IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT
AND SHRI B. R. BASKARAN, ACCOUNTANT MEMBER

IT(TP)A No.2576/Bang/2019
Assessment year : 2015-16

M/s. Randox Laboratories India Private Limited, Plot No.191-195 and 246-250, Bommasandra-Jigani Link Road, KIADB Industrial Area, Bengaluru – 560 105. **PAN: AADCR 0074 K**	Vs.	The Asst.Commissioner of Income Tax, Circle 5(1)(1), Bengaluru.
ASSESSEE		RESPONDENT

Assessee by	:	Shri S. Krishna Upadhyaya, CA
Revenue by	:	Shri Sumeer Singh Meena, CIT(DR-OSD), ITAT, Bangalore.

Date of hearing	:	29.12.2021
Date of Pronouncement	:	04.01.2022

O R D E R

Per N V Vasudevan, Vice President

This is an appeal by the Assessee against the order dated 23.10.2019 of the Asst.CIT, Circle 5(1)(1), Bangalore passed u/s.143(3) read with Sec.144C of the Income Tax Act, 1961 (the Act) in relation to assessment year 2015-16.

2. We shall first take up for consideration Grounds No. 3 & 4 raised by the Assessee which are with regard to the adoption of the Most Appropriate Method (MAM) for determination of Arm's Length Price (ALP) in respect of an international transaction of sale of reagents by the Assessee to its Associated Enterprise (AE).

3. The Assessee is a wholly owned Indian subsidiary of Randox Laboratories Ltd., a company based in United Kingdom (hereinafter referred to as AE). The parent company is primarily engaged in the business of manufacturing medical diagnostic reagents and analyzers. Diagnostic reagents are **used to diagnose a range of health issues by screening for pathogens, antigens, co-infections, genetic diseases, and a host of other physical diseases**. Analyzer is a **medical laboratory instrument designed to measure different chemicals and other characteristics in a number of biological samples quickly**, with minimal human assistance. These measured properties of blood and other fluids may be useful in the diagnosis of disease.

4. The Assessee imports reagents and diagnostic equipments (analyzers) from the parent Randox Laboratories (India) P. Ltd. and sells them to independent third parties in India. The question before the AO was, whether the price paid by the Assessee to its AE for purchase of reagents was at Arm's length because as per the provisions of Sec.92 of the Act, income arising from an international transaction (transaction with a related party) has to be determined having regard to Arm's Length Price (ALP). Section 92F define Arm's Length Price is the price applied (or proposed to be applied) when two unrelated persons enter into a transaction in uncontrolled conditions. **Unrelated Persons;** Section 92A, the persons said to be unrelated if they are not associated or deemed to be associated enterprise. **Uncontrolled Conditions;** are that conditions which are not controlled or suppressed or moulded for achievement of a predetermined results.

5. The AO referred to the Transfer Pricing Officer (TPO) the question of determination of ALP of the aforesaid transaction of purchase of reagents, as per provisions of Sec.92CA of the Act. The main dispute between the

Assessee and the Revenue is with regard to which is the most appropriate method (MAM) for determination of ALP, whether it is Transaction Net Margin Method (TNMM) as contended by the revenue or the Resale Price Method (RPM) as contended by the Assessee.

6. It was the plea of the Assessee that it purchases reagents, analyzers and spares from its Associated Enterprises (AEs) and sells them as it is in India. No further addition to these products are done once they are imported into India. From 2013, Assessee also started purchasing the reagents in bulk and packing them in smaller quantities for sale in India for certain non-standard quantities, which are purely based on customer requests in India. However, it does not carry out any manufacturing activity but for the purpose of excise duty, the activity of packing reagents in smaller quantities is considered as deemed manufacture. It does not carry out any further activities on the reagents that are purchased form its AEs and sells the same as it is in smaller quantities.

7. In order to facilitate the sale of its reagents, Assessee devised a selling model. Under this model, Assessee under an agreement titled 'Placement agreement' places an analyzer in the premise of its customer at free of cost for a period of upto 5 years. This placement of the analyzer is to facilitate the sale of its reagents and also to ensure that in case the customer gets accustomed to use the analyzer that is placed by Assessee in the customer’s premises, they might eventually buy the same from the Assessee. The conditions for placing this analyzer is after taking a commitment from the customer that the reagents totaling certain minimum committed value is mandatorily to be purchased from Assessee.

8. The TPO concluded that the Assessee is not a mere distributor and rejected the usage of RPM which the Assessee had considered as the

Most Appropriate Method (MAM) and instead chose Transactional Net Margin Method (TNMM) as the MAM. Further, the TPO also rejected the TP study conducted by the Assessee and passed the order u/s 92CA of the Act on 29.10.2018 making an addition of Rs. 3,01,91,170 as TP adjustment.

9. The Assessee in its objection to the draft assessment order in which the addition proposed by the TPO was added to the total income, before the Dispute Resolution Panel (DR) contended that the Assessee is merely a distributor and the activity conducted by the Assessee is that of buying and reselling reagents and analysers without any change in the product. It was reiterated that in order to better the sale of the reagents, it has adopted a model for Indian market, which the Assessee calls it as 'Reagent Rental Contract (RRC)', where the analyser machine in which such reagents are used are placed in the premises of the customer and a certain commitment for sales is taken from them. This is a mode to increase the sale of reagents, to cater to the customer requirement of ensuring that the capital investment that they will have to do in buying expensive analysers is reduced and also a business strategy to cater to price sensitive and fragmented Indian market. It was also highlighted that the labs in India are to a large extent run by persons who might not have the capacity to invest in purchasing the machines, which are technologically advanced and thereby monetarily expensive. There is no change in the fact that the Assessee is merely an entity that is re-selling the reagents. For those customers who are interested in buying the machines, Assessee sells the same to them as well.

10. With regard to the accounting treatment, the Assessee pointed out that when Assessee places an analyzer in the place of its customer, the cost of such analyzer is capitalized in the books of the Assessee and

depreciation is claimed on such analysers which is a business expenditure and charged to the Profit & Loss account. This has been categorized under Plant & Machinery in the Fixed Assets schedule in the audited financial statements. Majority of the assets in Plant and Machinery are the analyzers itself. If a company has to carry out its activities, it will require various fixed assets to aid its core business activities. In the case of a trading company like Assessee, assets that aid the sale of its products are its key assets.

11. It was contended that merely because a certain mode of selling/distribution has been adopted by the Assessee does not in any way mean that they don't remain a reseller of the product. The product remains the same with no value addition. It is only that the selling mode adopted has been made conducive to ensure that the sales in India increases for the Randox reagents. A pictorial summary of the business model of the Assessee's business is provided in page 309 of the paperbook. As a distributor, the activity of the Assessee is to ensure that the maximum number of products are sold and any method for that can be adopted.

12. With regard to the conclusions of the TPO that since there is a huge cost of depreciation in the Profit & Loss account and hence the Assessee is not a simple distributor, the Assessee pointed out that during the previous year the Assessee earned a gross margin of 31.16% which is generally higher as compared to the other distributors. As mentioned in the OECD TP guidelines, this is one of such situations where the gross margin is higher because, there are activities conducted in selling, which entails such a higher margin. The TPO has gone by presumptions that as a distributor, the gap between Gross Profit and Net Profit cannot be higher. It is the plea of the Assessee that merely, because the selling model that the Assessee has adopted is unique and not ordinary, this presumption does not hold good.

13. It was the plea of the Assessee that the TPO presumed that distributors do not do any activities other than distribution. It was the plea of the Assessee that it is very clearly mentioned in the risk analysis of the Assessee in the Transfer Pricing Documentation that the Assessee bears the risk of marketing and creating demand for the product. It is responsible for ensuring that the product sales increase. In order to do that, the Assessee has adopted such methods and functions which will create more demand and products can be sold. The TPO's assumption that distributor will not carry out such functions in baseless. Further, by the TPO's admission itself, the Gross margin earned by the Assessee is huge. This is a clear indication that because of the additional activities in selling the product that the Assessee is adopting, it is naturally earning higher margins.

14. The DRP however confirmed the order of the TPO and held that, the Assessee has unique business model and during the year, the functions performed are not of a simple distributor.

15. Aggrieved by the order of the DRP on the MAM for determining ALP, the Assessee is in appeal before the Tribunal. It is the plea of the Assessee before the Tribunal that there is neither any reasoning that has been provided for such a presumption nor any factual modification that has been done by the DRP in arriving at such conclusion. It has been the contention of the Assessee that the conclusions arrived by the TPO as confirmed by the DRP are only based on surmise and needs to be reversed. It is also the plea of the Assessee that the DRP failed to follow the rulings of Hon'ble Mumbai ITAT in the case of the Assessee in IT(TP)A No.507/Mum/2015 and IT(TP)A No. 1568/Mum/2015 relating to AY 2010-11 and in IT(TP)A No. 433/Bang/2016 and IT(TP)A No. 800/Bang/2016 relating to AY 2011-12 wherein the business activity of the Assessee were

the same. It has also been contended that the DRP erroneously gave a finding that the facts of the Assessee are different for AY 2010-11 and 2011-12 as against the facts for the relevant year being AY 2015-16. It has also been contended that the DRP has failed to understand the nature of manufacturing activity carried out by the Assessee. It was reiterated that from 2013, Assessee had started purchasing the reagents in bulk and packing them in smaller quantities for sale in India for certain non-standard quantities, which are purely based on customer requests in India and it does not carry out any actual manufacturing activity of the product. However, for the purpose of excise duty, the activity of packing reagents in smaller quantities is considered as deemed manufacture. So, if one actually analyses the manufacturing activity, it does not carry out any further activities on the reagents that are purchased form its AEs and sells the same reagents as it is in smaller quantities.

16. It was submitted that the sale from manufacturing segment reproduced as under is insignificant as compared to the distribution/ traded segment.

Particulars	**AY 2015-16 (in Rs.)**		
	Manufactured	**Traded**	**Total**
Sale of products	12,48,261	42,15,20,034	42,27,68,295
Excise duty	(1,14,276)	Nil	(1.14,276)
Purchase of Stock in trade	Nil	28,05,80,849	28,05,80,849
Cost of Materials consumed	7,72,410	Nil	7,72,410
Change in inventory of stock in trade	2,495	(95,81,460)	(95,78,965)
Gross profit	**3,64,070**	**13,13,57,725**	**13,17,21,795**

GP/ Sales	**29.16%**	**31.16%**	**31.16%**

17. It was submitted that i light of the above-mentioned fact, it is clearly evident that the facts of the case remains the same as AY 2010-11 and 2011-12 as it is a deemed manufacturing activity as per excise and no modifications are done on the product. Also, the contribution of the manufacturing segment as compared to the gross profit of the company as a whole is very insignificant (0.30% of total turnover for AY 2015-16) and such activity of repacking the bulk reagent into non-standard quantity of reagents are done to cater to demand of some of the customers. It was submitted that as per the OECD TP guidelines para 3.9, though comparability analysis should be done for individual transactions, however for the sake of practical difficulties arising in the case of combined transactions, they should be analysed on the basis of pre-dominant nature.

18. The learned DR relied on the order of the DRP.

19. We have considered the rival submissions. As already stated, it is undisputed before us that identical issue had come up for consideration before the ITAT Mumbai Bench in Assessee's own case in AY 2010-11 in IT(TP)A No.507/Mum/2015 and the Tribunal by its order dated 7.6.2019 held that RPM was the MAM and directed the TPO to determine ALP applying RPM as the MAM. The said decision has been followed by the ITAT Bangalore "A" Bench in Assessee's own case in IT(TP)A No.433/Bang/2016 order dated 17.7.2019 for AY 2011-12.

20. The following were the relevant observations of the Tribunal on this issue in its order for AY 2010-11:-

> "7. We have considered rival submissions and perused the material on record. We have also applied our mind to the

decisions relied upon. The core issue arising for consideration is, whether the international transaction relating to purchase of reagents, spares, consumables from the AE is a simple trading activity, hence, can be benchmarked under RPM. Before we advert to the core issue, it is necessary to understand the activities of the assessee with its AE. As stated earlier in the order, assessee's AE is manufacturing medical diagnostic reagents, analyzers and consumables. Assessee imports these reagents form the AE and sells them to diagnostic units / laboratories in India for use in various chemical analysis. These reagents are analyzed in machines / equipments known as analyzers. For the purpose of sale of reagents, the assessee enters into specific agreements with third party customers. As per the terms of the agreement, a sample copy of which is placed in the paper book, the customer in India is required to purchase reagents from the assessee and in the event of such purchase, the assessee provides them the analyzer for carrying out the chemical analysis with the reagents. As per the terms of the agreement, the analyzer is made available to the customer for a period of five years without any extra cost. Further, as per the terms of agreement, the assessee is required to provide spares for the analyzer and also provide services including repairs. The analyzers were kept with the third party customers since the assessee was undertaking a research regarding its products as per Indian norms for clinical tests and to provide feedback to the Head Office. Thus, as could be seen from the facts on record, the analyzers were never sold to the third party customers who buy the reagents from the assessee, but, were only installed in their premises for chemical analysis and research work for a period of five years. After expiry of five year period, the WDV of the analyzers get reduced to zero and accounting entries to that effect are passed in the books. These facts are evident from the materials available on record. Thus, it is clear, the assessee is merely purchasing reagents from its AE and reselling them to third party customers in India without making any value addition. In fact, the analyzer / spares of the machines are never sold to the third party customers but always remain the property of the assessee.

8. Having examined the nature of transaction carried on by the assessee, it is necessary now to advert to the core issue. Undisputedly, in the transfer pricing analysis, the assessee has selected RPM as the most appropriate method. However, the

Transfer Pricing Officer has rejected the RPM primarily on the following reasoning:-

i) In the year under consideration, the assessee has made additions to the plant and machinery to the tune of ` 2.18 crore;

ii) It has capitalized cost of product development to the tune of 1.07 crore; and

iii) The notes to the fixed asset schedule shows that the company is setting up of a manufacturing unit.

9. On the aforesaid reasoning, the Transfer Pricing Officer has concluded that the assessee is not merely a trader but is also engaged in manufacturing and research activity. Learned DRP has simply endorsed the aforesaid view of the Transfer Pricing Officer without discussing much on the issue. However, while doing so, learned DRP has observed that in the transfer pricing analysis, the assessee has applied TNMM. Further, learned DRP while rejecting the contention of the assessee for adopting segmental results of the assessee and comparables, has observed that since the segmental accounting of the assessee is unaudited, it cannot be accepted.

10. Be that as it may, it is necessary to examine whether the finding of the Transfer Pricing Officer that the assessee is also involved in manufacturing activity is factually borne out from record. In this regard, the Transfer Pricing Officer has referred to the Notes to the Randox Laboratories (India) P. Ltd. fixed asset schedule forming part of the Balance Sheet of the assessee. On a perusal of the said Note, it becomes clear that, though, the assessee was intending to set-up a manufacturing unit in India and for that purpose has acquired lease hold land from Karnataka Industrial Area Development Board (KIADB), however, the assessee was in the process of setting-up of manufacturing unit which is evident from Note no.16 to the Notes to the Account forming part of Annual Report. It is seen that in December 2005, the assessee had entered into an agreement with KIADB for lease hold land to set-up its manufacturing unit. As per the agreement, lease period was for six years. The agreement further provided, if the assessee sets-up the unit within the lease period and other conditions of the agreement are fulfilled, title of the lease hold land is to be

conveyed to the assessee after the end of six year period. However, if the assessee fails to invest the minimum amount of project cost within the aggregate period penalty could be levied on the assessee. It is further evident, time for implementation of the manufacturing unit was extended till 16th May 2011, since, the assessee was in the process of obtaining relevant approval from KIADB for setting-up of the unit. Further, from the financial statements of the assessee it is evident that the assessee has not started its manufacturing activity in the impugned assessment year as it was still in the process of setting-up of the plant. Therefore, the finding of the Transfer Pricing Officer and learned DRP that the assessee is involved in manufacturing activity is factually incorrect. Further the fact that the analyzers were not sold to the third party customers is evident from the sample copy of the agreement placed in the paper book. Insofar as the product development cost is concerned, the material on record indicates that such cost was incurred towards spares for the analyzers and the assessee capitalized such cost.

11. Thus, from the aforesaid facts, it is very much clear that **in the year under consideration, assessee has not undertaken any manufacturing activity as the manufacturing unit was still in the process of being set-up. On the contrary, the facts on record clearly reveal that the assessee had purchased reagents and chemicals from its AE and sold to the third party customers without any value addition. Further, the analyzers, spares and consumables, though, were imported, however, they were not sold but were provided in the laboratories / diagnostics units of the third party customers for testing and research activity. Keeping in perspective the aforesaid factual position, it has to be examined which is the appropriate method to benchmark the arm's length price of the transaction. On going through the provisions of rule 10B and more particularly sub-rule-1(b) of the aforesaid rule, it is evident that RPM is applicable to a case where the price at which property purchased or service obtained by a enterprise from the AE is resold or provided to an unrelated enterprise. The gross profit margin of such a transaction is thereafter compared to the gross profit margin of similar comparable uncontrolled transactions after making necessary adjustment with regard to the expenditure incurred, functional and other differences, the arm's length**

price is determined. Thus, in the facts of the present case, since the assessee has resold the goods imported from the AE without any value addition, the most appropriate method which can be applied for determining the arm's length price is RPM and TNMM cannot be the most appropriate method in such type of transaction.

12. Having held so, it is necessary to deal with the decisions relied upon by the learned Counsel for the assessee. The Co-ordinate Bench in L'oreal India Ltd. (supra) while deciding the dispute of similar nature held that in such type of transaction RPM is the most appropriate method. While deciding Revenue's appeal against the aforesaid order of the Tribunal, the Hon'ble Jurisdictional High Court, in the decision referred to above, held that in case of distribution or marketing activities when the goods are purchased from associate entities and sales of those goods are effected to unrelated parties without any further processing, RPM has to be adopted. The Co-ordinate Bench in case of Airport Retail Pvt. Ltd. (supra) has held as under:-

> "10. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. As could be seen from the transfer pricing order as well as the facts materials on record, there is no dispute to the fact that the assessee is a reseller of finished goods, in the duty free shops set up at the Delhi Airport. It is also accepted that the products sold by the assessee such as liquor, perfumes, confectionary, tobacco, etc., are purchased from A.Es and sold to customers without any value addition or material change to such products. It is a fact that the assessee had bench marked the international transaction relating to purchase of finished goods from A.Es by adopting RPM. However, the Transfer Pricing Officer has rejected RPM primarily on the ground that gross profit computation of comparables was not produced by the assessee. He had also stated that the gross profit margin of the products sold by the assessee cannot be compared with gross profit margin of the products sold by the comparables as they are different in nature. In this context, it is to be noted that at the outset, the Transfer Pricing Officer had opined that the transaction of purchase of finished goods for resale was to be bench marked as per CUP method. We

are unable to understand why the Transfer Pricing Officer abandoned bench marking under CUP if he considered it as the most appropriate method to bench mark the international transaction between the assessee and the A.Es.

11. At this stage, it would be appropriate to refer to certain provisions in the statue relating to transfer pricing adjustment. Section 92C of the Act, provides for computation of arm's length price of an international transaction between the assessee and its A.E. by following one of the methods prescribed therein. Rule 10C, defines most appropriate method to be one which is best suited to the facts and circumstances of each particular transaction and which provides the most reliable measure of arm's length price in relation to the international transaction. Sub-rule (2) of rule 10C, specifies the factors to be considered for selecting most appropriate method. Rule 10B provides the mode and manner of determination of arm's length price under different methods. As per rule 10B(1)(b), determination of arm's length price under RPM is applicable to a case where the price at which property purchased or service obtained by the enterprise from the A.E. is resold or is provided to an unrelated enterprise. The gross profit margin in respect of such a transaction is thereafter compared to the gross profit margin of similar comparable uncontrolled transactions and after making necessary adjustment with regard to expenditure incurred, functionally and other differences the arm's length price is determined. Thus, when there is no dispute to the fact that the assessee is purchasing finished products from the A.Es for the purpose of reselling to unrelated parties without any value addition, under normal circumstances, the most appropriate method to bench mark the arm's length price of such transaction in terms of 10B is RPM. The Tribunal, Mumbai Bench, in Mattel Toys India Pvt. Ltd. (supra), after analyzing the applicability of most appropriate method in respect of such kind of international transactions has observed, under RPM product similarity is not a vital aspect for carrying out comparability analysis but operational comparability is to be seen. The Bench observed, gross profit margin earned by the independent

enterprise in comparable uncontrolled transaction will serve as a guiding factor which is also the case in case of a distributor wherein property and service purchased from the A.E. are resold to other independent entities without any value addition. Thus, it was concluded by the Bench that in such case of purchase and resale of finished products without any value addition RPM, is the best method to evaluate the arm's length price of the transactions. In case of Luxottica India Eyeware Pvt. Ltd. (supra), the Tribunal, Delhi Bench, following a number of other decisions held as under:-

> "10.2. Coming to the argument that the assessee himself has adopted TNMM as the MAM for its transfer pricing study and hence it cannot turn around and argue for adoption of RSPM as the MAM, we find that the Mumbai Bench of the Tribunal in the case of Mattel Toys(I) Pvt.Ltd. in ITA no.2476/Mum/2008 held as follows. "41. Now coming to the argument of the Ld.DR that once the assessee itself has chosen TNMM as the MAM in TPR, then it cannot resort to change its method at an assessment or appellate stage. In our opinion, such a contention cannot be upheld because if it is found on the facts of the case that a particular method will not result into proper determination of the ALP, the TPO or the appellate authorities can very well hold that why a particular method can be applied for getting proper determination of ALP or the assessee can demonstrate a particular method to justify its ALP. Thus, even if the assessee had adopted TNMM as the MAM in the TP report, then also it is not precluded from raising the contentions/objections before the TPO or the appellate Courts that such a method was not an appropriate method and is not resulting into proper determination of ALP and some other method should be resorted. The ultimate aim of the TP is to examine whether the price or the margin raising from an international transaction with the related party is at ALP or not. The determination of approximate ALP is the key

factor for which the MAM is to be followed. Therefore, if at any stage of the proceedings, it is found that by adopting one of the prescribed methods other than chosen earlier, the most appropriate ALP can be determined, the assessment authorities as well as the appellate Courts should take into consideration such a plea before them provided, it is demonstrated as to how a change in the method will produce better or more appropriate ALP on the facts of the case. Accordingly, we reject the contentions of the Ld.DR and also the observations of the AO and the Ld.CIT(A) that the assessee cannot resort to adoption of RPM method instead of TNMM."

10.3 The case of the assessee is much better than the case of M/s Mattel Toys (I) Pvt.Ltd. (supra) for the reason that the assessee in its transfer pricing report has also used RSPM as the MAM. Hence this argument of the Revenue is rejected.

10.4. As the undisputed fact is that the functional profile of the assessee is that of a trader and as the characterisation of the transaction is purchase and sale of goods, we hold that RSPM is the MAM by applying the following decisions of the Co-Ordinate Bench of the Tribunal.

“13. This finding in our humble opinion is wrong for the reason that the CIT(A) has adopted these very comparables, along with three others while arriving at the operating margins at Para 7.16 of his order. As the assessee is a trader, without value addition to the goods, we find force in the submissions of the assessee that resale price method is the most appropriate method for determining the ALV with respect to AE transaction. In fact, the Revenue has accepted this method in earlier two years. The TPO in his order dt. 7.3.2005 for the AY 2002- 03 and order dt. 20.3.2006 for the AY 2003-04, has agreed

with the computation of arm's length price made by the assessee under the resale price method." (ii) In the case of L'Oreal India P. Ltd. vs. ITO (ITA no.5423/Mum/2009) it is held as follows:

"19. During the course of hearing, ld.DR also supported the method considered by TPO and referred to Para 2.29 of OECD price guidelines 2010 as stated hereinabove. On the other hand, ld.AR justified the RPM method adopted by it and also referred to order of TPO in the preceding AY as well as succeeding AY to the AY under consideration to substantiate that RPM is the most appropriate method to determine ALP. He submitted that the assessee made adjustment for marketing and selling expenses to the profits to make it comparable to the comparable companies' profits. We agree with the Ld.CIT(A) that there is no order of priority of methods to determine ALP. RPM is one of the standard method and OECD guidelines also states that in case of distribution and marketing activities when the goods are purchased from AEs which are sold to unrelated parties, RPM is the most appropriate method. In the case before us, there is no dispute to the fact that the assessee buys products from its AEs and sells to unrelated parties without any further processing."

(iii) In the case of Danisco (India) Pvt.Ltd. vs. ACIT, Circle 10(1), New Delhi (ITA no.5291/Del/2010), it is held as follows:

"22. Considering the above submissions we find that the assessee established in 1998 as a 100% subsidiary of Danisco A/S Denmark. Danisco India is engaged in the business of manufacturing and trading of food additives. The manufacturing business in respect of food flavours and the trading business is for products for falling under the category of food ingredients. The main grievances of the assessee against the order of the Ld. TPO upheld by the Ld.DRP are

regarding their approach in the manner in which transfer pricing adjustment has been made, the approach adopted by the Ld.TPO in granting 17 comparable companies denying the economic adjustment claim made by the assessee, regarding computation of margins of the assessee, non consideration of supplementary transaction and denial of adequate opportunity of being heard to the assessee by the authorities below as well as their failure to examine the contentions and arguments of the assessee in this regard. Considering these grievances as discussed herein above by us in the arguments advanced by the parties/their submissions and having gone through the decision relied upon, we find substance in the submission of the assesse3e and thus we are of the view that it is a fit case to set aside the matter to the file of the Ld.TPO for his fresh consideration and decide the issue afresh after affording opportunity of being heard to the assessee and discussing their submissions in the order and reasons, if any, for not agreeing or agreeing with them. It is ordered accordingly with direction to the Ld.TPO to: a) first examine as to whether, was there any value addition on imported goods, and if answer is in negative then apply RPM as a most appropriate method for trading transactions of imported goods and in consequence examine the application of appropriate method as commission payment;

(iv) Frigoglass India P.Ltd. (ITA no.463/Del/2013), it is held as follows:

"We have heard the rival contentions and perused the material available on record. In our considered view, once assessee has given a methodology for working of ALP on selection of a particular method supported by appropriate comparables, the working can be dislodged by TPO on the basis of cogent reasons and objective findings. In this case except theoretical

assertions and generalized observations, no objective findings have been given to come to a reasoned conclusion that assessee's adoption of CPM for manufacturing segment and RPM for trading segment was Factually and objectively not correct. Thus the rejection of methods by TPO as adopted by assessee is bereft of any cogency and objectivity. The same is a work of guessing and conjectured. Similarly the TNMM method applied by the TPO suffers from the same inherent aberrations as mentioned above. In these circumstances we are of the view that Assessee's methods of CPM and RPM respectively worked by applying appropriate comparables is to be upheld. Thus the ALP working returned by the assessee is upheld. The Assessee's TP grounds are allowed."

(v) Textronic India Pvt.Ltd. vs. DCIT (ITA no. 1334/Bang/ 2010), it is held as follows:

"We have considered the rival submissions. The dispute is with regard to the ALP in respect of international transactions whereby the assessee imports equipment from its AE and resells them without any value addition to the Indian customers. In similar circumstances, Mumbai Bench of the Tribunal in the case of L'Oreal India Pvt.Ltd. (supra) has taken the view that the RPM would be the most appropriate method for determining the ALP. The Mumbai Bench of Tribunal in this regard, has referred to the OECD guidelines wherein a view has been expressed that RPM would be the best method when a resale takes place without any value addition to a product. In the present case, the assessee buys products from the AE and sells it without any value addition to the Indian customers. In such circumstances, we are of the view that the ratio laid down by the Mumbai Bench of the Tribunal in the case of L'Oreal India Pvt. Ltd. (supra) would be squarely applicable to the facts of the assessee's case. In that event, the GP as

> a percentage of sales arrived at by the TPO in Annexure to the TPO's order insofar as trading activity of comparables identified by the TPO at 12.90%. The GP as a percentage of sales of the assessee is at 35.6% which is much above the percentage of comparables identified by the TPO. In such circumstances, we are of the view that no adjustment could be made by way of ALP. We, therefore, accept the alternative plea of the assessee and delete the addition made by the AO. In view of the above conclusion, we are not going into the other issues on merits raised by the assessee on the approach adopted by the TPO in arriving at the ALP. Thus, ground Nos. 2 to 7 are allowed.
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> 10.5 In view of the above discussion, we direct the TPO to adopt RPM as the MAM in this case."

12. The aforesaid decision of the Tribunal, Delhi Bench, was challenged before the Hon'ble Delhi High Court by the Department. However, the High Court dismissed the appeal of the Revenue on the issue of acceptance of RPM selected by the assessee over TNMM applied by the Department. It is further necessary to observed, in case of OSI Systems Pvt. Ltd. (supra), the Tribunal, Hyderabad Bench, following the decision in case of Luxottica India Eyeware Pvt. Ltd. (supra) held as under:-

> "44. On a perusal of the extracted portion from the order of the Coordinate Bench, it is very much clear that after considering a number of decisions on the very same issue from different Benches of the ITAT, it was held that in case of transactions related to purchase and sale of goods, RPM is the most appropriate method. The principles laid down by the Delhi Bench clearly applies to the facts of the present case not only because the assessee is involved purely in trading activity, but also in the TP study assessee has adopted RPM as the most appropriate method. Only because in the preceding assessment year for some reason assessee has not challenged the decision of DRP in upholding application of TNMM, assessee cannot be prevented from objecting to

adoption of TNMM in the impugned assessment year. In view of the aforesaid, we remit the matter back to the file of the AO/TPO to examine assessee's analysis under the RPM and decide the issue accordingly afterdue opportunity of being heard to the assessee."

13. The facts on record reveal that the Transfer Pricing Officer under a misconception that the assessee has undertaken manufacturing activity has rejected RPM. Learned DRP has also not examined the facts in proper perspective. Rather, learned DRP has recorded an erroneous finding by stating that in the transfer pricing analysis the assessee has chosen TNMM as the most appropriate method. The aforesaid finding of learned DRP is factually incorrect, as, on a perusal of the transfer pricing analysis of the assessee, a copy of which is placed in paper book, it is revealed that the assessee has selected RPM as the most appropriate method and has also explained why TNMM is not applicable to the subject transaction. In view of the aforesaid, we hold that RPM is the most appropriate method to benchmark the subject international taxation relating to purchase of reagents analyzers, etc. Since, neither the Transfer Pricing Officer nor learned DRP has pointed out any other defect in the transfer pricing analysis of the assessee except that the assessee is involved in manufacturing activity, we are of the view that the benchmarking done by the assessee under RPM has to be accepted. More so, when the Transfer Pricing Officer has accepted the comparables selected by the assessee. That being the case, only thing which requires verification is the gross margin of the assessee with that of the comparables. We direct the Assessing Officer / Transfer Pricing Officer to examine this aspect and decide the issue accordingly after due opportunity of being heard to the assessee. With the aforesaid observations, grounds are allowed. Since, we have allowed assessee's claim that RPM is the most appropriate method, the other issue relating to computation of margin of comparables under TNMM does not require adjudication. Further, we direct the Assessing Officer / Transfer Pricing Officer to adopt the correct purchase figure as debited to the Profit & Loss account after due verification."

21. The reasons assigned by the TPO for regarding RPM as the MAM and other facts and circumstances remain the same in the present AY also and therefore the decision of the Tribunal would be equally applicable to the present AY also. In the light of similarity of facts in AY 2011-12 & 2010-11, we are of the view that the decision rendered by the Tribunal in AY 2010-11 would equally apply to AY 2011-12 also. Following the aforesaid decision of the tribunal we hold that RPM is the MAM for determining ALP and the AO/TPO is directed to compute the ALP as directed by the Tribunal in Paragraph-13 of its order for AY 2010-11, after affording Assessee opportunity of being heard. We hold and direct accordingly and allow the relevant grounds to the extent indicated in this order. The other grounds relating to determination of ALP under the TNMM becomes academic in view of the conclusions that RPM is the MAM for determining ALP in respect of the international transaction in question for the relevant AY.

22. The only other corporate tax issue raised by the Assessee is Grd.No.6 which reads as follows:

> *Ground 6 - The Learned AO has erred in making an addition of Rs.519,776/- u/s 43B of the Act towards Bonus and Leave encashment, which has been reversed in the subsequent periods and which are already considered in the income of AY 2016-17 upon such reversal.*

23. The AO added a sum of Rs.519,776/- u/s 43B of the Act for AY 215-16 towards Bonus and Leave encashment as amount was not paid within the due date of filing the return which was confirmed by the DRP.

24. It is the plea of the Assessee that excess provision made have been reversed subsequently in FY 2015-16 and on such reversal, the excess

provision has already been offered to tax in the subsequent year. Therefore, there is no requirement to again add that to the income u/s 43B of the Act in AY 2015-16, otherwise, it would lead to double taxation of the same income.

25. Below table provides the details of the amounts as mentioned in above points:

Particulars	**Provision as at 31st March 2015**	**Paid before 139(1) due date**	**Reversed and considered as income in subsequent year before 139(1) due date**
Bonus	40,216	38,211	2,005
Leave encashment	517,771	-	517,771
Total	**5,57,987**	**38,211**	**5,19,776**

26. The learned Counsel for the Assessee therefore submitted that the addition made needs to be reversed since the income added by the AO u/s 43B of the Act is already offered to tax once the provision has been reversed and hence there is no necessity to add the same again to the income u/s 43B, which has been erroneously done by the Learned AO.

27. We have considered the rival submission. Since as per the provisions of Sec.43B(f) of the Act, provision on account of bonus or leave encashment is not allowable as deduction except on the basis of actual payment irrespective of the method of accounting followed by an Assessee, the disallowance u/s.43B of the Act for AY 2015-16 is proper. However, since the same amount was offered to tax in AY 2016-17 and taxed in that year, there would be double addition and therefore the proper course would be to direct that the income offered in subsequent year 2016-17 and taxed to that extent should not be taxed. The AO will give necessary consequential relief to the Assessee.

28. In the result, appeal by the Assessee is partly allowed for statistical purpose.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(B.R.BASKARAN)	**(N.V. VASUDEVAN)**
Accountant Member	**VICE PRESIDENT**

Bangalore,
Dated, the 04th January, 2022 .

/NS/*

Copy to:

1. The Assessee
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.