आयकर अपीलीय अधिकरण "के" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

माननीय श्री पवन सिंह, न्यायिक सदस्य **एवं**
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।

BEFORE HON'BLE SHRI PAWAN SINGH, JM AND HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

(Through Video Conferencing Mode)

आयकरअपील सं./ I.T.A. No.882/Mum/2014
(**निर्धारण वर्ष** / Assessment Year:2009-10)
&
आयकरअपील सं./ I.T.A. No.396/Mum/2015
(**निर्धारण वर्ष** / Assessment Year:2010-11)
&
आयकर अपील सं./ I.T.A. No.6667/Mum/2016
(**निर्धारण वर्ष** / Assessment Year:2012-13)

M/s. Lubrizol India Private Limited Plant: 9/3, Thane Belapur Road Turbhe, Navi Mumbai – 400 705 Maharashtra CIN: U23201MH1966PTC013538	**बनाम**/ Vs.	**The Asstt. Commissioner of Income Tax -LTU** 29th Floor, Centre No.1 World Trade Centre, Cuffe Parade Mumbai-400 005.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAACL-0126- H**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Shri Percy Pardiwala-Ld. Sr. Counsel
Revenue by	:	Shri Anand Mohan-Ld. CIT-DR

सुनवाई की तारीख/ **Date of Hearing**	:	15/07/2020
घोषणा की तारीख / **Date of Pronouncement**	:	27/07/2020

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. The grievance of the assessee in all the above three appeals for Assessment Years 2009-10, 2010-11 & 2012-13 is more or less the same. Therefore, the appeals were heard together and are now being disposed-off by way of this consolidated order for the sake of convenience and brevity. It is admitted position that adjudication in any one year shall apply to other years also. Taking AY 2009-10 as the lead year we proceed with the adjudication of all these appeals.

ITA No. 882/Mum/2014, AY 2009-10

2. This appeal contest certain Transfer Pricing (TP) adjustments as made by Ld. Assessing Officer (AO) in final Assessment order dated 03/12/2013 passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 pursuant to the directions of Ld. Dispute Resolution Panel-1, Mumbai (DRP) u/s 144C(5) dated 30/10/2013. The assessee has been saddled with Transfer Pricing Adjustment of Rs.347.41 Lacs in the final assessment order, which is the substantial subject matter of this appeal. The assessee is before us on following grounds of appeal: -

> 1. That on the facts and circumstances of the case and in law the Ld. A.O erred in assessing the income of the appellant under the normal provisions of the Act at Rs.69,69,74,500/- against the returned income of Rs.66,22,32,943/- based on the directions received from Hon'ble Dispute Resolution Panel ("DRP") upholding the adjustment to the transfer price proposed by the Ld. Transfer Pricing Officer ("TPO").
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> 2. **Transfer Pricing**: -
>
> 2.1 That on facts and circumstances of the case and in law the Ld. A.O/TPO erred in proposing and the Hon'ble DRP further erred in upholding an adjustment of Rs.3,47,41,557/- in respect of the international transactions pertaining to export of chemical additives, alleging that the same to be not at arm's length in terms of the provisions of section 92C(1) and 92C(2) of the Act r.w.r. 10D of the Income Tax Rules, 1962 ("Rules").
>
> 2.2 That on facts and circumstances of the case and in law the Ld. TPO/DRP/AO erred in rejecting the application of Transactional Net Margin Method ('TNMM") as the most appropriate method used by the appellant for benchmarking the international transactions in respect of its exports of chemical additives to its Associated Enterprise ("AEs").

2.3 That on facts and circumstances of the case and in law the Ld. TPO/DRP/AO failed to appreciate that the Operating Margin ('OM") earned by the appellant of 13.57% at entity level is higher than the arithmetic mean of updated OM of 8.86% of comparable companies (as calculated by the appellant) and the updated OM of 4.54% of appellant's direct competitor i.e. India Additives Ltd., which justifies that the international transactions entered into by the appellant are at arm's length.

2.4 That on facts and circumstances of the case and in law the Ld. TPO / DRP/AO erred in not appreciating that, the appellant during the relevant period has performed his scientific analysis for selection of the most appropriate method having regard to the provisions of the Rule 10B of the Rules.

2.5 That on facts and circumstances of the case and in law the Ld. TPO / DRP/Assessing Officer erred in considering Comparable Uncontrolled Price ("CUP") method as the most appropriate method to benchmark the export of chemical additives.

2.6 That on facts and circumstances of the case and in law the Ld. TPO /DRP/Assessing Officer erred in appreciating the facts and reasoning of the appellant in relation to volume, geography and other differences due to which CUP method could not be treated as the most appropriate method.

2.7 That on facts and circumstances of the case and in law the Ld. TPO/DRP/Assessing Officer erred in disregarding the submissions suggesting appropriate adjustments to be made to the export price charged to AEs and sales price charged to unrelated parties in India, to make the same comparable with each other (without prejudice to its contention that CUP is not the most appropriate method to benchmark the export of chemical additives).

2.8 That on facts and circumstances of the case and in law the Ld. TPO/DRP/AO failed to appreciate that the appellant is a 50:50 joint venture and the transactions of the appellant with AE of one joint venture partner is generally monitored by the other joint venture partner who would want to protect his interest in profits from the joint venture.

2.9 That on facts and circumstances of the case and in law the Ld. TPO/DRP/AO erred in rejecting the whole entity approach adopted by the appellant for benchmarking the export of chemical additive which the Revenue Authorities (Department) had accepted in the previous assessment for A.Y 2002-03, A.Y 2003-04, A.Y 2004-05 and A.Y 2005-06.

2.10 That on facts and circumstances of the case and in law the Ld. TPO /DRP/AO erred in rejecting the segmental information between the AE and non-AE as provided by the appellant by making irrational assumptions and without providing any cogent reasons.

3. Levy of interest u/s 234B,234C and 234D: -

That on facts and circumstances of the case and in law the Ld. Assessing Officer, erred in levying interest under section. 234B, 234c and 234D.

4. Levy of Penalty u/s. 271(1)(c):c-

That on facts and circumstances of the case and in law the Ld. Assessing Officer, erred in proposing the initiation of the penalty proceedings u/s. 271(1)(c) of the Act.

3.1 The Ld. Sr. Counsel for assessee, Shri Percy Pardiwala, drew our attention to the orders of lower authorities to submit that the Transactional Net Margin Method (TNMM) as adopted by the assessee to benchmark the international transactions has been rejected without any sound basis particularly when the same methodology has been accepted by the revenue in most of the earlier as well as in succeeding years. In particular, reliance has been placed on the recent order of Tribunal in assessee's own case for AYs 2005-06 to 2007-08, ITA Nos. 8148/Mum/2010, 2305/Mum/2012 & 1821/Mum/2011, common order dated 20/11/2019 to submit that the similar methodology as adopted by the assessee has been accepted by the Tribunal in those years and facts are identical in these years and therefore, same view may be taken in the matter. In other words, Ld. Sr. Counsel submitted that the issue stood covered in assessee's favor by the cited order of the Tribunal. A copy of the order has been placed on record.

3.2 Per Contra, Shri Anand Mohan, Ld. CIT-DR submitted that principle of *res-judicata* would not apply to income tax proceedings and since the assessee failed to quantify / supply the necessary information as called for by Ld. TPO, the additions were justified. In the said background Ld. CIT-DR justified the application of comparable uncontrolled price (CUP) method and rejection of TNMM method by Ld. TPO to benchmark the concerned transactions.

4.1 We have carefully heard the rival submissions and perused relevant material on record including the cited decision of Tribunal in

assessee's own case. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

4.2 The material on record would show that the assessee is a 50:50 joint venture between LZ US and Indian Oil Corporation Ltd. The assessee is specialty chemical company serving the needs of the Petroleum industry. The assessee is stated to be engaged in the business of developing, manufacturing and marketing of additive systems for Automotive and Industrial Lubricants and for treatment of fuels.

4.3 A draft assessment order was passed by Ld. AO on 11/02/2013 pursuant to the order of Ld. Transfer Pricing Officer-1(5), Mumbai (TPO) dated 27/11/2012. The assessee preferred objections against the same before Ld. DRP which were disposed-off vide directions dated 30/10/2013. Pursuant to the said directions, final assessment order was passed on 03/12/2013 incorporating certain TP adjustments. Against this order, the assessee is under appeal before us.

4.4 The international transactions carried out by the assessee with its Associated Enterprises (AE) were referred to Ld. TPO for determination of Arm's Length Price (ALP). These transactions were in the nature of Import of raw material & finished goods, payment towards fee, exports of chemical additives and commission on customer service support activities. In assessee's TP study report, all these transactions were aggregated and benchmarked using entity level TNMM method. One of the transactions viz. export of chemical additives aggregated to Rs.11206.20 Lacs. The assessee had exported 9 products to its various

AEs. Similar products were sold to non-AE's in domestic as well as in export markets. Accordingly, Ld. TPO, observing the average rate of these products as sold to AE and non-AEs, concluded that there was difference in rates charged to AEs and non-AEs. This differential worked out to be Rs.380.25 Lacs in 7 product categories, the computation of which has been given in para-7 of Ld. TPO's order. In other words, CUP method was adopted to benchmark these transactions. Although, the assessee, in its submissions, attributed the difference in prices to quantifiable factors as well a non-quantifiable factor, however, the same could not find favor with Ld. TPO who termed the explanation to be very vague since the assessee could not carry out the effective quantification of the differences. Another plea that the segmental profit in AE segment was higher than margin on sales to non-AEs was also rejected since the TNMM method was found to be not justified. Finally, after granting an adjustment for packing material @Rs.6.50 per Kg, the differential was re-worked to Rs.347.41 Lacs and the said adjustment was proposed in its order dated 27/11/2012.The said adjustment was incorporated in draft assessment order dated 11/02/2013 which was subjected to objections before Ld. DRP.

4.5 The Ld. DRP upheld the application of CUP method to benchmark the transactions in preference to TNMM method. The plea that such methodology was accepted by revenue in AYs 2002-03 to 2005-06 was rejected since it was held that principle of res-judicate would have no application in Income Tax Proceedings. Reliance was placed on the directions of Ld. DRP for AY 2006-07. Finally, the action of Ld. TPO in

suggesting the impugned adjustment was upheld, against which the assessee is under further appeal before us.

5. As submitted by Ld. Sr. Counsel, we find that the assessee's methodology to benchmark the stated transactions was subject matter of dispute before this Tribunal for AYs 2005-06 to 2007-08, ITA Nos. 8148/Mum/2010, 2305/Mum/2012 & 1821/Mum/2011, common order dated 20/11/2019 wherein the matter was concluded by the co-ordinate bench in assessee's favor in the following manner: -

> 20. In our considered opinion the aforesaid reasoning fully applies to the facts of the present case. Without any change in facts and law the Transfer Pricing officer has changed the consistently applied TNMM method to the cup method. While doing so he has blandly held that TNMM method is not full proof. Furthermore, the assessee's objection that the comparison of other transactions have to be considered by adjustment of various factors is also not fully dislodged.
> 21. In the background of the aforesaid discussion and precedent we hold that the change in method from TNMM to CUP method is not justified. Hence, we set aside the order of the Assessing Officer. Accordingly, the order of learned CIT(A) for A.Y. 2005-06 is upheld and the order of Assessing Officer pursuant to DRP direction for A.Y. 2006-07 and 2007-08 is set aside.

As it could be observed that coordinate bench held that consistently applied TNMM method could not be disregarded without there being any change in any facts.

Upon perusal of the said order and the case records, we find that facts are pari-materia the same in earlier AYs as well as in AY 2009-10. In this year also, the assessee's consistent TNMM methodology has been rejected by Ld. TPO without any sound basis. Although the principle of res-judicate are not applicable to Income Tax proceedings, however, the rule of consistency would debar the revenue to change its stand in difference assessment years without any sound basis, facts and circumstances being identical. The said proposition is well supported by

the decision of Hon'ble Bombay High Court in the case of **PCIT v/s. Quest Investment Advisors Pvt. Ltd. reported in [2018] 409 ITR 545** wherein it has been held that when a principle has been accepted by the Revenue in earlier years as well as in subsequent years then the Revenue is bound by it unless there is a change in law or change in facts therein, which change has to be pointed out in the assessment Order. In so doing the jurisdictional High Court followed the judgment of the Supreme Court in **Bharat Sanchar Nigam Ltd. v/s. Union of India reported in [2006] 282 ITR 273** where the court had drawn a distinction between the principle of res judicata and consistency.

We find that similar methodology has been accepted by the revenue for AYs 2008-09 & 2011-12. Further, the application of TNMM method has been accepted by the Tribunal for AYs 2005-06 to 2007-08 and no change in facts or circumstances has been demonstrated before us for this year. Therefore, following the rule of consistency and the cited order of Tribunal in assessee's own case, we hold that TNMM methodology as adopted by the assessee to benchmark the transactions was to be accepted. Since, the margin of the assessee under this method have been shown to be within ALP range, the impugned adjustment of Rs.347.41 Lacs stand deleted.

6. The only other ground urged before us is correct computation of interest u/s 234B, 234C & 234D. For this, it would suffice on our part to direct Ld. AO to compute interest in accordance with law. We direct so.

7. Resultantly, the appeal stand partly allowed to the extent indicated in the order.

ITA No. 396/Mum/2015, AY 2010-11

8.1 It is accepted position that since facts are similar, the adjudication for AY 2009-10 would apply with full force to AY 2010-11 as well. The Ld. TPO has proposed similar adjustment of Rs.229.00 Lacs by applying CUP method. The same has been upheld by Ld. DRP in its directions dated 14/10/2014. Facts being pari-materia the same, our adjudication for AY 2009-10 shall mutatis-mutandis apply to this year also. By deleting the impugned TP adjustment, the ground raised, in this regard, stand allowed in similar manner.

8.2 In ground No.3, the assessee is contesting the addition of interest income on fixed deposits for Rs.19.93 Lacs. Facts qua the same are that there was a difference of Rs.19.93 lacs in interest income as reported by the assessee vis-à-vis interest income as reflected in TDS certificates. Accordingly, the differential was added to the income of the assessee. Before Ld. DRP, the assessee contended that following consistent method of accounting, the differential interest was already offered to tax in next assessment years and therefore, there was no loss to the revenue. However, the said plea could not find favor with Ld. DRP who upheld the action of Ld. AO.

8.3 Before us, Ld. Sr. counsel explained that the tenure of the fixed deposits was spread over a period of 2 financial years. The interest income up-to 31/03/2010 was correctly estimated, accounted for in the books and offered to tax whereas the balance amount was already offered to tax in AY 2011-12. The same is in accordance with mercantile system of accounting being followed by the assessee. In this background, it was pleaded that the

addition of Rs.19.93 Lacs ought to be deleted as the same has already been offered to tax in AY 2011-12 and there would only be timing difference.

8.4 Upon perusal of final assessment order dated 29/08/2016 for AY 2012-13, we find that the assessee has already been granted credit of Rs.35.83 Lacs, being excess interest income offered by the assessee during AY 2012-13. The same has been claimed on the plea that Ld. AO had added short income of Rs.19.93 Lacs for AY 2010-11 and Rs.32.87 Lacs for AY 2011-12. The said plea has been accepted by Ld. AO and the assessee's income has been reduced by Rs.35.83 Lacs in that year Therefore, we find that relief has already been granted to the assessee in AY 2012-13. Consequently, this addition would stand confirmed in AY 2010-11. The credit of TDS would be granted as per law. This ground stand dismissed.

8.5 The Ld. AO is directed to compute interest in accordance with law.

8.6 Resultantly, the appeal stands partly allowed to the extent indicated in the order.

ITA No. 6667/Mum/2016, AY 2012-13

9.1 It is accepted position that facts in this year are similar to AY 2009-10 and therefore, the adjudication for AY 2009-10 would apply with full force to this year as well. The assessee has been saddled with TP adjustment of Rs.491.43 Lacs in final assessment order dated 29/08/2016. The said adjustment is on similar lines as in AY 2009-10. The Ld. TPO applied CUP method which was upheld by Ld. DRP in its directions dated 05/07/2016. Aggrieved, the assessee is under further appeal before us. Facts being

pari-materia the same, our adjudication for AY 2009-10 shall mutatis-mutandis apply to this year also. By deleting the impugned TP adjustment, the ground raised, in this regard, stand allowed in similar manner.

9.2 The Ld. AO is directed to compute interest in accordance with law.

9.3 Resultantly, the appeal stands partly allowed to the extent indicated in the order.

Conclusion

10. All the appeals stand partly allowed to the extent indicated in the order.

Order pronounced on 27th July, 2020.

Sd/-	**Sd/-**
(Pawan Singh)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 27/07/2020
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

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उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai.**