trading transactions were accepted at Arm's Length by applying the RPM method and no adjustments on account of ALP were made in those years by the Revenue authorities. In support of his aforesaid contention, he pointed to the order passed u/s 92CA(3) dated 31.1.2016 for AY 2012-13, order passed u/s 143(3) dated 30.3.2016 for AY 2013-14 and order dtd 15.12.2017 passed u/s 143(3) for AY 2015-16 the copies of which are placed at pages 460 to 465 of the paper book consisting of case laws. He thereafter submitted that though the principles of *Res Judicata* are not applicable to Income tax proceedings but at the same time, a different view is not warranted unless there are material changes in the facts and there are no material changes in the facts in the year under consideration and the other years. In support of his aforesaid contentions, he relied on the decision of H'ble Apex Court in the case of Radhasoami Satsang Vs CIT (1992) 193 ITR 321.

11. He thereafter pointing to the table at page 35 of the Synopsis submitted that the gross margins of the assessee at 24.59% is higher than the gross margin of the comparable companies finally selected by the TPO which is at 14.60%, and in such a situation no adjustment on account of import of finished goods is warranted. He, therefore, submitted that the additions made by TPO and upheld by DRP is uncalled for.

12. Learned DR on the other hand pointing to the observations made by TPO in his order submitted that the TPO has rightly rejected the RPM method and had correctly held the TNMM method to be the most appropriate method. He further submitted that res judicata principle does not apply to income-tax proceedings as each assessment year is a separate unit and what is decided in one year may not apply in the following year. He therefore submitted that the order of AO needs to be upheld and the appeal of the Assessee deserves to be dismissed.

13. We have heard the rival submissions and perused the material available on record. The issue in the present case is with respect to TPO addition of Rs.1,80,55,010/- made on account of the ALP on purchase of goods.

14. It is an undisputed fact that assessee is into the business of distribution of surveying instruments. It is the assessee's submission that assessee was purchasing finished goods from its

associated enterprises and selling it to unrelated parties without any value addition. The aforesaid contention of the assessee of reselling the goods to unrelated parties without any value addition has not been controverted by Revenue.

15. We find that the Assessee had applied RPM method to benchmark the international transactions of the goods purchased for resale. The RPM method followed was rejected by the TPO and he held that TNMM method to be the most appropriate method for determining the international transactions.

16. We find that various benches of the Tribunal have held that when the assessee purchases the products from its AE's and resales the same without any further value addition or further processing than RPM is the most appropriate method for determination of ALP of international transactions for which reference can be made to the decision of H'ble Delhi High Court in the case of Matrix Cellular International Services P Ltd (90 Taxmann.com 54), Delhi Bench of Tribunal in case of Swarovski India Pvt. Ltd. Vs ACIT [(2017) 78 taxmann.com 325 (Del)], Mumbai Tribunal in the case of Mattel Toys India P Ltd Vs DCIT [(2013) 34 Taxmann.com 203], Delhi Tribunal in the case of Nokia (India) Pvt. Ltd.(ITA No.242/Del/2010) and Videojet Technologies (I) P Ltd Vs ACIT (ITA No 6956/Mum/2012).

17. We further find that the Pune Benches of the Tribunal in the case of ACIT vs MSS India Pvt Ltd ((2009) 123 TTJ 657 (Pune) has observed as under:

“While there is no particular order or priority of methods which the assessee must follow, and no method can invariably be considered to be more reliable than others, on a conceptual note, transactional profit methods (i.e. Transactional Net Margin Method and Profit Split Method) are treated as methods of last resort which are pressed into service only when the standered methods, which are also termed as ‘traditional methods’, (i.e. Comparable Uncontrolled Price Method, Resale Price Method and Cost Plus Method) cannot be reasonably applied.”

18. We further find that it is assessee’s contentions that the purchase of trading goods undertaken by the assessee and application of Reselling Price Methods for determining the arm’s length price has been accepted by the Revenue in preceding and succeeding assessment years. The aforesaid contention of the Ld AR is found correct in view of the assessment orders of the Assessee for AY 2012-13,2013-14 and AY 2015-16 (which are placed at page 460 to 465 of the paper book). Further before us, the aforesaid contentions of the Ld AR have not been controverted by Revenue. We are aware of the fact that *Res Judicta* principles are not applicable to the income tax proceedings but at the same time we find that the Honorable Supreme Court in the case of Radhasoami Satsang vs. CIT (supra) has held that where a fundamental aspect permeating through the different assessment years is accepted one way or the other, a different value in the matter is not warranted unless there are any material change of facts.

19. Before us, no distinguishing feature in the facts for the year under consideration and that of earlier and subsequent years, wherein the RPM method which been followed by the assessee, has been brought by the Revenue. Considering the totality of the aforesaid facts, we are of the view that DRP was not justified in rejecting the RPM method followed by assessee. We, therefore set aside the order and direct the AO to compute the ALP by following the RPM method. **Thus, the grounds of appeal of the assessee are allowed.**

20. **In the result, the appeal filed by the assessee is allowed.**

Order pronounced in the open court on 29.06.2020

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Priti Yadav, Sr.PS

Sd/-

**(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

Date:- 29.06.2020

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI