IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "I–1": NEW DELHI]

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA. No. 507 & 508 /Del/2021 & SA No 81 & 82/ Del/2021
(Assessment Year : 2015-16 & 2016-17)

Sumitomo Corporation India Private Limited, 302&303,3rd Floor,World Mark–2 Asset No. 8, Aerocity Hospitality District, New Delhi – 110 037. **PAN: AABCS1887M**	Vs.	The Assessing Officer, Regional / National e-Assessment Centre, Delhi.
(Appellant)		(Respondent)

Assessee by :	Shri Himanshu Sinha, Adv.; & Shri Bhuwan Dhooper, Advocate.
Department by :	Shri Shashi Bhusan Shukla, [CIT] – DR;
Date of Hearing :	11/10/2021
Date of pronouncement :	24/11/2021

O R D E R

PER PRASHANT MAHARISHI, A. M. :

01 This appeal in ITA. No. 507 (Del) of 2021 is filed by Sumitomo Corporation India Private Limited, against the assessment order passed by the National e-Assessment Centre, Delhi, on 30th April, 2021, under Section 143(3) read with Section 144B of the Income Tax Act, 1961 (the Act) for assessment year 2015-16.

02 The assessee has raised the following grounds of appeal:-

"1. That the Ld. AO has grossly erred both on facts and in law, in determining the income of the Appellant at Rs. 44,17,63,259/- in assessment order dated 30 April 2021 framed under section 143(3) read with section 144B of the Act as against the income of Rs. 19,70,11,810/- per the modified return of income filed by the Appellant. In so doing, the Ld. AO has erred in making an addition of Rs. 24,47,51,449/- in the arm's length price of international transactions entered by the Appellant with its associated enterprises ("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:

2.1 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

2.2 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. The Ld. TPO has disregarded 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") has been disregarded without any justification whatsoever.

5. The Ld. AO / TPO has disregarded the directions of the Ld. Dispute Resolution Panel ("DRP"), wherein it is directed to the Ld. AO / TPO to ascertain whether an appeal has been filed against the order of Hon'ble Income-tax Appellate Tribunal ("ITAT") in the Appellant's own case for AY 2012-13 & AY 2013-14 or AY 2014-15; and in case no appeal has been filed against the aforesaid orders, the benchmarking of the AE indent segment has to be in line with the aforementioned ITAT orders and that the adjustment made by the Ld. TPO in its original order on protective basis has to be dropped.

While making the adjustment based on the directions of the Ld. DRP, the Ld. AO / TPO has assumed that an appeal has been filed against the order of ITAT for AY 2012-13 & AY 2013-14 or AY 2014-15, but have not provided any evidence to substantiate the same. Therefore, the order of the Ld. AO / TPO should be considered null and void-ab-initio due to non-compliance with section 1440(10) and section 1440(13).

Substantive addition

6. The Ld. DRP / TPO erred in considering the average rate of commission earned in non- AEs segment by applying Comparable Uncontrolled Price ("CUP") method to determine arm's length commission rate for indenting transactions with the AEs (other than those which are covered by the Bilateral Advance Pricing Agreement with Japan). While doing so, the Ld. DRP / TPO disregarded:

6.1 the difference in the functions performed, risks assumed, number of transactions, value of transactions, nature of products, commission rates and geographical locations etc. in respect of transactions of Appellant with AEs (other than Sumitomo Corporation, Japan) and non-AEs;

6.2 the judgments of Hon'ble ITAT in Appellant's own cases for (i) AY 2007-08 to AY 2011-12 (based on the order of High Court), (ii) AY 2012-13 and AY 2013-14 and (iii) AY 2014-15, wherein Hon'ble ITAT has held that the average rate of commission earned in non-AEs segment cannot be considered to determine arm length's commission rate; and held that TNMM with Berry ratio (modified form of OP/OPEX) as the PLI should be accepted as the most appropriate method;

6.3 the directions of the Hon'ble High Court of Delhi in Appellant's own case for AY 2007-08 to AY 2010-11 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; and

6.4 the transfer pricing approach agreed upon in the Bilateral Advance Pricing Agreement ("BAPA") signed between the Appellant and the Central Board of Direct Taxes ("CBDT"), where TNMM has been selected as the most appropriate method with OP/OPEX as the PLI for similar transactions with Sumitomo Corporation Japan.

7. The Ld. DRP / TPO has erred in applying and computing ALP for indenting transactions by applying 3.36 per cent commission rate (by first applying 2.92 per cent and then adding 0.44 per cent based on OP/OPEX of comparable companies). While doing so, the Ld. DRP / TPO erred in:

7.1 alleging that the functions performed by the Appellant were far more for the AEs as compared to the non-AEs, without providing any justification / empirical evidence thereof;

7.2 applying a flawed methodology of adding a mark-up of Cf.44 per cent to the commission earned from the non-AEs, which does not fall under any of the specified methods in Section 92C of the Act, read with Rule 10B of Income-tax Rules, 1962 (''the Rules");

7.3 using a set of companies for calculation the mark-up of 0.44 per cent (i.e. 15.07 per cent of 2.92 per cent), most of whom are not comparable to the Appellant on various grounds; and

7.4 not considering the companies as comparable, which were contained in the TP documentation prepared by the Appellant and also provided in form of a fresh search (during the course of transfer pricing assessment).

Protective addition

8. Without prejudice to the contention that TNMM with Berry ratio (modified form of OP/OPEX) as the PLI should be accepted as the most appropriate method for determining ALP of the international transactions entered into by the Appellant in a proper manner, as has been upheld by the Hon'ble ITAT in earlier years, rather than the CUP method, the Ld. TPO and AO have erred in respect of the following while computing the protective adjustment amounting to INR 3,16,09,462:

8.1 including the free-on-board ("FOB") value of goods transacted under indenting segment in the cost base, while calculating the ALP for transactions

with AEs other than Sumitomo Corporation Japan. Further, the Ld. DRP / TPO has also erred in adding the FOB value of goods as part of the operating revenues of the Appellant;

8.2 using a set of companies for computation of the arm's length margin, most of whom are not comparable to the Appellant on various grounds;

8.3 not considering the companies as comparable, which were contained in the TP documentation prepared by the Appellant and also provided in form of a fresh search (during the course of transfer pricing assessment); and

8.4 computing the segmental profitability of the Appellant by allocating expenses to the non-AE segment, so as to fix the profit level (i.e. OP/OPEX) of such segment to be 15.07 per cent (being the median margin of the set of comparable companies). While doing so, the Ld. DRP / TPO failed to appreciate that the OP/OPEX should be determined using the actual figures reflected in the profit and loss account. Since the gross profit and operating expenses are undisputed, the operating expenses should be allocated in the ratio of gross profit of each segment and not by assuming an arbitrary OP/OPEX for non-AE segment.

9. The addition of INR 3,16,09,462/- to the total income of the Appellant on protective basis is completely misconceived both in law and on facts. The Ld. DRP / TPO erred in making an adjustment on protective basis in respect of an issue on which substantive addition has also been made, which is not permissible in law as the concept of substantive and protective adjustment is relevant only when an income is to be added in the hands of more than one taxpayer. This is without prejudice to the contention that TIM MM with Berry ratio (modified form of OP/OPEX) as the PLI should be accepted as the most appropriate method for determining ALP of the international transactions entered into by the Appellant in a proper manner, as has been upheld by the Hon'ble ITAT in earlier years, rather than the CUP method.

10. That on the facts and circumstances of the case and in law, the AO have erred in levying / charging interest under sections 234B and 234C of the Act.

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. “

03 The fact shows that appellant is a subsidiary of Sumitomo Corporation, Japan, engaged in providing trade facilitation and support services to its AE as well as non-AE parties. It earns revenue from intending transactions wherein it facilitate import and export of goods to and from India. The services are co-ordination, communication, collection of information and liaison with customers. It also carries out trading of goods without maintaining

any inventory and purchases are made based on confirmed sale orders.

04 Assessee filed its return of income on 27.11.2015 at Rs.9,40,97,200/-. The fact shows that the assessment year is one of the covered years as per bilateral advance pricing agreement under the category of roll back years. Assessee revised its return of income at Rs.19,70,11,810/- to give effect to such agreement of 18.10.2016.

05 Assessee has entered into international transactions and domestic transactions with its AE and, therefore, reference was made to Transfer Pricing Officer for determination of Arms Length price of its international transaction.

06 Assessee has entered into several international transactions. However, assessee has adopted Transactional Net Margin Method (TNMM). The assessee combined all transactions and adopted Transactional Net Margin Method. It adopted the profit level indicator of operating profit margin to value added expenses OP / VAE. The PLI of the assessee was at 7.58%. The assessee selected 20 comparables engaged in the business of providing support services and computed their margin 3.35% – 5.12%.

07 Assessee entered into the bilateral advance pricing agreement on 2.08.2016 covering assessment year 2011-12 to 2018-19. As per that agreement, TNMM was accepted as the most appropriate method and operating profit margin of operating expenses was selected as proper level indicator. It was agreed that the margin of the assessee should be in the range of 22.5% to 29%. The assessee revised its return of income on 18.10.2016 and offered the income arising from transactions with Sumitomo Corporation, Japan. However, the transactions with other AEs other than Sumitomo Corporation, Japan, were retained. The ld. Transfer Pricing Officer accepted the ALP of transactions with Sumitomo Corporation, Japan, and all other trading transactions. Now the only dispute remains is with respect to the earning of the commission income with its Associated Enterprises other than Sumitomo Corporation, Japan. The ld. Transfer Pricing Officer passed an order under

Section 92CA (3) on 31.10.2019. The ld. TPO noted that the BAPA Agreement provides ACP of the commission of 22.5% to 29.5%. The Arms Length margin of the AEs other than Japan should be taken at 26%. He selected 11 comparables and found average third PLI 24.35%. He applied Arms Length percentage of margin at 26% on operating expenses of Rs.1283,94,65,686/- and thereafter determined the difference between operating cost and Arms Length price of Rs.333,48,06,125/-. He noted that international transactions are to the extent of Rs.65,98,41,761/- and, therefore, proportionate adjustment @ 5.14% was determined at Rs.17,13,35,198/-. He proposed the above adjustment to the commission income of the assessee on substantive basis.

08 He also proposed a protective adjustment in the hands of the assessee by adopting CUP Method and using internal CUP i.e. commission earned from Associates Enterprise with commission income earned from non-associates enterprises. He found that the rate of commission from AE is 1.67 percentages whereas from non-AEs it is 2.92% of FOB value of goods. Accordingly, he found that Arms Length commission received from AE is Rs.11,09,68,199/- of FOB value of sales of Rs.1262,21,61,684/- and its Arms Length price is Rs.44,68,24,524/-. Accordingly, he proposed an adjustment of Rs.23,58,56,325/- on protective basis. He passed an order on 31.10.2019.

09 Against which the draft assessment order was passed on 12th December, 2019 wherein the addition of Rs.40,71,91,523/- was made against the returned income of Rs.19,70,11,810/- was made against the returned income of Rs.19,70,11,810/- and the total income was determined at Rs.60,42,03,333/-. Interesting to note in this case is that in the draft assessment order the substantive addition of Rs.17,13,35,198/- and protective addition of Rs.23,58,56,325/- aggregating to Rs.40,71,91,523/- was made.

10 The assessee preferred an objection before the ld. Dispute Resolution Panel that passed its direction on 24th December 2020. In para No. 7.5.1 of the direction, the ld. DRP noted that if the Revenue has not

filed an appeal against the order of the co-ordinate bench in assessee's own case in earlier years the protective adjustment should be dropped, it held that the addition made on the basis of the CUP method should be used and substantive addition should be made on that basis. It further held that the average commission earned by the appellant from non-AEs should be taken as ALP of the commission transaction with Associated Enterprise other than Japan. It further held that the Transactional Net Margin Method should only be used to make a protective addition.

11 Based on the above directions, the ld. Transfer Pricing Officer passed an order on 25th February 2021. The ld. TPO made the substantive adjustment using the CUP method amounting to Rs.21,31,41,987/-. He also computed the protective addition amounting to Rs.3,16,09,462/-. For computing the protective adjustment, he determined the operating expenses and added that too the FOB value of goods and reached an amount of Rs.1283,32,15,727/-. To this figure he applied the profit level indicator of operating profit to operating expenses of 15.07% and computed the Arms Length income to Rs.1476,71,81,337/-. With respect to the commission received from the Associated Enterprise, he derived the commission income by making an addition of FOB value of goods at the revised operating income of Rs.1284,29,20,639/-. Based on the above working he calculated the difference between revised operating income and the Arms Length income of Rs.192,42,60,698/-. He determined that 1.64% is the proportion of international transaction and applied it to the revised operating income and calculated the transfer pricing adjustment of Rs.3,16,09,462/-. Thus, on CUP basis he made addition of Rs.21,31,41,987/- adopting CUP method and on protective basis adopted TNMM method Rs.3,16,09,462/-.

12 Accordingly the final assessment order was passed on 30th April 2021 wherein addition on substantive basis was made of Rs.21,31,41,987/- and on protective basis Rs.3,16,09,462/-. The total income of the assessee was determined at Rs.44,17,63,260/-. Against this order, the assessee is aggrieved.

13 The ld. AR submitted that substantive addition made using CUP method has already been dealt with by the co-ordinate bench in assessee's case in prior 8 assessment years starting from assessment year 2008-09 to assessment year 2014-15. He referred to those orders, which are placed in paper book and, therefore, submitted that addition made of Rs.21,31,41,987/- is covered in favour of the assessee in assessee's own case.

14 It was further stated that the ld. TPO has failed to follow the binding directions of the ld. DRP. He submitted that the DRP has held that substantive addition using CUP method should only be made if there is an appeal filed against the order of the co-ordinate bench before the Hon'ble High Court. He, therefore, submitted that the ld. TPO has exceeded his jurisdiction.

15 The ld. AR further submitted that both protective adjustment and substantive adjustment could not be made in the hands of the same assessee with respect to the same source of income. He relied on plethora of judicial precedents. He further submitted that Transactional Net Margin Method applied by the ld. Transfer Pricing Officer is also not correct. He stated that the TPO has used the FOB value of goods transacted by the Associated Enterprises on which commission income has been earned which the Assessing Officer had added to the commission income as well as to the operating expenses. He referred to the order of the co-ordinate bench of earlier years and stated that FOB value of goods is neither an income nor expense of the assessee, but it is merely a cost for the Associated Enterprise. He further submitted that the TPO has also not used the PLI of operating profit margin on operating expenses as mandated in the orders of the co-ordinate bench. Thus, the working is not proper.

16 He further stated that the Assessing Officer has assumed the margin of 15.04% without any basis.

17 He further submitted that the TPO has rejected 18 comparables out of 20 comparables selected by the assessee and retained only 2 comparables without giving any reasons. The TPO further added 3

comparables whose functional analysis is different. Some of the comparables added by the ld. Transfer Pricing Officer are engaged in cargo handling and shipping business and some of the comparables are in logistic business. The whole comparability analysis is without any reason. He objected to the comparability analysis of the ld. TPO and DRP.

18 The ld. DR referred to the order of the ld. DRP. He extensively referred to para No. 6 of the order of the ld. DRP with respect to the substantive adjustment and para No. 7 with respect to the protective adjustment and supported it.

19 With respect to the objection of making an addition of FOB value to the commission income and also to the operating cost of the assessee, he submitted that the commission is earned on FOB value and, therefore, it is required to be added in the income and then also required to be considered as cost of the assessee to work out the correct margin.

20 With respect to the comparables, he relied on the order of the ld. Transfer Pricing Officer.

21 In rejoinder, the ld. AR submitted that the issue is covered in favour of the assessee by the earlier decisions of the co-ordinate bench where the CUP method is rejected. He submitted that computation of adjustment on the basis of TNMM method is faulty. He stated that the FOB value is neither an income nor an expense of the assessee. With respect to the comparables, he reiterated his arguments already advanced. He submitted that the binding directions of the DRP are not followed by the ld. TPO.

22 We have carefully considered the rival contentions and perused the orders of the lower authorities. We find that in the case of the assessee for assessment years 2007-08 to 2011-12, the co-ordinate bench has decided the issue by order dated 22nd October, 2018 (2018) 99 Taxmann.com 390 wherein it has held that the CUP method could not be applied and only TNMM was to be taken as the most appropriate method for bench marking transaction. An identical view has also been taken by the co-ordinate bench in

assessee's own case for assessment years 2012-13 and 2013-14 by order dated 21st May, 2019 (2020) 116 Taxmann.com 752. There is no change in the facts and circumstances of the case in assessment years 2015-16 and 2016-17. The co-ordinate bench in **Sumitomo Corporation India (P.) Ltd. *v.* Assistant Commissioner of Income Tax, Circle-24 (2), New Delhi* [2018] 99 taxmann.com 319 (Delhi - Trib.)** has held as under:-

> **"15.** 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 per cent 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 'Automotive', 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 'Nil' 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 'chemicals' 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 'electronics' 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 arm's 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 ratio' 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 arm's length result and therefore, we hold that TNMM should be taken as a most appropriate method for benchmarking the said transaction."

23 In view of the above facts and the binding precedents in assessee's own case, we respectfully following the same hold that the CUP method cannot be applied in the case of the assessee for making an adjustment to the commission income of the assessee. The co-

ordinate bench has also held that TNMM is the only method, which can be applied. Accordingly, the addition made by the ld. Transfer Pricing Officer of Rs.21,31,41,987/- on substantive basis adopting the CUP method is deleted. Accordingly, ground Nos. 6 & 7 of the appeal are allowed.

24 Now we come to the protective addition of Rs.3,16,09,462/- made by the ld. Transfer Pricing Officer pursuance to the direction of the ld. Dispute Resolution Panel adopting TNMM method.

25 The ld. Transfer Pricing Officer has added FOB value of goods of Rs.1262,21,61,684/- to the operating expenses of the assessee as well as to the commission income of the assessee. For the sake of clarity, the steps of the computation are as under:-

steps	Basis	Amount
1	added the free on-board value of goods to the operating expenses (₹ 1,262,21,61,684+ □ 21,10,54,043	1,283,32,15,727
2	Considered the median of the range as per the comparable set as the arm's-length operating profit/operating expenses	15.07%
3	Computed the arm's-length income by applying OP/OPEX	1,476,71,81,337
4	In respect of commission received from the associated enterprises, included the FO be value of goods to derive at the revised operating income (₹ 12,622,161,684 + □ 211,054,043	1,284,29,20,639
5	Calculated the difference between revised operating income and the arm's-length income (step 3-step 4)	192,42,60,698
6	Computed the proportion of	1.64%

	international transactions (i.e. commission earned from associated enterprise) to the revised operating income (₹ 210,968,199/ ₹ 12,842,920,639	
7	Calculate the transfer pricing adjustment by restricting the difference (as per step 5) to the proportion of international transaction (i.e. commission earned from associated enterprises)	3,16,09,462

26 Now in the above steps we find that while calculating step 1, there is no justification given by the learned transfer-pricing officer of making an addition to the operating expenses of the free on-board value of goods on which the commission is earned. There is no justification also while calculating step 4 that why free on-board value of goods are also added to the operating income. Neither the learned transfer-pricing officer nor the learned dispute resolution panel has given any justification for making the above adjustment. The learned departmental representative also could not show us any reason that why the free on-board value is required to be added to the operating expenses as well as to the operating income derive at the arm's-length price of the indent commission on by the assessee from associated enterprises other than Japan.

27 We find that the coordinate bench in eight prior assessment years has held that the transactional net margin method with berry ratio as the profit level indicator should be adopted. Therefore, respectfully following the coordinate bench in assessee's own case for earlier years we find that only the berry ratio needs to be adopted. Further the tribunal in earlier year has also held that FO be value of goods is the cost and revenue of the buyer and the seller

and not the commission agent. Therefore, such an adjustment could not have been made.

28 It is also argued that the segmental accounts prepared by the learned transfer-pricing officer with respect to the operating expenses, certain assumptions have been made. There is no justification given that how the operating expenditure amounting to ₹ 924,309,577 has been bifurcated by the learned transfer-pricing officer with respect to the transactions with Sumitomo Corp Japan, other associated enterprises other than Japan and independent parties.

29 Further with respect to selection of the comparables, the learned transfer pricing officer and the learned dispute resolution panel have rejected 18 out of the 20 comparables selected by the assessee and retained only two comparables. However, there are no reasons given for the same.

30 Further the learned transfer pricing officer has also included two comparables which are engaged in the business of cargo handling and sipping services activities

31 During the course of transfer, pricing assessment assessee has submitted a fresh set of potential comparable companies, which are engaged in business support services. Those set of comparables were rejected.

32 In view of the above facts we hold that benchmarking of the commission income from associated enterprises other than Japan is required to be computed as Under:-

i. The learned assessing officer/transfer pricing officer is directed to not to adopt CUP method for computation of the arm's-length price of the indent in business from non-Japan associated enterprises.

ii. The learned assessing officer/transfer pricing officer is directed to adopt transactional net margin method adopting the berry ratio for computing the arm's-length price of the indent in business income from known the associated enterprises.

iii. The learned assessing officer/transfer pricing officer is directed to not to consider the free on-board value of goods imported/exported while working out the arm's-length price from either operating income or operating expenditure of the assessee.

iv. The assessee is directed to submit fresh set of comparables. The learned transfer-pricing officer is directed to examine the same, he may reject or include fresh comparables. Thus, the fresh comparability analysis is required to be conducted.

33 In view of our above finding in ground number 8 and 9 of the appeal of the assessee are allowed with above directions.

34 Ground number 10 is with respect to the charging of interest u/s 234B and 234C of the act, which is consequential in nature and therefore dismissed.

35 Accordingly appeal of the assessee in ITA number 507/Del/2021 assessment year 15 – 16 is partly allowed.

36 ITA number 508/del/2021 assessment year 2016 – 17 filed by the assessee against the assessment order passed u/s 143 (3) read with Section 144C (13) read with Section 144B of the income tax act on 4/3/2021.

37 It was submitted by the parties that the facts and issue involved in assessment year 2016 – 17 identical to that of assessment year 2015 – 16. Their arguments also remain the same.

38 We find that the assessee filed its original return of income on 28/11/2016 declaring a total taxable income of ₹ 147,791,830/–. As assessee has entered into the similar international transactions the matter was referred to the learned transfer-pricing officer for determination of the arm's-length price. The learned transfer pricing officer passed an order u/s 92CA (3) of the act on 31/10/2019 wherein the total addition of 396,080,318 was made to the total income of the assessee on account of adjustment to the value of international transaction entered into by the assessee. The learned transfer pricing officer made an adjustment of ₹ 166,639,618/– on substantive basis and further adjustment of ₹ 229,440,700 on

account of protective basis. The draft assessment order was passed on 12/12/2019 wherein the total income of the assessee was computed at ₹ 396,080,318. The objections were filed before the learned dispute resolution panel. The learned DRP passed directions on 10/1/2020. Accordingly the learned dispute resolution panel proposed the substantive addition of ₹ 211,237,219 and protective addition of ₹ 31,671,649/–. Accordingly both these additions on substantive basis as well as on protective basis were made and against the returned income of ₹ 147,791,830/– the total income of the assessee was computed at ₹ 390,700,780/–. The assessee is aggrieved with that order and has preferred this appeal.

39 We have considered orders of the lower authorities, grounds of appeal as well as the arguments of both the parties. We find that the issue is identical to the issue decided by us for the assessment year 2015 – 16. As the facts and circumstances are not disputed by the parties, on the similar reasons given by us, we give the similar direction to the learned assessing officer/transfer pricing officer as well as to the assessee.

40 Accordingly, ITA number 508/del/2021 filed by the assessee for assessment year 2016 – 17 is partly allowed.

41 The stay petitions filed by the assessee in SA number 81 and 82/del/2021 for assessment year 15 – 16 becomes infructuous and hence dismissed.

Order pronounced in the open court on : 24th November 2021.

Sd/-	**Sd/-**
(SUDHANSHU SRIVASTAVA)	**(PRASHANT MAHARISHI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated : 24/11/2021.

MEHTA

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1. Appellant;
2. Respondent

3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	24.11.2021
Date on which the typed draft is placed before the dictating member	24.11.2021
Date on which the typed draft is placed before the other member	24.11.2021
Date on which the approved draft comes to the Sr. PS/ PS	24.11.2021
Date on which the fair order is placed before the dictating member for pronouncement	24.11.2021
Date on which the fair order comes back to the Sr. PS/ PS	24.11.2021
Date on which the final order is uploaded on the website of ITAT	24.11.2021
date on which the file goes to the Bench Clerk	24.11.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	