

आयकर अपीलिय अधिकरण
मुंबई पीठ “ के ”
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री प्रशांत महर्षि, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “K”, MUMBAI
BEFORE VIKAS AWASTHY , JUDICIAL MEMBER &
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
ITA NO.1161/MUM/2019(A.Y.2005-06)
ITA NO.1351/BANG/2011(A.Y. 2007-08)
ITA NO.1644/BANG/2012(A.Y.2008-09)

Aquity Solutions India Pvt. Ltd.
(Earlier known as M Modal Global
Services Pvt.Ltd.), 1st Floor, Unit No.103,
Reliable Plaza, Plot No.K10, Kalwa Industrial Area,
Village-Elthen, Taluka & Dist.Thane, Airoli,
Navi Mumbai – 400 708.

PAN: AAACC-9165-F

..... अपीलार्थी /Appellant

बनाम Vs.

Dy. Commissioner of Income Tax-15(2)(2),
Room No.480,
Aaykar Bhavan, MK Road,
Mumbai 400 020

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by: Ms.Karishma R. Phatarphekar with
S/Shri Harsh Shah/ Paras Savla/
Pratik Poddar/Shreyash Shah

प्रतिवादी द्वारा/Respondent by : Ms. Vatsalaa Jha

सुनवाई की तिथि/ Date of hearing : 16/02/2022

घोषणा की तिथि/ Date of pronouncement : 13/05/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

These three appeals by the assessee germinate from same set of facts and involve identical issues, therefore, these appeals are taken up together for adjudication and are decided by this common order.

2. The appeal of the assessee in ITA No.1161/Mum/2019 is taken up as lead case, hence, facts are narrated from aforesaid appeal for deciding the issues raised in all the three appeals.

ITA NO.1161/MUM/2019 – A.Y. 2005-06:

3. This appeal by the assessee for assessment year 2005-06 is in second round, of litigation before the Tribunal. In first round, the Tribunal vide order dated 29/05/2015 admitted additional evidence furnished by the assessee to substantiate CUP as the most appropriate method and restored the issue to Assessing Officer / Transfer Pricing Officer(TPO) for determination of Arms Length Price (ALP) and most appropriate method. In the second round the TPO passed the order making adjustment of Rs.8,05,30,774/-. The assessee filed objections before the DRP but remained unsuccessful. Consequently, the Assessing Officer passed the assessment order dated 07/12/2017 in accordance with the findings of the Dispute Resolution Panel (DRP). Now, the assessee is in appeal against the findings of TPO/Assessing Officer.

4. At the outset, Ms.Karishma R. Phatarphekar appearing on behalf of the assessee submitted that she is not pressing ground No.1 of the appeal. In respect of Transfer Pricing(TP) ground at Sl.No. 2 to 9, the Id.Counsel for the assessee submitted that if ground No.4 of the appeal is decided in favour of the assessee the other grounds on TP would become infructuous. Narrating the facts relevant to the issue in ground No.4 of appeal the Id.Counsel for the assessee submitted that, the assessee is engaged in providing Medical Transcription Services(MTS) to its AEs. To benchmark the transaction in TP study initially the assessee adopted Transactional Net Margin Method (TNMM) as the most appropriate method. Subsequently, the assessee changed the method of benchmarking and adopted CUP as the most appropriate method. The Id.Counsel for the assessee submitted that

the assessee had furnished additional evidence before the CIT(A) in the first round of litigation. However, the CIT(A) rejected the same. The assessee carried the issue in appeal before the Tribunal. The Tribunal admitted additional evidences and restored the issue back to the file of Assessing Officer to consider additional evidences and thereafter decide the issue afresh. The Id.Counsel for the assessee submitted that during the period relevant to the assessment year under appeal the assessee received Rs.0.1025 per line as against the rate of rs.0.050 per line received by the third parties. The Id.Counsel for the assessee submitted that since there was direct comparison available CUP is the most appropriate method to benchmark the transaction. The TPO in Assessment Year 2010-11 to Assessment Year 2013-14 accepted CUP as the most appropriate method. In the impugned assessment year the primary reason for rejecting CUP is that the assessee in TP study had adopted TNMM as the most appropriate method to benchmark international transaction with AE.

The Id.Counsel for the assessee giving brief history of the assessee submitted that the assessee company was incorporated as wholly owned subsidiary of Health Scribe Inc (1993). In the year 2005 Health Scribe Inc was merged with Spheris Inc. Consequently, the name of the assessee company was changed to Spheris India Pvt. Ltd. In the year 2009 consequent to bankruptcy Spheris Inc. was taken over by CBay Group. Spheris India Pvt. Ltd. was merged with CBay System India Pvt. Ltd. in 2010. Thereafter, the name of the assessee was changed to M.Model Global Services Ltd. in the year 2012 and later on, the name of the company was changed to its present name i.e. Aquity Solutions India Pvt. Ltd. in the year 2019. The Id.Counsel for the assessee contended that Cbay Systems India Pvt. Ltd. was also engaged in providing Medical Transcription Services(MTS). In the case of CBay Systems India Pvt. Ltd. CUP was accepted as the most appropriate method. The Id.Counsel for the

assessee made multiple submissions for adopting CUP as most appropriate method. The submissions of Id.Counsel for the assessee on various comparable factors is tabulated as under:

Comparability factor	Submissions of the assessee
1. Duration	Agreement in the case of Cbay and in the case of assessee are on similar terms and conditions with regard to the period of validity. The TPO and the DRP agreed that the agreements are valid for the year under consideration. The assessee also furnished comparable data for the period , which is at pages 63 and 64 of the paper book.
2. Business volume	The Id.Counsel for the assessee contended that the DRP has failed to appreciate the fact that assessee's volume of business with its AE is higher than third party vender's volume. Despite the fact that the business volume is much higher, the rate earned by the assessee from its AE is higher than the rate earned by the third party vendor. Therefore, if volume adjustment is carried out a lower rate is to be charged to the AE.
3. Termination	The period of termination of the agreement between the assessee and its AE is 12 months. Whereas, in the third party agreement, period of termination is only 90 days. Despite being safeguard for a higher period, the

	<p>assessee is getting better rate as compared to the rate offered to third party vendors.</p>
4. Telecommunication cost	<p>The assessee has explained that although the agreement may not mention explicitly as to who has to bear the telecommunication cost. The fact is that the cost is borne by the assessee. This fact is evident from the Schedule - 11 to the P&L account for the Financial Year ended on 31/03/2005 at page 62 of the paper book. Thus, treatment of telecommunication cost is similar to the third party rate.</p>
5.Non-compete provision	<p>The Id.Counsel for the assessee submitted that even if some portion of the price is attributed to the existence of non-compete clause in the third party agreement , an adjustment would entail reducing this from the rate charged by the third parties. This sort of adjustment will only further reduce the third party rate.</p>
6. Use of software and equipment	<p>Under CUP what is to be compared is price for similar services. Undisputedly, services provided by the assessee to its AE and the services provided by the AE to the third parties are the same i.e. MTS. When services in question are identical the price can be compared.</p>

Thus, on the facts of the case CUP is the most appropriate method to benchmark the transaction.

4.1 The Id.Counsel for the assessee contended that in the case of Ckar Systems Pvt. Ltd., which is also engaged in providing MTS, the Tribunal accepted CUP as most appropriate method to benchmark the transaction. The said company was engaged in rendering MTS to CBay Systems USA and also to other overseas customers. The Tribunal in ITA NO.565/Hyd/2011 vide order dated 19/12/2012 accepted CUP as most appropriate method. The Revenue carried the issue in appeal before Hon'ble High Court. The Hon'ble High Court in Income Tax Appeal No.731 of 2014 decided on 31/12/2014 affirmed the findings of Tribunal. In assessee's own case the TPO had accepted CUP as most appropriate method for benchmarking the transaction in Assessment Year 2009-10 to 2013-14. The Id.Counsel for the assessee further referred to the decision in the case of Effective Tele Services P. Ltd. vs. Asst.CIT, 90 taxmann.com 390 (Ahd-Trib) to contend that where the assessee is rendering similar support services to AE as well as non-AEs on similar terms and condition at a higher rate to the AEs as compared to non-AEs, CUP is the most appropriate method to determine the ALP.

4.2 The Id.Counsel for the assessee submitted that in so far as the objection of the DRP & TPO that assessee cannot change the method to benchmark the transaction the objection is unsustainable in the light of following decisions:

- (i) Mettal Toys (I) Pvt. Ltd. vs. DCIT, 34 taxmann.com 54(Del)
- (ii) PCIT vs. Metrix Cellular International Services Pvt. Ltd. 90 taxmann.com 54(Del).

5. On corporate tax issue raised in ground No.10 to 15, the Id.Counsel for the assessee submitted that in ground No.10 the assessee has assailed that the Assessing Officer while passing the assessment order has erred in not reducing telecommunication expenses of Rs.1,16,99,3421/- from export turnover and total turnover. Whereas, the DRP had directed the Assessing Officer to provide the relief to the assessee. The Id.Counsel for the assessee prayed that the Assessing Officer be directed to follow direction of the DRP.

6. In respect of ground No.11 of appeal, the Id.Counsel for the assessee submitted that the Assessing Officer has erred in not allowing set-off of brought forward business loss and unabsorbed depreciation. The issue can be restored to Assessing Officer with suitable directions.

7. In ground No.12, the assessee is seeking directions for allowing TDS credit and credit for advance tax payment.

8. In respect of ground No.14 the Id.Counsel for the assessee has submitted that directions may be given to Assessing Officer to adopt correct figures for the purpose of computing Book profits u/s.115JB of the Act.

9. Per contra, Ms. Vatsalaa Jha representing the Department vehemently defended the order of TPO/Assessing Officer and prayed for dismissing the appeal of assessee. The Id. Departmental Representative submitted that the

assessee in its TP study had adopted TNMM as most appropriate method. It was only after merger with CBay Systems India Pvt. Ltd. that the assessee has changed its stand and is seeking to apply CUP to benchmark its transaction. The Id. Departmental Representative submitted that the assessee has placed reliance in the case of CKar Systems Pvt. Ltd. The facts of the said case are distinguishable. It is not a case of merger. In the said case right from the beginning CUP was adopted as most appropriate method.

10. Rebutting the submissions made on behalf of the Revenue, the Id.Counsel for the assessee pointed that the assessee had furnished additional evidences for adopting CUP as most appropriate method, the Tribunal had admitted additional evidences and restored the issue for ascertaining the most appropriate method to TPO/Assessing Officer. Therefore, in the light of additional evidences filed by the assessee, CUP can be applied as most appropriate method.

11. We have heard the submissions made by rival sides and have examined the orders of authorities below. The assessee is in second round of litigation before the Tribunal. As regards the grounds, raised by the assessee assailing TP adjustment, the only ground on which submissions have been made by the Id.Counsel for the assessee is ground No.4. The same is reproduced herein below:

"4. On facts and circumstances of the case and in law, the learned AO / TPO under the directions of the Hon'ble DRP have erred in rejecting Comparable Uncontrolled Price ('CUP') method and adopting Transactional Net Margin Method (TNMM) as the most appropriate method to benchmark the international transaction of the Appellant"

12. The issue before us is in narrow compass i.e. Whether CUP can be adopted over TNMM as most appropriate method to benchmark international

transaction, in the facts of present case? Undisputedly, in TP study the assessee had selected TNMM as the most appropriate method. Subsequently, after merger with CBay Systems India Pvt. Ltd. the assessee sought change in most appropriate method to benchmark International Transaction from TNMM to CUP. In so far as the rate received by the assessee for MTS from its AEs, the same has not been disputed by the Revenue. The rate received by the assessee and the third party as furnished by the assessee are as under:

Rate received by the assessee	Rate received by third party
Rs.0.1025 per line	Rs.0.050 per line

It is evident from the aforesaid rates that the AE is paying higher rate to the assessee as against non-AE third party for providing similar services. The assessee has also highlighted through comparable analysis of various factors that the assessee is in more advantageous position as compared to unrelated third party.

13. The assessee has relied on the decision of Tribunal in the case of Ckar Systems Pvt. Ltd.(supra). The said company is also engaged in providing MTS to its parent company Cbay Systems Pvt. Ltd. USA. We find that in the case of ACIT vs. Ckar Systems Pvt. Ltd. (supra), the Tribunal upheld CUP as the most appropriate method for determining ALP of the international transaction. The relevant extract of the decision of the Tribunal in the aforesaid case reads as under:

“ 11. We have heard the rival submissions and perused the materials on record. The facts of the case have been exhaustively dealt with by the CIT(A) in his order. It is a fact on record that the assessee has adopted the CUP method for computing the Arms' Length Price for the international transaction entered into by it with its AE for the medical transcription service rendered by it to the AE. In this regard, the assessee has considered two external comparables and three internal comparables. The external comparables the two Indian companies, M/s. ELICO Limited and M/s. Shaster Technologies Ltd. have also entered into agreements with M/s. CBay Systems Ltd. USA for providing medical transcription services. Similarly, the assessee has also entered into agreement with three overseas customers (internal comparables) for providing medical transcription services similar to the ones provided by assessee to its AE. As can be seen from the price charged by the assessee to its AE, in comparison with the price charged by the assessee to its other overseas customers, so also by the price charged by the other two Indian companies, viz. ELICO Ltd and Shaster Technologies P. Ltd. to M/s. CBay Systems, USA, it is clear that they are almost within similar range. The service rendered by the assessee to its AE as well as to the other overseas customers and the services rendered by the other two Indian companies to CBay systems is also same, i.e. medical transcription work. Therefore, the comparables adopted by the assessee are uncontrolled parties and can be considered for the purpose of determining the Arms' Length Price as per CUP method. As can be seen from the order of the TPO, though the TPO accepts the fact that CUP method is the most direct and reliable one to apply for determining Arms' Length Price, he rejects the CUP method adopted by the assessee in the present case on the ground that in the absence of information, the assessee's statement that in medical transcription industry, in general, the price charged per line of transcription is around 00.6 US\$ cannot be accepted and that apart, no publicly available information on prices charged in independent transactions of similar and identical nature that reflect the characteristics of the services rendered by the assessee, has been furnished. Therefore, the comparable for applying the CUP method cannot be accepted. The TPO has further observed that the assessee also accepts that the TNMM method is a useful method for computing the Arms Length Prices in its case. However, such finding of the TPO is not correct. It is seen from the order of the TPO itself that in response to his show-cause notice dated 22.10.2008, the assessee has strongly objected to the proposal for applying the TNMM method and has requested for accepting the CUP method applied by the assessee. The assessee has submitted before the TPO that it has applied the CUP method after comparing the functions performed and the risks undertaken by each entity involved in the inter-company transactions. The TPO has brushed aside the objections of the assessee by simply observing that the assessee has not provided quantitative details with reference to the unrelated comparables. However, such finding of the TPO is again not correct, considering the fact that the assessee has furnished all the relevant information/data, requisitioned by the TPO from time to time. This fact is very much evident from para 1.1 of the order of the TPO itself. Therefore, the finding of the TPO that the assessee has not given the quantitative details is without any basis. It is a matter of fact that the assessee has submitted the agreements between the assessee and its AE as well as the agreements entered into by the AE with the other Indian companies and the agreements between the assessee and its other overseas customers. The assessee has also submitted bills raised and the prices charged for each line of medical transcription work by the assessee to its AE and by the Indian companies for the services rendered to CBay Systems USA and also the services rendered by the assessee to the overseas customers. On perusing services rendered and price charged for all the aforesaid

transactions, it is seen that the price charged by the assessee to its AE on each line of medical transcription work at 0.063 US\$ is almost equal to the similar rate charged per line on medical transcription work by the other uncontrolled parties, considered as comparable by the assessee. The observation of the TPO that the comparables cannot be considered to be uncontrolled is without any basis, and it is based on mere presumptions and surmises. When the comparables considered by the assessee are in no way connected either with the assessee or with its holding company, and all the information/data relating to their transactions are available, the TPO was not justified in rejecting the computation of ALP made by the assessee by applying the CUP method. The CIT(A) has passed a well reasoned order, elaborately discussing the various issues raised by the TPO and ultimately came to a conclusion that the CUP method is the most appropriate method for computing the ALP for the international transactions entered into by the assessee with its AE. We fully agree with the order of the CIT(A) in this behalf. We accordingly uphold the same and reject the ground of the Revenue on this issue."

The Revenue has contended that facts in the case of Ckar Systems Pvt. Ltd are distinguishable as the said company applied CUP to benchmark the transaction right from beginning, unlike assessee where the most appropriate method is sought to be charged after merger. We do not agree with the objection raised by the Id. Departmental Representative. The relevant factor is that for benchmarking the transaction for providing MTS, CUP has been considered as most appropriate method. There is no bar in changing the method for determination of ALP u/s. 92C of the Act, provided the method followed in the most appropriate method as specified in Rule 10B and provides most reliable measure of ALP in relation to the international transaction. In the case of assessee taking into considerations the facts CUP would be the most appropriate method. The Assessing Officer in subsequent Assessment Years in the case of assessee starting from Assessment Year 2009-10 onwards has accepted CUP as the most appropriate method for benchmarking international transaction with no change in facts and nature of services provided by the assessee to its AEs.

14. It would also be relevant to mention here that from the data provided by the assessee it is evident that the assessee is in more advantageous position as compared to unrelated third parties. Under such situation CUP would be the most appropriate method for benchmarking international transactions with AEs.

15. One of the objections raised by TPO/DRP is with regard to change in method for benchmarking the transaction. The purpose of TP mechanism is to determine ALP by adopting the most appropriate method. In the case of Asstt. CIT vs. Sudarshan Chemical Industries Ltd. in ITA No.1792/PN/2013 for Assessment Year 2005-06 decided on 25/11/2016, the Tribunal had considered the question whether the assessee can change the method of determining ALP. The Tribunal held as under:

“8. We have heard the submissions made by both sides and have perused the orders of the Authorities below. We have also considered the decisions and documents on which Id. AR has placed reliance. The primary question which has been emerged from the submission of the Id. D.R. and the grounds of appeals is: Whether the assessee can change the method of determining ALP? In the present case undisputedly, the assessee had adopted CPM as most appropriate method during Transfer Price study. The Assessee had made certain adjustment on cost side and income side of the uncontrolled transactions to make it comparable with controlled transaction. Ostensibly, the details were not available with the assessee at the time of TP study so as to apply CUP method. Subsequently, when all the details were available, the assessee determined ALP by applying CUP method. During first Appellate proceedings, the Commissioner of Income Tax (Appeals) sought remand report from the A.O regarding merits of applications of CUP method. The A.O. accepted in principle that CUP method is most direct way to analyze the Arm's Length Price as it entails comparing the prices of identical products, sold to third parties and associated enterprises in identical condition. The A.O. further admitted that in the instant case, third party transactions pertain to same entity which is not associated enterprises from a certain date. Accordingly, the circumstances of sale are identical. In such scenario, it would be possible to compare the prices of the same products which were sold before and after the party ceases to be an AE of the assessee and thus CUP method can be applied. However, A.O. objects to applying CUP method on the ground that the assessee had adopted CPM in the TP study.

9. Selection of a method for determining arm's length price for particular transaction is subject to most appropriate method rule as set out under Rule 10C of the Income Tax Rules,

1962. Rule 10C (1) provides that for the purpose of sub section (1) of Section 92C, the most appropriate method shall be the method which is best suited in the facts and circumstance of particular international transaction and which provides most reliable result of arm's length price in relation to international transaction. Any of the methods given in section 92C (1) of the Act, may be selected as the most appropriate method, provided it gives the best estimate of the arm's length price. In evaluating, whether the method is best suited, following factors are to be kept in mind:

- i) the nature and class of international transaction
- ii) degree of comparability between controlled and uncontrolled transaction.
- iii) the class or classes of AE's entering into transactions & functions performed by them
- iv) reliability of data and assumptions.
- v) the extent of reliable adjustments that can be made to factor the differences between the transactions being compared.

10. The result is more reliable if uncontrolled transaction is closely comparable to the controlled transactions. CUP being direct method is preferred over other methods listed in Section 92C (1) of the Act. If CUP method is not applicable because of absence of comparables or the relevant data, the other method giving the most fair result, can be applied. If at the time of TP study, the details are not available with the assessee to apply CUP method, there is no restriction on the assessee for re-computing ALP by applying CUP, if during the course of assessment proceedings the relevant data comes in possession of the Assessee. The endeavor should be to apply the most appropriate method which would give closest result. There is no bar under the Act or Rules made there under which restricts the assessee to change the method of determining ALP. However, it should be kept in mind that the change of method should be for bonafide reasons and not in an arbitrary manner just to circumvent adjustment proposed by the TPO.

11. The Mumbai Bench of Tribunal in the case *Mattel Toys (I) Pvt Ltd v/s. DCIT (Supra)* has held that the assessee is not precluded from adopting the most appropriate method at the subsequent stage even if, the assessee adopted some other method as most appropriate method in the transfer price report. In the said case, Assessee adopted TNMM as most appropriate method in transfer pricing study. During First Appellate proceedings, the assessee submitted that TNMM was not most appropriate method and Resale Price Method (RPM) should be adopted. The Commissioner of Income Tax (Appeals) rejected the same. The Tribunal held that if ALP of any transaction can be determined by applying any of the direct methods like CUP, RPM, CPM, then they should be given preference. Once the traditional method has been rendered in applicable then only TNMM should be resorted to. The relevant extract of the findings of the Tribunal are as under:-

“ 41. Now coming to the argument of the learned Departmental Representative that once the assessee itself has chosen TNMM as most appropriate method in TPR, and then it cannot resort to change its method at an assessment or appellate state. 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 most appropriate method in the transfer pricing 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 transfer pricing is to examine whether the price or the margin arising from an international transactions with the related party is at ALP or not. The determination of approximate ALP is the key factor for which most appropriate method 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 learned Departmental Representative and also the observations of the Assessing Officer and the learned Commissioner (Appeals) that the assessee cannot resort to adaption of RPM method instead of TNMM.”

[Emphasis applied by us]

12. Similar view was taken by the Tribunal in the case ACIT v/s. Chemtex Global Engineering Pvt Ltd (Supra) wherein change of most appropriate method was accepted. The relevant extract of the findings of the Tribunal is as under:

“26. Further, the Act does not provide that an assessee has to choose a particular method for benchmarking its transactions. Even, if a particular method is chosen at the time of furnishing its study report the company can always support its transactions with another method. In the instant case all the details were furnished before the TPO and the A.O to highlight that the average hourly rate charged to the third parties were lower compared to the AE and hence the international transactions were at arm’s length. Even at this stage, the Ld. DR could not place any material on record to justify that the assessee is precluded from taking support from any other method for benchmarking its transactions. In other words, the Income Tax Act does not preclude the assessee from benchmarking its transactions with the help of any other method other than the one which is taken for consideration in its study report.

27. For the purpose of Sub Section (1) of Section 92C of the Act the most appropriate method has to be selected by the A.O. Rule 10C also provides that most appropriate method shall be the method which is best suited to the facts and circumstances of each particular international transaction. In other words, the A.O./TPO has to exercise their judicial discretion in considering as to whether the method/ methods adopted by the assessee is suitable to the facts of the case and if, in their opinion, the method followed by the assessee is not suitable, the A.O./TPO has to give show cause notice to the assessee before adopting an appropriate method. Ordinarily, in

service contracts, CUP method is more suitable, where an assessee enters into agreement with unrelated third parties on similar lines as that of AE. When such facts are available, the A.O./ TPO has to give their reasons before rejection of the data furnished by the assessee.”

13. Thus, in view of the facts of the case and decisions discussed above, we are of considered view that the Assessee is not precluded from changing most appropriate method for determining ALP. Accordingly, we do not find merit in the appeal of Revenue and thus the same is dismissed.”

Thus, in the light of the aforesaid decision we find no infirmity in assessee changing the method of determining ALP from TNMM to CUP. In the result, assessee succeeds on ground No.4 of the appeal.

16. Since, we have allowed ground No.4 of the appeal, the alternate submissions made by assessee in ground No.2,3&5 to 9 of the grounds on TP issue have become infructuous, hence, dismissed as such.

17. In respect of ground No.10 of the appeal, the short contention by Id.Counsel for the assessee is that the Assessing Officer has not given effect to the direction of the DRP. The ground No.10 of the appeal is restored to Assessing Officer to give effect to the directions of the DRP. The ground No.10 is thus, allowed for statistical purpose.

18. In ground No.11, the assessee has assailed the action of Assessing Officer in not allowing set off of brought forward business loss and depreciation. In ground No.12 the assessee is seeking direction to the Assessing Officer for allowing credit of TDS and advance tax. Both these grounds are restored to Assessing Officer for denovo consideration in accordance with the provisions of the Act. The Assessing Officer shall grant credit of TDS and advance tax paid on the basis of documentary evidence

furnished by the assessee. Thus, grounds of appeal No.11 and 12 are allowed for statistical purpose.

19. In ground No.13 of appeal, the assessee has assailed levy of interest u/s. 234B of the Act. Charging of interest u/s. 234B of the Act is mandatory and consequential, hence, ground No.13 of appeal is dismissed.

20. In ground No.14 of appeal, the assessee has assailed computation of Book Profit u/s. 115JB of the Act. The Id.Counsel for the assessee prayed that the Assessing Officer be directed to adopt correct figure while computing book profits. This issue is restored back to the file of Assessing Officer with direction that while computing books profit u/s.115JB correct figures be considered. Consequently, ground No.14 of the appeal is allowed for statistical purpose.

21. In ground No.15 of appeal, the assessee has assailed initiation of penalty u/s. 271(1)(c) of the Act . Challenge to penalty proceedings u/s. 271(1)(c) of the Act at this stage is premature, therefore, this ground of appeal is dismissed as such.

22. In the result, appeal of the assessee is partly allowed in the terms aforesaid.

ITA NO.1351/BANG/2011(A.Y. 2007-08)

ITA NO.1644/BANG/2012(A.Y.2008-09)

23. The Id.Counsel for the assessee submitted that the issues raised in ITA No.1351/Bang/2011 and 1644/Bang/2012 are identical to the issues raised in ITA No.1161/Mum/2019 except that these two appeals are in the first round of litigation, whereas the appeal for assessment year 2005-06 is in second

round. The Id.Counsel for the assessee submitted that the primary issue in TP adjustment is application of CUP as most appropriate method vis-à-vis TNMM. The facts germane to the said issue are identical to the facts in assessment year 2005-06. The Id.Counsel for the assessee further submitted that the CUP data for the assessment years under consideration is as under:

Assessment year	Rate received by the assessee	Rate received by third party
2007-08	0.1174 per line	0.0521 to 0.065 per line
2008-09	0.1315 per line	0.0573 to 0.0603 per line

24. The Id. Departmental Representative fairly admitted that the primary issue raised by the assessee in appeals for 2007-08 and 2008-09 relates to TP issue on adoption of CUP as most appropriate method. The issue raised in 2007-08 and 2008-09 is identical to the issues raised in Assessment Year 2005-06.

25. Both sides heard. We find that in appeal for Assessment Year 2007-08 the ground No.3 of the appeal and in Assessment Year 2008-09 ground No.4 of the appeal is similar to ground No.4 decided by us for the Assessment Year 2005-06. Both sides are unanimous in stating that the facts germane to the issue are identical. The only difference is that in the Assessment Year 2005-06 the Tribunal had admitted additional evidences filed by the assessee in support of CUP to be adopted as most appropriate method and restored the issue back to the file of Assessing Officer /TPO to consider the same. Whereas, in the

Assessment Years 2007-08 and 2008-09 the documents furnished by the assessee in support of CUP are yet to be admitted. Be that as it may, the issue remains the same as has been considered by us in appeal of assessee for 2005-06. Keeping in view the fact that the issue raised in these appeals is identical to the issue adjudicated in 2005-06 and to avoid protracted litigation, these appeals are decided on the basis of the documents furnished by the assessee for the impugned assessment years. The Revenue has not objected to the same. Since, the facts are *pari-materia*, the findings given by us while adjudicating ground No.4 of the appeal for Assessment Year 2005-06 would *Mutatis Mutandis* apply to the ground No.3 for Assessment Year 2007-08 and ground No.4 for the Assessment Year 2008-09, respectively.

26. The other grounds raised on TP issue in the respective appeals are dismissed as having become infructuous.

27. The corporate tax issues raised by the assessee in appeal for Assessment Year 2007-08 are similar to the grounds raised in Assessment Year 2005-06, consequently the findings given by us while deciding the respective issue would *Mutatis Mutandis* apply to the Assessment Year 2007-08.

28. Similarly, the grounds raised by the assessee in Assessment Year 2008-08 on corporate tax issues are similar to the grounds raised in Assessment Year 2005-06 except for ground No.16, where the assessee has raised issue relating to deduction u/s. 10A of the Act. In so far as ground No. 12 to 15 and 17 are concerned, the findings given by us while adjudicating the respective grounds in Assessment Year 2005-06 would *Mutatis Mutandis* apply to this ground as well.

29. In so far as issue raised in ground No.16 the same is restored back to the file of Assessing Officer for denovo adjudication in accordance with the facts of the case, documents on record and in accordance with law after affording reasonable opportunity of hearing/making submissions to the assessee.

30. In the result, appeals of the assessee for Assessment Year 2007-08 and 2008-09 are partly allowed in the terms aforesaid.

Order pronounced in the open court on Friday the 13th day of May, 2022.

Sd/-

(PRASHANT MAHARISHI)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 13/05/2022

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषित **Copy of the Order forwarded to :**

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

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)

ITAT, Mumbai