आयकर अपीलीय अधिकरण
मुंबई पीठ "के", मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एस. रिफौर रहमान, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
आअसं. 6393/मुं/2017 (नि. व. 2013-14)
ITA NO. 6393/MUM/2019 (A.Y.2013-14)

M/s Lubrizol India Pvt. Ltd.
9/3, Thane Belapur Road,
Turbhe, Navi Mumbai-400705.
PAN: AAACL 0126H ..... अपीलार्थी /Appellant

बनाम Vs.

The DCIT, LTU-2,
29th Floor, Centre No.1,
World Trade Centre, Cuffe Parede,
Mumbai 400005 ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Percy J. Pardiwala
प्रतिवादी द्वारा/Respondent by : Shri Sushil Kumar Mishra

सुनवाई की तिथि/ Date of hearing : 15/04/2021
घोषणा की तिथि/ Date of pronouncement : 18/05/2021

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 31.08.2017 passed under section 143(3) read with section 144C(13) of the Income Tax Act (hereinafter referred to as 'the Act') for the Assessment Year 2013-14.

2. Sh. Percy J. Pardiwalla, appearing on behalf of the assessee narrating the facts of case submitted that the assessee/appellant is engaged in the business of developing, manufacturing and marketing additive systems for automotive, industrial lubricants and treatment of fuels. The assessee-company is 50:50 Joint Venture between Lubrizol Corporation USA and Indian Oil Corporation Ltd. During the period relevant to the Assessment Year (AY) under appeal, the assessee entered into various international transactions with its Associated Enterprises (AE). The assessee benchmarked its international transactions of export of Chemical Additives to its Associated Enterprises (AEs) by applying Transaction Net Margin Method (TNMM) as the most appropriate method. The Transfer Pricing Officer (TPO) rejected TNMM and applied CUP. The TPO draws support from the directions of DRP in AY 2009-10 for replacing TNMM with CUP. Thus, the TPO made adjustment of Rs.1,19,89,044/- qua transaction of export of chemical additives to AEs. The DRP also placed substantial reliance on the Directions of DRP in AY 2009-10 and AY 2012-13 to uphold CUP as the most appropriate method.

The ld. Counsel for the assessee submitted that in the preceding Assessment Years i.e. AY 2005-06 to 2007-08 and thereafter in AY 2009-10, 2010-11 & 2012-13, the TPO rejected TNMM as the most appropriate method and applied CUP. The issue travelled to the Tribunal in all the impugned AYs, the Tribunal held that TNMM applied by the assessee is the most appropriate method for benchmarking the transactions. The ld. Counsel furnished copy of the Tribunal order dated 20.11.2019 common for ITA No. 8148/Mum/2010 for AY 2006-07, and ITA No. 2305/Mum/2012 for AY 2007-08 and order of the Tribunal in ITA No. 882/Mum/2014 for AY 2009-10, ITA No. 396/Mum/2015 for AY 2010-11 and ITA No. 6667/Mum/2016 for AY 2012-13 decided vide single

order dated 27.07.2020. The ld. Counsel submitted that the Tribunal has been consistently holding TNMM as the most appropriate method for benchmarking international transactions in the case of assessee. The nature of international transactions with AEs in the impugned AY are similar, therefore, the issue raised in ground no.2 of appeal is squarely covered in favour of the assessee by the order of Tribunal in assessee's own case.

2.1 The ld. Counsel submitted that in ground no.3 of appeal, the assessee seeks direction to the AO that interest under section 234C be levied on returned income and not on assessed income.

2.2 The ld. Counsel submitted that the assessee has filed an additional ground of appeal claiming deduction in respect of Education Cess on income tax. To support his contentions, the ld. Counsel placed reliance on following decisions:

(i) Sesa Goa Ltd. Vs. JCIT, 117 taxmann.com 96;
(ii) Chambal Fertilizers & Chemicals Ltd. Vs. JCIT, 107 taxmann.com 484; and
(iii) DCIT Vs. Bajaj Allianz General Insurance Co. Ltd. (ITA No. 1111 and 1112/PUN/2017 for AY 2013-14 & 2014-15 decided on 25.07.2019.

3. Shri Sushil Kumar Mishra (DR) representing the department vehemently supported the impugned order. However, the ld. DR fairly admitted that the T.P. issue raised by the assessee in Ground No.2 of appeal is similar to the one adjudicated by the Tribunal in assessee's own case in the preceding AYs. The ld. DR opposed admission of additional ground raised by the assessee at belated stage.

4. We have heard the submissions made by rival sides, examined the orders of the authorities below and have considered the decisions on which

the ld. Counsel for the assessee has placed reliance. The ground no.1 of appeal is general in nature, hence, require no adjudication.

5. The assessee in Ground No.2 of the appeal has assailed T.P. Adjustment of Rs. 1,19,89,044/- in respect of export of chemical additives to its AEs. The assessee applied TNMM as the most appropriate method to benchmark international transactions with its AE. The TPO rejected assessee's method of benchmarking and applied CUP. We find that for similar unsubstantiated reasons the TPO rejected TNMM as the most appropriate method in the preceding AYs. The same was upheld by the DRP. The Co-ordinate Bench in appeal of the assessee in ITA No. 882/Mum/2014, 396/Mum/2015 & 6667/Mum/2016(supra) decided by common order reversed the findings of DRP/Assessing Officer by observing as under:

> *"5. As submitted by Ld. Sr. Counsel, we find that the assessee's methodology to benchmark the stated transactions was subject matter of dispute before this Tribunal for AYs 2005-06 to 2007-08, ITA Nos. 8148/Mum/2010, 2305/Mum/2012 & 1821/Mum/2011, common order dated 20/11/2019 wherein the matter was concluded by the co-ordinate bench in assessee's favor in the following manner: -*
>
> > *20. In our considered opinion the aforesaid reasoning fully applies to the facts of the present case. Without any change in facts and law the Transfer Pricing officer has changed the consistently applied TNMM method to the cup method. While doing so he has blandly held that TNMM method is not full proof. Furthermore, the assessee's objection that the comparison of other transactions have to be considered by adjustment of various factors is also not fully dislodged.*
> >
> > *21. In the background of the aforesaid discussion and precedent we hold that the change in method from TNMM to CUP method is not justified. Hence, we set aside the order of the Assessing Officer. Accordingly, the order of learned CIT(A) for A.Y. 2005-06 is upheld and the order of Assessing Officer pursuant to DRP direction for A.Y. 2006-07 and 2007-08 is set aside.*
>
> *As it could be observed that coordinate bench held that consistently applied TNMM method could not be disregarded without there being any change in any facts.*
>
> *Upon perusal of the said order and the case records, we find that facts are pari-materia the same in earlier AYs as well as in AY 2009-10. In this year also, the assessee's consistent TNMM methodology has been rejected by Ld. TPO without any sound basis. Although the principle of res-judicate are not applicable to Income Tax proceedings, however, the rule of consistency would debar the revenue to change its*

stand in difference assessment years without any sound basis, facts and circumstances being identical. The said proposition is well supported by M/s. Lubrizol India Private Limited Assessment Years :2009-10, 2010-11 & 2012-13 8 the decision of Hon'ble Bombay High Court in the case of PCIT v/s. Quest Investment Advisors Pvt. Ltd. reported in [2018] 409 ITR 545 wherein it has been held that when a principle has been accepted by the Revenue in earlier years as well as in subsequent years then the Revenue is bound by it unless there is a change in law or change in facts therein, which change has to be pointed out in the assessment Order. In so doing the jurisdictional High Court followed the judgment of the Supreme Court in Bharat Sanchar Nigam Ltd. v/s. Union of India reported in [2006] 282 ITR 273 where the court had drawn a distinction between the principle of res judicata and consistency.

We find that similar methodology has been accepted by the revenue for AYs 2008-09 & 2011-12. Further, the application of TNMM method has been accepted by the Tribunal for AYs 2005-06 to 2007-08 and no change in facts or circumstances has been demonstrated before us for this year. Therefore, following the rule of consistency and the cited order of Tribunal in assessee's own case, we hold that TNMM methodology as adopted by the assessee to benchmark the transactions was to be accepted. Since, the margin of the assessee under this method have been shown to be within ALP range, the impugned adjustment of Rs.347.41 Lacs stand deleted."

No distinguishing factor or contrary decision has been brought on record by the Revenue. The facts in the impugned AY are identical, therefore, we find no reason to take a different view. Respectfully following the decisions of Co-ordinate Bench, we hold TNMM as the most appropriate method to benchmark the transactions in assessee's case and direct the Assessing Officer to delete the adjustment for parity of reasons. **The ground No.2 of the appeal is thus, allowed.**

6. In Ground No.3 of the appeal, the assessee has assailed the manner of charging interest under section 234C of the Act. The AO is directed to re-compute interest under section 234C of the Act, in accordance with law. **The Ground No.3 of appeal is allowed for statistical purpose.**

7. In Ground No.4 of the appeal, the assessee has assailed levy of penalty under section 271(1)(c) of the Act. Challenge to penalty proceedings at this

stage is premature. **Consequently, ground No.4 of appeal is dismissed, as such.**

8. The assessee has raised an additional ground claiming deduction in respect of 'Education Cess and Secondary and Higher Education Cess on Income Tax'. The additional ground raised in appeal by the assessee is legal in nature and requires no fresh documentary evidences for adjudication. It is a well accepted legal principle that legal ground can be raised at any stage *[Re. NTPC vs. CIT 229 ITR 383 (SC)]*. The claim of assessee is based on judgement rendered by Hon'ble Jurisdictional High Court in the case of *Sesa Goa Ltd. (supra).* Therefore, we see no impediment in admitting additional ground.

The assessee has raised fresh claim of deduction of Education Cess on income tax for the first time at second appellate stage, therefore, we deem it appropriate to restore this issue to the file of Assessing Officer for deciding the same after examining the facts in light of afore mentioned decision of Hon'ble Jurisdictional High Court. Consequently, **the additional ground raised by the assessee is allowed for statistical purpose.**

9. In the result, appeal of the assessee is partly allowed.

Order pronounced in open Court on **Tuesday** the **18th** day of May, 2021.

Sd/-	**Sd/-**
(S.RIFAUR RAHMAN)	(VIKAS AWASTHY)
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Dated: 18/05/2021
*S.K.,*PS

<u>प्रतिलिपि अग्रेषितCopy of the Order forwarded to</u> :

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

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai