

IN THE INCOME TAX APPELLATE TRIBUNAL “K” BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VP AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.1912/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2011-12)

ACIT-15(1)(2) 483A, 4 th Floor, Aayakar Bhavan, Mumbai-400021.	बनाम/ Vs.	M/s. Doka India Pvt. Ltd. Plot No. 26A, Sector-7, 601 to 606, Mahavir Landmark Bldg, Kharghar, Navi Mumbai-410210.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCD7895H		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri Anand Mohan (DR)	
Assessee by:	Shri Dharmesh Shah/ Dhaval Shah	

सुनवाई की तारीख / Date of Hearing: 13/02/2020
घोषणा की तारीख /Date of Pronouncement: 07/08/2020

आदेश / ORDER

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the assessment order passed u/s.144C(1) of the Income Tax Act, 1961 (in short “the Act”) in pursuance of the directions of Dispute Resolution Panel – I, Mumbai [hereinafter referred to as the “DRP”] dated 29.12.2015 relevant to the A.Y. 2011-12.

2. The revenue has raised the following grounds: -

“(i) *“On the facts and circumstances of the case in law, the Hon’ble DRP erred upholding the RPM method as most appropriate method, considering only the nature and class of International Transaction, ignoring the additional requirement of the IT Rules 10(C)(2)(c) which specifically requires availability, coverage and*



reliability of data necessary for application of the method whereas the comparable accepted by DRP are lacking in all qualifications.

- (ii) On facts and circumstances of the case, the DRP has erred in upholding the RPM method ignoring the requirement of the IT Rules 10(C)(2)(d) which specifically refers to the degree of comparably existing between the International Transaction and uncontrolled transactions and between the enterprises entering into such transactions whereas the degree of comparability between functions and products of assessee and comparables is not as required for application of RPM.*
- (iii) On the facts and circumstances of the case, the DRP has erred in ignoring the provisions of rule 10(B)(1)(b)(ii) where price of same or similar product or service is most important criterion for benchmarking in RPM method while accepting the existing comparable used for application of TNMM ignoring the difference in language of Rule 10(B)(1)(b)(ii) & Rule 10(B)(1)(e)(ii)*
- (iv) While upholding RPM method & comparable set adopted by TPO, the DRP has erred in not taking into account the fact that the property dealt with by the comparables is not similar to the property dealt with by the assessee as required in Rule 10(B)(1)(b)(ii) and in particular,*
 - (i) Arrow India Ltd. is in manufacturing of equipment relating to sugar industries*
 - (ii) Bagaria Trading Ltd. Is trading of Iron & Steel's sheet & plates*
 - (iii) CCL International Ltd. is manufacturer of concrete slabs and contractor of infra projects including roads.*
 - (iv) Goodluck Steel Tubes Ltd. Is trader of Iron & Steel Tubes and pipes*
 - (v) Karma Industries Ltd. Is in trading and manufacturing of iron and steel products.*
 - (vi) Shree Global 1'radefin Ltd is purely trader of iron and steel plates and other products*
 - (vii) Technocraft Industries (India) Ltd. Is manufacturer of drum closures*



- (viii) *Trans Asia Corporation Ltd. is trader of steel, chemical products as well as contract manufacturer of polymer products.*
- (ix) *Ushdev International is in trading of ferrous and non ferrous metal products.*
- (v) *The Hon'ble DRP has erred in not seeking fresh comparables from assessee if it wished to accept RPM method as the products and functions of the existing comparables are not comparable to the assessee.*
- (vi) *the appellant prays that the order of the Hon'ble DRP on the grounds be set aside and that of the assessing officer be restored.*
- (vii) *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

3. Brief facts of the case are that the assessee filed the return of income declaring current year's loss of Rs.6,01,77,992/-. The return of income was processed u/s 143(1) of the I. T. Act, 1961. The case was selected for scrutiny. Notices u/s 143(2) & 142(1) of the I. T. Act, 1961 were issued and served upon the assessee. The assessee company was wholly owned subsidiary of Doka GMBH, and was engaged in providing economical framework system and services. The company was also offers engineering services and also engaged in importing and exporting, distributing, selling, trading, hiring of formwork and form work systems including all components, parts and accessories. The assessee has also shown sales of Rs.19,67,05,324/- and other income at Rs.1,80,29,570/- and the net loss as per P & L Account has been computed at Rs.6,02,51,100/-. A reference u/s 92CA(1) of I. T. Act, 1961 for the A.Y. 2011-12 was made to the Transfer Pricing Officer, Mumbai for the computation of Arm's Length Price in relation to International transaction entered into by the assessee company after taking approval of CIT-9, Mumbai, vide his office letter No. CIT-



9/T9/F. No.59.1/Transfer Pricing Reference Approval/2013-14 dated 28.10.2013. The jurisdictional Transfer Pricing Office (TPO), Viz, Dy. CIT, Transfer Pricing -1(2)(1), Mumbai vide order u/s 92CA(3) dated 28.01.2015 suggested adjustment to the tune of Rs.6,57,50,820/- to the Arm's Length Price as against determined by the assessee. Accordingly, the assessee was given fresh opportunity of being heard and a draft assessment order was framed wherein an adjustment of Rs.6,57,50,820/- was made to the total income u/s 92CA(3) of the Act as per provisions of Section 144C of the Act. The said draft assessment order dated 27.03.2015 was duly served on the assessee.

4. Against the said proposed upward adjustment u/s 92CA(3) of the Act, the assessee filed objections before the DRP-1, Mumbai. The objection of the assessee was considered and disposed off by the DRP-1, Mumbai vide its objection no. 158. Further, the DRP in its direction issued u/s 144C(5) dated 29.12.2015 received in this office on 31.12.2015 has deleted the proposed adjustment of Rs.6,57,50,820/-. For ready reference the relevant extract of the directions of the DRP read as under.:-

“2.1 All the sub-grounds of objection are related to each other and therefore, they taken up together for decision. We have considered the reasons recorded the TPO and the submission made by the assessee. In view of the &visions quoted by the assessee and the facts of the case, we are in agreement with the claim of the assessee that the TPO has rejected the transfer pricing study of the assessee without valid and sufficient reasons. The assessee is a distributor of formwork and formwork systems purchased from its AEs. It does not carry out any value addition in the products purchased. Though it is giving some of the products on rental basis, rental income earned by the assessee is only a very small portion of gross receipts/gross profit of the assessee. Gross receipts of the assessee are Rs.21.47,34,894/- and gross profit earned by



the assessee from sale and rentals is Rs.3,93,86,787/- whereas rental income received by the assessee is Rs. 18,02009/- (.84% of the turnover) only. It has been submitted by the assessee that it is not incurring any advertisement and brand building expenses on behalf of the AE. Total selling and advertising expenses of the assessee are Rs.32,49,094/- only (1.51% of the turnover) and substantial part of it is towards travelling expenses of marketing staff Considering that the product is new in market and it is only second year of operations of the assessee, selling advertising expenses are very reasonable. In view of these facts, we are of the opinion that the assessee had rightly applied RPM for benchmarking its International transaction of purchases of formwork and formwork systems from AEs. Application of TNMM method by the TPO is not proper in the facts of the case. Adjustment of Rs 6,57,50,820/- made by the TPO is directed to be deleted.”

5. Thereafter, the addition was deleted of Rs.6,57,50,820/-. Aggrieved by this order, the revenue has filed the present appeal before us.

6. All the issues are in connection with the direction of DRP in which the RPM method considered instead of TNMM which was considered by TPO. The Ld. Representative of the revenue has argued that the DRP has given the direction which was not in accordance with law, therefore, the assessment is not liable to be sustainable in the eyes of law. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the AO/DRP. Before going further, we deem it necessary to advert the finding of the DRP on record.:-

“2.1 All the sub-grounds of objection are related to each other and therefore, they are taken up together for decision. We have considered the reasons recorded by the TPO and the submission made by the assessee. In view of the decisions quoted by the assessee and the facts of the case, we are in agreement with the claim of the assessee that the TPO has rejected the transfer pricing study of the assessee without valid and sufficient reasons. The assessee is a distributor of formwork and formwork systems purchased from its AEs. It does not carry out any



value addition in the products purchased. Though it is giving some of the products on rental basis, rental income earned by the assessee is only a very small portion of gross receipts/gross profit of the assessee. Gross receipts of the assessee are Rs. 21,47,34,894/- and gross profit earned by the assessee from sale and rentals is Rs. 3,93,86,787/- whereas rental income received by the assessee is Rs. 18,02,009/- (.84% of the turnover) only. It has been submitted by the assessee that it is not incurring any advertisement and brand building expenses on behalf of the AE. Total selling and advertising expenses of the assessee are Rs.32,49,094/- only (1.51% of the turnover) and substantial part of it is towards travelling expenses of marketing staff. Considering that the product is new in market and it is only second year of operations of the assessee, selling advertising expenses are very reasonable. In view of these facts, we are of the opinion that the assessee had rightly applied RPM for benchmarking its international transaction of purchases of formwork and formwork systems from AE5. Application of TNMM method by the TPO is not proper in the facts of the case. Adjustment of Rs. 6,57,50,820/- made by the TPO is directed to be deleted.”

7. The factual position is not a dispute. The assessee offered the RPM resale price method which undoubtedly rejected by TPO. The assessee is a distributor of formwork and formwork systems purchased from its AEs. It does not carry out any value addition in the products purchased. However, the assessee received some rental income which is of Rs.18,02,009/- i.e. 84% of the total turnover. The gross receipts of the assessee was of Rs.21,47,34,894/- and gross profit earned by the assessee from sale as well as rental income was of Rs.3,93,86,787/-. The assessee did not incur any advertisement expenses and brand building expenses on behalf of the AE. The total selling and advertising expenses of the assessee are Rs.32,49,094/- which was 1.51% of the turnover and substantial part of it is towards travelling expenses of marketing staff. The product was new to the market and it is only second year of operations of the assessee. Selling advertising expenses are very reasonable. Accordingly, it seems that the assessee has applied RPM for benchmarking its international transaction of



purchases of formwork and formwork systems from AEs. Application of TNMM method by the TPO is not proper in the facts of the case. We noticed that the TPO in the A.Ys.2009-10 & 2010-11 had already accepted the benchmarking of the transactions on RPM basis u/s 92CA(3) of the Act. There is not reasonable ground mentioned in the year under consideration to differentiate the earlier opinion. No reasons are mentioned how the method is liable to be changed into TNMM. In this regard, we also find support of the decision in the case of **Seminis Vegetable Seeds Pvt. Ltd. (62 Taxmann.com 283 (Mum), ACIT Vs. AO Smith India Water Products Pvt. Ltd. (98 Taxmann.com 295 (Bang), DCIT Vs. Delta Power Solutions India Pvt. Ltd. (68 Taxmann.com 247 Del) & Clariant Chemicals (India) Ltd. Vs. JCIT (44 taxmann.com 421 (Mum)**. In the above discussion, we are of the view that the DRP has rightly directed the AO to apply the RPM method and direct to AO to delete the additions. We nowhere found any illegality and infirmity in the direction of the DRP. We also nowhere found any reasonable ground to interfere with the direction of the DRP. therefore, we decide these issues in favour of the assessee against the revenue.

Reasons for delay in pronouncement of order

6.1 Before parting, we would like to enumerate the circumstances which have led to delay in pronouncement of this order. The hearing of the matter was concluded on 07/02/2020 and in terms of Rule 34(5) of Income Tax (Appellate Tribunal) Rules, 1963, the matter was required to be pronounced within a total period of 90 days. As per sub-clause (c) of Rule 34(5), every endeavor was to be made to pronounce the order within 60 days after



conclusion of hearing. However, where it is not practicable to do so on the ground of exceptional and extraordinary circumstances, the bench could fix a future date of pronouncement of the order which shall not ordinarily be a day beyond a further period of 30 days. Thus, a period of 60 days has been provided under the extant rule for pronouncement of the order. This period could be extended by the bench on the ground of exceptional and extraordinary circumstances. However, the extended period shall not ordinarily exceed a period of 30 days.

6.2 Although the order was well drafted as well as approved before the expiry of 90 days, however, unfortunately, on 24/03/2020, a nationwide lockdown was imposed by the Government of India in view of adverse circumstances created by pandemic covid-19 in the country. The lockdown was extended from time to time which crippled the functioning of most of the government departments including Income Tax Appellate Tribunal (ITAT). The situation led to unprecedented disruption of judicial work all over the country and the order could not be pronounced despite lapse of considerable period of time. The situation created by pandemic covid-19 could be termed as unprecedented and beyond the control of any human being. The situation, thus created by this pandemic, could never be termed as ordinary circumstances and would warrant exclusion of lockdown period for the purpose of aforesaid rule governing the pronouncement of the order. Accordingly, the order is being pronounced now after the re-opening of the offices.

6.3 Faced with similar facts and circumstances, the co-ordinate bench of this Tribunal comprising-off of Hon'ble President and Hon'ble Vice



President, in its recent decision titled as **DCIT V/s JSW Limited (ITA Nos. 6264 & 6103/Mum/2018)** order dated 14/05/2020 held 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 the hearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.

(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 notice board.

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 limitation has expired 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 be 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 timebound 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 suo motu 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", in the light of the above analysis of the legal position, the period during which lockout was in force is to be 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 re-fix 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.

Driving strength from the ratio of aforesaid decision, we exclude the period of lockdown while computing the limitation provided under Rule 34(5) and proceed with pronouncement of the order.

8. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 07/08/2020

Sd/-

(PRAMOD KUMAR)
VICE PRESIDENT

मुंबई Mumbai; दिनांक Dated : 07/08/2020
Vijay Pal Singh/Sr. PS

Sd/-

(AMARJIT SINGH)
JUDICIAL MEMBER



ITA No.1912/M/2016
A.Y.2011-12

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**