

आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ “आई-2”, नई दिल्ली में

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

सुश्री सुषमा चावला, उपाध्यक्ष एवं डॉ. बी आर आर कुमार, लेखा सदस्य के समक्ष  
**BEFORE MS. SUSHMA CHOWLA, VP & DR. B.R.R. KUMAR, AM**

**[THROUGH VIDEO CONFERENCING]**

आयकर अपील सं. / ITA No. 1761/Del/2015  
निर्धारण वर्ष / Assessment Year: 2010-11

Metal One Corporation India Pvt.Ltd.,  
1<sup>st</sup> Floor, Sood Tower,  
25, Barakhamba Road,  
New Delhi-110001.  
PAN-AAFCM1225

.....अपीलार्थी / Appellant

vs

The DCIT,  
Circle-16(2),  
New Delhi

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by:  
प्रत्यर्थी की ओर से / Respondent by:

Sh. Nageshwar Rao, Sr.Adv.  
Sh. M.Barnwal, Sr.DR

सुनवाई की तारीख / <b>Date of Hearing : 01.06.2020</b>	घोषणा की तारीख / <b>Date of Pronouncement: 31.07.2020</b>
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**आदेश / ORDER**

**PER SUSHMA CHOWLA, VP**

The present appeal filed by assessee is against order of DCIT, Circle-16(2), New Delhi dated 27.01.2015 relating to assessment year 2010-11 against the order passed under section 143(3)/144C of the Income-tax Act, 1961 (in short ‘the Act’).

2. The assessee has raised following grounds of appeal:-

1. *“That on the facts and circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant for the relevant AY at INR 13,29,17,212 as against returned income of INR 12,08,08,280.*

**Transfer Pricing**

2. *That on the facts and circumstances of the case and in law, the Hon'ble Dispute Resolution Panel ("DRP") / AO / Transfer Pricing Officer ("TPO") erred in making a transfer pricing adjustment of INR 92,84,585 in respect of the international transaction relating to provision of sales support services (held as marketing support services) alleging the same to be not at arm's length in terms of the provisions of Sections 92C(1) and 92C(2) of the Act read with Rule 100 of the Income-tax Rules, 1962 ("the Rules").*

3. *That on the facts and circumstances of the facts and in law, the DRP/AO /TPO erred in not appreciating the business model, functional, asset and risk analysis undertaken by the Appellant and have further erred in not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with Rules for the determination of the arm's length price for rendering sales support services.*

4. *That on the facts and circumstances of the case and in law, the DRP/Assessing Officer/TPO have erred in arbitrarily rejecting comparable companies identified by the Appellant that were functionally comparable and in arbitrarily selecting comparable companies which were not functionally comparable, and thereby choosing an incorrect set of comparable companies in an arbitrary and subjective manner.*

5. *That on the facts and circumstances of the case and in law, the DRP/ Assessing Officer/ TPO erred in arbitrarily rejecting I modifying the search process and the filters adopted by the Appellant for the purpose of benchmarking its international transaction of rendition of sales support services.*

6. *That on the facts and circumstances of the case and in law, the DRP/ Assessing Officer/ TPO erred in not providing appropriate economic adjustments, as required under Rule 108(1)(e)(iii) of the Rules, on account*

*of differences in working capital and risk profile between the Appellant and the comparable companies.*

7. *That on the facts and circumstances of the case and in law, the DRP/Assessing Officer/TPO have erred by ignoring the provisions of Rule 108(4) of the Rules and judicial pronouncements, which advocate usage of multiple year data of comparable companies for the purpose of determination of the arm's length price as defined under section 92F of the Act.*

8. *That on the facts and circumstances of the case and in law, the DRP/Assessing Officer/TPO have erred in not restricting the adjustment to the value of international transactions .*

9. *That on the facts and circumstances of the case and in law, the DRP / AO / TPO erred in not providing the Appellant the benefit of (+ / -) 5% range as provided by the proviso to section 92C(2) of the Act.*

### **Corporate Tax**

10. *That on the facts and circumstances of the case and in law, the DRP / AO erred in rejecting the Appellant's claim for depreciation on goodwill by placing reliance on the decision of the apex Court in the case of Goetze India Private Limited vs CIT: 284 ITR 323 (SC) holding that the AO has no power to allow the claim of the Appellant unless made by way of a revised return.*

11. *That on the facts and circumstances of the case and in law, the DRP / AO erred in rejecting the claim of the Appellant for depreciation on goodwill amounting to INR 6,09,00,000 in pursuance to the Business Transfer Agreement dated June 01, 2008 for acquisition of metal division of Mitsubishi Corporation India Pvt Ltd ("MCIPL"), alleging that the Appellant has not filed any valuation report for the assets taken over from MCIPL.*

12. *That on the facts and circumstances of the case and in law, DRP / AO erred in disallowing mark- to-market foreign exchange loss amounting to INR 28,14,307 in relation to forward covers taken by the Appellant to hedge foreign currency risk alleging it to be notional and speculative in nature.*

13. *That on the facts and circumstances of the case and in law, the DRP / AO erred in disallowing the expenditure of INR 10,040 paid for*

*subscription charges for publication of advertisement alleging the same to be in the nature of donation and therefore, not an allowable expenditure under section 37(1) of the Act.*

*14. That on the facts and circumstances of the case and in law, the AO has erred in charging interest under sections 234A, 234B, 234C and 234D of the Act.”*

3. Ground of appeal No.1 raised by the assessee is general in nature and does not require any adjudication; hence, dismissed.

4. The issue raised vide Ground of appeal Nos. 2 to 9 is with regard to transfer pricing adjustment made in provision of sales support services to the Associated Enterprises (in short “AEs”). The Ld.AR for the assessee pointed out that it wishes to press Ground of appeal Nos. 2, 4 & 9 in this regard and also the additional ground No.9A.

5. The assessee has raised following additional ground of appeal:-

*9A. “As facts of case and applicable law remain identical during period under appeal as in year relating to which Advance Pricing Agreement (“APA”) was entered into subsequently, approach, basis adopted and conclusion reached in APA years deserves to be consistently applied to year under appeal.”*

6. The Ld.AR for the assessee points out that the alternate ground was that in subsequent years, the Advance Pricing Agreement (in short “APA”) proceedings have been accepted and the FAR analysis was same in the year under appeal also and the benefit of APA proceedings may also be allowed to the year under appeal.

7. The Ld.DR for the Revenue on the other hand strongly opposed the admission of additional ground and pointed out that there was no roll back of the APA proceedings for earlier years. In case the year under consideration was to be taken as part of APA proceedings then the assessee should have included the same in the list and the Transfer Pricing Officer (in short "TPO") should have been examined the claim of the assessee. The Ld.AR for the assessee further pointed out that on merits of issue of adjustment on account of transfer pricing, the limited issue was selection of comparable, allowability of working capital and risk adjustments.

8. Briefly in the facts of the case, the assessee is a wholly owned subsidiary of Metal One Japan and is in operation since 01.06.2008. During the year under consideration, the assessee was engaged in the import of steel and allied products from its AEs and resale of the same to local customers through its distribution network in India. The assessee also provided sales support services (indenting services) to its AEs. The adjustment has been made on account of segment of provision of sale support services by the assessee to its AEs. The assessee had selected Transactional Net Margin Method (in short "TNMM") as most appropriate method for benchmarking the transaction and determined Profit Level Indicator (in short "PLI") of OP/OC. The assessee has selected 17 companies as comparable and based on three years data had concluded that the transaction was at arm's length price. The Assessing Officer made reference to the TPO u/s 92CA(1) of the Act. The TPO had accepted the TNMM as the most appropriate method and determined the

PLI at 11.38%. The TPO selected fresh set of 09 comparables companies with average PLI of 23.25% and made adjustment of Rs.93,51,561/-. The Assessing Officer passed draft assessment order against which the assessee filed objections before the DRP. Consequent to the directions of the DRP, the TPO re-determined the adjustment after considering the correct margin of 02 companies and made adjustment of Rs.92,84,585/-. The Assessing Officer passed final assessment order making aforesaid adjustment in the hands of the assessee, against which the assessee is in appeal before us.

9. Though the assessee has raised several grounds of appeal but before us it has pointed out that if limited issues are decided then the margin shown by the assessee would be within the margins of the finally selected comparables. The assessee is aggrieved by the inclusion of certain companies as comparables.

10. The first concern is APITCO Ltd. Our attention was drawn to the audited financial of the said company and it was pointed out that it was engaged in multiple segments and was not functionally comparable to the assessee. Further, arguments were made for the exclusion of Global Procurement Consultants Ltd.; TSR Darashaw Ltd.; Quippo Valuers & Auctioneers Pvt.Ltd. The Ld.AR of the assessee further pointed out that vide Ground No.9A, it has raised additional issue that in case the approach, basis adopted and conclusion reached in APA proceedings for the subsequent years are applied to the year under consideration, where the FAR was same, then no adjustment is to be made in the hands of the assessee.

11. We find that the additional ground of appeal raised by the assessee is to be admitted being a legal issue. Various Benches of the Tribunal have held that the conclusion reached in APA proceedings deserves to be applied in case facts and circumstances, FAR are similar to the subsequent years. Similar view has been applied in the case of Pune Bench of the Tribunal in M/S. Honeywell Automation India Ltd. vs ACIT, Circle-7, Pune in ITA No.359/Pune/2013 vide order dated 02.11.2018 and also in Ranbaxy Laboratories Ltd. Vs. ACIT in ITA No.196/Del/2013 vide order dated 25.04.2016. Applying the said parity of reasoning, we hold that once the APA has been concluded in the hands of the assessee then the same approach/basis is to be adopted for instant Assessment Year. Accordingly, the Assessing Officer/TPO is directed to follow the approach/basis of APA applied for the subsequent year to the instant Assessment Year.

12. The Ld.AR for the assessee pointed out that in case the same is so applied then no adjustment needs to be made in the hands of the assessee. Since we have allowed additional ground in the hands of the assessee, there is no need to adjudicate the issue on merit.

13. Now, coming to the corporate issues raised by the assessee. The first issue raised vide Ground of appeal Nos. 10 & 11 is against the disallowance of depreciation on Goodwill claimed by the assessee pursuant to the Business Transfer Agreement. The assessee had made no claim of depreciation of goodwill in its return of income and the claim was made for the first time during the course of assessment proceedings. The Assessing Officer placing

reliance on the decision of Hon'ble Supreme Court in Goetze (India) Ltd. [2006] 284 ITR 323 (SC) rejected the claim of the assessee. The said claim was also rejected on merits by the Assessing Officer. The Assessing Officer proposed the addition in the hands of the assessee against which objections were filed before the DRP, who did not adjudicate the issue. The Assessing Officer passed final assessment order, not granting depreciation on goodwill, against which the assessee is in appeal before us.

14. The Ld. AR for the assessee after pointing out to the factual aspects referred to the order of the CIT(A) for Assessment Year 2011-12 and pointed out that after obtaining Remand Report from the Assessing Officer, the said claim was allowed in the hands of the assessee. The Ld.AR for the assessee further pointed out that pursuant to the agreement of slum sale, vide agreement dated 20.06.2008, sum of Rs.34 crores was paid to Mitsubishi and the difference between sale value and book value of the assets was booked and depreciation was claimed, though during the course of assessment proceedings. The Ld. AR for the assessee points out that the Hon'ble Supreme Court in Smifs Securities Ltd.: (2012) 348 ITR 302 has held that goodwill was intangible asset and depreciation is to be allowed on it. Our attention was drawn to the order of the CIT(A) in Assessment Year 2011-12 and the Remand Report of the Assessing Officer which are placed at pages 25 to 29 of the Paperbook. The assessee further pointed out that the Hon'ble Delhi High Court in Triune Energy Services (P.) Ltd. vs DCIT [2016] 237 Taxman 230 (Delhi) observed that in view of Accounting Standard 10,

consideration paid in excess of value of tangible assets was rightly classified as goodwill and therefore, further exercise to value goodwill was not warranted.

15. The Ld.DR for the Revenue took us through various covenants of the Business Transfer Agreement and pointed out that no depreciation was claimed in any of the assessment years i.e Assessment Year 2009-10 to 2011-12. He further pointed that payment of goodwill is not defined anywhere in the agreement. Further, no valuation report of any competent person was available; so, no depreciation is to be allowed on goodwill.

16. We have heard the rival contentions and perused the record. The first issue is whether the claim which has not been made in the Return of income, can the same be allowed in the hands of the assessee, if subsequently raised during the assessment proceedings. The Hon'ble Delhi High Court in CIT vs Jai Parabolic Springs Ltd. 306 ITR 42 (Del.) and Hon'ble Bombay High Court in CIT vs Pruthvi Brokers & Shareholders Pvt.ltd. 349 ITR 336 (Bom.) has held that "even if a claim made by assessee-company does not form part of original return or even revised return", the same is to be allowed in accordance with law. In such facts and circumstances, we are of the view that the claim of depreciation on goodwill needs to be considered in the hands of the assessee. The Business Transfer Agreement is dated 20.06.2008 and no depreciation on goodwill was claimed in the return of income. The case of the assessee is that the said depreciation on goodwill is allowable in the hands of the assessee. On the other hand, the case of the Revenue is that the

payment of goodwill itself is not defined in the agreement and there is no valuation report from any Competent Authorities so the said claim of depreciation on goodwill is not allowable. We are of the view that the claim can be considered in the hands of the assessee subject to verification of the factual aspects in the hands of the assessee. The Assessing Officer was of the view that the claim was not allowable because of the decision of Hon'ble Supreme Court in Goetz India Ltd. (supra); though he has made some reference to the factual aspects of the case. The DRP has not adjudicated this issue; though the CIT(A) has allowed the claim of the assessee in Assessment Year 2011-12. The present Assessment Year being the year in which agreement was entered into i.e. dated 20.06.2008, it is considered fit to remit this issue of determining resultant amount of goodwill on which depreciation is allowable in the hands of the assessee, consequent to the terms and conditions of the Business Transfer Agreement, back to the file of Assessing Officer. The Assessing Officer is directed to verify the claim of the assessee after allowing reasonable opportunity of hearing. The assessee is also directed to produce all the facts before the Assessing Officer, who shall decide the same in accordance with law.

17. The next issue raised vide Ground of appeal No.12 is against the disallowance of Rs.28,14,307/-. The Assessing Officer treated the said loss on account of restatement of forward contracts to be notional loss following CBDT instruction No.3 of 2010 and disallowed the same. The Assessing Officer also treated the transaction to be speculative transaction under

section 43(5) of the Act. The DRP confirmed the disallowance of Mark to Market foreign exchange loss and in consequence the Assessing Officer passed the final assessment order, against which the assessee is in appeal before us.

18. The Ld.AR for the assessee placed reliance on the decision of Hon'ble Delhi High Court in CIT vs Industrial Finance Corporation of India Ltd. [2009] 185 TAXMAN 296 (Del.). The Ld.AR for the assessee further pointed out that in the succeeding year, the gain arising on similar transaction was assessed to tax.

19. We have heard the rival contentions and perused the record. The issue is raised against the disallowance of Mark to Market foreign exchange loss of Rs.28,14,307/-. The assessee has booked the said loss on account of reinstatement of forward contract. The Assessing Officer had treated it to be notional and also speculative in nature. The issue stands covered by the decision of Hon'ble Delhi High Court in CIT vs Industrial Finance Corporation of India Ltd. (supra); further Revenue's SLP(C).CC No.10349 of 2020 against this decision was dismissed by Hon'ble Supreme Court vide order dated 09.07.2020. The Hon'ble Bombay High Court in Pr.CIT vs International Gold Company Ltd. Tax Appeal 1827 of 2016 allowed mark to market loss on revaluation of forward exchange contracts and also held that CBDT Instruction No.3 of 2010 dated 23.03.2010 cannot be applied.

20. Following the same parity of reasoning, we reverse the orders of Assessing Officer in this regard and direct the Assessing Officer to delete the disallowance made on account of mark to market foreign exchange loss. Ground of appeal No.12 raised by the assessee is thus allowed.

21. Now, coming to the Ground No.13 raised by the assessee which is against the disallowance of subscription charges of Rs.10,000/-. The amount was treated as donation by Assessing Officer and disallowed u/s 37(1) of the Act and the final assessment order was passed. We find no merit in the plea of the assessee where the amount is paid as donation to society. The assessee has enclosed the receipt and at best the assessee is entitled to claim deduction u/s 80G of the Act. The Assessing Officer may verify the same and allow the claim in accordance with law.

22. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 31<sup>st</sup> July, 2020.

**Sd/-**

**(DR. B.R.R. KUMAR)**  
लेखा सदस्य/ACCOUNTANT MEMBER

**Sd/-**

**(SUSHMA CHOWLA)**  
उपाध्यक्ष / VICE PRESIDENT

दिल्ली / दिनांक Dated : 31<sup>st</sup> July, 2020

\* Amit Kumar \*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. मुख्य आयकर आयुक्त / The Pr. CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, दिल्ली / DR, ITAT,  
Delhi
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक रजिस्ट्रार, आयकर अपीलीय अधिकरण ,दिल्ली  
**Assistant Registrar, ITAT, Delhi**