

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-2', NEW DELHI**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
(THROUGH VIDEO CONFERENCING)**

ITA No.454/Del/2021
Assessment Year: 2016-17

SABIC India Pvt. Ltd. 10th Ambience Corporate Tower-II, Ambience Islands Gurgaon PAN No. AAACS2708N	Vs	DCIT Circle -22 (2) New Delhi
(APPELLANT)		(RESPONDENT)

S.A. No.49/Del/2021
(In ITA No. 454/Del/2021)
Assessment Year: 2016-17

SABIC India Pvt. Ltd. 10th Ambience Corporate Tower-II, Ambience Islands Gurgaon PAN No. AAACS2708N	Vs	DCIT Circle -22 (2) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Ajay Vohra, Sr. Advocate Sh. Aditya Vohra, Advocate
Respondent by	Sh. Sunil Kumar, CIT DR

Date of hearing:	02/06/2021
Date of Pronouncement:	08/06/2021

ORDER**PER N. K. BILLAIYA, AM:**

This appeal by the assessee is directed against the order dated 31.03.2021 framed u/s. 143 (3) read with section 144 C (13) of the Act.

2. Simultaneously the assessee has also filed application for the stay of the demand arising out of the aforementioned assessment order. We decided to proceed with the appeal.

3. The substantive grievance of the assessee read as under :-

1. *That the on facts and circumstances of the case, the assessment under section 143 (3) read with section 144 (13) of the Income Tax Act, 1961 ("the Act") at an income of Rs.4,39,14,34,770 is bad in law and void-ab-initio.*

2. *That on the facts and circumstances of the case, the transfer pricing adjustment in an amount of Rs. 361,32,20,620 is not sustainable in law.*

3. *That the TPO / DRP erred on facts and in law in disregarding the economic analysis performed by Appellant and rejecting the Transactional Net Margin method ('TNMM') adopted by Appellant in relation to provision of marketing support services, thereby making an upward adjustment of Rs. 361,32,20,620.*

4. *Without prejudice, that the TPO / DRP erred on facts and in law in not benchmarking the international transaction of provision of market support services using CUP method, adopting the internal comparable in the form of third party agreement between Saudi Basic Industries Corporation ('SABIC') with an unrelated party*

namely EURL Maghreb Petrochemicals Company ('MAPECO'), accepted by DRP during AY 2015-16.

5. That the TPO / DRP erred in facts and in law in applying Other Method using CUP approach as the Most Appropriate Method ('MAM') without giving any reasons / justification in support thereof.

5.1. That the TPO / DRP erred in facts and in law in benchmarking the international transaction of provision of market support services adopting the following comparables :

a) 6245 Zbigniew Torkaz,

b) 17964 Atagencer, LLC; Mehmet Gencer,

c) L22581 Dow Coming Corp. & Advanced Polymer Systems Inc

d) L291 Equipmart Inc. and Collegiate Pacific Inc.

e) L23918 Longman Group UK Ltd and Future media PLC

5.2 That the TPO / DRP erred in facts and in law in not appreciating that the aforesaid

comparables are not in the business of provision of market support services and further that such comparables were rejected by the DRP in assessment year 2015-16.

6. That the TPO / DRP erred in facts and in law in disregarding the principles of Res Judicata and the rule of consistency even though the facts of AY 2016-17 are identical to that of AY 2015-16.

The Appellant craves leave to add, alter, amend or vary the above grounds of appeal before or at the time of hearing of the appeal.

4. Representatives of both the sides were heard at length. Case record carefully perused and the judicial decisions referred to during the course of the arguments have been duly considered.

5. The profile of the appellant and its group read as under :-

2. Profile of the Group and Assessee

The SABIC Group holding company, Saudi Basic Industries Corporation ("Sabic"), is a public company, headquartered in Riyadh, Saudi Arabia, and has been listed on Tadawul, the Saudi Arabian stock exchange, since 1984. SABIC has operations in over 50 countries with a global workforce of approximately 40,000 individuals and manufactures on a global scale in Saudi Arabia, the Americas, Europe, and Asia Pacific. SABIC is among the world's market leaders in the production of polyethylene, polypropylene and other advanced thermoplastics, glycols, methanol, and fertilizers. With regard to ownership, 70 percent of SABIC's share are owned

by the Saudi Arabian government, while the remaining 30 percent of shares are held by private investors in Saudi Arabia and other countries of the Gulf Cooperation Council.

Sabic India Private Limited ("Sabic India"/ "the Assessee") was incorporated on 15th June, 1992 as a wholly foreign owned enterprise. It has offices in New Delhi, Mumbai, Chennai and Bangalore.

Sabic India's primary activities entail the provision of marketing support services to facilities Sabic and SAPPL in their efforts of selling fertilizers, chemicals and polymers primarily in India, but also in Nepal, Maldives, Bhutan, Sri Lanka, and Bangladesh. As a sales support organization, Sabic India does not enter into contracts with the customers and does not take title to inventory. The products are sold an: invoiced directly by Sabic and SAPPL to the third party customers. Accordingly, SABIC India does not book sales revenue in its books, either, since it does not act as a buy-sell organization.

6. The details of the international transaction entered by the assessee with its AE during the year under consideration are as follows :-

S. No.	Description of the transactions	Amount (In INR)
i.	Provision of marketing support services	87,92,14,730/-
ii.	Training and SAP related expense	14,75,826/-

7. The assessee has used TNMM to benchmark its international transactions pertaining to provision of marketing

support services. The assessee has also paid Training and SAP related expenses to its AE and the international transaction relating to the same has been considered as closely linked to the marketing support activities and hence no separate benchmarking is undertaken by the assessee.

8. Justifying the adoption TNMM as the most appropriate method the assessee contended that it is engaged facilitation of sales to its AE's and accordingly characterized as a support service provider exposed to normal risk. It has been accordingly contended that because of the limited functional and risk profile and there being absence of tangible property, inventory, debtor related functions, operating expenses are clear quantitative measure of functions performed and there is no taking of title of goods purchased. Accordingly OP/ VAE and GP / VAE were considered as PLI for benchmarking purpose.

9. The final set of comparable companies selected are as under :-

OP/VAE (percent) of comparable companies

S No	Company Name	FY 2015-16	FY 2014-15	FY 2013-14	Weighted Average
1	A B M International Ltd.	-37.81%	-104.91%	-228.88%	-100.26%
2	Metroglobal Limited	-38.38%	7.49%	-16.32%	-7.92%

3	Heetu Chemicals	8.03%	11.30%	-1.23%	6.09%
4	P H Trading Ltd.	-4.38%	17.81%	3.91%	6.35%
No. of comparables					4
Mean					-23.94%
Our operating margins (OP/VAE)					369.39%

Berry ratio (GP/VAE) (percent) of comparable companies

S No	Company Name	FY 2015-16	FY 2014-15	FY 2013-14	Weighted Average
1	A B M International Ltd.	62.19%	-4.91%	-128.88%	-0.26%
2	Metroglobal Limited	61.62%	107.49%	83.68%	92.08%
3	Heetu Chemicals	108.03%	111.30%	98.77%	106.09%
4	P H Trading Ltd.	95.62%	117.81%	103.91%	106.35%
No. of comparables					4
Mean					76.06%
Our operating margins (OP/VAE)					469.39%

10. In alternative the assessee has also undertaken corroborative benchmarking for comparable independent selling/ indenting under TNMM. The OP/ OC earned by these companies for the selling / indenting activities performed by them, was then computed as under :-

OP/OC (percent) of comparable companies

S No	Company Name	FY 2015-16	FY 2014-15	FY 2013-14	Weighted Average
1	Priya International Ltd (Segmental)	23.95%	-3.17%	22.55%	13.44%
2	ICC International Agencies Ltd (Segmental)	-12.68%	47.04%	16.57%	18.75%
3	Majestic Research Services Ltd	35.33%	19.34%	NC	28.71%
4	Killick Agencies and Marketing Limited	3.41%	33.12%	31.39%	24.64%
No. of comparables					4
Mean					21.38%
Our operating margins (OP/OC)					369.39%

11. It would be pertinent to mention here that this practice has been adopted by the assessee since A.Y. 2009-10 to A.Y. 2014-15. It is equally pertinent to mention that TNMM has been accepted as the most appropriate method in assessment year 2009-10 to 2014-15.

12. We find that the TPO has discarded the TNMM method adopted by the assessee summary. We further find that without assigning any specific reason the TPO proceeded by using the “other method” as the most appropriate method and finally came to the set of following comparables for making the ALP adjustment :-

S. No.	Ref.	Agreement Title	Agreement Type	Industry	Cost Base	Exclusivity	Rate
1	L22581	Non Compete Agreement	Asset Purchase, Patent, technology, trademark	Chemicals	Net Sales	Exclusive	5.00%
2	L291	Distribution Agreement	Distribution	Business Services	Net Sales	Unknown	5.00%
3	L23918	Distribution Agreement	Distribution, Trademark, Trade Name	Educational Services, Business Services	Net Sales	Exclusive	15.00%
4	L17961	Technology Assistance and Marketing Support Agreement	Services, Technology	Chemicals	Net Sales	Unknown	3.75%
5	L11144	Exclusive Sales and Distributorship Agreement	Distribution	Chemicals	Net Sales	Exclusive	10%
6.	L6245	License Agreement	Know-how Patent, Process Technology	Chemicals, Recycling & Sanitation	Net Sales	Unknown	3.75%
7.	L17964	Technical Assistance and Marketing Support Agreement	Services, Technology	Chemicals, Recycling & Sanitation	Net Sales	Unknown	3.75%
Median							5%

13. And accordingly computed the Arms Length price as under :-

Particulars	Amount (INR)
Sales generated by the AEs in India [A]	89,84,87,07,000/-
Arm's length rate of commission (%) [B]	5.00%
Commission income at ALP [C = A*B]	4,49,24,35,350/-
Commission income of taxpayer [D]	87,92,14,730/-
Adjustment u/s 92CA [E = C - D]	3,61,32,20,620/-

D]	
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14. In our considered opinion the TPO may discard the search process, the TPO may also discard the comparables used by the assessee but cannot discard the method which is accepted by the revenue since A.Y. 2009-10 onwards.

15. In our considered view before adopting the “other method” the TPO has to give reason for discarding the five methods mentioned in the rules. We find that the order of the TPO/AO/DRP are devoid of such finding.

16. The Hon’ble Delhi High Court in the case Sumitomo Corporation India Private Limited in ITA No.381/2013, 382/2013, 738/2015 and 702/2014 vide judgment dated 22.07.2016 at para 31 of its order has observed as under :-

“31. The Assessee had, for reasons indicated in its transfer pricing report, adopted TNMM as the most appropriate method with Berry ratio as the PLI. Although, the TPO found fault in the use of Berry ratio - according to him, the same was not permissible under Rule 10B(1)(e) of the Rules – he did not proceed to select the most appropriate method for computation of ALP. This, in our view, would be essential as the reliability of the determination of the ALP is in turn dependent on the effectiveness of the method in relation to the controlled transaction being tested. In the present case, the dispute essentially relates to the commission earned by the Assessee in respect of transaction with its AEs.”

17. And further para -33 observed as under :-

“33. We find no infirmity with the Tribunal's finding that indenting transactions reported by the Assessee were plainly in the nature of facilitating trade where the Assessee was required to do nothing more than to follow up the customers for facilitation of the transaction. The Assessee was not required to raise any invoice for sale and purchase and its financial commitment and risk were inconsiderable.”

35. One of the principal issues before the Tribunal concerned the applicability of TNMM with Berry ratio as the PLI, as the most appropriate method. Mr Aggarwal had sought to contend before us that the TPO had rejected the PLI of Berry ratio but had not rejected the TNMM as the most appropriate method and, therefore, it was incumbent upon him to replace the PLI with whichever ratio he considered appropriate as had been done in the preceding years. He contended that on principles of consistency, he was required to follow the TNMM method. There is much merit in the contention that a method once considered appropriate should be consistently applied unless for good reasons, the TPO decides otherwise.

However, this is a salutary guiding principle and would not fetter the TPO from independently examining the transfer pricing approach reported by the Assessee. The purpose of imputing ALP to international transactions is to ensure that the real income of the Assessee in respect of international transactions (and with effect from 1st April, 2013 certain domestic transactions) are charged to tax under the Act. It is thus, implicit that the exercise to determine such income be undertaken for each assessment year.

37. We may now also consider Mr Aggarwal's contention that Berry ratio had been accepted as the appropriate PLI in respect of Sogo Shosha establishments and, therefore, the same should also be accepted in the case of the Assessee. The term 'Sogo Shosha' is used in respect of large general trading companies that include within their fold a large network of subsidiary and affiliated companies, thus, enabling the said companies to leverage their network for their business. It is reported that these companies account for a substantial portion of the Japan's overall trade across the world. However, it is not necessary that the trading arrangement between Sogo Shosha enterprises and their affiliates/ subsidiaries in India be identical or similar. It is also not possible to assume - without it being established as a fact - that all international transactions entered into by Indian enterprises with their related Sogo Shosha enterprises would be on identical footing. Thus, it is not apposite to determine the ALP without examining the nature of international transaction in each case.

38. Insofar as the use of Berry ratio as a PLI is concerned, the TPO had rejected the same for three reasons. First of all, he held that the same is not permissible under Rule 10B(1)(e) of the Rules; secondly, he held that the Assessee had acquired substantial intangibles in the form of supply chain intangibles and human resources intangibles and Berry ratio was not an apposite PLI in cases where an Assessee used substantial intangibles for its business. Thirdly, the TPO held that the rate of commission on indenting transaction was determined in reference to the value of goods and not on the basis of any cost incurred by the Assessee.”

18. The observations made in para -38 (supra) do not match with the facts of the case in hand as no such finding has been given by the TPO/ DRP.

19. The facts considered by the Hon'ble High Court at para -45 of its order are identical to the facts of the assessee. Para-45 of the order read as under :-

“45. Traditionally, the denominator of the ratio only comprised of selling, general and administration expenses. However, the Treasury Legislation of USA also included depreciation as a part of the Operating Expenses used as a denominator in the berry ratio. As is apparent, Berry ratio has limited applicability; it can be used effectively only in cases where the value of goods have no role to play in the profits earned by an Assessee and the profits earned are directly linked with the operating expenditure incurred by the Assessee. In other words, the operating expenditure incurred by the Assessee effectively captures all functions performed and risks undertaken by the Assessee. Thus, in cases where an Assessee uses intangibles as a part of its business, Berry ratio would not be an apposite PLI as the value of such tangibles would not be captured in the operating cost and, therefore, it would not be appropriate to compute the ALP based on net profit margin having regard to the operating cost as a relevant base. Similarly, Berry ratio would not be an appropriate PLI for determining ALP in cases of Assesseees who have substantial fixed assets since the value added by such assets would not be captured in Berry ratio.”

20. In another case the Hon'ble High Court of Delhi in *Li and Fung India Private Limited* 40 taxmann.com 300 had the occasion to consider a similar quarrel wherein the assessee had strongly contended that no such adjustment was made in the earlier assessment years. Para -46 of the said judgment is as under :-

46. It can be seen from the above that the Berry ratio can be used only in very limited circumstances and the limitations that we have listed above are by no means exhaustive. There is also a view expressed that use of Berry ratio as a PLI results in indicating less than fair ALPs in tax jurisdiction where the Assesseees have a lower bargaining power. In the aforesaid context, in our view, the TPO had correctly reasoned that Berry ratio could not be used as a PLI in cases of Assesseees which were using intangibles.

However, we find that there was no cogent material for the TPO to hold that the Assessee had developed supply chain and human resources intangibles. In any event, there was no material to conclude that costs of such intangibles were not captured in the operating expenses.

47. In our prima facie view, the third reason stated by the TPO, that is, the rate of commission paid to the Assessee is based on the value of the goods, would be a valid reason to reject the use of Berry ratio because Berry ratio can only be applied where the value of the goods are not directly linked to the quantum of profits and the profits are mainly dependent on expenses incurred. The fundamental premise being that the operating expenses adequately represent all functions performed and risks undertaken. For this reason Berry ratio is effectively applied only in cases of stripped down distributors; that is, distributors that have no financial exposure and risk in respect of the goods distributed by them.

21. We find that the CBDT circular No.14 referred to in the judgment (supra) also clearly mentions that if any, of such circumstances mentioned in the said circular exists then the AO may reject the price adopted by the assessee and determined the ALP in accordance with the same rules. As mentioned elsewhere no such circumstance has been mentioned by the TPO in the case in hand.

22. The institute of Chartered Accountants of India in its guidelines has mentioned as under :-

“6.56 The introduction of the Other Method as the sixth method allows the use of ‘any method’ which takes into account (i) the price which has been charged or paid or (ii) would have been charged or paid for the same or similar uncontrolled transactions, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts. The various data which may possibly be used for comparability purposes could be:

(a) Third party quotations/ invoices;

(b) Valuation reports;

(c) Tender/Bid documents;

(d) Documents relating to the negotiations;

(e) Standard rate cards;

(f) Commercial & economic business models; etc.

6.57 It is relevant to note that the text of Rule 10AB does not describe any methodology but only provides an enabling provision to use any method that has been used or may be used to arrive at price of a transaction undertaken between non AEs. Hence, it

provides flexibility to determine the price in complex transactions where third party comparable prices or transactions may not exist. The wide coverage of the Other Method would provide flexibility in establishing arm's length prices, particularly in cases where the application of the five specific methods is not possible due to reasons such as difficulties in obtaining comparable data due to uniqueness of transactions such as intangibles or business transfers, transfer of unlisted shares, sale of fixed assets, revenue allocation/splitting, guarantees provided and received, etc.

However, it would be necessary to justify and document reasons for rejection of all other five methods while selecting the 'Other Method' as the most appropriate method. The OECD Guidelines also permit the use of any other method and state that the taxpayer retain the freedom to apply methods not described in OECD Guidelines to establish prices, provided those prices satisfy the arm's length principle."

23. A perusal of the aforesaid guidelines of the ICAI also show that it would be necessary to justify and document reasons for rejection of other five methods while selecting the "other method" as the most appropriate method.

24. In the light of the aforesaid discussion and keeping in mind the past history of the assessee in so far as the TP adjustment and the most appropriate method let us now see the finding of the DRP on the objections raised by the assessee :-

3.2.1 The Panel has considered the submission. It is noticed that this Panel during the AY 2015-16 rejected the assessee's objection to

the 'CUP' method adopted by the TPO/AO and its request to accept TNMM as MAM. Following the same, we uphold the TPO's action of using the 'CUP' approach and employing the other method and selecting the comparables after considering the functional profile. No argument has been advanced regarding the defects in the other method employed by the TPO and it is merely stated that the TPO has not followed the direction of the Panel on the principle of res judicata. The Panel, however, does not find the argument acceptable as every assessment year is an independent assessment year and the decisions may vary in view of the facts obtaining .in that case. The TPO in para 9 of his order has given sufficient reasons justifying the application of other method using the database having comparables. The objection, therefore, is not acceptable and is rejected accordingly.

3.3 Ground no 1.2 relates to the certain factual errors, which the assessee. has tabulated as follows:

Factual errors in the Order passed by TPO	Our Contentions
SABIC India Private Limited was incorporated on 15 June 1992 as a wholly owned foreign owned enterprise, (refer Para 2, Page 1 of the TP order given at page 19 of the Paperbook)	We were incorporated in the year 1992 as a joint venture between SABIC and an Indian unrelated partner. As on date, we are a subsidiary of SABIC Global Limited ('SGL') with 51% shareholding and balance shares are held by SABIC Asia Padfic Pte Ltd. ('SAPPL).
Companies engaged in trading operations cannot be considered as comparable to the service provider earning commission income.	We wish to submit that while undertaking the benchmarking analysis of the international transactions entered with the AEs, we had also performed a search of comparable companies who were service providers and engaged in the provision of services. However, the learned TPO has completely ignored the alternate, benchmarking analysis

<p>In the absence, of reliability and correctness, the benchmarking process of the Assessee company is being rejected by the undersigned. (Para 8, Page 5 of the TP order given at page 23 of the Paperbook)</p>	<p>conducted in the TP report. Refer page no,27Q of the paper book for alternate benchmarking analysis submitted to TPO</p>
<p>While undertaking the search process, this office has selected the keywords for Industry of Business Services, Chemicals, Oil & Gas and Wholesale Trade etc to arrive at the true comparables. (Para 12, Page 11 of the TP order given at page 29 of the Paperbook)</p>	<p>The learned TPO has not provided any search process in support of the comparable agreements identified on the third party database.</p>
<p>On perusal of the submission, it was found that the one comparable agreement was</p>	<p>During our submission dated 24 June 2019 and 2 September 2019 and, we have submitted two agreements</p>
<p>Submitted by the assessee to benchmark the international</p>	

3.3.1 The Panel directs -the: TPO/AO to verify the contention and-late necessary 'actions accordingly.

3.4 Ground no 1.4 relates to the consideration of external comparables which according to the assessee do not meet the comparability criterion. The decision of the Panel in respect of these comparables is as follows: L17961 Maciej Zalewski Trustee; Maciej Zalewski, an individual and Polymer Energy / ILC Rate-3.75%

3.4.1 This comparable was already rejected by this Panel during AY 2015-16 on the ground that licensee is a manufacturer of machinery and equipment, using polymer recycling and related technology and compensation is for technology and continuous technical assistance to licensee. Following its order for AY 2015-16, the Panel directs the TPO/AO to exclude this comparable.

L11144 Bioshield Technologies Inc and Sanitary Coating Systems, LLP
Rate - 10%

3.4.2 This comparable was already rejected by this Panel during AY 2015-16 on the ground that there was nothing to indicate that agreement survived and existed during the relevant period and that involves antimicrobial and biostatic products. Further, purchaser i.e Sanitary Coating is required to pay royalty of 10% of net selling price of any product, service or fee earned by him. Following its order for AY 2015-16, the Panel directs the TPO/AO to exclude this comparable. .

6245 Zbigniew Torkaz, an individual and Trustee and Polymer Energy LLC
Rate- 7.50%

3.4.3 The assessee has submitted that this agreement is identical to Sr no 1 and should, “ therefore, be excluded. The Panel has considered the submission. The agreement is not similar to the serial no 1 as it pertains to a host of sectors and the agreement is regarding know how, patent and process technology. The Panel, accordingly, rejects the objection and upholds the action of the TPO.

L17964 Atagencer, LLC; Mehmet Gencer, an individual and Polymer Energy LLC
Rate-
J. 3.75%

3.3.4 The assessee has submitted that this agreement is identical to Sr no 1 and should ; therefore be: excluded. The Panel has considered the submission. The agreement is not similar to the serial no 1 but to L6245 Zbigniew Torkaz, an individual and Trustee and Polymer Energy LLC.

The Panel, accordingly, rejects the objection and upholds the action of the TPO.

L22581 Dow Coming Corp. & Advanced Polymer, Systems Inc Rate-5%

3.4.5 The assessee has submitted that this agreement is not similar to the assessee's agreement it is essentially, and agreement for sale, transfer and assignment of certain worldwide patents in respect of certain products. Thus, according to the assessee, the agreement is an Asset Purchase agreement. The Panel does not find the argument acceptable as this agreement also relates to patent, technology and trademark.

L291 Equipmart Inc. and Collegiate Pacific Inc. Rate-5.00%

3.4.6 This agreement is sought to be distinguished by the assessee on the ground that the distributor is required to pay royalty of 5 % of Net Sales in respect of products sold by him, whereas the assessee is said to be earning marketing support fee and not making any payment to our AEs. According to the assessee, consideration also involves combination of lump sum fees in the form of shares and cash and product is incomparable (i.e. Rollers and its component parts & accessories used in tennis court. The Panel has considered the submission. In the case of the distribution agreement, marketing support services are inherent and, therefore, the agreement cannot be distinguished on that ground. Further, the TPO has clearly recorded the industry as 'business services' and thus, the Panel has no reason to interfere with the selection of this comparable by the TPO. The objection is, accordingly, rejected.

L23918 Longman Group UK Ltd and Future media PLC Rate-15.00%

3.4.7 The assessee contests this agreement on the ground of the product being incomparable (i.e. interactive courseware). The contention, however, is not acceptable as the TPO has categorically recorded that this agreement is/relating to distribution, trademark and tradename and the industry is educational services and

business services. The TPO, therefore, .correctly included this comparable in the final set of comparables. The objection of the assessee, accordingly, stands rejected.

25. A perusal of the finding of DRP show that the DRP had put the onus on the assessee whereas the onus lies on the TPO to justify the adoption of “other method” as the most appropriate method and not on the assessee. Further the comparable used by the TPO and accepted by the DRP related the payment of royalty relating know-how, patent and process technology and therefore, such comparables cannot be accepted on the business profile of the assessee.

26. In fact we find conflicting findings of the DRP for example in the case of L 1 7961 Maciej Zalewski Trustee; Maciej Zalewski. The DRP says that this comparable was rejected by this panel during A.Y. 2015-16 on the ground that licensee is a manufacturer of machinery and equipment whereas for the same profile the DRP has accepted L6245 Zbigniew Torkaz, an individual and Trustee and Polymer Energy has submitted that this agreement is identical to Sr. No.1 and should therefore, be excluded. The agreement is regarding know-how, patent and process technology. Atagencer, LLC; Mehmet Gencer an individual and Polymer Energy LLFC Rate 3.75% the assessee has submitted that this agreement is identical to Sr. No. 1.

27. Considering the facts of the case in hand in totality in the light of the judicial decisions mentioned here in above we are of the considered view that the lower authorities should have accepted TNMM as the most appropriate method on the business profile qua the international transaction of the assessee as was accepted in A.Y.2009-10 to 2014-15. We accordingly direct the AO/ TPO to delete the TP adjustment of Rs.361320620/- appeal filed by the assessee is accordingly allowed.

28. Since we have decided the appeal the stay petition in stay application No. 49/Del/2021 become infructuous.

Order pronounced in the open court on 08.06.2021.

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

NEHA

Date:-08.06.2021

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	08.06.2021
Date on which the typed draft is placed before the dictating Member	08.06.2021
Date on which the typed draft is placed before the Other member	08.06.2021
Date on which the approved draft comes to the Sr.PS/PS	08.06.2021
Date on which the fair order is placed before the Dictating Member for Pronouncement	08.06.2021
Date on which the fair order comes back to the Sr. PS/ PS	08.06.2021
Date on which the final order is uploaded on the website of ITAT	08.06.2021
Date on which the file goes to the Bench Clerk	08.06.2021
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	