

**आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई**  
**IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH, CHENNAI**  
**श्री वी. दुर्गा राव, न्यायिक सदस्य एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष**  
**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER**  
**AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

आयकर अपीलसं./I.T.A.Nos.617/Chny/2015 & 572/Chny/2016

(निर्धारणवर्ष / Assessment Years: 2010-11 & 2011-12)

M/s. Socomec Innovative Power Solutions Pvt.Ltd. <i>[Formerly known as Socomec UPS India Pvt.Ltd.]</i> Thiru-Vi-Ka Industrial Estate, Guindy, Chennai-600 032.	Vs	Deputy Commissioner of Income Tax, Corporate Circle-6(2) Chennai-34.
PAN: AAKCS 3579H		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Mr. Hredai, Advocate
प्रत्यर्थीकीओरसे/Respondent by	:	Mr. Palani Kumar, CIT

सुनवाईकीतारीख/Date of hearing	:	01.07.2022
घोषणाकीतारीख /Date of Pronouncement	:	07.09.2022

**आदेश / ORDER**

**PER G. MANJUNATHA, AM:**

The appeal filed by the assessee in ITA No.617/Chny/2015 is directed against assessment order passed by the Assessing Officer u/s.143(3) r.w.s.144C(13) r.w.s 92CA(3) of the Act, in pursuant to the directions of DRP, Chennai dated 19.11.2014 issued under section 144C(5) of the Act and pertains to assessment year 2010-11. The appeal filed by the assessee in ITA No.572/Chny/2016 is directed against final assessment order passed by the Assessing Officer u/s.143(3) r.w.s. 92CA(6) r.w.s 144C(13) of the Income Tax Act, 1961 in pursuant to the directions of the DRP-2, Bengaluru

dated 23.12.2015 issued under section 144C(5) of the Act and pertains to assessment year 2011-12. Since, facts are identical and issues are common, for the sake of convenience, these two appeals were heard together and are being disposed off, by this consolidated order.

2. Brief facts of the case are that the assessee company M/s. Socomec Innovative Power Solutions Pvt.Ltd., a joint venture between Numeric Power Systems Ltd. and Socomec SA, France. The company is engaged in the business of trading of uninterrupted power supply (UPS) systems and accessories. The company also provides maintenance and other after sale services in respect of UPS systems through network of branches situated across the country. The assessee has entered into various international transactions with its AEs, including purchase of finished goods, sale of UPS and agency commission etc. The assessee company purchases UPS from its AEs and sells them in Indian market. The assessee had originally adopted CUP as most appropriate method for determination of ALP for AE purchases. During the course of assessment proceedings, the Transfer Pricing Officer has

rejected CUP method adopted by the assessee for benchmarking transactions with its AEs. During the course of TP proceedings, the assessee vide its letter dated 09.01.2015 has stated that in case CUP method cannot be adopted, then Resale Price Method may be adopted as most appropriate method, because the assessee is predominantly engaged in business of trading in UPS and accessories. The Assessing Officer rejected CUP as well as RPM method proposed by the assessee and has adopted TNMM as most appropriate method with Berry Ratio as PLI. The TPO has selected two comparables, Ms. Sukam Power Systems Ltd and Swelect Energy Systems Ltd, with average Berry Ratio of 0.23 and then compared with Berry Ratio of the assessee which was at - 3.14% and made TP adjustment of Rs.5,84,30,031/-. The assessee challenged TP adjustment as proposed by the TPO before the DRP, but could not succeed. The DRP sustained additions made by the Assessing Officer and applied TNMM as most appropriate method. The assessee challenged order of the Assessing Officer before the Tribunal and the Tribunal vide its order dated 26.04.2017 in ITA Nos. 617/Mds/2015 & 572/Mds/2016 upheld TNMM with Berry Ratio as most

appropriate method to benchmark international transactions of the assessee with its AEs. The assessee challenged order of the Tribunal before the Hon'ble High Court of Madras and the Hon'ble High Court in TCA No.725 & 726 of 2017 dated 23.11.2020 set aside appeals to the file of the Tribunal with a direction to reconsider the issue of most appropriate method for benchmarking international transactions of the assessee with its AEs with reason as to why and how CUP method is not most appropriate method in given facts and circumstances of the case.

3. The learned A.R for the assessee submitted that the assessee being distributor of UPS products in India has purchased UPS from its AE. The main source of income of the assessee is sale and service of UPS in India. The assessee has adopted CUP as most appropriate method and compared transactions with its AEs with similar transactions of third party importers from various countries after obtaining information from Customs authorities, Chennai under RTI and claims to be a tested party. The TPO has summarily rejected CUP method and adopted TNMM with Berry Ratio as most appropriate

method and made upward adjustment towards import of UPS and accessories from its AE. The learned A.R further submitted that in case CUP cannot be adopted as most appropriate method, then the assessee has suggested Resale Price Method (RPM) as alternative method for benchmarking international transactions, because RPM is most suitable method for traders/distributors. However, the TPO has rejected contention of the assessee and has adopted TNMM with Berry Ratio without appreciating fact that Berry Ratio can only apply in case, where revenue of the assessee predominantly depends upon operating expenses, but not products and services. In this case, if you go through financial results of the assessee, the assessee has incurred very less operative expenses and most of the expenses pertain to import of finished goods from AEs and thus, Berry Ratio cannot be adopted.

4. The learned DR, on the other hand, supporting orders of the TPO as well as DRP submitted that the Tribunal has upheld TNMM as most appropriate method with Berry Ratio as PLI, after considering relevant facts of the case. Although, the

Hon'ble High Court has set aside the order of the Tribunal to decide the issue of most appropriate method, but the TPO has given categorical finding in light of facts of present case to adopt TNMM as most appropriate method. Therefore, the learned DR submitted that there is no error in the reasons given by the TPO/DRP to benchmark international transactions of the assessee with its AE by adopting TNMM as most appropriate method with Berry Ratio as PLI and thus, their orders should be upheld. In this regard, the learned DR has filed written submissions which has been reproduced as under:-

*"Background of the Case:*

*The assessee is in the business of trading of UPS Batteries and accessories in India. During FY 2009-10 and FY 2010-11 the assessee imported UPS from its AE and sold in the Indian market and also provided post sales services in connection to the UPS systems being sold.*

*The assessee benchmarked the transaction of AE purchases using CUP method as MAM.*

*The TPO rejected the CUP method of the assessee and hence benchmarked the transaction using TNMM as the MAM and Berry Ratio as PLI. The TPO arrived at 4 comparables with average Berry ratio of 0.55 as against the Berry ratio of assessee being -0.44 and made an adjustment of Rs. 11,64,40,050/-*

- The Id. DRP vide order dt. 19.11.2014 upheld the order of the TPO.*
- The Hon'ble ITAT vide order dt. 26.04.2017 held that use of 'TNMM as MAM with Berry Ratio as PLI by the TPO was justified and confirmed the*

*order of the DRP/TPO, During the course of the hearing the assessee submitted additional evidence and sought fresh search of comparable companies using RPM which was rejected by the Hon'ble ITAT.*

- The assessee further filed an appeal before the Hon'ble High Court of Madras. The Hon'ble High Court of Madras vide order dt. 23.11.2020 remanded the matter back to the ITAT and directed the ITAT to give reasons for rejection of CUP method as adopted by the assessee and adoption of TNMM by the TPO.*

*Reasons for rejection of CUP Method:*

- The brands that were taken for comparison by the assessee were entirely different from the assessee company. Under CUP Method the products which differ in respect of brand value, technology, cost of production, place of production, energy efficiency etc. cannot be compared. Kind attention is invited to Para 8 of the TPO Order. He has given a detailed reason for rejecting CUP Method relying on the OECD guidelines and relevant case laws.*

*He further strengthened it in **Para 10.3, 11 & 12** duly countering the assessee' s submission.*

*Kind attention is invited to order of the DRP. DRP has also confirmed the rejection of CUP Method and adoption of TNMM Method in **page 5, 6, 7, 8 and 9.***

***Why Berry Ratio should be adopted?***

*Kind attention is invited to **Para 13** and **13.1** of the TPO order wherein a detailed discussion had been done by the TPO for adopting TNMM as the MAM and Berry Ratio as the PLI. He has given a categorical finding that assessee is a limited risk distributor and hence, Berry Ratio under TNMM will be the MAM*

Kind attention is invited to order of the DRP. DRP has also confirmed the adoption of Berry Ratio in **page 12, 13, 14 & 15.**

**Why RPM should not be considered?**

For the Assessment Year 2011-12, the TPO has given categorical rejection of RPM in **Para 10.2** of its order

" ..... As already stated that the assessee has not purchased all the materials from its AE. The assessee has purchased nearly 50% of the materials such as batteries and other electrical items from domestic market and from other independent enterprises. If Resale Price Method considers is Most Appropriate Method the margin earned by the assessee through purchase of materials from other independent parties is also part of the Gross Profit earned by the assessee which leads to anomaly.

The import of UPS systems from the AEs by the assessee primarily finds application in big industries. The Authorized Representative had stated that the assessee provides after sale services, warranty claim etc. which directly affects the gross margin of the assessee and comparables.

It is reiterated here again that, to overcome such limitations, or with the above facts in mind the TPO had suggested TNMM (Berry Ratio as PLI) for the present case. Based on the above discussions, the RPM method selected by the assessee as most appropriate method is rejected with the corresponding facts and circumstances.

In this connection, the decision of Hon'ble ITAT in the case of ***M/s Kubota Agricultural Machinery India (P) Ltd*** in ITA No:441/Mds/2015 passed

*for the A Y 2010-11 is relied upon where the issue has been squarely covered. “*

5. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The facts with regard impugned dispute are that the assessee is in the business of trading in UPS and accessories, has imported UPS from its AEs. The assessee has adopted CUP as most appropriate method and claimed that it has benchmarked import of UPS from its AE with third party importer transaction of similar products and such information has been obtained under RTI from Chennai Customs authorities. The assessee has filed a chart explaining transactions with import from its AEs with comparable imports of similar nature by third parties and claimed that price paid by the assessee for its imports from its AEs are at arm's length price. Alternatively, the assessee has made submission before the TPO that in case, CUP method cannot be adopted as most appropriate method, then RPM is suitable method for the assessee like traders / distributors and thus, filed relevant details to consider RPM as most appropriate method. The TPO has rejected CUP as well as RPM proposed by the assessee

and has adopted TNMM with Berry Ratio as PLI as most appropriate method. The TPO has selected two comparables with Berry Ratio 0.37% and then compared with Berry Ratio of average assessee and has made upward adjustment towards import of UPS.

6. In this factual background, if you consider reasons given by the TPO to make adjustment towards import of UPS from its AEs, we do not find any merit in the reasons given by the TPO to reject CUP method adopted by the assessee as most appropriate method for benchmarking transactions with its AEs, because the TPO has summarily rejected CUP method adopted by the assessee without giving any reasons as to how CUP method is not suitable for given facts & circumstances of the present case. No doubt, CUP cannot be applied in each & every case, because in order to apply CUP method for benchmarking transactions, one has to have accurate data with respect to nature and type of transactions entered into by the assessee with its AEs. In case, if there is slight difference in nature of transactions, then CUP may not give desired results. In this case, the assessee claims that it has compared its

transactions with AE with third party transactions of similar nature, where similar type of products has been imported by other importers. The assessee has filed a chart explaining transaction-wise import of goods from its AE with third party importers and claimed that price paid by the assessee is less than the price paid by the third party importers on similar goods and services. The assessee has obtained information from Chennai Customs authorities to compare transactions with its AE. We find that the assessee has tried to establish its case with help of third party importers of similar goods & services and claimed that transactions with its AEs are at arm's length price. However, the TPO / DRP has summarily rejected claim of the assessee without assigning any reasons as to why transactions of the assessee cannot be compared with CUP method.

7. Coming back to another aspect of the issue. The assessee has made alternative submission before the TPO and argued that in case, CUP method cannot be applied, then RPM is suitable method for an assessee like traders/distributors. The assessee is in the business of distribution of UPS in India. The assessee has purchased UPS from its AE. The predominant

revenue from operations of the assessee is from trading in UPS and accessories. Although, the TPO claims that the assessee purchased more than 50% of goods from Indian suppliers, but on perusal of details filed by the assessee, said findings of the TPO appears to be not based on any evidences. On the other hand, the assessee has filed necessary details to prove that it is only engaged in the business of trading in UPS and accessories and its major revenue from operations for the year is from trading in UPS and accessories. Therefore, we are of the considered view that under these circumstances Resale Price Method (RPM) is suitable method for benchmarking transactions with its AEs. The TPO without considering above method has simply rejected arguments of the assessee and has adopted TNMM with Berry Ratio as PLI and benchmarked transactions of the assessee with AE.

8. Coming back to TNMM method. TNMM method is most appropriate method, where other methods cannot be adopted for benchmarking transactions of the assessee with its AEs, however, where other methods can be applied, then there is no need to go for TNMM as most appropriate method. Further,

Berry Ratio is ratio of operating profits to operating expenses and Berry Ratio can be applied, where operating expenses are considered as relevant base for determining profitability of any assessee. The Hon'ble Delhi High Court in the case of Sumitomo Corporation India Pvt.Ltd. Vs DCIT (2016) 387 ITR 611 had considered principles based on which Berry Ratio can be applied and after considering relevant facts held that Berry Ratio can only be applied, where value of goods is not directly linked to quantum of profit and profits are mainly dependent on expenses incurred by the assessee. Further, Berry Ratio can effectively be applied only in certain cases such as stripped down distributors as they have no financial exposure and risk in respect of goods distributed by them. In this case, major expense of the assessee is purchase of UPS from its AEs. When you compare major expenses of the assessee, other operating expenses is very minimal, when compared to purchase of UPS. From the above, it is very clear that Berry Ratio cannot be applied to facts of the present case, because as we have already stated in earlier part of this order that Berry Ratio can only be applied where operating expenses is main contributor for determining profitability of an assessee. In this

case, operating expenses incurred by the assessee is very less, when compared to total amount paid for purchase of UPS from its AEs. Therefore, we are of the considered view that the TPO has completely erred in adopting TNMM with Berry Ratio as PLI for benchmarking international transactions of the assessee with its AEs.

9. In this view of the matter and considering facts & circumstances of the case, we are of the considered view that TNMM with Berry Ratio as PLI cannot be applied as most appropriate method for benchmarking transactions of the assessee with its AEs and thus, we direct the TPO to re-examine case of the assessee and apply either CUP as considered by the assessee to benchmark its transactions or RPM as proposed by the assessee and determine ALP of international transactions of the assessee with its AEs. Accordingly, we set aside the issue to the file of the TPO with a direction to reconsider the issue in light of our discussions given hereinabove for both assessment years.

10. The next issue that came up for our consideration for assessment year 2011-12 is addition towards disallowance of

provision for warranty expenses. The assessee has claimed for provision for warranty of Rs.1,67,33,228/-. The assessee claims that it has made provision for warranty expenses based on historical trend and past experience. The assessee further claims that it has taken support from the decision of the Hon'ble Supreme Court in the case of M/s.Rotork Controls India (P) Ltd. Vs.CIT., 314 ITR 62 and argued that its case is squarely covered by the facts of the above case. The Assessing Officer has disallowed provision for warranty on the ground that the assessee has not provided basis for arriving provision created for warranty expenses and details regarding computation of expenditure has not been explained.

11. We have heard both the parties and considered relevant materials on record. We find that the Hon'ble Supreme Court had considered issue of provision for warranty in the case of M/s.Rotork Controls India (P) Ltd. Vs.CIT.,(supra) and held that if provision made for warranty is on the basis of historical trend and past experience and further, there is scientific basis for making provision, then same needs to be allowed as deduction. In this case, the assessee claims that it has to

provide after sale service to customers on each and every UPS sold in India for which the assessee needs to incur warranty expenses. The assessee further claimed that provision made for warranty expenses is on the basis of historical trend and past experience, and further said provision is made on scientific basis. The Assessing Officer claims that the assessee has not provided basis for arriving at provision for warranty and further, could not explain computation as to how such figure has been arrived at. The facts are contradictory. The assessee claims that it has made provision for warranty expenses on the basis of scientific method, where the Assessing Officer claims that the assessee could not explain basis of provision for warranty expenses. Therefore, we are of the considered view that the issue needs to go back to the file of the Assessing Officer for further examination. Hence, we set aside this issue to the file of the Assessing Officer and direct the Assessing Officer to reconsider the issue in light of the decision of the Hon'ble Supreme Court in the case of M/s.Rotork Controls India (P) Ltd. Vs.CIT., (supra) and in case, the assessee could able to explain basis for provision for warranty, then the Assessing Officer is directed to examine case of the assessee in light of

the above decision of the Hon'ble Supreme Court and decide the issue in accordance with law.

12. The next issue that came up for our consideration from appeal of the assessee for the assessment year 2010-11 is disallowance of employees contribution to PF & ESI u/s.36(1)(va) r.w.s. 2(24)(x) of the Income Tax Act, 1961. We find that issue of disallowance of employees contribution to PF & ESI u/s.36(1)(va) r.w.s. 2(24)(x) of the Act, is covered in favor of the assessee by the decision of the ITAT., Chennai, in the case of M/s.Adyar Ananda Bhavan Sweets India Ltd., in ITA Nos.402 & 403/Chny/2021 dated 08.12.2022, where the Tribunal, after considering the amendment to the provisions of Sec.36(1)(va) of the Act, by the Finance Act, 2021, held that said amendment is prospective in nature, which is applicable from assessment year 2020-21 onwards and thus, belated payments of employees' contribution to PF & ESI after due date specified under the respective Acts, but paid within due date for filing of return of income u/s.139(1) of the Act, is an allowable deduction u/s.36(1)(va) of the Act. Therefore, consistent with the view taken by the co-ordinate Bench, we are of the

considered view that if remittance to employees' contribution to PF & ESI is made on or before due date for filing of return of income u/s.139(1) of the Act, then there cannot be any disallowance u/s.36(1(va) r.w.s. 2(24)(x) of the Act. Hence, we direct the Assessing Officer to verify the issue with reference to date of remittance of PF & ESI and in case, the Assessing Officer finds that the assessee has remitted PF & ESI on or before due for filing of return of income u/s.139(1) of the Act, then the Assessing Officer is directed to delete additions made towards disallowance of employees contribution to PF & ESI.

13. In the result, the appeals filed by the assessee for assessment years 2010-11 & 2011-12 are allowed for statistical purposes.

Order pronounced in the open court on 7<sup>th</sup> September, 2022

Sd/-  
**(वी. दुर्गा राव)**  
(V. Durga Rao)  
न्यायिक सदस्य /Judicial Member

Sd/-  
**(जी. मंजुनाथ)**  
(G. Manjunatha)  
लेखा सदस्य / Accountant Member

चेन्नई/Chennai,  
दिनांक/Dated 7<sup>th</sup> September, 2022.  
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant
2. Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.