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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.4773/Del/2015
Assessment Year: 2011-12

M/s. Jubilant Pharmova Ltd. (earlier known as M/s. Jubilant Life Sciences Ltd.), Plot No. 1A, Sectore-16A, Noida	**Vs.**	JCIT, Range-1, Moradabad
PAN :AABCV0200H		
(Appellant)		**(Respondent)**

And

ITA No.5121/Del/2015
Assessment Year: 2011-12

DCIT, Circle-1, Moradabad	**Vs.**	M/s. Jubilant Pharmova Ltd. (earlier known as Jubilant Life Sciences Ltd.), Gajraula, Amroha, Uttar Pradesh
		PAN :AABCV0200H
(Appellant)		**(Respondent)**

Assessee by	Sh. K.M. Gupta, Advocate
Department by	Sh. Mahesh Shah, CIT(DR)

Date of hearing	16.02.2022
Date of pronouncement	13.05.2022

ORDER

PER SAKTIJIT DEY, JM:

Captioned cross appeals arise out of order dated 26.05.2015 of learned Principal Commissioner of Income Tax (OSD) (Appeals), Moradabad, pertaining to assessment year 2011-12.

ITA No.4773/Del/2015
(Assessee's Appeal)

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

1. *That on facts and in law the order/directions passed by the Assessing Officer ("AO")/Transfer Pricing Officer ("TPO")/Commissioner of Income-Tax (Appeals) ["CIT(A)"] are bad in law and void ab-initio.*
2. *That the CIT(A) erred on facts and in law in upholding the disallowance of club expenses of Rs.252,626/- by holding that the same has not been incurred for the purpose of the business of the Appellant.*
3. *That the CIT(A) erred on facts and in law in upholding the disallowance of expenditure of INR 41,67,476/- by holding, inter-alia, that these expenses are not relatable to the year under consideration and hence, not allowable in the assessment year* 2011-12.

3. Ground No. 1, being a general ground, does not require specific adjudication.

3.1 In ground no. 2, the assessee has challenged disallowance of club expenses of Rs.2,52,626/-.

3.2 Briefly the facts are, in course of assessment proceeding the Assessing Officer noticed that assessee had claimed deduction of Rs.2,52,626/- towards payment made to various clubs. Being of the view, such expenditure was not incurred for the purpose of business, the Assessing Officer disallowed the same. Learned Commissioner (Appeals) also upheld such disallowance.

3.3 Before us, it is a common point between the parties that the Tribunal has decided identical issue in favour of the assessee in the preceding assessment years.

3.4 Having perused the materials on record, we find that this is a recurring issue between the parties since assessment year 2000-01 onwards. However, it is also a fact on record that in the preceding assessment years, the Tribunal has decided the issue in favour of the assessee by allowing the deduction claimed. In the latest order passed by the Tribunal for assessment year 2009-10 and 2010-11 in ITA No. 4637/Del/2014 and Ors, dated 28.02.2022, the Tribunal following its earlier order has held as under:

> ***"3.2** On perusal of the order dated 12.03.2019 passed in ITA No. 4410/Del/2003 and others, we find while deciding identical issue in assessee's own case, the Tribunal has held as under:*
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>> *"75. The 3rd ground of appeal is with respect to disallowance of club expenses of INR 48751/-. The fact shows that during year appellant has made certain payment to various clubs, which was disallowed by learned assessing officer holding that it is not for purpose of business of assessee. The learned CIT - A also upheld disallowance holding that assessee being a corporate body is not capable of utilizing club facilities itself.*
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>> *76. On hearing parties, it was noticed that above issue is squarely covered in favour of assessee by order of coordinate bench for assessment year 2001 - 02 in case of assessee wherein it has been held that club expenses are in nature of business expenditure and therefore allowable to appellant relying on decision of honourable Bombay High Court and*

> *Gujarat High Court. The honourable Supreme Court has also held in CIT vs. United Glass manufacturing company limited civil appeal number 6449 of 2012 that club expenses are also PO of business expenditure. The honourable Delhi High Court has also taken similar view in 326 ITR 425 and 218 taxmann 69 in view of this ground number 3 of appeal of assessee is allowed."*

> ***3.3*** *Facts being identical, respectfully following the decision of the coordinate bench, we allow assessee's claim of deduction. Consequently, disallowance is deleted. This ground is allowed."*

3.5 Facts being identical, respectfully following the consistent view of the Tribunal in assessee's own case, as referred to above, we allow the deduction claimed by the assessee. Hence, the addition is deleted. This ground is allowed.

4. In ground no. 3, the assessee has challenged the disallowance of prior period expenses of Rs.41,67,476/-. In course of assessment proceeding, the assessee made a claim that an amount of Rs.41,67,476/- represents expenditure incurred for the current year and not relate to earlier assessment year. He submitted, though, as measure of abundant precaution, the Assessing Officer has added back such expenses in the computation of income. However, the same, being an allowable deduction, should be allowed. The Assessing Officer, however, did not accept the claim of the assessee. Learned Commissioner

(Appeals) also did not interfere with the decision of the Assessing Officer.

4.1 Before us, learned counsel for the assessee submitted that while deciding identical issue in assessee's own case in preceding assessment years, the Tribunal has restored the issue back to the Assessing Officer for reconsideration. Thus, he submitted, consistent with the view expressed by the Tribunal in the preceding assessment years, the issue may be restored back to the Assessing Officer.

4.2 Learned Departmental Representative agreed with the aforesaid submission of the assessee.

4.3 Having considered rival submissions and perused the materials on record, it is noticed, assessee's claim of deduction in respect of certain expenses was disallowed on the reasoning that such expenses do not pertain to the impugned assessment year. However, it is the claim of the assessee that such expenses are related to the year under consideration and do not pertain to the earlier assessment years.

4.4 We find, while deciding identical issue in assessee's own case in the preceding assessment years, the Tribunal has restored it back to the Assessing Officer with certain directions. In the

latest order passed in assessment years 2009-10 and 2010-11 (supra), the Tribunal has restored the issue to the Assessing Officer with the following observations:

> ***"4.1** We have heard the parties and perused the materials on record.*
> ***4.2** As could be seen from the facts on record, certain expenses claimed by the assessee were disallowed by the departmental authorities on the reasoning that they do not relate to the impugned assessment year. While confirming the addition, learned Commissioner (Appeals) has observed that the assessee did not claim the deduction by way of a revised return of income. Thus, according to him, the Assessing Officer could not have entertained assessee's claim. Accordingly, he upheld the decision of the Assessing Officer.*
> ***4.3** At the time of hearing, learned counsels appearing for the parties have agreed that the issue is squarely covered by the decision of the Tribunal in assessee's own case in the preceding assessment years. Having deliberated upon the issue, we find that certain expenditure alleged to be relating to prior period was payable during the previous year 2008-09, as per the claim of the assessee. It is evident, the reason for disallowing assessee's claim is, it was not made through a revised return of income. As we find, identical issue came up for consideration before the coordinate bench in assessee's own case in assessment years 2000-01 to 2008-09. While deciding the issue the bench has observed as under:*
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> > *"36. We have carefully considered rival contention and perused orders of lower authorities. The learned assessing officer has given a clear-cut finding that it was not found that these expenses were quantified during relevant previous year only. By deleting above disallowance also vide para number 1 of order, learned CIT appeal noted that it is clear that assessing officer has not allowed proper opportunity to explain same to assessee and learned AO has straight way referred notes of accounts as mentioned by auditor and concluded that disallowance is made without appreciating*

> *proper facts. We do not agree with finding of learned CIT - A that disallowance cannot be sustained as assessee has also been taxed on miscellaneous income of earlier years charged to tax this year. The logic- given by learned CIT appeal that assessing officer should have treated both these items of prior period income and expenses on same parity is devoid of any merit. It is also not acceptable that without examining facts of case that when these expenses have been crystallized, disallowance cannot be deleted. Before neither learned assessing officer nor before learned CIT appeals or before us has assessee shown that, this expenditure has been crystallized during year. Unless this is shown these expenditure cannot be allowed without verification. It is also fact that definition of prior period expenditure for companies act and definition of prior period expenditure for income tax act are different. Therefore it needs to be examined that how assessee has shown in its balance sheet prior period expenditure following companies act 1956 for preparing balance sheet according to schedule VI of companies act, and while filing return of income, it is contesting that same are not prior period expenditure. This dichotomy in argument of assessee is required to be rebutted by assessee himself before assessing officer. There has to be a categorical answer from assessee that disclosure made by it under companies act is erroneous and it is to be demonstrated by reliable evidences. Further, we also do not accept argument of assessee that auditors have certified prior period expenditure. This is devoid of any merit as balance sheet and notes on accounts according to companies act are prepared by assessee, auditor merely expresses an opinion on that. Therefore assessee itself has classified same is a prior period expenditure while preparing its balance sheet and now it is taking a different stand for purpose of computation of its income under income tax act. In view of this,whole issue is set aside back to file of learned assessing officer with a direction to assessee to show that above expenditure is not a prior period expenditure and has been crystallized during year only. If assessee demonstrates that, addition is required to be deleted. Accordingly, ground number 16 of appeal of learned AO is allowed with above direction."*

4.4 *Facts being identical, respectfully following the decision of the coordinate bench in assessee's own case, as referred to above, we restore this issue to the file of Assessing Officer to decide it afresh following the direction of the Bench in the order referred to above. This ground is allowed for statistical purposes."*

4.5 Facts being identical, respectfully following the consistent view of the Tribunal in assessee's own case, as discussed above, we restore this issue to the Assessing Officer for re-consideration in accordance with the directions of the Tribunal in earlier years. This ground is allowed for statistical purposes.

5. In the result, the appeal is partly allowed.

ITA No.5121/Del/2015
(Revenue's Appeal)

6. Grounds raised by the Revenue are as under:

1. *That the Ld. Pr. Commissioner of Income Tax(OSD)/ (Appeal)), Moradabad has erred in law and on facts in allowing benefit of deduction u/s 80-IA of the Income Tax Act, 1961 of Rs.20,93,80,606/- on the profits derived from the business of generation of power for captive consumption.*
2. *That the Ld. Pr. Commissioner of Income Tax(OSD)/ (Appeal)), Moradabad has erred in law and on facts of the case in deleting the disallowance of expenses to the tune of Rs.40,95,343/- made by the assessing officer on account of expenses debited under the head Books & Periodicals by treating it as an expenditure of capital nature.*
3. *The Ld. Pr. Commissioner of Income Tax(OSD)/ (Appeal)), Moradabad has erred in law and on facts in deleting the addition of Rs.12,26,551/-(being 10% of the total insurance claim) made by the assessing officer on the cogent reason that the assessee failed to substantiate the actual amount of loss incurred vis-a-vis the amount for which the claim is lodged, as the correctness of loss incurred remained ascertainable.*

4(a) *(i) The Ld. Pr. Commissioner of Income Tax(OSD)/ (Appeal)) has grossly erred in law and on facts by treating the corporate guarantee given to AEs outside the ambit of "international transaction" within the meaning of section 92B of the I.T.Act,1961 and in deleting the ALP adjustment to the tune of Rs.23,16/27,000/-.*
(ii) The Ld. Pr. Commissioner of Income Tax(OSD)/ (Appeal)) has grossly erred in ignoring the fact that the exercise of ALP adjustment of Rs.23,16,27,000/ by the TPO was based on information received u/s 133(6) of the I.T.Act ,1961 from various banks .

(iii) The ld. Pr. Commissioner of Income Tax(OSD)/ (Appeal) has grossly erred in law and on facts by ignoring that the assessee's contention expressed during assessment proceedings that adjustment if any should be calculated after giving effect to repayment was not relevant and that the department's case is not that the service providers have encashed the guarantee given by the assessee, even if tire assessee has made all the payment and the guarantee has not been invoked then also the AE was liable to compensate the assessee for the risk taken by it.

(iv)The ld. Pr. Commissioner of Income Tax(OSD)/ (Appeal)) has grossly erred in law and on facts in ignoring the this fact that in case if the AE had taken the same guarantee, even in general parlance, from the third party or a bank it would have to pay guarantee charges irrespective of the fact that the guarantee was invoked or not, in deleting the ALP adjustment to the tune of Rs.23,16,27,600/.

4(b) (i) The Ld. Pr. Commissioner of Income Tax(OSD)/ (Appeal)) has erred in law and on facts by accepting the explanation given by the assessee and its submission that ALP adjustment for export of finished goods made by the TPO to the tune of Rs. 19,43,00,000/- cannot exceed final price charged from third party without considering reasons given by the TPO for arriving at ALP adjustment on this issue and in deleting the adjustment made by the TPO to the tune of Rs.19,43,00,000/.

(ii) The Id. Pr. Commissioner of income tax(OSD)/ (Appeal)) has grossly erred in law and on facts in accepting the assessee's submission that the AEs of the assessee are to be considered Tested Party and in deleting the adjustment made by the TPO to the tune of Rs.19,43,00,000/.

(iii)The Id. Pr. Commissioner of income tax(OSD)/ (Appeal)) has grossly erred in law and on facts in accepting that CUP method should not be adopted as most appropriate method for benchmarking export of finished goods by the assessee to its AEs without appreciating the TPO's exercise for adopting CUP method being best method for bench-marking export of finished goods by the assessee to the AEs(which is very obvious from the table for doing so in the body of order) and in deleting the adjustment made by the TPO to the tune of Rs.19,43,00,000/.

(iv)The Id. Pr. Commissioner of income tax(OSD)/ (Appeal)) has grossly erred in law and on facts in accepting the submission of the assessee that the TPO had allocated 'other income' on the basis of export sale of finished goods made to AEs and non AEs on arbitrary basis without producing any basis or reason for allocation of other income and so observing that TPO had completely failed to give his finding and explaining in detail the basis of reallocating other income between AEs and non AEs segment and in deleting the adjustment made by the TPO to the tune of Rs.19,43,00,000/

(v)The Id. Pr. Commissioner of income tax(OSD)/ (Appeal)) has erred in law and on facts in ignoring the reasoned 'benchmark analyses' made by the TPO after giving obvious reasons for rejecting the external

benchmark analyses given by the assessee for determining 'arms length price' of the transaction , and in deleting the adjustment made by the TPO of Rs.19,43,00,000/ on account of export of finished goods.

5. *That the order of Id. Pr. Commissioner of income tax(OSD)/ (Appeal)), Moradabad may be set aside and order of the AO may be restored.*

7. The first issue in dispute is regarding assessee's claim of deduction under section 80IA of the Act.

7.1 Briefly the facts are, the assessee is a resident company engaged in the business of manufacturing and sale of pharmaceuticals, life science products, industrial products, performance polymers & Chemicals etc. For the assessment year under dispute, the assessee had filed his return of income on 28.11.2011 declaring nil income after claiming deduction under section 80IA of the Act. In course of assessment proceeding, the Assessing Officer wanted to verify the authenticity of assessee's claim of deduction under the aforesaid provision. Therefore, he called upon the assessee to furnish the required details. On verifying the details furnished, he found that the deduction under section 80IA of Rs.20,93,80,606/- was claimed with regard to profit from generation of power. Though, the assessee furnished detailed submission to justify its claim of deduction, however, the Assessing Officer relying upon the fact that identical deduction claimed by the assessee was disallowed in the preceding

assessment years on the reasoning that there is no separate and distinct unit capable of carrying on any business activity, disallowed assessee's claim of deduction. Whereas, learned Commissioner (Appeals) having found that the assessee has satisfied all the conditions of section 80IA of the Act and further, the fact that identical issue has been decided in favour of the assessee in its own case in assessment years 2000-01 to 2008-09 in ITA No. 4410/Del/2003 and Ors., followed the same and allowed assessee's claim of deduction.

7.2 Before us, though, learned Departmental Representative strongly relied upon the observations of the Assessing Officer, however, he fairly submitted that in the preceding assessment years issue has been decided in favour of the assessee.

7.3 Learned counsel for the assessee strongly relied upon the observations of learned Commissioner (Appeals).

7.4 Having considered rival submissions and perused the materials on record, it is observed that this is a recurring dispute between the parties since assessment year 2000-01 onwards. While deciding the issue in a consolidated order passed for assessment years 2000-01 to 2008-09 in ITA No. 4410/Del/2003 and Ors., dated 12.03.2019, the Tribunal allowed assessee's

claim of deduction under section 80IA of the Act with the following observations:

> *"193. Ground no. 2 of the appeal is with respect to the disallowance of deduction u/s 80IA of the Act of INR 30,27,47,766/-. Both the parties explained that above issue has already been considered in the earlier appeals of the AO, which are heard together. They also submitted that there is no change in the facts and circumstances of the case as well as in their arguments. In the case of the assessee, we have already allowed the claim of the assessee u/s 80IA of the Income Tax Act with respect to the generation of power. Therefore for the similar reasons and in absence of any change in the facts and circumstances of the case we also direct the learned AO to allow the claim of the assessee u/s 80IA of INR 30,27,47,766/-. Accordingly, ground no. 2 of the appeal is dismissed."*

7.5 Facts being identical, respectfully following the consistent view of the Tribunal in assessee's own case, as discussed above, we uphold the decision of learned Commissioner (Appeals) on the issue.

8. The next issue arising for consideration is, deletion of disallowance of expenses incurred by the assessee towards books and periodicals. In course of assessment proceeding, the Assessing Officer noticed that the assessee had incurred expenses of Rs.40,95,343/- towards books and periodicals. Being of the view that such expenditure incurred by the assessee is of capital nature and since similar claims were disallowed in the earlier assessment year, the Assessing Officer disallowed the deduction claimed in the impugned assessment year. Whereas, learned

Commissioner (Appeals) allowed the deduction claimed relying upon his decision in preceding assessment years.

8.1 We have considered rival submissions and perused the materials on record. It is observed, identical issue came up for consideration before the Tribunal in assessment years 2000-01 to 2008-09 (supra), while deciding the issue the Tribunal upheld the decision of learned Commissioner (Appeals). In the latest order passed for assessment years 2009-10 and 2010-11 in ITA No. 4637/Del/2014 and others, dated 28.02.2022, the Tribunal reiterated its earlier decision as under:

> ***"7.2*** *As we find, identical issue came up for consideration before the coordinate bench in assesee's own case in assessment year 2000-01 to 2008-09 (supra). While deciding the issue, the Tribunal has held as under:*
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> > *"31. Ground number 13 of appeal is against deletion of disallowance of books and periodical expenses of INR 2098978/- which was claimed by assessee as revenue expenditure held by AO as capital expenditure, learned CIT-A allowed it is a revenue expenditure. Ground number 14 is also related to it. On hearing parties it was found that identical issue has been decided in case of assessee for assessment year 98 - 99 in assessee's own case wherein it has been held that expenditure incurred by assessee on 'purchase of books and journals cannot be held to be a capital expenditure. There is no change in facts and circumstances of case, nature of expenditure is also same, no contrary judicial precedent cited, therefore, following decision of coordinate bench, and hence, we dismiss ground number 13 and 14 of appeal of revenue."*
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> ***7.3*** *Facts being identical, respectfully following the decision of the coordinate bench in assessee's own case, we dismiss the ground."*

8.2 Facts being identical, respectfully following the decision of the Tribunal in assessee's own case, as discussed above, we uphold the decision of learned Commissioner (Appeals).

9. The next issue arising for consideration is in relation to deletion of disallowance of Rs.12,26,551/-.

9.1 Briefly the facts are, in course of assessment proceeding, the Assessing Officer noticed that during the year under consideration, the assessee had received insurance claim from insurance company towards loss in transit of goods comprising of raw materials, stocks, finished goods etc. Therefore, he called upon the assessee to furnish the details of loss of goods in transit for which insurance claim of Rs.1,22,65,509/- was received. After examining the details furnished and submission of the assessee, the Assessing Officer observed that no documentary evidence in support of actual amount of loss incurred was furnished by the assessee. Thus, he disallowed 10% of the insurance claim received, by stating that the assessee could not furnish the complete details regarding the loss of goods in transit. Learned Commissioner (Appeals) deleted the disallowance; firstly, on the reasoning that the assessee has furnished all necessary details

with regard to the claim of loss; and secondly, similar disallowance made in the preceding assessment year was deleted.

9.2 We have considered rival submissions and perused the materials on record. Undisputedly, the disputed disallowance has been made by the Assessing Officer on purely ad-hoc basis. It is observed, while dealing with similar disallowance made in the preceding assessment years, i.e., 2000-01 to 2008-09, the Tribunal has upheld the decision of learned Commissioner (Appeals) with the following observations:

> *"99. We have carefully considered rival contention and find that addition made by learned assessing officer is devoid of any merit. Insurance industry is a highly regulated industry wherein there are standard procedures for raising claims. Seldom, it happens that a person receives full amount of loss from insurance companies because issues of obsolete items, depreciation due to efflux of time etc. It is also known that insurance companies have surveyors whose primary work is to review claims made and assess' losses! Surveyors in insurance industry are domain experts for particular area- be it fire, loss in transit or loss due to any other natural calamity. The Ld. AO does not have arty mechanism to estimate it. Receipt of sums from insurance companies is sufficient proof of having incurred losses. Nevertheless, claims received from insurance companies because of raw materials, stocks, unfinished goods, fixed assets, vehicles and from railways was credited to P&L account and offered to tax by Appellant. When sum is offered to tax, Action of Ld. AO cannot doubt correctness of claim without any evidences - Ld. AO's addition is based on mere suspicion and surmises therefore have no legal or factual basis. Therefore, we upheld the order of the ld CIT A. Accordingly, ground number 5 of appeal is dismissed."*

9.3 Facts being identical, respectfully following the decision of the Coordinate Bench in assessee's own case, as discussed above, we uphold the decision of learned Commissioner (Appeals).

10. The next issue raised in ground no. 4(a) relates to deletion of addition made on account of transfer pricing adjustment made to the Arm's Length Price (ALP) of corporate guarantee provided to the overseas Associated Enterprises (AEs). While the Transfer Pricing Officer (TPO), treating the provision of corporate guarantee as an international transaction, charged guarantee commission at 4.86%, learned Commissioner (Appeals), accepting assessee's primary claim, held that the provision of corporate guarantee is not an international transaction.

10.1 We have considered rival submissions and perused the materials on record. It is observed, identical issue arising in assessee's own case in assessment years 2009-10 and 2010-11 came up for consideration before the Tribunal. While deciding the issue, the Bench in the order, referred to elsewhere, held as under:

> ***"9.4*** *We have considered rival submissions and perused the materials on record. Insofar as the factual position relating to the issue is concerned, there is no dispute that the assessee has provided corporate guarantee in respect of loans availed by certain overseas AEs. From the initial stage itself, the assessee has taken a stand that the provision of corporate guarantee does not fall within the scope and ambit of international transaction as provided under section 92B of the Act. While, the TPO has rejected the aforesaid contention of the assessee and has determined the ALP of guarantee commission, learned Commissioner (Appeals) accepting assessee's submission, has held that provision of corporate guarantee cannot be treated as international transaction. However, we are unable to subscribe to the view expressed by learned Commissioner (Appeals).*

> ***9.5*** *By virtue of an amendment made to section 92B of the Act by Finance Act, 2012 with retrospective effect from 01.04.2002, the scope and ambit of the expression 'international transaction' was widened with the insertion of Explanation to section 92B of the Act. Clause (i)(c) of the Explanation clearly says that 'capital financing, including any type of long term or short term borrowings, lending or guarantee, purchase or sale of marketable securities or any types of advance payments or deferred payments or any other debt arising during the course of business can be regarded as international transaction'. Thus, keeping in view the amendment made to section 92B of the Act, provision of corporate guarantee has to be regarded as an international transaction in terms of section 92B of the Act. The Hon'ble Madras High Court in case of PCIT v. Redington (India) Ltd. (supra), after taking note of the amendment to section 92B of the Act, has held that provision of corporate guarantee will fall within the scope and ambit of international transaction as defined under section 92B of the Act. Therefore, we hold that provision of corporate guarantee towards loan availed by the AEs constitutes international transaction under section 92B of the Act.*
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> ***9.6*** *Having held so, we must observe, learned Commissioner (Appeals) has deleted the adjustment made in relation to provision of corporate guarantee simply on the reasoning that it is not an international transaction. Therefore, he has not considered the issue on merits. On perusal of material on record, we have observed, in course of proceeding before the TPO as well as before learned Commissioner (Appeals), the assessee had advanced detailed submissions on merits contesting the adjustment made on account of provision of corporate guarantee. While the TPO has completely rejected the submissions of the assessee, learned Commissioner (Appeals) did not deal with them as he held that the provision of corporate guarantee is not an international transaction. Thus, in our view, the assessee deserves a fair opportunity to contest the issue relating to the determination of ALP of guarantee commission to be charged on provision of corporate guarantee on merits.*
> ***9.7*** *In view of the aforesaid, we restore the issue to the Assessing Officer for de-novo adjudication after due and reasonable opportunity of being heard to the assesse. Ground is allowed for statistical purposes.*
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> ***10.*** *In the result, Revenue's appeal is partly allowed for statistical purposes."*

10.2 Facts being identical, following the decision of the Coordinate Bench in assessee's own case, as discussed above, we

restore this issue to the Assessing Officer for deciding afresh with similar direction.

11. The final issue raised by the Revenue in ground no. 4(b) relates to deletion of transfer pricing adjustment of Rs.19.43 crores proposed by the TPO to the ALP of export of finished goods.

11.1 Briefly the facts are, in the year under consideration, the assessee has effected export sales to the AEs to the tune of Rs.334.26 crores as against the total export sales of Rs.1135.69 crores. The assessee treating itself as the tested party undertook economic analysis to benchmark the transaction with AE. While doing so, the assessee applied Transactional Net Margin Method (TNMM) as the most appropriate method. For comparability analysis the assessee compared the price charged to the AEs with the price charged between other related parties. By adopting such comparative analysis, the assessee found that the price charged to AE is at arm's length. The TPO, however, did not find assessee's benchmark acceptable. He observed that 30% of the total export sales are to related parties, whereas, the rest of the export sales were to unrelated parties. Therefore, he was of the view that Comparable Uncontrolled Price (CUP) would be the most appropriate method to benchmark the transaction. After coming

to such conclusion, he proceeded to compare the price charged to the AEs with that to the non-AEs and ultimately concluded that price charged to non-AEs is more than the price charged to AEs. Thus, he proposed adjustment of Rs.19.43 crores. The assessee challenged the aforesaid adjustment before learned Commissioner (Appeals).

11.2 After considering the submissions of the assessee, learned Commissioner (Appeals) held that CUP cannot be the most appropriate method as the TPO has failed to justify the applicability of CUP method. Accordingly, he deleted the adjustment of Rs. 19.43 crores.

11.3 Drawing our attention to the TP Study Report of the assessee placed at page 507 of the paper-book, learned Departmental Representative submitted, initially the assessee had selected itself as tested party while applying internal TNMM. Extensively referring to the TP Study Report, learned Departmental Representative submitted, as per assessee's own admission, more than 50% of total exports consist of a single product and its derivatives. Further, he submitted, though the assessee does not dispute the fact that similar products were sold to both AEs and non-AEs, however, the assessee has not applied

the CUP method based on reasonings which are not acceptable. In this context, he drew our attention, to para 5.1.3 of the TP Study Report. He submitted, when same or similar products have been exported/sold to both AE and non-AEs in same geographical location and under similar condition, CUP method selected by the TPO is the most appropriate method as against internal TNMM applied by the assessee. He submitted, before learned first appellate authority, the assessee, for the first time, furnished a fresh report treating the foreign AE as the tested party. He submitted, the assessee has not even furnished the audited accounts of the AE. He submitted, being completely swayed away by the submissions of the assessee, learned Commissioner (Appeals) has rejected CUP method without providing reasonable basis for doing so. He submitted, learned Commissioner (Appeals) has not even examined the acceptability of internal TNMM applied by the assessee. Thus, he submitted, since learned Commissioner (Appeals) has allowed assessee's claim by relying upon materials which were never before the TPO, the issue may be restored back to the TPO for reconsideration.

11.4 In reply, learned counsel for the assessee submitted, learned Commissioner (Appeals) has examined the facts in detail

before coming to his conclusion. He submitted, allegation that the assessee only, at first appellate stage, furnished a fresh TP Study Report by treating the foreign AE as tested party is totally incorrect as such report was furnished before the TPO in course of proceeding. He submitted, CUP method cannot be made applicable as it requires strict comparability. He submitted, there are various factors which make the price charged to AE incomparable with non-AE by applying CUP method. Proceeding further, he submitted, while sale to AE is assured, sale to non-AE is not assured. Further, he submitted, the volume of sale to AE is much more than the sale to unrelated parties as such parties are several in number. Thus, he submitted, without looking at the differentiating factors, which make the price charged to AE incomparable to price charged to non-AE, CUP cannot be applied. He submitted, even while applying CUP method, the TPO has made certain follies, such as, holding that export incentive is not operative in nature, has allocated higher amount of other income to AE segment. He submitted, while the TPO has not disputed the allocation of cost, but has only disturbed the allocation of income. Thus, he submitted, due to various inaccuracies creeping into

benchmarking done by the TPO under CUP, it cannot be accepted.

11.5 In rejoinder, learned Departmental Representative submitted, it will be wrong to say that TPO has allocated or not allocated export incentive and other income to the AE segment. He submitted, the AO has allocated or not allocated the export incentive and other income for the purpose of computing the margin only.

11.6 We have given a thoughtful consideration to the rival submissions and perused the materials on record. It is evident, in the TP Study Report filed before the TPO, the assessee has benchmarked the export sale transaction with the AE by adopting internal TNMM. It is also a fact on record that while doing so, the assessee has treated itself as the tested party. However, before learned Commissioner (Appeals), the assessee has completely changed its stand by furnishing a fresh TP Study Report, wherein foreign AE has been treated as a tested party. It is a fact on record that relying on such TP Study Report treating the foreign AE as the tested party, learned Commissioner (Appeals) has deleted the adjustment proposed by the TPO by holding that CUP cannot be the most appropriate method. In this regard, it would

be worthwhile to look into the reasoning of learned Commissioner (Appeals), which is reproduced hereunder:

> *"I have carefully perused and considered the written submissions made by the appellant.*
> *It is an acceptable fact that, CUP method refers to comparing the price charged or paid for services provided in a comparable uncontrolled transaction with that charged to a related party. Further, CUP method cannot be accepted due to lack of comparable transactions, difference in quantities, difference in functions, etc.*
> *On perusal of the material and facts available on record, it has been observed TPO has completely failed in giving his findings and explaining the basis in detail for accepting CUP method.*
> *In light of above, I am convinced that Appellant has adequately submitted to prove the genuineness of its claim that use of CUP method is inappropriate to benchmark the transactions of exports to AE's.*
> *I have taken all of the above facts into consideration, relied on submissions filed by the Appellant, order orders passed by TPO, judicial precedents (supra), OECD guidelines, UN transfer pricing manual. Therefore, after having regard to the facts and circumstances of the aforesaid ground raised, submission filed by the appellant, in my considered opinion, I find merit in accepting that CUP method should not be adopted as most appropriate method for benchmarking export of finished goods by Appellant to its AE. Accordingly, adjustments made by TPO of Rs. 19,43,00,000/- on account of export of finished goods shall be deleted.*
> *Accordingly, ground of appeal is allowed and therefore the adjustment made by TPO of Rs 19,43,00,000 is deleted."*

11.7 On perusal of the aforesaid observations of learned Commissioner (Appeals), it is abundantly clear that he has simply accepted the submissions of the assessee while rejecting the CUP method applied by the TPO. When the facts on record reveal that out of the total export sales, 70% were made to non-AEs and only 30% were made to AEs, as per Rule 10B(1)(a) read with section 92C(2) of the Act, CUP method can be the most appropriate

method, as, it is a direct method considering the fact that the assessee has entered into similar transaction, both with the AEs and non-AEs. Therefore, before discarding CUP as the most appropriate method, it needs to be thoroughly examined; why the price charged to non-AEs cannot be compared with the price charged to AEs. More so, when sales have been effected to AEs and non-AEs in same geographical location and in, more or less, identical condition. Of course, assessee's contention that while applying CUP method certain factors, such as, the availability of promised buyer in the form of AE, volume of sale etc. has to be duly considered. However, unless they have any serious impact so as to make the applicability of CUP vulnerable, CUP method cannot be discarded. More so, when TNMM is the method of last resort when applicability of other methods fail. Further, in the original TP Study Report, the assessee has stated that the assessee has been chosen as the tested party due to reliability of data. It needs to be thoroughly examined, what are the compelling factors to substitute the foreign AE as the tested party and whether the data relating to the foreign AE is reliable. From the observations of learned Commissioner (Appeals) reproduced above, it does not appear that he has examined all theses aspects.

11.8 It is further relevant to observe, after discarding CUP as the most appropriate method, learned Commissioner (Appeals) has not given any conclusive finding regarding the observations of TPO for not accepting internal TNMM applied by the assessee as the most appropriate method. In fact, learned Commissioner (Appeals) has deleted the adjustment by simply rejected the CUP method applied by the TPO. He has not expressed even a single sentence regarding acceptability or otherwise of internal TNMM applied by the assessee. Thus, in our considered opinion, the order of learned Commissioner (Appeals) on the issue is a non-speaking one and bereft of valid reasoning. Though, learned counsel for the assessee has submitted before us that the subsequent TP Study Report by treating the foreign AE as tested party was available with TPO, however, such submission is not very much relevant as the circumstances under which the tested party was changed from assessee to AE has to be properly explained by the assessee. Even before us, the assessee has not properly explained the need for changing the tested party from assessee to AE, when the assessee itself in the first TP Study Report has stated that due to reliable information and data the assessee itself is taken as the tested party.

11.9 Considering the fact that learned Commissioner (Appeals) has not, at all, addressed the issue relating to applicability of CUP vis-à-vis internal TNMM with a speaking order, at this stage, we refrain from expressing any opinion on applicability of either CUP or TNMM as the most appropriate method. Suffice it to say, effort should always be made to benchmark the transaction under a direct method, like CUP, if sufficient data is available. In the facts of the present case, data by way of similar comparable and incomparable transactions are available on record. Therefore, it needs thorough examination, why CUP is not applicable. It is to be noted, even with regard to computation of margin under CUP method, the assessee has raised certain issues regarding the approach of the TPO in treating the export incentive as non-operating and allocating more other income to AE segment. These issues raised by the assessee, in our view, are crucial even for computing margin under CUP method. Since, learned Commissioner (Appeals) rejected CUP method applied by the TPO at the threshold, he did not go into all these issues. Therefore, aforesaid contentions of the assessee have to be taken note of by the authority concerned in case CUP is selected as most appropriate method. Thus, in view of the foregoing discussions,

we are of the opinion that the issue needs to be restored back to the Assessing Officer for fresh consideration after examining the various aspects deliberated earlier in this order.

12. Needless to mention, the assessee must be afforded a reasonable opportunity of being heard while deciding the issue. This ground is allowed for statistical purposes.

13. In the result, the appeal is partly allowed for statistical purposes.

14. To sum up, assessee's appeal is allowed and Revenue's appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 13th May, 2022

Sd/- **(DR. B.R.R. KUMAR)** **ACCOUNTANT MEMBER**	***Sd/-*** **(SAKTIJIT DEY)** **JUDICIAL MEMBER**

Dated: 13th May, 2022.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi