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

BEFORE SHRI SAKTIJIT DEY, JM & SHRI S. RIFAUR RAHMAN, AM

आयकरअपीलसं./ I.T.A. No. 6601/Mum/2017
(**निर्धारणवर्ष** / Assessment Year: 2013-14)

M/s Tokheim India Pvt. Ltd. Building No. 2, Plot No. 66, TTC Industrial Area, MIDC, Mahape, Navi Mumbai, Thane, Mumbai-400710	**बनाम**/ Vs.	ITO – 15(3)(1), Aayakar Bhavan, Churchgate Mumbai-400 020
स्थायीलेखासं./जीआइआरसं./PAN No. AACCK3414F		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Pankaj R. Toprani /Ms. Krypa R. Toprani, ARs
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri Uodal Raj Singh, DR
सुनवाईकीतारीख/ **Date of Hearing**	:	16.03.2020
घोषणाकीतारीख / **Date of Pronouncement**	:	27.07.2020

आदेश / O R D E R

Per S. Rifaur Rahman, Accountant Member:

The present appeal filed by the assessee is against the final order of assessment passed u/s 143(3) r.w.s. 144C(1) of I.T. Act, 1961 in pursuance of the directions issued by the Dispute

Resolution Panel (in short 'DRP') u/s 144C(5) of the Act vide order dated 29.06.2017 for AY 2013-14.

2. At the time of hearing, it is noticed that assessee has filed this appeal with the delay of 32 days and filed an affidavit with the reason that it is beyond the control of the assessee which resulted in a delay of 32 days in filing the appeal. In the reasons assessee has mentioned that the company was under crisis due to shifting of operations from old premises to another new location, because of this the management was occupied with finalization of office and factory location and other necessary documentation and operation of statutory records of various government authorities. Due to shifting, the final assessment order was received by non-finance and accounts team. It took some time to locate the final assessment order and also financial accounts team were engaged in upgradation of company's ERP software due to implementation of new GST requirements and other activities. Ld AR submitted that because of the above reasons the assessee could file the appeal with the delay. On the other hand, Ld DR objected to the above reasons. After considering the submissions of the assessee we are satisfied that the reasons brought to notice

by Ld AR is reasonable grounds for such delay and accordingly we condone the delay and proceed to hear the appeal.

3. At the time of hearing Ld AR submitted that assessee has filed the grounds of appeal in which assessee is pressing only ground No. 2 all other grounds are not pressed. Accordingly, we dismiss the ground No. 1, 3 and 4 as not pressed.

4. The brief facts relating to ground No. 2 are, assessee is a subsidiary of Tokheim Group S.A.S (Tokheim), which is a French-based manufacturing Co. It is one of the world leading manufacturers and services of fuel dispensing equipment. With operations in many countries around the globe, it offers customers a complete range of fuel dispensers and pumps, retail automation system, payment terminals, media devices, replacement parts and upgrade kits, and a full range of support services including service station construction and maintenance.

5. The assessee is engaged in the manufacture of fuel dispenser, which are used for dispensing of patrol or diesel at the petrol pumps. The assessee manufactures up to 6 hoze fuel dispensers. It manufactures these dispensers using both

indigenous raw materials and imported materials from third-party vendors as well as from associated enterprise. During this year assessee purchased fixed assets of ₹ 23,20,989/– from its AE Tokheim UK Ltd. Assessee submitted details of international transactions reported for this assessment year in which assessee has declared the details of fixed assets purchases and method adopted for TP analysis declared as 'other method'. At the time of assessment, TPO asked the assessee to produce relevant details of such purchases and justify ALP of the transaction. The assessee produced Bill of purchase from its AE and also bills of corresponding purchase made by its AE. The copy of the bills are part of TP order. TPO observed that the AE has raised bills of Pulser Test Rig and Metre on assessee while corresponding bill raised by E.P Engineering Co Ltd on its AE UK Ltd. He observed that it shows various items that too in quantity ranging from 30 to 1500. The items mentioned in both the bills are not same and therefore it is not accepted as a benchmark for comparing price charged by AE. Further he observed that the assessee failed to prove that AE has purchased the assets from other entity and supplied the same. Accordingly TPO observed

that assessee has failed to prove arms length of transaction and accordingly he treated it as Nil and made adjustment of ₹ 23,20,989/–. Aggrieved with the above order assessee preferred an appeal before the DRP.

6. Before the DRP, the assessee submitted a detailed calculation of 5% markup on cost along with the sample invoices pertaining to the raw materials required to manufacture fixed assets i.e. Pulser Test Rig and Metre Calibration Rig along with sample invoices of the fixed assets. It has submitted 100% of the raw material invoices. The assessee provided the working of the cost of fixed assets in the below chart:

Sr. No.	Supplier	Invoice reference	Amount inGBP	Amount in Euro	GBPto Euro Conversion rate
RM1	BROWNE & TAWSE	1558753	74.97	95.36	1.272
RM2	BROWNE & TAWSE	1559712	L 180.00	228.96	1.272
RM3	R.S. COMPONENTS	84973623	u 330.40	420.27	1.272
RM4	RES PRECISION ENGINEERING	2957	1,220.85	1,552.92	.1.272
RM5	R.S. COMPONENTS	84501568	178.86	227.51	1.272
RM6	BESPOKE BITS LTD	8673	5,800.00	7,377.60	1.272
RM7	RS Components - India test station	85780607	170.22	216.52	1.272

RM8	PIRTEK HOSES ASSEMBLIES	75709	253.14	321.99	1.272
RM9	R.S. COMPONENTS	86232281	25.07	31.89	1.272

Sr. No.	**Supplier**	**Invoice reference**	**Amount inGBP**	**Amount in Euro**	**GBPto Euro Conversion rate**
RM10	E P ENGINEERING.	11978	6,161.58	7,837.53	1.272
RM11	JOHN FRANKLIN	1	9,216.00	11,722.75	1.272
	Total actual costs incurred (A)		23,611.09	30,033.31	
Sr. No.	Customer invoices	Invoice reference		Amount in Euro	
Tl	Pulser rig	150624		9,217.43	
T2	Meter rig	150623		22,317.75	
	Total value invoiced (B)			31,535	
	Mark-up amount (C) = (A)-(B)			1,501.87	
	Mark-up (%) on cost (C / A)			5.00%	

7. The assessee submitted that the markup of 5% on cost as charged by its AE would be required to cover the freight, overheads and other general cost to be incurred by it while undertaking the sales. Accordingly, assessee selected other method as per rule 10AB as the most appropriate method and considered the transaction of purchase of fixed assets to be at arm's length. After considering the submissions of the assessee, DRP rejected the contention of the assessee by observing that out of the details submitted, it cannot be ascertained as to the rational for charging the markup by the AE. The reconciliation between the invoices for raw materials being converted into fixed assets is not documented in a manner whereby the contention of the assessee can be sustained. Therefore, it sustained the treatment of ALP made by the TPO.

8. Aggrieved with the above order, assessee is in appeal before us objecting to the adjustment made by the TPO and the same was sustained by DRP. At the time of hearing Ld AR brought to notice details of the workings submitted before DRP and brought to notice details of invoice raised by its AE along with copies of invoices raised by the different suppliers to its AE

which is part of paper book submitted before us. He submitted that TPO treated the ALP Adjustment as nil. He objected to the treatment of ALP adjustment without applying any method as specified in the income tax rules. He submitted that TPO cannot make ALP adjustment without following any method, for the proposition he relied in the case law **DCIT versus C – DOT Alcatel – Lucent Research Centre Private Limited (2016) 66 taxman.com 281 (Delhi – tribunal) and CIT versus Lever India Exports Ltd (2017) 78 taxman.com 88 (Bombay).**

9. Further, he submitted that assessee has imported these rigs and meter and customs authority has accepted the cost and the documentation, therefore it cannot be rejected. The Customs follows different method of ALP. He prayed that the ALP adjustment made by TPO be deleted.

10. On the other hand, Ld DR supported the findings of tax authorities and submitted that there is no comparabilities available for the transaction.

11. Considered the rival submissions and material on record. We notice that assessee has entered into various international

transactions and one of the transaction is purchase of fixed assets from its AE. There is no dispute that assessee has imported certain rigs from its AE in UK. The issue before us is assessee has declared this transaction as international transaction and adopted the 'other method' for the purpose of arms length price. By declaring other method as appropriate method and treating the 5% markup as ALP for the transaction. We notice that TPO verified the invoices submitted by the assessee and found that there is difference in quantities mentioned in both the invoices and accordingly rejected the submissions of the assessee. On the other hand, assessee has submitted a detailed chart for purchase of Pulser Rig and Pulser Test Rig along with copies of invoices by other suppliers to its AE in UK. We noticed that assessee has filed one invoice from its AE for purchase of Pulser Rig for the value of Euro 9217 and invoice of EP Engineering. The TPO verified the same and came to the conclusion that there is variation in quantities mentioned in both. However, we gone through the submissions made by the assessee before DRP. We notice that assessee has purchased fixed assets by way of 2 invoices, 1st invoice for purchase of Pulser Rig and 2nd invoice

for Metre Rig for the total cost of euro 31,535/– and includes a markup of 5% on the above invoice. However, the AE has submitted the documentation for supply of above Rigs. The breakup of the invoices and a copy of the invoice from John Franklin who has made the above rigs by utilizing the various raw materials from the different suppliers and he charged euro 11,722.75/-. All these details are part of paper book submitted before the DRP as well as before us. It clearly indicates that assessee has imported these assets. Since it is an international transaction, without documentation the assessee would not have cleared these assets from customs. It also declared this transaction as international transaction. In our considered view there is supporting documents available for the cost of fixed assets supplied by its AE. If there is missing document, it is only for the markup charged by AE. Even though assessee has declared that it has followed other method, in fact not followed any method to arrive at the ALP. In our considered view, TPO should adopted one of the method prescribed in the income tax rules before rejecting the method adopted by the assessee and treating the ALP as nil.

12. The benchmarking has to be done only for the markup charged by Tokhiem UK, whether it is appropriate. We notice that assessee has filed the reasons for charging 5% as markup that is for taking care of administration and fright cost. It is not submitted before us any document relating to prices i.e. whether it is FOB or C & IF prices. Since the AE has supplied the assets on cost to cost with a markup of 5% and the Customs has accepted the transaction as reasonable we do not see any reason to disturb the transaction.

12.1 We notice that in the similar situation TPO has treated the ALP as nil without following any method or parameters set out in chapter X of the act, the Hon'ble High Court of Bombay in the case of **Lever India Exports Ltd (supra)** deleted the impugned addition made by TPO. For the sake of brevity, which is reproduced below:-

> *7. We note that the Tribunal has recorded the fact that the respondent assessee has launched new products which involved huge advertisement expenditure. The sharing of such expenditure by the respondent assessee is a strategy to develop its business. This results in*

improving the brand image of the products, resulting in higher profit to the respondent assessee due to higher sales. Further, it must be emphasized that the TPO's jurisdiction was to only determine the ALP of an International Transaction. In the above view, the TPO has to examine whether or not the method adopted to determine the ALP is the most appropriate and also whether the comparables selected are appropriate or not. It is not part of the TPO's jurisdiction to consider whether or not the expenditure which has been incurred by the respondent assessee passed the test of Section 37 of the Act and/or genuineness of the expenditure. This exercise has to be done, if at all, by the Assessing Officer in exercise of his jurisdiction to determine the income of the assessee in accordance with the Act. In the present case, the Assessing Officer has not disallowed the expenditure but only adopted the TPO's determination of ALP of the advertisement expenses. Therefore, the issue for examination in this appeal is only the issue of ALP as determined by the TPO in respect of advertisement expenses. The jurisdiction of the TPO is specific and limited i.e. to determine the ALP of an International Transaction hi terms of Chapter X of the Act read with Rule 10A to 10E of the Income Tax Rules. The determination of the ALP by the respondent assessee of its advertisement

> *expenses has not been disputed on the parameters set out in Chapter X of the Act and the relevant Rules. In fact, as found both by the CIT (A) as well as the Tribunal that neither the method selected as the most appropriate method to determine the ALP is challenged nor the comparables taken by the respondent assessee is challenged by the TPO. Therefore, the ad-hoc determination of ALP by the TPO dehors Section 92C of the Act cannot be sustained.*

13. Respectfully following the above decision we are inclined to delete the addition made by the TPO in the present case. Accordingly, the appeal filed by the assessee is accordingly **allowed**.

14. It is pertinent to mention here that this order is pronounced after a period of 90 days from the date of conclusion of the hearing. In this regard, we place reliance on the decision of co-ordinate bench of this Tribunal in the case of JSW Ltd in ITA Nos. 6264 & 6103/Mum/2018 dated 14.5.2020, wherein this issue has been addressed in detail allowing time to pronounce the order beyond 90 days from the date of conclusion of hearing by excluding the days for which the lockdown announced by the

Government was in force. The relevant observations of this tribunal in the said binding precedent are as under:-

> *7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:*
>
> *(5) The pronouncement may be in any of the following manners:—*
>
> *(a) The Bench may pronounce the order immediately upon the conclusion of*
> *thehearing.*
>
> *(b) In case where the order is not pronounced immediately on the conclusion*
> *of the hearing, the Bench shall give a date forpronouncement.*
>
> *(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not**ordinarily**(emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the noticeboard.*
>
> *8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of* ***Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]*** *wherein*

*Their Lordships had, inter alia, directed that "**We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (**emphasis, by underlining, supplied by us now**), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment**". In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.*

*9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "**In case the limitationhasexpired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown**". Hon'ble*

*Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "**It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly**", and also observed that "**arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020**". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. **force majeure** clause) maybe invoked, wherever considered appropriate, following the due procedure…". The term '**force majeure'** has been defined in Black's Law Dictionary, as '**an event or effect that can be neither anticipated nor controlled**' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary"period.*

10.In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under

the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of ***Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]****, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "****while calculating the time for disposal of matters made time- bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly****". The extraordinary steps taken suomotu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily",inthelightoftheaboveanalysisofthelegalposition, theperiodduringwhich lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.*

> *11. To sum up, the appeal of the assessee is allowed, and appeal of the Assessing Officer is dismissed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the noticeboard.*

15. Respectfully following the aforesaid judicial precedent, we proceed to pronounce this order beyond a period of 90 days from the date of conclusion of hearing.

16. Order pronounced as per Rule 34(4) of ITAT Rules and by placing the pronouncement list in the notice board on 27.07.2020.

Sd/-	*Sd/-*
(Saktijit Dey)	(S. Rifaur Rahman)
न्यायिकसदस्य / Judicial Member	लेखासदस्य / Accountant Member

मुंबई Mumbai;दिनांकDated : 27.07.2020
Sr.PS. Dhananjay

<u>आदेशकीप्रतिलिपिअग्रेषित</u>/<u>Copy of the Order forwarded to</u> :

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

आदेशानुसार/ BY ORDER,

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