

आयकर अपीलीय अधिकरण
मुंबई पीठ "जे"
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI G.MANJUNATHA, ACCOUNTANT MEMBER

आअसं. 2263/मुं/2017 (नि. व.2012-13)
ITA NO.2263 /MUM/2017(A.Y.2012-13)
आअसं. 2264/मुं/2017 (नि. व.2008-09)
ITA NO.2264/MUM/2017 (A.Y.2008-09)
आअसं. 6815/मुं/2017 (नि. व.2013-14)
ITA NO.6815 /MUM/2017(A.Y.2013-14)

Sandoz Private Limited,
MIDC, Plot No.8-A/2,8-B,
TTC Industrial Area.Kalwa Block,
Village Digha, Navi Mumbai 400 708
PAN: AAACS9267J

..... अपीलार्थी /Appellant

बनाम Vs.

The Joint Commissioner of Income Tax -8(1)(2)/
The Dy. Commissioner of Income Tax -8(1)(2),
Room No.615, 6th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai 400 051

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : S/Shri Rajan Vora &
Hemant Chandariya
प्रतिवादी द्वारा/Respondent by : S/Shri Anand Mohan &
A. Mohan, CIT - DRs

सुनवाई की तिथि/ Date of hearing : 04/09/2020
घोषणा की तिथि/ Date of pronouncement : 10/09/2020

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

These three appeals have been filed by the assessee. In ITA No.2263/Mum/2017 the assessee has assailed the assessment order dated 30/01/2017 passed u/s.143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short 'the Act') for the assessment year 2012-13. ITA No.2264/Mum/2017 is against the assessment order dated 30/01/2017 passed u/s. 143(3) r.w.s. 144C(13) of the Act, for assessment year 2008-09. ITA No.6815/Mum/2010 is directed against assessment order dated 30/10/2017 passed u/s. 143(3) r.w.s. 144C(13) of the Act for A.Y. 2013-14. Since, the issues raised in all these appeals are common, these appeals are taken up together for adjudication and are decided vide this common order. The appeal for assessment year 2012-13 is taken as lead case, hence, the facts are narrated from the said appeal.

ITA. NO 2263/MUM/2017 – A.Y. 2012-13.

FACTS OF THE CASE:

2. The brief facts of the case as emanating from records are that the assessee is a subsidiary of Novartis Holding-AG, Switzerland. The assessee is engaged in the business of manufacturing and trading of Active Pharmaceutical Ingredients (APIs) and Finished Drugs Formulation (FDFs). The assessee is also engaged in provision of contract development support services and related recoveries.

2.1. In the impugned assessment year the assessee imported 17 APIs from its Associated Enterprises (AEs). The assessee adopted Transactional Net Margin

Method (TNMM) as most appropriate method to benchmark its international transactions of import of APIs. Out of 17 APIs, the Transfer Pricing Officer (TPO) could obtain comparable price in respect of only four APIs u/s 133(6) of the Act. The TPO accepted the price adopted by assessee in respect of two APIs i.e. Hydroxypropyl Cellulose and Macrogol, as the assessee's import price of the said APIs was lower than the comparable price. In respect of the other two APIs i.e. Mycophenolate Mofetil and Activated Carbon the TPO applied CUP to benchmark the transaction as the import price of these two items were higher than the average price per unit of comparable. The TPO made adjustment of Rs.17,97,82,202/- in respect of international transaction of import of two APIs from AEs. Thus, out of 17 APIs imported by the assessee, the TPO accepted import price of 15 APIs. Further, the TPO rejected assessee's approach of inter-linking import and export transactions. The TPO held that both the transactions are separate and independent as they are between different entities.

2.2. The TPO also made transfer pricing adjustment in respect of recoveries of cost of:

- Material (APIs) to render contract development support services; and
- Bioequivalence studies.

The contention of the assessee is that the cost on above services are recovered from AEs on actual basis. The TPO held that the services are akin to services provided by the assessee under Contract Development support services and assessee's margin for the same is 34.45%. The TPO applied same mark-up on recoveries and made adjustment of Rs.24,89,43,950/-. Thus, TPO vide order

dated 22/1/2016 made adjustment of Rs.42,87,26,152/- on the international transactions with AEs by the assessee.

2.3. The Assessing Officer while passing the draft assessment order made disallowance of Rs.1,30,04,803/- u/s. 37(1) of the Act in respect of payments purportedly made to the Doctors.

Aggrieved by the order of TPO and the disallowance made in the draft assessment order, the assessee filed objections before the Dispute Resolution Panel (DRP). The objections of the assessee on aforementioned adjustments/disallowances were rejected in toto by the DRP. The Assessing Officer passed impugned assessment order making additions in accordance with the directions of the DRP. Hence, the present appeal by the assessee.

SUBMISSIONS ON BEHALF OF THE ASSESSEE:

3. Shri Rajan Vora appearing on behalf of the assessee submitted that the assessee in appeal has raised 28 grounds. The ground No.1 to 3 are general. In ground of appeal No. 4 to 12, the assessee has assailed the addition made in respect of international transactions of import of APIs. The main grounds challenging the adjustment are ground No.4 and 9. The other grounds i.e. ground No.5 to 8 and 10 to 12 are in support of the above said two main grounds.

3.1. The Id. Authorized Representative of the assessee submitted that in the impugned assessment year, the assessee imported 17 APIs from its AEs to be used in manufacturing of FDFs. The assessee exported final product (FDFs) to its AEs. The import of APIs from AEs and export of FDFs to AEs is a composite

transaction under an agreement. The TPO has erred in treating import of APIs and export of FDFs as two separate transactions. The Id. Authorized Representative for the assessee submitted that the business model of the assessee is akin to that of a 'contract manufacturer'. The assessee manufactures the products as per specifications of its AEs based on confirmed order from the AEs. The inputs are imported from AEs and the final product is exported to AEs. The assessee has to maintain defined standard of quality and has to use standardised raw material for manufacturing of FDFs. Owing to contract manufacturing arrangement between assessee and its AEs, the assessee receives remuneration on cost plus bases. The compensation payable to the assessee as per Manufacturing Agreement (at page 376 of the paper book) depends on the price at which APIs has been imported by the assessee. Thus, pricing of the assessee's export is inter-linked with the pricing of assessee's purchase of APIs. The assessee is entitled to recover actual cost of APIs and other inputs used in manufacture of FDFs. The assessee is compensated with cost + mark-up on manufacturing process only. The Id. Authorized Representative of the assessee pointed that it is an unrebutted fact that the assessee is exporting FDFs to its AEs. The only objection raised by the TPO is that the import of APIs and export of FDFs are to different entities. The TPO has failed to appreciate the terms and conditions of the Manufacturing Agreement which was furnished before him. The Id. AR pointed that at page 404 to 406 of the paper book are the extracts from the Excise Register. The same would show export/consumption details of API (Mycophenolate Mofetil) used in manufacturing process. Ample documentary evidence was furnished before the TPO and the DRP to substantiate the contentions made on behalf of

the assessee. The TPO and the DRP have failed to appreciate the cogent evidences produced by the assessee.

3.2. The Id. Authorized Representative for the assessee submitted that out of 17 APIs imported by the assessee from its AEs, the TPO objected to the import cost of only two APIs i.e. Activated Carbon and Mycophenolate Mofetil. The assessee adopted TNMM as most appropriate method to benchmark its international transaction. The TPO rejected the same in respect of import of only two APIs and applied CUP to benchmark the transaction of import of Activated Carbon and Mycophenolate Mofetil. The Id. AR contended that the Tribunal in the case of *UCB India Private Ltd. vs. Asst. CIT reported as 121 ITD 131 (Mum.)* has held that the TPO has erred in applying CUP without examining quality, potency and other parameters of product purchased by the comparables and set aside the adjustment made by the TPO. In the present case the TPO/DRP has failed to appreciate that the assessee is strictly following WHO-Good Manufacturing Practice (GMP) in manufacturing activity. Further, there is geographical difference with respect of procurement of APIs. The assessee is importing APIs from its AEs located in Germany and Slovenia, whereas, the comparable selected by the TPO procure APIs from domestic manufacturers.

3.3. The Id. AR further contended that the TPO cannot resort to cherry picking when all the APIs are part of closely linked transactions. The TPO accepted TNMM in respect of other 15 APIs out of 17. The Id. AR placed reliance on the decision of Tribunal in the case of *Amphenol Interconnect India Pvt. Ltd vs. DCIT in ITA No. 1548/PUN/2011 for AY 2007-08 decided on*

30/05/2014 to contend that where substantial part of benchmarking of international transaction has been accepted by the TPO, the TPO cannot change the method of benchmarking remaining minuscule part of the same international transaction.

3.4. The Id. AR contended that the TPO gathered information regarding two APIs under section 133(6) of the Act to benchmark the transaction. The said information is not available in public domain. The Id. AR submitted that the adjustment made by TPO is without proper appreciation of facts and judicial precedents. The assessee is entitled to full reimbursement of the cost of APIs, hence, there is no transfer of profits. The TPO and the DRP have erred in observing that there is no mention of recovery of cost of APIs in the Manufacturing Agreement. The Id. AR pointed that at the end of agreement there is a table of 'Cost elements to be reimbursed under the Manufacturing Agreement' (page 388 & 389 of paper book). The table clearly shows that cost of material including APIs used as inputs would be reimbursed without markup.

3.5. The Id. Authorized Representative for the assessee further contended that no dispute whatsoever was raised by the TPO in respect of international transaction of import of APIs in the assessment years 2009-10, 2010-11, 2011-12 and 2014-15. The TPO made adjustment in respect of import of APIs in AY 2008-09, 2012-13 and 2013-14. The DRP accepted the objections of the assessee in AY 2013-14. The Id. Authorized Representative of the assessee submitted that the assessee has been regularly importing APIs from AEs and after manufacturing FDFs, has been exporting the same to its AEs. In

all the years the assessee has been consistently applying TNMM as the most appropriate method to benchmark its transaction. The nature of international transactions, i.e. import of APIs & export of FDFs to AEs is on similar lines in all the years.

4. The Id. AR submitted that in ground of appeal No. 13 to 17, the assessee has assailed the adjustment made by the TPO/ directions of the DRP is in respect of recovery of cost of APIs and cost of bio-equivalence studies under the contract development services segment. The Id. AR pointed that the cost is incurred in respect of those patents that are likely to expire. As per the terms and conditions of Service Agreement (page 495 to 510 of the paper book) the data compiled by the development centre is sent to the AEs. The cost of the services is billed by the assessee on internal cost + mark-up. The assessee also incurs some external cost on behalf of the AEs, like cost of procurement of APIs and bio-equivalent studies conducted by third parties. The external cost are charged to AEs on actual basis. The TPO has erred in holding that the recoveries of the actual cost by the assessee from AEs are in the nature of sundry services rendered to AEs. Majority of the recoveries are on account of cost of material to render contract development support services and bio-equivalence studies. Such transactions are significant in the development of new products by assessee's AE. The services rendered by the assessee are akin to 'contract development support services'. The assessee is remunerated by mark-up of 34.45%. Since the nature of transaction is same, the TPO applied same mark-up on recoveries. The Id. AR prayed for deleting the entire adjustment as the assessee is recovering external cost without any mark-up.

The Id. Authorized Representative of the assessee made an alternative prayer without prejudice to his initial submissions to delete the entire adjustment. The Id. AR submitted that if, the cost of APIs and bio-equivalence studies are considered as integral part of contract development support services segment i.e. the average cost is included in segment revenue and segment cost, the revised margin (OP/OC) after considering cost of APIs and bio-equivalence studies would be 18.03%. The said margin would meet arm's length test if compared to average margin of the comparable companies i.e. 13.08%. The Id. Authorized Representative for the assessee furnished a table giving the calculations:

Particulars	As per transfer pricing study	Revised margin after considering cost of APIs and bio-equivalence studies.
Operating Revenue (A)	1,03,83,00,256	1,74,15,78,243
Operating cost (B)	77,22,59,534	1,47,55,37,522
Operating Profit (C=A-B)	26,60,40,722	26,60,40,722
OP/OC(D=C/B)	34.45%	18.03%
Margin of comparable companies as per Transfer Pricing Study	13.08%	

The Id. Authorized Representative for the assessee pointed that similar adjustment was made by the TPO in assessment year 2013-14. The assessee filed objections before the DRP. The DRP upheld TPO's findings of treating cost of APIs and bio-equivalence studies as integral part of contract development service activities. However, the DRP after considering the revised margin of operating cost vis-a-vis the margin earned by the comparable companies concluded that the cost of recoveries is at arm's length. The DRP after appreciating alternate plea of the assessee deleted the adjustment proposed by the TPO.

5. The Id. Authorized Representative of the assessee submitted that in ground of appeal No.18 to 22, the assessee has assailed disallowance of Rs.1,30,04,803/- made under section 37(1) of the Act in respect of payments allegedly made to medical practitioners (Doctors). The Id. Authorized Representative for the assessee submitted that the payments were neither made to medical practitioners, nor made for purchasing gifts or sponsoring travelling expenses of the Doctors, the expenses were incurred towards conducting of seminars. The Id. Authorized Representative for the assessee pointed that Assessing Officer has made disallowance by referring to the code of conduct laid down by Indian Medical Council (Professional Conduct Etiquette and Ethics) Regulations 2002 (in short 'MCI Regulations) and CBDT Circular 5/2012. The Id. Authorized Representative of the assessee asserted that these regulations apply to medical practitioners and not to pharmaceutical companies and hence, the expenditure has been wrongly disallowed in the hands of the assessee. In support of his submissions the Id. Authorized Representative placed reliance on followings decisions:

1. Max Hospitals vs. Medical Council of India [WP(c) 1334/2013(Del)(HC)
2. Dr. Anil Gupta vs. ACIT(ITA No.485/2008) (Raj) (HC)
3. DCIT vs. PHL Pharma Private Ltd. (ITA No.4605/Mum/2014) (Mum. Trib.)
4. M/s. Solvay Pharma India Ltd. (Now Merged with Abbott India Ltd.) vs. Pr. CIT (ITA No.3585/Mum/2016)(Mum. Trib.)
5. Novartis Healthcare Pvt. Ltd. Vs. ACIT (ITA N.2786/M/2016) (Mum. Trib.)
6. Aristo Pharmaceuticals Pvt. Ltd. Vs. ACIT (ITA No.6680/Mum/2012, 5553/Mum/2014, 5479/Mum/2015) (Mum. ITAT)

6. The Id. Authorized Representative of the assessee submitted that the assessee does not wish to press grounds of appeal No.23 to 27.

SUBMISSION OF DEPARTMENT REPRESENTATIVE:

7. Per contra, Sh. Anand Mohan, representing the Department vehemently defended the impugned assessment order and the directions of the DRP. The Id. Departmental Representative submitted that the TPO could gather comparable prices of only four APIs out of 17 imported by the assessee during the period relevant to the assessment year under appeal. Therefore, in the absence of comparable data in respect of 13 APIs, the TPO accepted the data furnished by the assessee. Out of four APIs for which comparable prices were available, the TPO accepted the price in respect of two APIs as the comparable prices were higher. It was only in the case of 2 APIs that the TPO found that prices charged to the assessee were higher. Hence, the adjustment was made by the TPO while determining arm's length price. The Id. Departmental Representative defended the action of TPO in applying CUP as most appropriate method to determine ALP. In support of his contention the Id. Departmental Representative placed reliance on the decision of Tribunal rendered in the case of *Serdia Pharmaceuticals India Pvt. Ltd. Vs. ACIT reported as 44 SOT 391(Mum) and Fulford (India) Ltd. vs. ACIT, 113 taxmann.com 286*. The Id. Departmental Representative further submitted that since import of API and export of the final product manufactured by the assessee were not to same entities, therefore, the TPO and the DRP were justified in holding that both the transactions are distinct and unconnected.

7.1 As regards Corporate Tax issue of disallowance under section 37(1) of the Act, the Id. Departmental Representative submitted that the issue can be restored to Assessing Officer for verification of the expenditure.

FINDINGS:

Transfer Pricing Adjustments

8. We have heard the submissions made by rival sides and have perused the orders of authorities below. We have also examined the documents referred by the Id. Authorized Representative of the assessee during the course of his submissions and the decisions on which reliance has been placed by the rival sides. The ground No. 1 to 3 of the appeal are general in nature and hence, require no adjudication. In ground No.4 and 9 of the appeal, the assessee has impugned adjustment in relation to international transactions of import of APIs by the assessee. The said grounds are reproduced here in below:-

“On the facts and circumstances of the case and in law, the learned AO/Hon’ble DRP/Joint Commissioner of Income Tax- Transfer Pricing-4(1) (hereinafter referred to as the ‘learned TPO’) on facts and in law have:

4. erred in making a transfer pricing adjustment of Rs.17,97,82,202 in respect of the international transaction of import of APIs from AE namely Activated Carbon and Mycophenolate Mofetil (hereinafter referred to as 'said APIs');

9. erred in making a transfer pricing adjustment on account of import of APIs from AE (which is used for manufacture of FDFs) under CUP method, without appreciating that the Appellant is following a cost plus model under manufacturing of FDFs segment and thereby any adjustment made on the cost side will have a corresponding impact on the revenue side which will be revenue neutral;”

The assessee is engaged in manufacturing and trading of APIs and FDFs. The assessee imports APIs from its overseas AEs and after manufacturing of drugs

and formulations export FDFs to its group concerns/AEs. Since, the assessee is importing inputs for manufacturing of FDFs from its AEs and exporting final product to its AEs only, the assessee has treated the entire transaction of import and export as one composite transaction. During the course of submissions, the Id.Authorized Representative of the assessee has referred to Manufacture Agreement dated 01/01/2009 between Sandoz GmbH (in short 'Sandoz') and the assessee (at page 376 of the Paper Book). It would be essential to refer to the relevant clause of the said agreement to appreciate the scope of agreement, obligations of the assessee and manner of remuneration. The extract of the relevant clauses of the agreement are reproduced herein below:-

"Article 2 – Scope of the Agreement"

- 2.1 *This Agreement lays down the general conditions applicable to the Production and Supply of Agreement Products by Manufacturer for Sandoz under a manufacturing arrangement, which may be amended separately from time to time upon mutually written agreement of the Parties. It is understood that this Agreement shall not apply to the extent the Parties, in individual cases, explicitly and in writing depart from its terms after the Effective Date.*
- 2.2 *Individual manufacturing will be deemed completed upon the release to Sandoz of the relevant Quality Assurance statement of compliance, unless otherwise agreed in writing.*

Article 3 – Purchase Order and Acceptance

- 3.1 *Sandoz or its Affiliates shall issue written purchase orders describing the specific order in details. Manufacturer shall only accept orders from Sandoz or its Affiliates under this Agreement if they are in writing. Oral orders (telephone) shall only be accepted in exceptional cases (emergency) forwarding the written order without delay.*

Sandoz or its Affiliates will specify in the purchase order:

- *the Agreement Products ordered (including Specification)*
- *volume*
- *delivery schedule*
- *packaging and Transportation, if applicable*
- *the reference number of the respective purchase order.*

- *the name of the Sandoz unit/affiliate issuing the purchase order and the country of destination and place of delivery.*

Article 4 – Commercial Terms

- 4.1 *The price for the individual agreement Product shall in general include the cost for the respective API and/or Bulk Product.”*

The terms ‘agreement product’ and ‘affiliates’ as defined in Article 1 of the agreement are as under:

““Agreement Product” shall mean any API, Medical Product, Bulk Product, Drug Product, as the case may be, which Sandoz orders from Manufacturer during the term of Agreement;

“Affiliate” shall mean any corporation or other business entity which directly or indirectly, is controlled by, controls, or is under common control with Sandoz or Manufacturer as the case may be. For such purposes, “Control” shall mean the direct or indirect ownership of at least fifty percent (50%) of the voting interest in such corporation or other entity or the power in fact to control the management directions of such entity;”

8.1. As per Article-2 of the agreement the assessee (Manufacturer) shall manufacture and supply the agreement products for Sandoz only. The Article-3.1 specifies that the assessee shall accept manufacturing orders only from the Sandoz or from its affiliates under the agreement. Thus, a bare perusal of the above mentioned clauses of the agreement shows that the agreement binds the assessee to carry out manufacturing process for Sandoz and its affiliates (AEs). Article 4 of the agreement specifies that the cost of manufactured product includes cost of API/Bulk product. Along with the agreement there is schedule that specifies cost element to be reimbursed to the assessee. A perusal of the chart shows that the assessee would be entitled for

reimbursement of material cost including APIs, Bulk product and partially packed Drug Products without mark-up. The assessee shall be remunerated with mark-up of 15% on processing cost and transportation, warehousing and customer services cost. The Revenue has not disputed the fact that the assessee has imported inputs (APIs) for manufacturing of FDFs from its AEs and has exported the final products to its AEs, albeit to AEs other than the suppliers of APIs. The only objection raised by the TPO is that the import of raw material and the export of finished goods are to different entities. However, the TPO has failed to appreciate the fact that the international transactions of importing APIs and export of FDFs are within group companies. The manufacturing agreement in an unambiguous manner has restricted the assessee to manufacture for Sandoz and its affiliates. Since the import and export transactions are within the group concerns and manufacturing is carried out in accordance with the orders received from AEs, we have no hesitation in holding that there is live link of the import and export transactions.

9. As we have observed earlier that along with the Manufacturing Agreement is a schedule specifying the cost elements to be reimbursed. Article 4.1 read with the schedule makes it explicitly clear that the cost of FDFs shall include cost of APIs and the cost of all inputs including APIs would be reimbursed without any mark up. It is only the manufacture/processing cost on which the assessee would be remunerated with mark-up of 15%. Since, the assessee would be reimbursed entire cost of APIs used in manufacturing of FDFs, there is no element of transfer of any profits to overseas AEs. Whatever cost the assessee is paying to its AE for import of API, the same is added to the

standard cost of inputs used for manufacturing FDFs and is recovered by exporting FDFs to AEs.

10. The assessee has imported 17 APIs from its AEs and applied TMNN to determine arm's length price of the import transactions. The TPO accepted TNMM in respect of 15 APIs and applied CUP to benchmark arm's length price of only 2 APIs. It is undisputed that the assessee does not have unfettered choice to select most appropriate method to benchmark international transactions. The method to benchmark arm's length price has to be selected in accordance with the provisions of the Act and Rules framed thereunder. However, TPO having accepted the method applied by assessee to benchmark substantial part of the international transaction of importing APIs, cannot question the method of benchmarking trivial part of same transaction. Our view is supported by the decision rendered in the case of *Amphenol Interconnect India Pvt. Ltd. (supra.)*.

11. The Revenue has placed heavy reliance on the decision of *Serdia Pharmaceuticals (India) Pvt. Ltd. (supra)* for applying CUP to benchmark the transaction of import of two APIs i.e. Mycophenolate Mofetil and Activated Carbon. The aforesaid decision of the Tribunal is distinguishable on facts and hence, does not advance the cause of Revenue. In the said case the APIs were imported by the assessee (therein) from its AEs and used the same for manufacturing FDF. The FDF was produced and marketed by the assessee for consumption of end users. Further, the APIs imported by the assessee had comparables. The assessee adopted TNMM to benchmark the transaction of import of APIs. On the basis of inputs from assessee, the TPO collected

information on the cost of APIs and found that the comparable prices of APIs were far lower. The TPO rejected TNMM and applied CUP as the most appropriate method to benchmark the arm's length price of APIs and made adjustment. The CIT(A) upheld the adjustment. The Tribunal after examining the facts in the said case confirmed the order of CIT(A) in upholding determining arm's length price of APIs by adopting CUP as the most appropriate method. The Tribunal while upholding selection of CUP for benchmarking transaction of import of APIs observed:

"76. In view of the above discussion, in our considered view, as long as appropriate comparables can be found, CUP method will indeed be the most appropriate method in respect of generic drug, even when such a generic drug is manufactured by its original patent holder."

Similar view has been expressed by the Tribunal in the case of *Fulford (India) Ltd. (supra)*.

In the instant case the distinguishable facts are: The assessee has imported APIs from its AEs for manufacturing FDFs and has exported FDFs to its AEs under manufacturing arrangement. Thus, the entire international transactions of import and export is within the closed loop of AEs. The assessee has imported 17 APIs. The TPO accepted TNMM adopted by the assessee in respect of 15 APIs and applied CUP in respect of only two APIs. The TPO failed to find appropriate comparables for closely linked transactions. Hence, in the peculiar facts of the present case CUP cannot be adopted to benchmark the international transaction of import of APIs.

12. Ostensibly, the assessee has been consistently benchmarking its international transactions of import of APIs by adopting TNMM as the most appropriate method. The Id. Authorised Representative of the assessee has pointed that TPO has accepted the assessee's method of benchmarking in AY 2009-10, 2010-11, 2011-12 and AY 2014-15. The TPO has objected to applying TNMM in AY 2008-09, 2012-13 and 2013-14. Although in all the years the nature of international transactions and the product imported from AEs were same. In AY 2013-14 the objections of the assessee against the adjustment were accepted by the DRP and the adjustment was deleted. The Revenue accepted the same as no appeal against the findings of the DRP has been filed by the Department. These facts have not been refuted by the Revenue. No material has been brought on record to distinguish the facts in the impugned assessment year.

13. Be that as it may, once the TPO has accepted the cost of inputs determined by the assessee by applying TNMM as the most appropriate method in substantial part of international transaction, the TPO has no discretion of cherry picking two APIs and apply CUP to benchmark transaction. We further observe that whatever be the cost of inputs (APIs), the assessee would be getting reimbursement of the cost (without margin) after processing of the same into FDF. The international transactions of import of APIs and export of FDFs are within the close loop of group concerns and hence, interlinked. The findings of the TPO and the directions of the DRP are reversed and the adjustment made on the import cost of APIs is deleted. The assessee succeeds on ground No.4 and 9 of the appeal.

14. The grounds No.5 to 8 and 10 to 12 of the appeal are in support of the main grounds i.e. ground no. 4 and 9, raised by the assessee assailing adjustment of international transaction of import of APIs. Since the assessee succeeds on main grounds, the supporting grounds have become academic, hence, are not deliberated upon.

15. The next transfer pricing issue raised in the appeal by assessee is against adjustment of Rs.24,89,43,950/- on recoveries of cost of APIs and cost of Bio-equivalence studies under Contract Development Service agreement. The grounds of appeal on the issue are as under:

“Adjustment of ₹24,89,43,950 of international transactions with AEs with respect to recovery of cost of APIs & cost of bioequivalence studies in contract development services segment

13. *erred in making a transfer pricing adjustment of Rs.24,89,43,950 of international transactions with AEs with respect to recovery of cost of APIs & cost of bioequivalence studies in contract development services segment;*

14. *erred in not appreciating that the international transaction of contract development support service provided to AEs should exclude the recovery of cost of APIs and bioequivalence studies which are pass through costs and entire cost on these expenses are recovered from AEs on a cost to cost basis which meets the arm's length test;*

15. *erred in applying a mark-up earned by the Appellant itself in its contract development support services segment i.e. 34.45% on recovery transaction of cost of APIs and cost of bio-equivalence studies which is arising out of a controlled transaction and is contrary to the arm's length principles;*

16. *without prejudice to the above, erred in not considering that even if the recovery cost of APIs and cost of bio-equivalence studies are considered as an integral part of contract development support activity of the Appellant (i.e the aforesaid cost is included in the segment revenue and segment cost), the revised margin of 18.03% on operating cost would still meet the arm's length test as compared to comparable companies (i.e. 13.08% on operating cost);*

17. *without prejudice to the above, erred in making adjustment on total recovery of expenses from AEs amounting to Rs. 72,26,23,949 as against Rs. 70,32,77,988 being recovery from AEs in relation to cost of APIs and cost of bio-equivalence studies as per Form 3CEB;”*

16. The Id. Authorized Representative of the assessee has referred to service agreement at page 495 of the Paper Book. A perusal of the said agreement reveals that as per Article-3 of the agreement, the assessee (service provider) shall invoice on monthly basis the service charges for services rendered and the assessee shall be entitled to mark-up of 10% on internal services cost only.

The Id. Authorized Representative of the assessee has fairly admitted that in assessment year 2013-14, the DRP has held that the cost of APIs and cost of Bio-equivalence studies are integral part of Contract Development Services support activity. However, the DRP deleted the addition on the ground that the revised margin of the assessee after including the recovery cost of API and bio-equivalence studies are at arm's length. The Id. Authorized Representative of the assessee stated at the Bar that the issue can be disposed of in the similar manner. The assessee has filed a chart giving the revised margin after including cost of APIs and Bio-equivalence studies. The revised margin of the assessee is 18.03% as against margin of comparable companies at 13.08%. Since the margin is within tolerance limit, therefore, no adjustment is required. The alternative contention of the assessee raised in ground No.16 of the appeal is accepted. In the result, ground No.13 to 15 and 17 are dismissed and ground No.16 is allowed.

Corporate Tax Issue:

17. In ground No.18 to 22 of the appeal, the assessee has assailed disallowance of expenditure amounting to Rs.1,03,04,803/- incurred by the assessee on health care professionals(Doctors). The Assessing Officer has made disallowance by placing reliance on MCI Regulations and CBDT Circular (supra). The contentions of the assessee is that the expenditure has been incurred for conducting seminars and not on gifts and personal travelling expenses of Doctors. We find that this issue has been considered by the Tribunal in catena of appeals and has held that MCI Regulations does not apply on pharmaceutical companies. Thus, any expenditure incurred by pharmaceutical company on medical professionals is outside the scope of MCI guidelines. For the sake of completeness relevant extract of the decision rendered in the case of M/s Solvay Pharma India Ltd. is reproduced herein below:-

“21. CBDT Circular no. 5 of 2012 seeks to disallow expenditure incurred by pharmaceutical companies inter-alia in providing 'freebies' to doctors in violation of the MCI Regulations. The term 'freebies' has neither been defined in the Income-tax Act nor in the MCI Regulations'. However, the expenditure so incurred by assessee does not amount to provision of 'freebies' to medical practitioners. The expenditure incurred by it is in the normal course of its business for the purpose of marketing of its products and dissemination of knowledge etc and not with a view to giving something free of charge to the doctors. The act of giving something free of charge is incidental to the main objective of product awareness. Accordingly, it does not amount to provision of freebies. Consequently, there is no question of contravention of the MCI Regulations and applicability of Circular no. 5 of 2012 for disallowance of the expenditure.

22. The department has not brought anything on record to show that the aforesaid regulation issued by Medical Council of India is meant for pharmaceutical companies in any manner. On the contrary, the assessee has brought to the notice of the bench the judgment of the Delhi High Court in the case of Max Hospital v. MCI in [WPC 1334 of 2013, dated 10- 1-2014], wherein the Medical Council of India admitted that the Indian Medical Council Regulation of 2002 has jurisdiction to take action only against the medical practitioners and not to health sector industry. From the aforesaid decision, it is ostensibly clear that the Medical Council of India has no jurisdiction to pass any order or regulation against any hospital or any health care sector under its 2002 regulation. So once the Indian Medical

Council Regulation does not have any jurisdiction nor has any authority under law upon the pharmaceutical company or any allied health sector industry, then such a regulation cannot have any prohibitory effect on the pharmaceutical company like the assessee. If Medical Council regulation does not have any jurisdiction upon pharmaceutical companies and it is inapplicable upon Pharma companies like assessee then, where is the violation of any of law/regulation? Under which provision there is any offence or violation in incurring of such kind of expenditure.

23. Now coming to the Explanation to Section 37(1) invoked by the CIT, the Explanation provides an embargo upon allowing any expenditure incurred by the assessee for any purpose which is an offence or which is prohibited by law. This means that there should be an offence by an assessee who is claiming the expenditure or there is any kind of prohibition by law which is applicable to the assessee. Here in this case, no such offence of law has been brought on record, which prohibits the pharmaceutical company not to incur any development or sales promotion expenses. A law which is applicable to different class of persons or particular category of assessee, same cannot be made applicable to all. The regulation of 2002 issued by the Medical Council of India (supra), provides limitation/curb/prohibition for medical practitioners only and not for pharmaceutical companies. Here the maxim of 'Expressio Unius Est Exclusio Alterius' is clearly applicable, that is, if a particular expression in the statute is expressly stated for particular class of assessee then by implication what has not been stated or expressed in the statute has to be excluded for other class of assessee. If the Medical Council regulation is applicable to medical practitioners then it cannot be made applicable to Pharma or allied health care companies. If section 37(1) is applicable to an assessee claiming the expense then by implication, any impairment caused by Explanation 1 will apply to that assessee only. Any impairment or prohibition by any law/regulation on a different class of person/assessee will not impinge upon the assessee claiming the expenditure under this section.

24. We observe that the CBDT Circular dated 1-8-2012 (supra) in its clarification has enlarged the scope and applicability of 'Indian Medical Council Regulation 2002' by making it applicable to the pharmaceutical companies or allied health care sector industries. Such an enlargement of scope of MCI regulation to the pharmaceutical companies by the CBDT is without any enabling provisions either under the provisions of Income Tax Law or by any provisions under the Indian Medical Council Regulations. The CBDT cannot provide casus omissus to a statute or notification or any regulation which has not been expressly provided therein. The CBDT can tone down the rigours of law and ensure a fair enforcement of the provisions by issuing circulars and by clarifying the statutory provisions. CBDT circulars act like 'contemporanea expositio' in interpreting the statutory provisions and to ascertain the true meaning enunciated at the time when statute was enacted. However the CBDT in its power cannot create a new impairment adverse to an assessee or to a class of assessee without any sanction of law. The circular issued by the CBDT must confirm to tax laws and for purpose of giving administrative relief or for clarifying the provisions of law and cannot impose a burden on the assessee, leave alone creating a new burden by enlarging the scope

of a different regulation issued under a different act so as to impose any kind of hardship or liability to the assessee. In any case, it is trite law that the CBDT circular which creates a burden or liability or imposes a new kind of imparity, same cannot be reckoned retrospectively. The beneficial circular may apply retrospectively but a circular imposing a burden has to be applied prospectively only. Here in this case the CBDT has enlarged the scope of 'Indian Medical Council Regulation, 2002' and made it applicable for the pharmaceutical companies. Therefore, such a CBDT circular cannot be reckoned to have retrospective effect. The free sample of medicine is only to prove the efficacy and to establish the trust of the doctors on the quality of the drugs. This again cannot be reckoned as freebies given to the doctors but for promotion of its products. The pharmaceutical company, which is engaged in manufacturing and marketing of pharmaceutical products, can promote its sale and brand only by arranging seminars, conferences and thereby creating awareness amongst doctors about the new research in the medical field and therapeutic areas, etc. Every day there are new developments taking place around the world in the area of medicine and therapeutic, hence in order to provide correct diagnosis and treatment of the patients, it is imperative that the doctors should keep themselves updated with the latest developments in the medicine and the main object of such conferences and seminars is to update the doctors of the latest developments, which is beneficial to the doctors in treating the patients as well as the pharmaceutical companies.

25. In view of the above discussion, we do not find any merit in the order passed u/s.263.

26. In the result, appeal of the assessee is allowed.”

Thus, we find merit in the grounds No. 18 to 22 raised by the assessee. However, we observe that the AO while dealing with this issue has out-rightly disallowed the amount claimed by the assessee. We deem it appropriate to restore this issue to the Assessing Officer for the limited purpose of verification of the expenditure and allow the same in accordance with our above finding. The grounds No.18 to 22 are allowed for statistical purpose, in the above terms.

18. The Id.Authorized Representative of the assessee has stated at the Bar that he is not pressing grounds No.23 to 27 of the appeal. These grounds of appeal are dismissed, accordingly.

19. In ground No.28 of the appeal the assessee has assailed initiation of penalty proceedings under section 271(1)(c) of the Act. The challenging to penalty proceedings is premature at this stage. This ground of the appeal is dismissed, as such.

20. In the result, **appeal of the assessee for assessment year 2012-13 is partly allowed in the terms aforesaid.**

ITA NO.2264/MUM/2017, A.Y. 2008-09:

21. This appeal by the assessee is against transfer pricing adjustment on import of APIs and recoveries of cost of APIs & cost of Bio-equivalence studies under Contract Development Services agreement. Both the sides unanimously stated that the facts in assessment year 2008-09 are similar to TP adjustment made in assessment year 2012-13. The Id.Authorized Representative of the assessee stated that the submissions made in respect of appeal for 2012-13 would equally hold good for the appeal for assessment year 2008-09.

20. Both sides heard. We find that the TPO in assessment year 2008-09 has made transfer pricing adjustment only in respect of 2 APIs i.e. Sodium Benzoate and Simvastatin USP Rovereto (Lek) as against 11 APIs imported by the assessee during the relevant period. The adjustment has been made by TPO for similar reasons as has been given in assessment year 2012-13. Since the factual matrix of the case and the nature of international transactions are identical in both the assessment years, the findings given by us while adjudicating this issue in ITA No.2263/Mum/2017 would *mutatis mutandis*

apply to assessment year 2008-09. Consequently, ground No.6 and 11 of the appeal are allowed.

21. The other grounds raised on the issue i.e. grounds No. 7 to 10 and 12 to 14 being in support of the main ground have become academic and hence, not being deliberated upon.

22. In ground of the appeal No.15 to 19, the assessee has assailed adjustment of Rs.35,44,97,586/- with respect to cost of APIs and cost of Bio-equivalence studies. The above grounds are identical to grounds No.13 to 17 raised in the appeal for assessment year 2012-13. The assessee has filed a chart giving revised margins after including cost of APIs and Bio-equivalence studies. The revised margin of the assessee is 16.37% as against margin of comparable companies at 13.54%.

Particulars	As per transfer pricing study	Revised margin after considering cost of APIs and bio-equivalence studies.
Operating Revenue (A)	75,24,19,812	1,56,18,54,198
Operating cost (B)	53,27,18,828	1,34,21,53,215
Operating Profit (C=A-B)	21,97,00,984	21,97,00,984
OP/OC(D=C/B)	41.24%	16.37%
Margin of comparable companies as per Transfer Pricing Study	13.54%	

Since the margins of the assessee are within tolerance limits, the findings given by use while adjudicating this issue in assessment year 2012-13, would mutatis mutandis apply to the present appeal. Accordingly, ground No.18 is allowed and grounds No.15 to 17 and 19 are dismissed.

23. In ground No.20, the assessee has assailed initiation of penalty proceedings under section 271(1)(c) of the Act. The challenge to penalty proceedings at this stage is premature. This ground of the appeal is dismissed, as such.

24. The ground of appeal No.1 and 2 are general in nature, hence, require no adjudication.

25. In ground 3 and 4 of the appeal, the assessee has raised legal ground challenging the jurisdiction of TPO. The Id. Authorized Representative of the assessee stated at the Bar that grounds No.3 & 4 are not pressed. Both these grounds are dismissed, as such.

26. In the result, **appeal of the assessee for assessment year 2008-09 is partly allowed.**

ITA NO.6815/MUM/2017, A.Y. 2013-14:

27. The assessee in appeal has raised two issues. The first issue is against adjustment of Rs75,19,986/- on account of MODVAT credit and closing stock under section 145A of the Act. The Id. Authorized Representative of the assessee stated at the Bar that this issue is not pressed. Accordingly, the issue raised in the grounds of appeal is dismissed as not pressed.

28. The second issue in appeal is with regard to disallowance of Rs.78,84,160/- under section 37(1) of the Act on account of payment made to health care professionals(Doctors). This issue is identical to the one adjudicated by us in the appeal of assessee for assessment year 2012-13

above. Since the facts and the grounds of appeal are identical, the finding given by us while adjudicating the issue in assessment year 2012-13 would *mutatis mutandis* apply to the present appeal. The issue is restored to the file of Assessing Officer with similar directions. The grounds of appeal No.1 to 5 are allowed for statistical purpose.

29. The Id. Authorized Representative of the assessee stated at the Bar that he is not pressing grounds No.6 to 8. Consequently, these grounds are dismissed, as such.

30. In ground No.9 of the appeal, the assessee has assailed initiation of penalty proceedings under section 271(1)(c) of the Act. The challenge to penalty proceedings at this stage is premature. This ground of the appeal is dismissed, as such.

31. In the result, **appeal of the assessee for assessment year 2008-09 is partly allowed.**

32. To sum up, all the appeals by the assessee are partly allowed.

Order pronounced on Thursday the 10th day of September, 2020.

Sd/-

(G.MANJUNATHA)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 10/09/2020

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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(Dy./Asstt. Registrar)
ITAT, Mumbai

	Details	Date	Initials	Designation
1	Draft dictated on			Sr.PS/PS
2	Draft Placed before author			Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			