IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I-2 : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.8932/Del/2019
Assessment Year: 2014-15

Sumitomo Corporation India Pvt. Ltd., 302,303, 3rd Floor, World Mark-2, Asset No.8, Aerocity Hospitality District, New Delhi.	Vs	DCIT, Circle-24(2), New Delhi.

PAN: AABCS1887M

(Appellant) (Respondent)

Assessee by	:	Shri C.S. Aggarwal, Sr. Advocate
Revenue by	:	Ms Anshu Shukla Pandey, CIT-DR
Date of Hearing	:	04.09.2020
Date of Pronouncement	:	03.11.2020

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order passed by the AO u/s 143(3) r.w. section 144C of the IT Act, 1961 for A.Y. 2014-15.

2. The grounds raised by the assessee are as under:-

> õ1. That the Ld. Deputy Commissioner of Income Tax ('AO'), Circle 24(2), New Delhi has grossly erred both on facts and in law, in determining the income of the Appellant at Rs. 41,73,28,470 in assessment order dated October 22, 2019 framed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 ('the Act') as against the income of Rs. 22,72,93,710, per the return filed by the Appellant. In so doing, he has erred in

making an addition of Rs. 19,00,34,764 in the arm's length price of international transactions entered by the Appellant with its AEs

2. That in making the aforesaid addition, the Ld. AO has erred in making a reference under section 92CA(1) of the Act to the Ld. Transfer Pricing Officer ('TPO') on the following amongst other grounds, rendering the order of the Ld. TPO as unsustainable both in law and on facts:
a) As the reference made by the Ld. AO to the Ld. TPO is not in accordance with the provisions of Section 92CA(1) of the Act; and
b) As no opportunity of being heard was granted at any stage of the proceedings for this purpose, whether at the proposal stage or even later at the time of grant of approval

3. The Ld. TPO has erred in making the transfer pricing adjustment without establishing the existence of any one of the four pre-conditions provided in section 92C(3) of the Act, which is a mandatory requirement for making an adjustment under section 92CA(3) of the Act

4. That in making the aforesaid addition, the Ld. DRP has grossly erred in in its jurisdiction when it directed the Ld. AO / TPO to make an adjustment on substantive basis of Rs. 19,00,34,764, which amounted to 'modifying' of the order of the Ld. TPO u/s 92CA(3) of the Act.

5. That the Ld. AO could not have made additions on substantive basis as the same had not been proposed by the Ld. TPO in his order u/s 92CA(3) of the Act.

6. The Ld. TPO has erred in disregarding the transfer pricing approach adopted by the Appellant to determine the arm's length price ('ALP') of its international transactions. The Appellant's use of transactional net margin method ('TNMM') with operating profit / operating expenses ('OP/OPEX') as the profit level indicator ('PLI') in the transfer pricing documentation, has been disregarded without any justification whatsoever.

7. The Ld. TPO has erred in disregarding the Judgments of Hon'ble Tribunal in Appellant's own case for AY 2007-08 to AY 2013-14 wherein TNMM with Berry ratio (modified form of OP/OPEX) as the PLI has been accepted as the most appropriate method for benchmarking the transactions relating to the indent segment. Further, the Ld. DRP / TPO also failed to appreciate that the Hon'ble High Court as well as the Hon'ble Tribunal has also held that percentage of average commission earned from third parties cannot be used as a basis for making adjustment in respect of related party transactions.

8. The Ld. TPO while making the adjustment of Rs. 19,00,34,764 was under assumption that the method adopted by the Hon'ble Tribunal could have been accepted. In fact, the Hon'ble Tribunal itself did not find favour with the adjustment so made, after remand from the Hon'ble High Court.

9. The Ld. TPO has erred in failing to appreciate that while proposing or making upward adjustment in the arm's length price, the Ld. TPO has not adopted any prescribed method and the alleged method on which variation had been proposed in the draft order was wholly arbitrary and totally unwarranted both on facts and in law.

10.The Ld. TPO has erred in disregarding the transfer pricing approach adopted by the Appellant (being TNMM as the most appropriate method with OP/OPEX as the PLI), despite the fact that this methodology has been agreed upon in the BAPA signed between the Appellant and the Central Board of Direct Taxes.

11.That the Ld. TPO / DRP both have failed to comprehend that the Hon'ble High Court of Delhi in Appellant's own case has held that in case the average rate of commission earned from third parties was to be considered as arm's length price for indenting transactions with the AEs, it had to be established that there is no significant variation in the rate of commission between different products and without conducting any such enquiry, such average rate of commission could not be adopted as arm's length.

12.The Ld. DRP has failed to appreciate the huge difference in FOB value on which commission had been earned from third parties viz. Rs. 51,31,23,599 and FOB value of indent transaction with AEs (other than Sumitomo Corporation Japan) viz. Rs. 12,53,46,49,034. Further, there are huge difference in the geographical locations and business segments due to which, per the judgement of the Hon'ble High Court in Appellant's own case, the average commission rate earned from third parties cannot be used for making adjustment in relation to transactions with AEs

The above grounds of appeal are mutually exclusive and without prejudice to each other.

The Appellant craves leave to add, alter, amend or vary any of the above grounds either before or at the time of hearing as we may be advised. The arguments taken hereinabove are without prejudice to each other.

3. The facts of the case, in brief, are that the assessee company is engaged in the business of facilitating the import and export activities both directly and

indirectly on behalf of various customers in India and overseas through the provision of the trade related support services and the trade related advisory services.

4. It filed its return of income on 28th November, 2014 declaring total income at Rs.22,72,93,710/-. It is worthwhile to mention here that, Assessee Company entered into a Bilateral Advance Pricing Agreement (BAPA) with the Central Board of Direct Taxes (CBDT) on 02.08.2016. The year under consideration i e. F.Y, 2013-14 related to A.Y. 2014-15 is one of the covered years under the BAPA under the category 'Roll Back Years'. Accordingly, the assessee Company revised its ITR at an income of Rs 22,72,93,710/- to give effect to the BAPA on 18.10.2016. Since the assessee had entered into certain international transactyions with its AE, the AO referred the matter to the TPO for determination of the armøs length price of the international transaction. The TPO, during the course of assessment proceedings, observed that the international transactions and the analysis carried by the assessee are as under:-

<table>
<tr><th rowspan="3">International Transaction</th><th rowspan="3">Transfer Pricing Method</th><th colspan="3">Sumitomo India</th><th>Comparable</th></tr>
<tr><th rowspan="2">Profit Level Indicator ["PLIø]</th><th rowspan="2">Total Value of Transaction [Amount of INR]</th><th rowspan="2">Margin</th><th>Findings</th></tr>
<tr><th>Arithmetic Mean</th></tr>
<tr><td>Sale of goods</td><td rowspan="3">TNMM</td><td rowspan="3">OP/VAE</td><td>4,782,797</td><td rowspan="3">24.52%</td><td rowspan="3">3.39 %</td></tr>
<tr><td rowspan="2">Purchase of coods
Trade Payable</td><td>477,077,786</td></tr>
<tr><td>297,206,390</td></tr>
<tr><td>Reimbursement of expenses received/receivable</td><td rowspan="2">Other method</td><td rowspan="2">NA</td><td>14523365</td><td colspan="2" rowspan="2">NA</td></tr>
<tr><td>Miscellaneous Income</td><td>75140</td></tr>
<tr><td>Provision of services</td><td>TNMM</td><td>OP/VAE</td><td>793,606,244</td><td rowspan="3">24.52%</td><td rowspan="3">3.39%</td></tr>
<tr><td>Availment of services</td><td>TNMM</td><td>OP/VAE</td><td>79,383,171</td></tr>
<tr><td>Trade and others</td><td>TNMM</td><td>OP/VAE</td><td>3,538,197</td></tr>
</table>

Trade receivable	TNMM	OP/VAE	228,428,160		
Managerial Remuneration (SDT)	TNMM	OP/VAE	88,244,006		

5. The TPO observed that as per the BAPA, the transaction of the assessee with its AE Sumitomo, Japan only is covered under the agreement. The transaction of the assessee with AEs other than Sumitomo, Japan, during the year are not covered under BAPA. The TPO analysed the AE-wise transaction with profitability, the details of which are as under:-

Particulars	SCJ	AE Others	Non-AE	Total
Sales(A)	543,544,968	20,975,803	962,004,322	1,526,525,093
(-) Cost of Goods Sold	498,314,582	18,299,895	853,870,004	1,370,484,481
	45,230,386	2,675,908	108,134,318	156,040,612
(+) Commission Fee	603,840,855	189,765,102	92,411,946	886,017,903
(-) Commission Paid	-	-	-	-
(+) Trading Interest	75,140	-	-	75,140
(-) Bank Charges	-	-	-	-
GROSS PROFIT ON SALES- (A)	649,146,381	192,441,010	200,546,264	1,042,133,655
Details of Operating Expenses				
Employees Cost as per audited financials				355,064,692
Administrative Expenses (as per Note 1 below)				472,227,829
Depreciation as per audited financials				17,376,622
OPERATING EXPENSES (OPEX)				844,669,143
AE OPEX Allocation	52,87,54,805	15,67,50,637	15,91,63,702	844,669,143
OPERATING PROFIT (OP)- (B)	1203,91,576	356,90,373	413,82,562	1974,64,512
ACTUAL OP/OPEX %	22.77%	22.77%	26.00%	
TARGET OP/OPEX %	22.50%	/22.50%	22.50%	

6. From the above, the TPO noted that the operating profit margin of the transaction of the assessee with Sumitomo, Japan calculated as per BAPA is 22.77% which is within the armøs length margin of 22.5% to 29.5% agreed upon in BAPA. He, therefore, held that the transaction between the assessee and its AE Sumitomo Japan to be at armøs length as per the terms and conditions laid down in BAPA.

7. However, he observed that the transaction of the assessee with its AEs other than Sumitoto, Japan, are not covered under BAPA. Therefore, these transactions are required to be benchmarked to determine the armøs length price. He noted that the assessee has used TNMM method to benchmark its transaction with Sumitomo, Japan under BAPA. Further, there is no functional difference between the transaction of the assessee with Sumitomo, Japan and other AEs. He, therefore, held that these transactions shall also be benchmarked at the same rate of profitability as applied for the transaction with Sumitomo, Japan. Since the profitability in respect of transaction of the assessee with its AEs other than Sumitomo, Japan is also 22.77%, the TPO held that these transactions are also at armøs length. In view of the above discussion, the TPO held that the transfer pricing adjustment on substantive basis is not required to the total income of the assessee on account of its international transactions.

8. For the purpose of benchmarking the international transactions of the assessee, the financials of the assessee including the FAR as mentioned in the TP

documents were analysed by the TPO. He noted that the assessee in its TP documents had carried out segmental accounting showing AE trading segment and AE indent segment and accordingly benchmarked its international transaction based on such segments the details of which are as under:-

Particulars	Trading Segment AE	Indent Segment AE
Sales [A]	564,520,771	
Commission [B]		793,605,957
Total	564,520,771	793,605,957
Purchases	499,988,190	
Change in Stock	16,626,287	
Total (C)	516,614,477	-
Gross Profit [D = (A-C)]	47,906,294	793,605,957
Operating Expenses		
Total Operating Expenses	38,473,761	637,348,528
Operating Profit	9,432,533	156,257,429
OP/VAE (Treating interest income as non-operating in nature)	24.52%	24.52%

9. From the various details furnished by the assessee, the TPO noted that the total international transaction between the assessee and its AE during the impugned assessment year are as under:-

International Transaction	Total Value of Transaction [Amount in INR]
Sale of goods	47,82,797
Purchase of goods	477,077,786
Trade payable	297,206,390
Re-imbursement of Expenses received/receivable	14,523,365
Miscellaneous income	75,140
Provision of services	793,606,244
Availment of services	79,383,171
Trade and other receivables	35,38,197
Trade receivables	228,428,160
Managerial Remuneration	88,244,006
Rendering of Services	793,605,957

10. On being asked by the AO/TPO, the assessee furnished the details of FOB value of goods imported/exported in respect of Sumitomo, Japan, AEs other than Sumitomo Corporation and non-AEs the details of which are as under:-

Particulars	SC)	AE Others	Total AE	Non AE
Commission	60,38,40,855	18,97,65,102	793,605,957	1,55,47,705
FOB value of commission	19,34,95,67,570	12,53,46,49,034	31,88,42,16,604	51,31,23,599
Rate of Commission	3.12%	1.51 %	2.49%	3.03%

11. The TPO noted that the commission income earned on FOB value of goods was worked out at 3.03% of FOB value of goods exported/imported in the case of non-AEs and at 2.49% of FOB value of goods/services in the case of AE. The functions discharged by the assessee were far more for the AE as compared to the functions discharged by the assessee for the non-AEs. He, therefore, estimated the adjusted commission for higher degree of functions discharged for the AEs as compared to the commission earned from non-AEs at 5% of the FOB value of the export/import and proposed to treat the same as armøs length price of the international transaction of commission income from the AE and accordingly proposed an upward adjustment of Rs.43,69,67,350/- on protective basis the details of which are as under:-

FOB Value of sales	12534649034
Arm's Length rate of commission	5%
Arm's Length commission	626732452
Commission received from the AE	189765102
Adjustment	436967350
International transaction	189765102
3% of International transaction	5692953

12. The AO accordingly made the addition of Rs.43,69,67,350/- to the total income of the assessee. The assessee filed objections against the draft order before the DRP wherein the DRP directed the TPO to apply 3.03% as CUP for adjustment on substantive basis as against protective addition made by the TPO. The TPO thereafter computed the armøs length price of the international transaction in the nature of receipt of commission income at Rs.19,00,34,764/- as against earlier upward adjustment of Rs.43,69,67,350/-. The AO accordingly passed the order u/s 143(3) r.w. section 144C, determining the total income at Rs.41,73,28,470/- wherein he made the addition on account of TP adjustment at Rs.19,00,34,764/-.

13. Aggrieved with such order of the AO/TPO/DRP, the assessee is in appeal before the Tribunal.

14. The ld. Counsel for the assessee strongly challenged the order passed by the AO/TPO/DRP by making addition to the tune of Rs.19,00,34,764/-. He submitted that the assessee had determined the percentage of profit by allocating expenses incurred on the basis of gross margin earned by AEs other than Sumitomo Corporation Japan, and by non-AEs whereas the TPO had allocated after assuming 26% of the gross profit earned by non-AEs and, thereafter had allocated expenses in proportion of gross profit. He submitted that the TPO had accepted when he held that the profit earned with AEøs are at armøs length and has also accepted the same while computing the armøs length price by selecting the TNMM as the most

appropriate method. Despite the same, the TPO further proceeded to make protective adjustment. However, the DRP has held that such protective adjustment to be made on substantive basis. He submitted that the aforesaid approach of the TPO is highly arbitrary and totally unfounded. He submitted that once the transactions entered into by the assessee with its AEs are held to be at armøs length, there is no justification to have proceeded to make any protective adjustment under the regime of TP adjustment. He submitted that there is no concept of protective adjustment in TP assessment and the TPO has only to determine whether the international transactions entered into by an assessee with its AE are at armøs length and no more. Therefore, once it is found by the TPO that the transactions entered by the assessee with its AE Sumitomo, Japan are at armøs length which gave a margin of 22.77% as against the claim of the assessee at 24.52%, on the basis of TNMM which has been held to be the most appropriate method, the approach of the TPO in making protective adjustment itself is without justification. He submitted that the TPO has first to choose/select which is the method to be adopted as most appropriate method to determine armøs length price and having so found that TNMM is the most appropriate method, there, thus, remains no scope to proceed further to determine the ALP by adopting any other method. He accordingly submitted that the approach of the TPO to make the protective adjustment is without jurisdiction and goes beyond the statutory provisions contained in section 92CA(3) of the Act.

14.1 Referring to the decision of the Tribunal in assesseeøs own case, copy of which is placed at pages 248-279 of the paper book, the ld. Counsel for the assessee drew the attention of the Bench to page 251 of the paper book and thereafter drew the attention of the Bench to the question No.2 which reads as under:-

> õ(2) Whether the Income Tax Appellate Tribunal has disregarded the assesseeøs claim that they had followed Transactional Net Margin Method? (This question will include the submission of the appellant that the Transfer Pricing Officerøs order does not adopt any specified method)ö

15. He submitted that the Honøble High Court held that TNMM is the most appropriate method. He submitted that after the decision of the Honøble High Court restoring the matter to the Tribunal, the Tribunal, vide order dated 22nd October, 2018 in ITA No.5095/Del/2011 and batch of other appeals for AYs 2007-08 to 2011-12, held that CUP method cannot be applied and other methods admittedly are inapplicable of capturing the true armøs length result and accordingly held that TNMM should be taken as the most appropriate method for benchmarking the transaction. He submitted that despite the aforesaid findings, the TPO had without jurisdiction proceeded to determine the ALP at 3.03% on protective basis and that too even without making in-depth enquiry whether the transactions can be held to be comparable. He submitted that there is no method whereby the average margin of commission should be applied straightaway without appreciating the nature of transaction entered by the assessee with its AEs

and non-AEs which cannot be regarded as comparable so held by the Honøble High Court.

15.1 Referring to page 7 of the order of the DRP, the ld. Counsel drew the attention of the Bench to para VIII where the DRP has observed as under:-

> õVIII. The TPO has brought forward that the method used in earlier years as directed by the Honøble ITAT has been used to make protective assessment. However, since appeal is in process of being filed in Høble H.C. against the ITAT order dated 21.05.2019, the TPO/AO is directed to make adjustment on substantive basis.ö

16. He submitted that the TPO had adopted an approach to make the protective addition based upon the method used earlier by the Tribunal in its order which was subject matter of appeal u/s 260A of the Act in ITA No.381/2013 and others. The DRP overlooked that the said method used to make protective addition has been negatived by the Honøble High Court by its judgment dated 22nd July, 2016 wherein it is held that the if the Tribunal thought that this was the case, it was necessary for the Tribunal to conduct a further in-depth enquiry as to relevant uncontrolled transactions. He submitted that the DRP further failed to appreciate that the TPO had not conducted any further in-depth enquiry as to the relevant uncontrolled transactions in the manner so directed by the Honøble High Court. Further, the DRP also overlooked that even the Tribunal vide its order dated 22nd October, 2018, after the remand had held that TNMM is the most appropriate method and no other method is applicable. He accordingly submitted that the DRP, instead of having directed to have held that the addition so proposed was

factually misconceived, yet, went into an error both on facts and in law in directing the TPO to make an assessment on substantive basis by directing it to make an addition of Rs.19,00,34,764/-. He submitted that the DRP should have held that no adjustment is permissible either on facts and in law and, as such, the addition made by the TPO on protective basis which has been held to be made on substantive basis by the DRP is entirely erroneous and, therefore, to be vacated.

16.1 Referring to the decision of the coordinate Bench of the Tribunal in the case of MSD Pharmaceuticals (P) Ltd. vs. ACIT, vide ITA No.7569/Del/2018, he submitted that the Tribunal has laid down the principle that protective addition along with substantive addition of an item of income can be made only when the identity of the real owner of the income is unclear. He submitted that similar principle has also been upheld by the Tribunal in the case of Samsung India Electronics Pvt. Ltd. vs. ACIT, vide ITA No.2511/Del/2018.

17. Regarding the observation of the DRP that appeal is in process of being filed before the Honøble High Court against the order of the Tribunal dated 21st May, 2019, he submitted that no such appeal has been filed since the assessee has not yet received any such notice. He submitted that the Tribunal had merely followed its order dated 22nd October, 2018 passed by it for A.Y. 2007-08 to 2011-12 on the basis of an order dated 21st April, 2019 for AYs 2012-13 and 2013-14. Here also, it was held that the TNMM is the most appropriate method. He accordingly submitted that the addition made by the AO/TPO/DRP should be deleted.

18. The ld. DR, on the other hand, submitted that it is not a covered matter as argued by the ld. Counsel. Referring to the decision of the Honøble High Court and the observation of the DRP, he submitted that the Honøble High Court has held that the approach used by the TPO/DRP and the ITAT for considering average rate of commission earned from non-AEs in indent segment as the armøs length price for the commission earned from the AEs needs further examination and indepth enquiry to decide that CUP method is the most appropriate method. He submitted that the Tribunal in separate orders dated 22nd October, 2018 for AYs 2007-08 to 2011-12 and the order dated 21st May, 2019 for AYs 2012-13 to 2013-14 has restored the issue to the file of TPO to examine and benchmark the international transaction by adopting TNMM as the most appropriate method by taking the õberry ratioö as PLI. It was directed that the assessee has to substantiate its margin by bringing comparable uncontrolled transactions to demonstrate that its commission earned in this segment is at armøs length and the TPO shall examine the same and decide. He accordingly submitted that he has no objection if the matter is restored to the file of the AO/TPO with similar directions.

19. We have considered the rival arguments made by both the sides, perused the orders of the AO/TPO/DRP and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find, the TPO, in the instant case proposed an adjustment of Rs.43,69,67,350/- on protective basis in respect of indent segment of AEs other than Sumitomo Corporation, Japan by

considering 5% as the arm⌀s length commission rate for commission received. We find, the DRP while holding that no protective adjustment is required and the addition has to be made on substantive basis, directed the TPO to apply 3.03% as CUP for adjustment by observing as under:-

> "However, the panel feels that the assessee's contention that õthe reliance placed by the TPO on the non-AE indent commission rate (i,e. 3.03 percent) and thereafter addition a mark-up (of 1.97 percent), is incorrect", is not without merit. The TPO has in para 8.4 of the order merely mentioned that "The functions discharge d by the assessee were far more for the AE as compared to the functions discharged by the assessee of the non AEs. The adjustment commission for higher degree of functions discharged for the AE as compared to the commission earned from non AE (at 3.03%) is estimated at 5% of the FOB value of the export/import and it was proposed to be treated as arm⌀s length price of the international transaction of commission income from AE.
>
> In view of the same, the TPO is directed to apply 3.03% as CUP for adjustment."

20. It is the submission of the ld. Counsel that once the Hon⌀ble High Court has held that TNMM is the most appropriate method, therefore, CUP method cannot be applied and other methods are admittedly inapplicable. It is also his submission that once the TPO has held that the transactions entered into by the assessee with its AEs are at arm⌀s length, there arises no justification to have proceeded to make any protective adjustment under the regime of TP adjustment. We find, identical issue was decided by the Tribunal after the order of the Hon⌀ble High Court in ITA No.5095/Del/2011 and batch of appeals for AYs 2007-08 to 2011-12 vide order dated 22nd October, 2018. The Tribunal has held that ÷berry ratio⌀ should be accepted as the most appropriate PLI for taking as base under TNMM while

determining the ALP of the international transaction for all the five years under consideration. Thereafter, the Tribunal restored the matter to the file of the TPO to examine and benchmark the international transaction by adopting TNMM as the most appropriate method by taking ÷berry ratioø as PLI. The relevant observation of the Tribunal from para 15-19 of the order reads as under:-

> õ15. We have heard the parties at length and also perused the material referred to before us as discussed herein above. The approach of determining the ALP on the basis of average percent of commission reported by the assessee in respect of indenting transactions with the non AEs as held by the Tribunal has not found judicial favour with the Hon'ble High Court and matter has been remanded back for further examination of similarity between the two transactions and to conduct further in depth inquiry to examine the high degree of comparability of relevant control and uncontrolled transactions. Further, if the average rate of commission on such transactions was to be applied to the FOB value of goods involved in the indenting transactions with the AEs, then this Tribunal has to satisfy itself that there is no significant variation in the rate of commission between different products. From the perusal of the indenting transactions undertaken by the assessee with AE and non AE under various product segments, it is discerned that, for instance in the product segment ÷Automotiveø, the assessee has undertaken 249 transactions with AE and only 4 with non AE and in the Assessment Year 2007-08 the volume of transaction, FOB value wise is ÷Nilø in the case of non AE; and the commission earned with the AE is Rs. 7,50,43,686/- and with the non AE it is only Rs.9,672/-. Similarly the products dealt with AE in automotive segment are entirely different and the geographies involved are Switzerland, Singapore, Thailand and Japan whereas non AE transactions are with Suzuki Motorcycle India Pvt. Ltd. and Bajaj Auto Ltd in India. Likewise under the product ÷chemicalsø the assessee has undertaken 1044 transaction with AE and only 112 transaction with non AE and the commission with AE is 1.28%, whereas non AE it is 2.26%. Similarly, the products dealt with AE and non AE under this segment are quite different and geography involved with AE are Spain, Japan, Italy, Switzerland, Thailand, whereas with non AE it is India. Likewise in ÷electronicsø segment the transaction undertaken with the AE are 253, whereas with the non AE it is 5 and again not only the products are different but also geographical location are different with that of non-AE which are mostly with Indian parties and all AE transactions are with various foreign countries. Similar differences are noted in all across 10 to 11 products dealt by the assessee with AEs and non AEs. The total number of transactions with the AE during the year was 3,145 and with non AE it was only 371. Thus, apparently there is a huge difference in volume on FOB basis and the geographies dealt

are also entirely different. The amount of average commission earned with the AE, is 1.58% whereas in the case of non AE it is 2.26. All these differences are permeating in all the Assessment Years as highlighted by the assessee in the chart submitted before us and on perusal of the same, it is quite glaring that under both the transactions, i.e., controlled transaction with the AE and uncontrolled transaction with the non AEs, there are huge dissimilarity between the products, difference in volume, difference in value, markets and geographical location.

16. It is quite settled proposition that while applying CUP method, a very high degree of similarity has to be seen between the control and uncontrolled transactions not only in terms of products, contractual terms, volume, value but also market and geography locations. The reason being under CUP, price charged or paid for the property transferred has to be identified and the differences between the international transaction and the comparable uncontrolled transactions has to be seen which could materially affect the price in the open market. The price of different products cannot be the same as it depends upon the negotiation based on volumes, value and other contractual terms. Further different market and geographical location also affects the pricing factors and therefore, if there are differences on account of these factors CUP cannot be held to be the most appropriate method for bench marking the armøs length price. Here in this case, under the indenting segment there are various dissimilarities in the transaction with the AE and non AE as discussed above and for this reason alone the average commission earned cannot be the benchmarking factor for determining the ALP, and therefore, we hold that neither the CUP method can be applied nor the transaction with the AE and non AE can be taken for the purpose of comparability analysis. Thus, we reject the CUP method by taking the average commission earned in the transaction with the AE and non AE.

17. Now, in these circumstances, we have to see whether TNMM can be considered as most appropriate method. First of all, it has been brought on record before us that right from the Assessment Years 2003-04 to 2006-07, TNMM has been accepted as the most appropriate method by the TPO. However, instead of ÷berry ratioø as PLI, TPO has taken OP/TC as PLI. Further, it has been brought to our notice that from the Assessment Years 2011-12 to 2018-19 under the MAP agreement it has been agreed that TNMM should be the most appropriate method to determine the ALP of the international transaction of the indent keeping into the fact that assessee is a low risk service provider and there is no change in FAR right from Assessment Years 2003-04 to 2018-19. Once TNMM has been accepted under the similar FAR, we do not find any reason to deviate by adopting some other method. Otherwise also we have held that CUP method cannot be applied and other methods admittedly are incapable of capturing the true armøs length result and therefore, we hold that TNMM should be taken as a most appropriate method for benchmarking the said transaction.

18. Now having accepted that TNMM is the most appropriate method, the second issue which needs to be clarified is what should be the base for computing the PLI. As stated above, the Hon'ble High Court has approved the permissibility of using all ÷berry ratioø as PLI in a situation where the functions performed did not entail huge creation of valuable intangibles. The nature of the assesseeøs business is a routine business support services and there is no creation of any human capital or supply chain intangible. The Hon'ble High Court has held that ÷berry ratioø can only be applied where the value of goods is not directly linked to the quantum of profits and the profits are mainly determined on expenses incurred. Here in this case, the assessee is acting as an indenting agent commission service provider, i.e., as a facilitator of a trade and has no financial risk, because assessee was not required to raise any invoice for sale and purchase in its financial commitment and risk are insignificant. As a service provider, the key business driver for the assessee is operating expenses incurred on establishment and operation of business, i.e., salary, rent and other such expenses and it does not employ any significant assets in the business except for routine assets like office, furniture and fixtures to run its business and also there is no intangible creation by the assessee company. Besides there is no trading capital employed as goods are neither bought nor sold by the assessee in the indenting segment. Under these facts and circumstances, the profit derived by the assessee is mainly depended on its operating expenditure as the value of goods does not enter in its financial. As a low risk service provider, it seeks to obtain adequate return on its operating expenses as the operating expenses incurred represents the value added carried on by the assessee. In other words, the operating expenses adequately and sufficiently represents the functions performed and the risk undertaken by the assessee. Thus, we hold that the ÷berry ratioø should be accepted as the most appropriate PLI for taking as base under TNMM while determining the ALP of the Indian transaction for all the five years under appeal.

19. Accordingly, we remand the matter back to the file of the TPO to examine and benchmark the international transaction by adopting TNMM as the most appropriate method by taking ÷berry ratioø as PLI. The assessee has to substantiate its margin by bringing comparable uncontrolled transactions to demonstrate that its commission earned in this segment is at armøs length; and the TPO shall examine the same and decide accordingly. Needless to say that TPO shall give due and effective opportunity to the assessee to substantiate its ALP as per direction given above.

20. In the result, the appeal for all the Assessment Years are treated as partly allowed for statistical purposes.ö

21. We find, following the above decision, the Tribunal in assesseeøs own case vide ITA No.7261 & 7262/Del/2018, order dated 21st May, 2019 for AYs 2012-13 and 2013-14 respectively again restored the issue to the file of the TPO by observing as under:-

> õ5. On perusal of aforestated observations by this Tribunal in immediately preceding assessment year following points emerge:
>
> - there are huge differences in volume on F.O.B. basis and the geographies dealt with in AE and non-AE segment are entirely different.
> - The products involved in controlled and uncontrolled transactions are not similar and identical in volume value market and geographical location. •
> - The pricing factor which largely depends upon the geographical locations are different in AE and non-AE segment and therefore CUP cannot be applied 94 determining ALP of transaction either with AE or with non-AE.
>
> Therefore TNMM is most appropriate method under such circumstances instead of CUP. Considering fact that assessee is a low risk service provider and that there is no change in FAR from assessment year 2003-04 to 2018-19 as has been observed by this Tribunal in preceding assessment year, we do not find any reason to deviate by adopting any other method other than TNMM. Respectfully following view taken by this Tribunal in preceding years, we remand the issue back to file of Ld. TPO to examine and benchmark international transaction by adopting TNMM as most appropriate method by taking Berry ratio as PLI, as has been approved by Hon'ble High Court. Needless to say that assessee shall be granted proper opportunity as per law.
>
> 5.1. Accordingly, the issue raised by the assessee in the appeal for assessment year 2012-13 stands allowed for statistical purposes.ö

22. Respectfully following the consistent decision of the Tribunal in assesseeøs own case for AYs 2007-08 to 2013-14, we restore the issue to the file of the AO/TPO with a direction to examine and benchmark the international transaction by adopting TNMM as the most appropriate method by taking ÷berry ratioø as PLI.

The assessee has to substantiate its margin by bringing comparable uncontrolled transactions to demonstrate that its commission earned in this segment is at armøs length. Needless to say, the AO/TPO shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed for statistical purposes.

23. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 03.11.2020.

Sd/- Sd/-

(KULDIP SINGH) (R.K. PANDA)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Dated: 03rd November, 2020.

dk

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi