

IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI OM PRAKASH KANT, AM

आयकर अपील सं/ I.T.A. No.1467/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2007-08)

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| Mylan Pharmaceuticals Pvt. Ltd. (Formerly known as Mylan India Pvt. Ltd. and earlier to that as Merck Development Centre Pvt. Ltd.) One India Bulls Centre, Tower 2B, 7 th Floor, 841, Senapati Bapat Marg, Elphinstone Road, (W), Mumbai-400013. | बनाम / Vs. | ACIT-6(3) Aayakar Bhavan, Mumbai. |
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आयकर अपील सं/ I.T.A. No.1283/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2007-08)

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| ACIT, Cir-6(3) Room No.522, 5 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020. | बनाम / Vs. | Mylan Pharmaceuticals Pvt. Ltd. (Formerly known as Mylan India Pvt. Ltd. and earlier to that as Merck Development Centre Pvt. Ltd.) One India Bulls Centre, Tower 2B, 7 th Floor, 841, Senapati Bapat Marg, Elphinstone Road, (W), Mumbai-400013. |
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Cross Objection No. 50/Mum/2013
Arising out of I.T.A. No.1283/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2007-08)

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| Mylan Pharmaceuticals Pvt. Ltd. (Formerly known as Mylan India Pvt. Ltd. and earlier to that as Merck Development Centre Pvt. Ltd.) One India Bulls Centre, Tower 2B, 7 th Floor, 841, Senapati Bapat Marg, Elphinstone Road, | बनाम / Vs. | ACIT, Cir-6(3) Room No.522, 5 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020. |
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ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.

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| (W), Mumbai-400013. | | |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCM9323J | | |
| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |
| Assessee by: | Ms. Hirali Desai/Amol Mahajan/Kinjal Patel | |
| Revenue by: | Shri Ankush Kalra | |

सुनवाई की तारीख / Date of Hearing: 16/06/2022
घोषणा की तारीख /Date of Pronouncement: 28/07/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

These cross appeals by the assessee and the Revenue and the cross objection by assessee are arising out of the order of the against the order of the Ld. CIT(A)-15 dated 26.12.2011 for AY 2007-08.2.

We first take up the appeal of the assessee in ITA No. 1467/Mum/2012. The grounds of appeal raised by the assessee are as follows:

“1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals)-15 [“the CIT(A)”] erred in confirming that license of Rs. 1,06,98,452 granted under ‘Served from India Scheme’ be treated as revenue receipt.

It is prayed that license of Rs. 1,06,98,452 granted under ‘Served from India Scheme’ be treated as capital receipt and hence not liable to tax. Without prejudice to ground No 1 above.

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in treating license amount of Rs. 93,31,671 as



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

taxable, without appreciating the fact that this amount has not been utilized during the year. Even if the license granted under 'Served from India Scheme' is treated as revenue receipt and not capital receipt, it is prayed that only the amount utilized during the year ought to be taxed and hence addition of Rs. 93,31,671 be deleted."

3. At the outset, the Ld. AR of the assessee, Ms. Hiral Desai submitted that she is not pressing the Ground no. 1 and therefore the same stands dismissed.

4. Ground No. 2 of the appeal is without prejudice to Ground No. 1. This ground raised by the assessee is against the action of the lower authorities assessing the entire license amount of Rs.93,31,671/- as taxable income of the assessee, rather than the actual sum utilized during the relevant year, which according to the assessee was Rs. 13.66 lacs. It is noted that, the assessee was sanctioned license under "Served from India Scheme" amounting of Rs.1,06,98,450/- during the relevant year under consideration, which could be utilised for import of capital goods and spheres, without payment of custom duty. The AO noted that, out of the said license, the assessee had utilized amount of Rs.13,66,779/- against imports made during the year and therefore such utilized amount of Rs.13,66,779/- was credited in the Profit & Loss Account and offered to tax. According to AO however, the entire amount was taxable in the year of entitlement of such benefit i.e. the relevant year and accordingly the differential amount of Rs.93,31,671/- [1,06,98,450 – 13,66,779] was assessed as income of the assessee in the relevant year. The assessee challenged the said addition before the Ld. CIT(A) who has pleased to dismiss the same. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before us.



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

5. At the time of hearing, the Ld. AR relied on the decision rendered by this Tribunal in assessee's own case in ITA No. 5201/Mum/2011 for the earlier AY 2005-06, wherein this exact same issue was decided in their favour. Per contra, the Ld. DR relied on the order of the lower authorities.

6. We have heard both the parties and perused the records. We note that the issue is no longer res-integra. It is noted that this Tribunal in assessee's own case for AY.2005-06, having regard to the provisions of Section 28(iv) of the Income Tax Act, 1961 (hereinafter "the Act") and following the decision of the Hon'ble Supreme Court in the cases of CIT Vs. Excel Industries (219 Taxman 379), CIT Vs. Shoorji Vallabhdas & Co. (46 ITR 144) & Morvi Industries Ltd. (82 ITR 835) has held that only the license amount which has been actually utilized during the year that can be brought to tax u/s 28(iv) of the Act. The relevant findings of the Tribunal are as follows:

"13. The assessee has raised additional ground of appeal in treating the entire advance licence amount of Rs.95,60,000/- as taxable in the assessment under appeal. The assessee has utilized licence to the tune of Rs.81,96,366/- and has offered the same to tax. The assessee has utilized the remaining amount in the next assessment year. The Id. Authorized Representative of the assessee stated at the bar that in the next assessment year assessee has offered to tax the amount to the extent licence benefit has been utilized in the period relevant to succeeding assessment year. The Hon'ble Apex Court in the case of CIT vs. Excel Industries Ltd.(supra) had an occasion to deal with the issue of taxability of benefit obtained by the assessee through advance licence. The question for adjudication before the Hon'ble Apex Court was:



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

“2. The question for consideration in all these appeals is whether the benefit of an entitlement to make duty free imports of raw materials obtained by the assessee through advance licences and duty entitlement pass book issued against export obligations is income in the year in which the exports are made or in the year in which the duty free imports are made”.

14. The Hon’ble Court answered the question in favour of the assessee after considering the decisions rendered in the cases of CIT vs Shoorji Vallabhdas & Co., 46 ITR 144(SC), Morvi Industries Ltd. 82 ITR 835(SC) and the provisions of section 28(iv) of the Act the Hon’ble Court observed as under:-

“20. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee.

21. In so far as the present case is concerned, even if it is assumed that the assessee was entitled to the benefits under the advance licences as well as under the duty entitlement pass book, there was no corresponding liability on the customs authorities to pass on the benefit of duty free imports to the assessee until the goods are actually imported and made available for clearance. The benefits represent, at best, a hypothetical income which may or may not materialise and its money value is therefore not the income of the assessee.

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XXXXXXXXXX 27. Applying the three tests laid down by various decisions of this Court, namely, whether the income accrued to the assessee is real or hypothetical; whether there is a corresponding liability of the other party to pass on the benefits of duty free import to the assessee even without any imports having been made; and the probability or improbability of realization of the benefits by the assessee considered from a realistic and practical point of view (the assessee may not have made imports), it is quite clear that in fact no real income but only hypothetical income had accrued to the assessee and Section 28(iv) of the Act would be inapplicable to the facts and



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

circumstances of the case. Essentially, the Assessing Officer is required to be pragmatic and not pedantic". Thus in view of the law laid down by the Hon'ble Apex Court, it is unambiguously clear that it is only to the extent that assessee has derived benefits from the licence during the impugned assessment year and the amount is chargeable to tax.

15. The Id. Authorized Representative of the assessee has stated at the bar that in the subsequent assessment year assessee has offered to tax the amount to the extent benefit is derived under the licence. Hence, the Revenue is not deprived of tax on the benefit derived by assessee from advance licence. Thus, in view of the facts of the case and the decision of Hon'ble Apex Court, we find merit in the contentions of the assessee. Accordingly, the additional ground raised by the assessee in the appeal is allowed.

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

7. Following the above decision rendered by this Tribunal in assessee's own case (supra), we hold that only the actual license amount of Rs.13,66,779/-, which has already been offered to tax by the assessee, could have been taxed as income u/s 28(iv) of the Act in the relevant year. The further addition of Rs.93,31,671/- made by the AO is held to be unsustainable and is thus directed to be deleted. Hence, Ground No. 2 of the assessee is allowed.

8. Now, we take up the revenue appeal in ITA. No. 1283/Mum/2012 and cross objections of the assessee in CO No. 50/Mum/2013, which relate to transfer pricing adjustment made by the TPO. The grounds of appeal of the Revenue reads as under: -

“Revenue Appeal: -

“1. On the facts and circumstances of the case, the Ld. CIT (A) has erred in rejecting M/s. Oil Field Instrumentation (India) Ltd. as



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

comparable without appreciating the fact that M/s. Oil Field Instrumentation (India) Ltd. is engaged in technical consultancy and engineering servicing which is broadly similar to the tax payer.”

2. “On the facts & circumstances of the case, the Ld. CIT (A) has erred in rejecting M/s. Agile Technologies, M/s. Engineers India and M/s. TCE Consulting as comparable without appreciating the fact that the above companies are engaged in provision of engineering services which is broadly similar to the tax payer.”

3. “On the facts & circumstances of the case, the Ld. CIT(A) has erred in holding that the amended provision to Section 92C(2) is applicable to AY. 2009-10 and onwards disregarding the fact that the amendment is applicable in relation to all cases in which proceedings are pending before the Transfer Pricing Officer (TPO) on or after 01.10.2009.”

4. “On the facts & circumstances of the case, the Ld. CIT(A) has erred in directing the A.O/TPO to grant the benefit of second proviso of Section 92C(2) of 5% margin to the assessee.”

5. “The appellant prays that the order of Ld. CIT (A) on the above grounds be set aside and that of the Assessing Officer be restored.”

6. “The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”

Cross-objection: -

1. On the facts and the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) (‘CIT(A)’) erred in not rejecting “Celestial Labs Ltd.” as a comparable without appreciating the fact that the company is engaged in creation as well as ownership of intellectual property and is also involved in commercialization and marketing of enzymes and nutraceuticals, and hence, is not comparable to the Appellant.

2. On the facts and the circumstances of the case and in law, the learned CIT(A) erred in rejecting “Research Support International Ltd.” as a comparable without appreciating the fact that the relevant



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

data of the company for financial year 2006-07. was available in the Prowess database and hence, the same can be included in list of companies comparable to the Appellant.”

9. Briefly stated, the assessee is engaged in the business of providing Research and Development Services as a part of Merck Group of Companies. For the relevant year, the assessee had filed its return of income declaring total income of Rs.5,41,40,077/-. Taking note of the fact that the assessee has undertaken international transactions with its Associated Enterprises, the AO in the course of assessment, had made a reference to the TPO u/s 92CA(1) of the Act for computation of the Arm’s Length Price in respect of such international transactions. The TPO noted that, the assessee has entered into an agreement with Merck Group entities for conducting R&D activities that involved pharmaceutical product process development of certain generics identified by the Merck group entities. The assessee had entered into the following international transactions with five (5) AEs, which has been reproduced by the TPO at para 5 of his order: -

| Sl. No. | Nature of service | AY 2007-08 | Method used |
|---------|-----------------------------------|-----------------------|-------------|
| 1 | Rendering of Contract R&D service | 18,63,53,642 | TNMM |
| 2 | Sale of goods/API | 6,51,59,920 | TNMM |
| 3 | Import of goods | 2,54,025 | TNMM |
| | Total | 25,17,67,587/- | |

10. The TPO noted that, the primary business of the assessee was rendering contract-based R&D services, and the sale of goods/API as



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

also the import of goods were inter-linked with this main activity of R&D services. The TPO therefore benchmarked all the above international transactions following the aggregate approach, and applied entity-level TNMM as the Most Appropriate Method. The TPO noted that, the assessee had selected Operating Profit/Total Cost (OP/TC) as the Profit Level Indicator (PLI). The assessee was taken as the tested party and the OP/TC of the assessee was computed at 24.64%. The PLI of the seven (7) comparables identified by the assessee, was worked out at 21.69%. The assessee accordingly claimed that the international transactions were at arm's length. The TPO, after examining the comparables selected by the assessee, rejected two (2) out of the seven (7) comparables viz., M/s Geologging Industries Ltd. & M/s Research Support Intl. Pvt. Ltd. The TPO further conducted a fresh search and added six (6) new comparables. The TPO accordingly arrived at the following set of eleven (11) comparables, whose PLI was worked out at 31.96%.

| Sl. No. | Name of the comparable company | PLI (%) | Remark |
|----------------|---|----------------|--|
| 1 | M/s. Alphageo (India) Ltd. | 38.21 | Identified and accepted as comparable by both assessee and TPO |
| 2 | M/s. Choski Laboratories Limited | 31.69 | |
| 3 | M/s. TCE Consulting Engineers Ltd. | 22.30 | |
| 4 | M/s. Water & Power Consultancy Services | 14.59 | |
| 5 | M/s. IDC (India) Ltd. | 15.89 | |
| 6 | M/s. Engineers India (Seg.) | 45.16 | New comparables identified and added by TPO |
| 7 | M/s. Agile Electric Technologies Pvt. Ltd. | 6.58 | |
| 8 | M/s. Vimta Labs Ltd. | 27.44 | |
| 9 | M/s. Oil field Instrumentation (India) Ltd. | 76.46 | |
| 10 | M/s. Celestial Labs Ltd. | 58.35 | |
| 11 | M/s. Mindtree Ltd (Seg.) | 14.90 | |



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

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|------------------------|--------------|
| Arithmetic Mean | 31.96 |
|------------------------|--------------|

11. The TPO benchmarked all the international transactions at the above computed arm's length PLI of 31.96%, and accordingly arrived at the adjustment of Rs.1,50,38,220/-. Aggrieved by this order, the assessee was in appeal before the Ld. CIT(A). After considering the submissions made by the assessee on the issue regarding selection of comparables, the Ld. CIT(A) did not accept the two (2) comparables, M/s Geologging Industries Ltd. & M/s Research Support Intl. Pvt. Ltd., which were sought to be included by the assessee but rejected by the TPO. The Ld. CIT(A) further directed the AO to exclude the following five (5) comparables from the above set of eleven (11) comparables:

- Oil Field Instrumentation (India) Ltd.
- Mindtree Ltd. (Seg.)
- Agile Electric Technologies Pvt. Ltd.
- Engineers India Ltd. (Seg.)
- TCE Consulting Engineers Ltd.

12. The Ld. CIT(A) also allowed the benefit of the tolerance range of +/- 5%, under the erstwhile proviso to Section 92C(2) of the Act i.e. +/-5% from the ALP of the comparables. With these directions, the Ld. CIT(A) directed the AO/TPO to re-compute the arm's length PLI and benchmark the international transactions of the assessee. Being aggrieved by the order of Ld. CIT(A), the Revenue is in appeal before us against the Ld. CIT(A)'s action of rejecting of four (4) out of the



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

above mentioned five (5) comparables introduced by the TPO, and also against allowing the range benefit of +/-5% under the erstwhile proviso to Section 92C(2) of the Act. In the cross objections, the assessee has objected to the Ld. CIT(A)'s action of accepting M/s Celestial Labs Ltd. identified by the TPO, as a suitable comparable and not accepting M/s Research Support Intl. Pvt. Ltd., which was identified as a comparable by the assessee.

13. We have heard both the parties and perused the records. From the facts of the case, it is noted that the assessee is engaged in the business of rendering R&D services on contractual basis in the pharmaceutical product process development. It is noted that applying the relevant filters, the assessee had identified the following seven companies, having regard to its FAR profile.

- a) Alpageo (India) Ltd.
- b) Choksi Laboratories Ltd.
- c) IDC (India) Ltd.
- d) Water & Power Consultancy Services
- e) Research Support Intl. Pvt. Ltd.
- f) Geologging Industries Ltd.
- g) TCE Consulting Engineers Ltd. (seg)

14. It is noted that comparables (a) to (d) are not in dispute in as much as these four comparables have been accepted by the TPO as well as the CIT(A). The comparables (e) & (f) i.e. M/s Research Support Intl. Pvt. Ltd & M/s Geologging Industries Ltd. were rejected both by TPO and Ld. CIT(A). As far as comparable (g) i.e. M/s TCE



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

Consulting Engineers Ltd. is concerned, we note that though this company was identified as a suitable comparable both by the assessee and TPO, but the Ld. CIT(A) excluded the same from the set of comparables. The Revenue has challenged this action of the Ld. CIT(A) before us.

15. Further, as noted above, the Ld. CIT(A) had also directed exclusion of four (4) other comparables, which were identified by the TPO. Out of this, the Revenue is in appeal seeking inclusion of three (3) comparables viz. M/s Oil Field Instrumentation (India) Ltd., M/s Agile Electric Technologies Pvt. Ltd. & M/s Engineers India Ltd.

16. We are of the considered view that for correct application of TNMM, it is necessary to select comparables, which were functionally similar and engaged in similar line of business as that of the assessee. Keeping that in mind, we now proceed to examine the above four (4) comparables, which according to the Revenue ought to be included in the final set of comparables for benchmarking the international transactions of the assessee.

- *Oil Field Instrumentation (India) Pvt. Ltd.* – It is noted that, this company is engaged in mud-logging services, supply of oil field equipment & supply of software license for mud logging. The financial statements placed before us, reveal that this company was also engaged in sale of spares and software dealing primarily in the Oil and Gas Sector. The Ld. AR had pointed out that, the TPO had excluded one of the assessee's comparable, M/s Geologging Industries Ltd., on the premise that it was engaged in mud logging services and therefore



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

functionally non-comparable. We thus find merit in her submission that, the action of TPO in including M/s Oil Field Instrumentation (India) Pvt. Ltd. was contradictory as its primary business was similar to that of M/s Geologging Industries Ltd. The Ld. DR was also unable to rebut this contention of the assessee. The Ld. AR further drew our attention to the decision of this Tribunal in the case of *Tevapharm Pvt. Ltd. vs ACIT* (ITA No. 6623/Mum/2011). In the decided case also, the assessee was engaged in providing contract R&D services and the TPO had identified Oil Field Instrumentation (India) Ltd. as a comparable. On appeal, this Tribunal rejected M/s Oil Field Instrumentation (India) Pvt. Ltd. as a comparable on the ground of different functional profile. Having regard to the foregoing facts and the decision rendered by this Tribunal (*supra*), we do not see any reason to interfere with the order of Ld. CIT(A) rejecting M/s Oil Field Instrumentation (India) Pvt. Ltd. as a comparable.

- Agile Electric Technologies Pvt. Ltd.- It is noted that, this company is engaged in providing engineering and associated services for design and development of motor and transformer parts. This company was rejected as a comparable by the Ld. CIT(A) since its functional profile was different than the assessee viz., contract R&D services. We find that, on similar facts and circumstances, this Tribunal in the case of *Tevapharm Pvt. Ltd. vs ACIT* (*supra*) had rejected M/s Agile Electric Technologies Pvt. Ltd. as a comparable holding it to be functionally different than the assessee, which in the decided case, was similarly engaged in rendering contract R&D services. Having regard to the



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

foregoing, we countenance the action of Ld. CIT(A) rejecting M/s Agile Electric Technologies Pvt. Ltd. as a comparable.

- *Engineers India Ltd.*- It is noted that the company is a public sector undertaking, whose 90% ownership vests with Government of India. This company is engaged in providing a full suite of engineering and related technical services for petroleum refineries, pipelines, offshore oil & gas and other industrial projects. From the order of Ld. CIT(A), we find that this company was rejected on the premise that being a government undertaking, it ought not be taken as a reliable independent party, particularly when other private independent comparables are available. We find that this reasoning given by Ld. CIT(A) is supported by the decision of the Hon'ble jurisdictional Bombay High Court in the case of CIT vs Thyssen Krupp Industries India Pvt. Ltd. (239 Taxman 46) wherein also the Hon'ble High Court had rejected M/s Engineers India Ltd as a comparable, by holding as under:

“The grievance of the respondent assessee before the Tribunal was that M/s. Engineers India Ltd. has been erroneously introduced as a comparable by the TPO for determining the ALP of the respondent assessee's International Transactions. The impugned order of the Tribunal records the fact that the Engineering India Ltd. is a Government Company and its annual report indicates that a substantial part of its revenue in execution of turnkey projects arose out of executing projects of public sector undertakings. In the circumstances, the impugned order of the Tribunal holds that the Engineers India Ltd. could not be considered to be comparable for the reason that contracts between Public Sector undertakings are not driven by profit motive alone but other consideration also weigh in such as discharge of social obligations etc. Thus, it is not comparable. Moreover, from the annual report, it is clear that the revenue earned in executing turnkey project for other public sector undertakings was much more than the filter of 25%,



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

which has been applied by the TPO in his order under Section 92CA(3) of the Act, while taking TRF Ltd. as a comparable on the ground that its related party transaction was not in excess of 25% of its total turnover. Thus, applying consistent filter of 25% or less of related party transaction alone to be considered comparable, Engineers India Ltd. could not be considered to be comparable.”

Following the above binding judgment of Hon'ble Bombay High Court, we confirm the order of Ld. CIT(A) rejecting M/s Engineers India Ltd. as a comparable.

- *TCE Consulting Engineers Ltd.*- It is noted that, this company was originally identified as a comparable by the assessee and accepted by the TPO. The Ld. CIT(A) however had refused to retain the same by holding it to be functionally dissimilar. We note from the functional profile of this company, that it was engaged in providing engineering consulting services like management consultancy services, pre-tendering services, etc. We find this company to be broadly comparable with the assessee. Also, the search conducted both by the assessee and the TPO, after applying all necessary filters, had considered this company to be comparable. The assessee has not been able to point out the defect in its TP study. The argument raised by the Ld. AR that the functions/business of this company was not strictly comparable with that of the assessee does not hold any water, as in application TNMM, broad functional comparability is also acceptable. For the aforesaid reasons, we direct that M/s TCE Consulting Engineers Ltd. should be considered as a comparable and to that extent the order of Ld. CIT(A) stands reversed.



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

17. In view of the above therefore, Ground No. 1 of the Revenue is dismissed and Ground No. 2 is partly allowed.

18. Ground No. 3 & 4 of the Revenue's appeal is against the order of Ld. CIT(A) allowing the benefit of +/-5% tolerance range in terms of the erstwhile proviso to Section 92C of the Act (as unamended by the Finance Act, 2009). The Ld. DR pointed out that, the proviso to Section 92C(2) as amended by the Finance Act, 2009 read as under:

(2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed:

[Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:

Provided further that if the variation between the arm's length price so determined and price at which the international transaction has actually been undertaken does not exceed five per cent of the latter, the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price.]

19. He further brought to our notice that the Finance Act, 2012 had introduced as new Explanation to sub-section (2) of Section 92C of the Act which clarified that the amended law shall apply to all TP proceedings which were pending on 1st October 2009. The relevant extract of the amended Section is as follows:

(2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed⁷ :



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

[Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:

Provided further that if the variation between the arm's length price so determined and price at which the international transaction [or specified domestic transaction] has actually been undertaken [does not exceed [such percentage of the latter, as may be notified] by the Central Government in the Official Gazette in this behalf], the price at which the international transaction [or specified domestic transaction] has actually been undertaken shall be deemed to be the arm's length price.]

[Explanation.—For the removal of doubts, it is hereby clarified that the provisions of the second proviso shall also be applicable to all assessment or reassessment proceedings pending before an Assessing Officer as on the 1st day of October, 2009.]

20. The Ld. DR submitted that, the case of the assessee for AY 2007-08 was pending as on 1st October 2009 in as much as the order u/s 92CA(3) was passed by the TPO only on 30th July 2010. Hence, he urged that the amended law ought to have been applied viz., the tolerance range of +/-5% should have been computed from the value of international transactions rather than the ALP, as directed by Ld. CIT(A). At the time of hearing, the Ld. AR, in all fairness agreed with this contention of the Ld. DR.

21. Having heard both the parties and in light of the amended provisions of Section 92C(2), and in particular having regard to the Explanation inserted by the Finance Act, 2012, we hold that the benefit of tolerance range of +/- 5% has to be computed from the value of international transactions. Accordingly, Ground Nos. 3 & 4 of the Revenue stands allowed.



*ITA No.1467/Mum/2012 & 1283/M/12
C.O. 50/Mum/2013
A.Ys. 2007-08
M/s Mylan Pharmaceuticals Pvt. Ltd.*

22. Coming to the cross objections of the assessee, we note that, at the time of hearing, the assessee did not press Ground No. 2 and the said ground therefore stands dismissed. In Ground No. 1 of the cross objection, the assessee has sought exclusion of M/s Celestial Labs Ltd. identified by TPO as comparable, which was also retained by Ld. CIT(A). In the written submissions filed before us, the Ld. AR of the assessee had contended that, once M/s Oil Field Instrumentation (India) Pvt. Ltd. is excluded from the comparable, then the arithmetic mean of the remaining comparables would be still be within the tolerance range of +/-5% of the PLI of the assessee. Since we have confirmed the order of Ld. CIT(A) excluding M/s Oil Field Instrumentation (India) Pvt. Ltd. as a comparable, this ground raised by the assessee has become academic in nature and is therefore dismissed as infructuous.

23. In the result, both the appeal of the assessee and Revenue is partly allowed and the cross-objection of the assessee is dismissed.

Order pronounced in the open court on this 28/07/2022.

Sd/-

**(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Sd/-

**(ABY T. VARKEY)
JUDICIAL MEMBER**

Mumbai; Dated 28/07/2022.
Vijay Pal Singh, (Sr. PS)



*ITA No.1467/Mum/2012 & 1283/M/12
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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**