



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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

ITA no.6432/Mum./2017  
(Assessment Year : 2013-14)

Sumitomo Chemical India Pvt. Ltd.  
195/7, 7<sup>th</sup> Floor, Moti Mahal  
J.T. Road, Churchgate  
Mumbai 400 020 PAN-AAECS3750L

..... Appellant

v/s

Dy. Commissioner of Income Tax  
Circl-13(1), Mumbai

..... Respondent

Assessee by : Ms. Karishma Phatarphekar  
Revenue by : Shri Bhoopathi

Date of Hearing – 06.07.2020

Date of Order – 27.07.2020

**ORDER**

**PER SAKTIJIT DEY. J.M.**

The captioned appeal has been filed by the assessee challenging the order dated 29<sup>th</sup> August 2017, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short "*the Act*") for the assessment year 2013-14, in pursuance to the directions of the Dispute Resolution Panel-2, (for short "*the DRP*").

2. The additional grounds raised by the assessee since do not require investigation into fresh facts and can be decided on the basis of facts available on record, they are admitted for adjudication.

3. Grounds no.1 and 2, of the main grounds being general in nature do not require adjudication.

4. In grounds no.3 to 6 of the main grounds, the assessee has challenged the addition made as a result of adjustment to arm's length price of trading segment. Whereas, in ground no.9, the assessee has raised an alternative contention to restrict the adjustment to the transaction with the Associated Enterprises (AE) only.

5. Brief facts are, as stated by the Assessing Officer, the assessee, a resident company, is primarily engaged in the business of manufacturing and trading of industrial chemicals, manufacturing and trading of agro chemicals, manufacturing and trading of public health chemicals and manufacturing of fine chemicals. During the year under consideration, the assessee entered into various international transactions with its overseas AEs involving both import and export of chemicals for trading. All these transactions were reported by the assessee as per the statutory mandate and were also benchmarked to ascertain the arm's length nature of transaction. As regards industrial chemicals, the assessee benchmarked the transaction by applying Transactional Net Margin Method (TNMM) with internal comparable transactions as the most appropriate method. Since, assessee's margin shown at 0.6% was within the acceptable range of net margin

of comparable transaction worked out at 1.69%, the transaction with AE was claimed to be at arm's length. As regards trading in public health chemicals, agro chemicals and fine chemicals, the assessee applied Resale Price Method (RPM) to benchmark such transactions. In the course of proceedings before him, the Transfer Pricing Officer verified various documents including the benchmarking done by the assessee. However, he was not convinced with the selection of most appropriate method by the assessee. He rejected both internal TNMM as well as RPM applied by the assessee. After rejecting the benchmarking done by the assessee, the Assessing Officer proceeded to determine the arm's length price under TNMM by short listing external comparables. By applying average net profit margin of 3.13% of the comparables, the Transfer Pricing Officer made a total adjustment of ₹ 9,01,93,565, across all the trading segments. The aforesaid adjustment suggested by the Transfer Pricing Officer was added back to the income of the assessee in the draft assessment order.

6. While dealing with assessee's objections on the issue, learned DRP observed, internal TNMM applied by the assessee for industrial chemicals cannot be considered as the most appropriate method since it involves import from AEs as well as export to the AEs. Learned DRP observed, since none of these transactions are uncontrolled

transactions, internal TNMM would not apply. Further, learned DRP observed, such transactions cannot be treated as comparable as inbound transactions cannot be compared with outbound transactions due to geographical difference. As regards the applicability of RPM in respect of trading in other segments, such as, agro chemicals, public health and fine chemicals, learned DRP held that while considering identical issue in assessee's own case in the preceding year, they have rejected RPM as the most appropriate method since the assessee has not merely sold the goods/products imported from the AEs but has made value addition and has also taken various risks. Accordingly, learned DRP upheld the decision of the Assessing Officer with slight modification regarding adjustment in fine chemical segment.

7. The learned Counsel for the assessee submitted, in the facts of assessee's case, internal TNMM is the most appropriate method vis-a-vis external TNMM to benchmark the transaction relating to trading in industrial chemicals. She submitted, while the Transfer Pricing Officer has not provided any reason for rejecting internal TNMM, the reasons provided by learned DRP are factually incorrect. She submitted, firstly, the assessee has not compared two controlled transactions. She submitted that the assessee has compared its AE segment with non-AE segment. She submitted, audited segmental details of both the AE and the non-AE segments are available. Drawing our attention to

Page-321 of the paper book, the learned Counsel submitted, apart from the fact that assessee had imported industrial chemicals from the AE for sale to third parties in domestic market, it had also purchased industrial chemicals from domestic third parties and exported to AEs. In this context, she also drew our attention to Pages-314 to 316 of the paper book to emphasize that availability of audited segmental results of both AE and non-AE segments make internal TNMM the most appropriate method. Further drawing our attention to such statement, the learned Counsel submitted, the margins of AE and non-AE segments clearly demonstrate arm's length nature of the transaction. Further, she submitted, the allegation of learned DRP that inbound and outbound transactions cannot be compared is untenable considering the fact that the comparables selected by the Transfer Pricing Officer also have both inbound and outbound transactions. Thus, she submitted, internal TNMM has to be accepted in the facts of the present case as the most appropriate method. In support of such contention, the learned Counsel relied upon the following decisions:-

- i) *Tecnimont ICB Pvt. Ltd. v/s ACIT, 92012 24 taxmann.com 28 (Mum.)(TM);*
- ii) *Cybertech Systems & Software Ltd. v/s ACIT, (2013) 33 taxmann.com 371 (Mum.) (Trib.);*
- iii) *DCIT v/s Elara Securities India Pvt. Ltd., ITA no.3906-3907/ Mum./2017, dated 06.01.2020; and*

iv) *Hughes Systique India Pvt. Ltd. v/s ACIT, (2013) 36 taxmann.com 41 (Del.)(Trib.).*

8. Without prejudice, the learned Counsel for the assessee submitted, the Transfer Pricing Officer has attributed the entire shortfall in profits to assessee's international transaction, which is unfair. She submitted, any addition has to be restricted to the proportion of international transaction with the AEs. In this context, she relied upon the following decisions:-

- i) *CIT v/s Hindustan Uniliver Ltd., (2018) 99 taxmann.com 135 (SC);*
- ii) *CIT v/s Hindustan Uniliver Ltd., (2016) 72taxmann.com325 (Bom.);*
- iii) *Hindustan Uniliver Ltd. v/s ACIT, (2012) 28 taxmann.com 142 (Mum.);*
- iv) *CIT v/s Alstom Projects India Ltd., (2017) 88 taxmann.com 465 (Bom.);*
- v) *Alstom Projects India Ltd. v/s ACIT, (2013) 36 taxmann.com 130 (Mum.);*
- vi) *CIT v/s Tara Jewels Exports Pvt. Ltd., (2017) 80 taxmann.com 117 (Bom.);*
- vii) *CIT v/s RatilalBecharlal& Sons, [2016] 107 taxmann.com 131 (Bom.);*
- viii) *PCIT v/s Bunge India Pvt. Ltd., (2019) 107 taxmann.com 131 (Bom.); and*
- ix) *CIT v/s Lanxess India Pvt. Ltd., (2016) 74 taxmann.com 167 (Bom.).*

9. The learned Counsel for the assessee submitted, in case such proportionate adjustment is made, there would be no addition as assessee's margin will be within  $\pm 3\%$ .

10. As regards the adjustment made to agro chemicals, public health chemicals and other segments, she submitted, while applying external TNMM and rejecting RPM, the Transfer Pricing Officer has not provided any reason. She submitted, since the assessee is a mere distributor of goods imported from AEs without making any value addition, the most appropriate method to benchmark such transaction is RPM. She submitted, learned DRP has also wrongly rejected RPM by relying upon its earlier order. Referring to the observations of the DRP in the earlier order, she submitted, the functions carried out and the risks borne by the assessee are normal for any distributor, therefore, for that reason alone, RPM cannot be rejected. In support of such contention, the learned Counsel relied upon the following decisions: –

- i) *CIT v/s L'oreal India Ltd., (2015) 53 taxmann.com 432 (Bom.);*
- ii) *ITO v/s L'oreal India Ltd., (2012) 24 taxmann.com 192 (Mum.);*
- iii) *Videojet Technologies India Pvt. Ltd. v/s ACIT, ITA no.6956/Mum./2012, dated.28.05.2019;*
- iv) *DCIT v/s Hazira LNG Pvt. Ltd., ITA no.1056/Ahd./2014, dated 27.12.2016;*
- v) *CIT v/s Luxottica India Eyewear Pvt. Ltd., ITA no.852/2015 (Del. HC);*

- vi) *Luxottica India Eyewear Pvt. Ltd. v/s DCIT, ITA no.1115/Del./2014, dated 05.11.2014;*
- vii) *Airport Retail Pvt. Ltd. v/s JCIT, (2017) 80 taxmann.com 165 (Mum.) (Trib.);*
- viii) *Ecolab Food Safety & Hygiene Pvt. Ltd. v/s ACIT, (2019) 108 taxmann.com 381 (Mum.);*
- ix) *Radox Laboratories India Pvt. Ltd. v/s ITO, (2019) 107 taxmann.com 136 (Mum.); and*
- x) *Mattel Toys India Pvt. Ltd. v/s DCIT, [2013] 34 taxmann.com 203 (Mum.).*

11. Without prejudice, the learned Counsel for the assessee submitted, if RPM is accepted, even if the gross margin of Transfer Pricing Officer's comparables are used, there would be no scope for any adjustment in agro chemical and public health chemical segments. Without prejudice, she submitted, if TNMM is held to be as the most appropriate method, then, any adjustment has to be restricted to the proportion of AE transactions. In this context, she again relied upon the decisions as noted in Para-8 above. Finally, she submitted, the Assessing Officer be directed to allow the benefit of suo-motu adjustment made by the assessee, if it arises.

12. The learned Departmental Representative relied upon the observations of the Assessing Officer and learned DRP.

13. We have considered rival submissions and perused the material on record. At the outset, we would deal with the adjustment made to

trading in industrial chemicals. It is evident, the assessee has benchmarked the aforesaid transaction by applying internal TNMM. While the Transfer Pricing Officer has not provided any reason why internal TNMM is not acceptable, learned DRP has observed that the assessee has compared one controlled transaction with another controlled transaction. Further, learned DRP has observed that inbound transaction cannot be compared with outbound transaction as they are in different geographical locations. We find the aforesaid findings of learned DRP not only factually incorrect but unacceptable. On a perusal of the documents furnished in the paper book, more particularly, at Page-321 as well as the segmental details at Pages-314 and 316, as well as the transfer pricing study report (TPSR), we have noticed that the assessee had imported industrial chemicals from AE for resale to domestic third parties. Similarly, assessee had also purchased industrial chemicals from domestic third parties and exported them to AEs. Further, the audited segmental results of such transactions both with AEs and non-AEs are available. As per the segmental details, while the net profit margin of purchase from AE for resale to domestic third parties is 0.6%, it has earned a net profit margin of 1.69% in respect of purchases made from domestic third parties and exported to AE. However, it is within the acceptable range. Therefore, the observations of learned DRP do not reflect the correct factual position. The legal principle is fairly well settled that if internal

comparables are available, then they have to be preferred over external comparables. Therefore, when the assessee has sold products both to AEs and non-AEs and audited segmental results of the AE and non-A.E. segments are available, then, the net margin earned on non-AE transaction can be considered for determining the arm's length price of the transaction with the AE. The decisions relied upon by the learned Counsel for the assessee, referred to above, clearly support this view. Even otherwise also, the contention of the learned Counsel for the assessee that the adjustment, if any, has to be restricted to the AE transaction is acceptable as it is supported by a number of judicial precedents. In view of the aforesaid, the addition made on account of transfer pricing adjustment to the trading in industrial chemical deserves to be deleted. Accordingly, we do so.

14. As regards the adjustment made in trading in agro chemicals and public health chemicals, it is evident, the assessee has benchmarked the transaction by applying RPM. Whereas, the Transfer Pricing Officer has benchmarked them by applying TNMM without ascribing any reason why RPM cannot be treated as most appropriate method. Learned DRP has approved the action of the Transfer Pricing Officer by simply relying upon their observation in assessee's own case in the preceding assessment year. On perusing the functional analysis of these segments as mentioned in the TPSR, a copy of which is at page 85 of the paperbook, it is noticed that the assessee has imported

certain chemicals in bulk from the AE and after repackaging them in small quantities has sold them to domestic third parties. There is nothing in the TPSR to suggest that the assessee has made any value addition to the imported goods before reselling them to domestic third parties. Thus, the functions of the assessee, prima facie, appears to be that of a distributor. On a perusal of Para-10.2.6 of learned DRP's order, it is seen that it has reproduced its observations made in the preceding assessment year, wherein, it is stated that the trading functions undertaken by the assessee are as under:-

- i) The package of goods in small quantity;*
- ii) Re-labeling before selling to third parties;*
- iii) Inspection of chemicals and ensure that the goods supplied meet the specifications of the assessee; and*
- iv) Further it has been observed by the DRP that the assessee also appears to bear the market, foreign exchange and credit regulatory risks.*

15. Observing thus, learned DRP has held that the aforesaid functions and risks undertaken by the assessee shows that it is not acting as a normal trader, but is also doing some value addition to the products sold in the Indian market. Therefore, they upheld rejection of RPM. We find the aforesaid reasoning of learned DRP quite vague and general in nature. Undisputedly, the assessee is importing these chemicals in bulk and selling them to customers by re-packaging in small quantities. These functions carried out by the assessee certainly

do not add any value to the products imported from the AE. Further, inspection of chemicals to ensure their quality or desired specification does not add value to the product. Even, the risks undertaken by the assessee, as noted by learned DRP, would normally be taken by any other distributor. Though, learned DRP has observed that the assessee is making some value addition to the products sold in Indian market, however, they have not elaborated or substantiated the nature of such value addition. In our considered opinion, the trading functions carried out by the assessee as per TPSR do not amount to value addition, unless, there are some other functions carried out by the assessee either to change the nature of product imported from the AE or improve its quality. We may observe, in the facts of the present appeal, the revenue has failed to bring any material on record to demonstrate that the assessee has made any value addition to the imported goods. Thus, the reasoning on the basis of which learned DRP has sustained rejection of RPM as the most appropriate method is not valid, at least, in the impugned assessment year. It is fairly well settled that in a case of import of goods for resale in domestic market merely as a reseller/distributor, the most appropriate method to benchmark is RPM. Even, a reading of rule 10B(1)(b) makes the aforesaid position clear. The decisions relied upon by the learned Counsel for the assessee also clearly support this view. In contrast, the Department has not brought any material on record to either show

that the assessee has made any value addition to the products imported from AEs or establish the nature of such value addition. Prima facie, it appears, RPM has been rejected merely on unsubstantiated allegation. The decisions cited by the learned Counsel for the assessee support this view. Further, in the cited decisions, it has also been held that re-packaging and re-labeling of goods do not amount to value addition. For the aforesaid reasons, we hold that RPM is the most appropriate method to benchmark the transaction. Even, otherwise also, we accept the contention of the learned Counsel for the assessee that adjustment, if any, has to be restricted to the AE transaction. Grounds raised are accordingly disposed off.

16. In ground no.7, the assessee has challenged the adjustment made to the arm's length price of fee paid towards management services.

17. Brief facts are, the Transfer Pricing Officer having found that the assessee has paid an amount of ₹ 60,60,103, towards management and accounting services, called upon the assessee to justify the arm's length nature of such payment. In response, it was submitted by the assessee that the payment was made to the AE for availing management and accounting services in terms of agreement entered with the AE. It was submitted that the assessee had allocated the payment for management and accounting services to all its segments

after proper benchmarking of the respective segments. The Transfer Pricing Officer, however, was not convinced with such submissions of the assessee and proceeded to determine the arm's length price of management and accounting services at nil by alleging that the assessee failed to prove that either the services were not rendered or they were not received. Accordingly, he determined the arm's length price at nil, thereby, making adjustment of entire amount of ₹ 60,60,104.

18. Learned DRP also upheld the decision of the Transfer Pricing Officer.

19. The learned Counsel for the assessee reiterating the submissions made before the DRP submitted that the Transfer Pricing Officer cannot determine the arm's length price at nil, that too, on ad-hoc basis without following any prescribed method. In this context, she relied upon the following decisions:-

20. *CIT v/s Merck Ltd., (2016) 389 ITR 70 (Bom.);*
21. *CIT v/s Lever India Exports Ltd., (2017) 78 taxmann.com 88 (Bom.);*
22. *CIT v/s Johnson & Johnson Ltd.,(2017) 80 taxmann.com 337 (Bom.);*
23. *Wartsila India Ltd. v/s ACIT, (2018) (10) TMI 1669, ITAT, Mumbai;*
24. *CIT v/s Kodak India Pvt. Ltd. (2016) 288 CTR 46 (Bom.);*

25. *Kodak India Pvt. Ltd. v/s ACIT, (2013) 155 TTJ 697 (Mum.); and*

26. *UT Worldwide India Pvt. Ltd. v/s DCIT, (2019) 103 taxmann.com 422.*

27. The learned Departmental Representative relied upon the observations of the Transfer Pricing Officer and DRP.

28. We have considered rival submissions and perused the material on record. Prima facie, we find that the assessee has not benchmarked the transaction relating to payment of management and accounting service fee independently, but, has allocated such payment to all the segments. This, in our view, is not a correct approach. The assessee should have benchmarked the aforesaid transaction independently. On the other hand, the Transfer Pricing Officer has determined the arm's length price at nil purely on ad-hoc basis without following any prescribed method. This, in our view, is also not acceptable, as held in various decisions cited by the learned Counsel for the assessee.

29. Though, the assessee may not be required to prove the benefit derived by it, however, it is required to furnish the basic documentary evidences as well as proper benchmarking to show the arm's length nature of the transaction. Since, the aforesaid exercise has neither been done by the assessee nor by the Transfer Pricing Officer, we are inclined to restore the issue to the Assessing Officer for de novo adjudication after due opportunity of being heard to the assessee.

30. In ground no.8, the assessee has challenged the disallowance of depreciation on goodwill acquired from Bilag Industries Pvt. Ltd., in the assessment year 2006-07.

31. We have considered rival submissions and perused the material on record. It is a common point between the learned Counsels appearing for the parties that the issue is covered by various decisions of the Tribunal in assessee's own case for the assessment year 2006-07 to 2010-11, which are as under:-

- i) *ITA no.3078/Mum./2012, dated 28.03.2014 for assessment year 2006-07;*
- ii) *ITA no.3077/Mum./2012, etc., dated 25.03.2015 for assessment year 2007-08;*
- iii) *ITA no.3915/Mum./2015, dated 15.03.2017;*
- iv) *ITA no.578/Mum./2017, dated 25.06.2018;*

32. Having perused the relevant facts and gone through the earlier decisions of the Tribunal, we find that this is a recurring issue between the assessee and the Revenue since assessment year 2006-07 onwards. While deciding the issue in earlier assessment years, in the orders referred to above, the Tribunal has allowed assessee's claim of depreciation on goodwill. Respectfully following the aforesaid decisions of the Tribunal, we allow assessee's claim of depreciation. This ground is allowed.

33. As regards ground no.10, the learned Counsel for the assessee submitted that she would not like to press the ground in the impugned assessment year, however, the issue should be left open to be agitated by the assessee in future.

34. In view of the aforesaid submission of learned Counsel for the assessee, the ground is dismissed as not pressed. However, it is open for the assessee to raise the issue if it arises in any other assessment year in future.

35. In ground no.11, the assessee has challenged the action of the Assessing Officer in not allowing the set-off of brought forward business loss and unabsorbed depreciation, whereas, in ground no.12, the assessee has raised the issue of non-granting credit for advance tax and TDS.

36. Having considered rival submissions, we direct the Assessing Officer to verify assessee's claim and decide the issue of set off of brought forward loss and unabsorbed depreciation as well as proper credit to advance tax and TDS by verifying relevant records and in accordance with law. These grounds are allowed for statistical purposes.

37. In the result, assessee's appeal is partly allowed.

Order pronounced by placing in the notice board under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963 on 27.07.2020

**Sd/-**

**S. RIFAUH RAHMAN  
ACCOUNTANT MEMBER**

**Sd/-**

**SAKTIJIT DEY  
JUDICIAL MEMBER**

**MUMBAI, DATED:**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

*Pradeep J. Chowdhury  
Sr. Private Secretary*

By Order

Assistant Registrar  
ITAT, Mumbai