

आयकर अपीलीय अधिकरण  
मुंबई पीठ "के", मुंबई पीठ  
श्री विकास अवस्थी, न्यायिक सदस्य एवं  
श्री गगन गोयल, लेखाकार सदस्य के समक्ष  
IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "K", MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER  
आअसं. 494/मुं/ 2022 (नि.व.2017-18)  
ITA NO. 494/MUM/2022(A.Y. 2017-18)

Firmenich Aromatics Production (India) Private Limited.  
[Successor to Firmenich Aromatics (India) Private Limited]  
ABR Sapphire, Plot No.79, Street-13,  
MIDC, Andheri East, Chakala Midc S.O,  
Mumbai – 400 093.

PAN; AABCF-1120-G

..... अपीलार्थी /Appellant

बनाम Vs.

Additiona/Joint/Deputy/Assistant  
Commissioner of Income Tax/ Income-tax Officer,  
National Faceless Assessment Centre, Delhi.

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : S/Shri Pratik Shah and Amol Mahajan

प्रतिवादी द्वारा/Respondent by : Ms. Samruddhi Dhananjay Hande

सुनवाई की तिथि/ Date of hearing : 15/12/2023

घोषणा की तिथि/ Date of pronouncement : 10/03/2023

**आदेश/ ORDER**

**PER VIKAS AWASTHY, JM:**

This appeal by the assessee is directed against the assessment order dated 18/01/2022 passed u/s. 143(3) r.w.s. 144C(13) r.w.s. 144B of the Income Tax Act, 1961 [in short 'the Act']. The assessee in appeal has assailed the Transfer Pricing adjustment in relation to :

(i) Export of finished products.

(ii) Payment of Royalty for availing technical know-how.

(iii) Payment of interest on External Commercial Borrowing (ECB).

3. The brief facts of the case as emanating from records are : The assessee /appellant is engaged in manufacturing and sale of flavours and fragrances used in manufacture of soap, detergent, toiletry, beverages, drugs, pharmaceuticals, etc. The assessee undertake the activity of manufacturing and sale of flavors and fragrances on license granted by Firmenich SA. The assessee entered into various international transactions during the period relevant to the assessment year under appeal with the Associated Enterprise (AE) in respect of : (i) export of finished products; (ii) payment of royalty; (iii) payment of interest on ECB loans.

3.1 To benchmark the international transaction relating to export of finished products and payment of royalty the assessee applied Transactional Net Margin Method (TNMM) as the most appropriate method and for benchmarking the transaction of payment on ECB loans, the assessee applied CUP. The Transfer Pricing Officer (TPO) rejected assessee's method of benchmarking the aforesaid international transactions. The TPO held that for benchmarking the transaction of export of finished goods and payment of royalty, CUP is the most appropriate method and thus made adjustment as under:

(i) Export of finished products	- Rs.57,73,987/-
(ii) Payment of royalty	- Rs. 4,56,77,850/-

3.2 As regards interest on ECB, the assessee benchmarked the transaction by applying CUP using Weighted Average Lending Rate ( WALR) of 10.16%. The TPO calculated the interest rate at LIBOR + 143.62 basis point. The TPO held that the assessee has made excess payment of interest on ECB loans and thus, made adjustment on the basis of differential of 206.38 basis point (350 bps – 143.62 bps) i.e. Rs.11,41,870/-.

3.3 Aggrieved by the adjustment made by TPO vide order dated 27/01/2021, the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP vide directions dated 23/12/2021 rejected the objections of the assessee. The Assessing Officer in line with the directions of the DRP passed the impugned assessment order. Hence, the present appeal by the assessee.

4. Shri Pratik Shah appearing on behalf of the assessee submitted that the international transaction in relation to export of finished goods and its benchmarking is identical to the one in Assessment Year 2013-14, 2014-15, 2015-16 and 2016-17. The TPO/Assessing Officer in the preceding Assessment Year have been making adjustment in respect of international transaction of export of finished goods by raising similar objection. In Assessment Year 2013-14 in appeal by the assessee in ITA No.2590/Mum/2017, the Tribunal vide order dated 23/07/2018 deleted the adjustment holding that where the AE and non-AE are located in different geographical location, the price at which products are sold to non-AEs cannot be used as CUP to determine Arm's Length Price (ALP) of the sales made to AEs. The Tribunal upheld TNMM adopted by the assessee for benchmarking the international transaction of export of finished goods and deleted the adjustment. The Id.

Authorized Representative for the assessee further submitted that in Assessment Year 2014-15 and 2015-16, the Tribunal in appeal of the assessee in ITA No.6081/Mum/2018 and 7844/Mum/2019 took similar view as was taken in Assessment Year 2013-14 (supra).

4.1 In respect of adjustment in relation to payment of royalty for availing technical know-how, the Id. Authorized Representative for the assessee submits that in Assessment Year 2012-13 and 2013-14 the TPO disallowed the payment of royalty on adhoc basis. The TPO thereafter, benchmarked the transaction of payment of royalty on the basis of certain agreements found during the search, and applied CUP. The matter travelled to the Tribunal . The Tribunal in ITA No.2590/Mum/2017 for Assessment Year 2012-13 deleted the adjustment holding : (a) The TPO was duty bound to determine the ALP by applying any of the prescribed method. The determination of ALP on an adhoc basis is unsustainable; (b) the CUP could not have been applied as the parties to the agreement( selected by the TPO for benchmarking the transaction) were located outside India. In other words, the Tribunal rejected CUP on account of geographical differences; (c) The TPO in 2010-11 and 2011-12 accepted payment of royalty to be at arm's length which was benchmarked using TNMM after aggregating it with other international transaction.

4.2 In Assessment Year 2014-15 and 2015-16 the TPO applied CUP to benchmark the transaction. The Tribunal in ITA No.6081/Mum/2018 for Assessment Year 2014-15 and ITA No.7844/Mum/2019 for Assessment Year 2015-16 followed the order for the preceding Assessment Years i.e. Assessment Year 2012-13 and 2013-14. The Id. Authorized Representative for the assessee submits that the TPO in the impugned assessment year has

applied CUP and corroborated it with TNMM for benchmarking the international transaction of payment of royalty. He further pointed that the TPO in the impugned assessment year has applied CUP and relied on the same agreement as was relevant to Assessment Year 2014-15 and Assessment Year 2015-16.

4.3 In relation to TP adjustment of payment of interest on ECB loans, the Id. Authorized Representative for the assessee submits that the Tribunal in assessee's appeal for Assessment Year 2013-14, 2014-15 and 2015-16 (supra) deleted the entire adjustment. In the impugned assessment year the TPO has adopted a similar approach, hence the facts being identical the adjustment made by TPO is liable to be deleted for parity of reasons.

5. Per contra, Ms. Samruddhi Dhananjay Hande representing the Department vehemently defended the order of TPO / impugned assessment order. The Id. Departmental Representative submits that the facts in the impugned assessment year with regard to the adjustment / payment of royalty are different. The TPO has not made any adhoc adjustment. The TPO has applied CUP. The TPO has given detailed reason in para -6 of the order for making the adjustment. The Id. Departmental Representative further placed reliance on the findings of the DRP in para-7.1 to 7.9 of the directions.

6. The Id. Authorized Representative for the assessee rebutting the submissions made on behalf of the Department submitted that there was shift in the approach of TPO in Assessment Year 2014-15. The TPO applied CUP. The Tribunal in Assessment Year 2014-15 and 2015-16 rejected CUP as the most appropriate method for benchmarking the transaction. The technical

assistance and know-how agreement is the same, hence, there is no distinction for benchmarking the transaction in assessment years 2014-15, 2015-16, and 2017-18. The Id. Authorized Representative for the assessee pointed that there was no order for Assessment Year 2016-17 as the assessment was time barred.

7. We have heard the submissions made by rival sides and have examined the orders of authorities below.

8. In ground No.1 of appeal, assessee has assailed TP adjustment in relation to export of finished products. The assessee has benchmarked the ALP of the transactions by applying TNMM. The contention of the assessee is that owing to geographical differences CUP cannot be applied. We find that the Co-ordinate Bench in assessee's own case in ITA No.7330/Mum/2017 for Assessment Year 2013-14 vide order dated 22/02/2019 decided similar controversy. The Bench after placing reliance on the decision of assessee's sister concern viz. Firmenich Aromatics Production (India) Pvt. Ltd. in ITA No.7145/Mum/2017 decided on 13/11/2018 held as under:-

*"7. We have considered rival submissions and perused material on record. As far as the primary facts are concerned, there is no dispute that out of the sales turnover of finished products sold to the AE amounting to ` 10,13,28,211, benchmarked by the assessee applying TNMM, the Transfer Pricing Officer has accepted a major part of the sales of finished products to the AEs to be at arm's length. He has only raised objections in respect of the turnover relating to specific finished products sold both to AEs and non-AEs. Upon verifying the price charged for such products to AEs and non-AEs, he has observed that the price charged to non-AEs is more than the price charged to AEs. Thus, he has made an upward adjustment of ` 73,04,480, to the price charged to AEs for sale of finished products. On a perusal of Annexure-1 to the order passed by the Transfer Pricing Officer, wherein, he has made comparative analysis of price charged to AEs and non-AEs for common products, it is noticed that he has short listed eight common products which were sold both to AEs and non-AEs. On a critical examination of the details mentioned in Annexure-1, it is noticed that except one non-AE in U.A.E., all other non-AEs are located in India. Whereas, the AEs are located outside India. Even, in respect of price charged to the solitary non-AE situated outside India, the Transfer Pricing Officer has compared it to the price charged for similar*

product to an AE in India. Therefore, in strict sense of the term, this particular sale of product Lemoncello to the AE in India cannot be termed as an international transaction. Be that as it may, from a perusal of Annexure-1, it becomes factually clear that sale of similar products made to both AEs and non-AEs are in different geographical locations. While the AEs are located in foreign countries the non-AEs are located in India. Therefore, the price charged to non-AEs in India cannot be used as a CUP for determining the arm's length price of the sales of finished products made to overseas AEs. One of the conditions of rule-10B(2) of the I.T. Rules, 1962, is, while considering the issue of comparability with an uncontrolled transaction, the conditions prevailing in the markets in which the respective parties to the transaction operate including the geographical location along with other factors have to be examined. Therefore, geographical location of the party to whom sales were made is a crucial factor to be weighed in while making comparability analysis. Undisputedly, in the facts of the present appeal, the Transfer Pricing Officer has compared the price charged to non-AEs located in India with the price charged to AEs in foreign countries. Therefore, the AEs and non-AEs being situated in different geographical locations, there may be various factors/reasons which could have influenced the price charged by the assessee to the AEs and non-AEs. Hence, the price charged to non-AEs cannot be considered to be a CUP to determine the arm's length price of the price charged for sale of finished products to the AEs.

8. xxxxxxxx

9. According to us, the price at which finished products were sold to AEs are not comparable with prices at which they have been sold to Non-AEs for the below mentioned reasons:- i). Differences in volume of both the transactions - It is general knowledge that volumes commands the prices. Purchase or sale of lower quantities are expensive, this is usually because of cost of transportation for deliveries and administration cost involved in handling smaller deliveries. The assessee is engaged in manufacturing of aromatic ingredients, natural and synthetic perfumery, flavoring and derivatives. Specific and majority of the products manufactured are sold to the group companies. However, in the circumstances where the group entities do not want a product then it is sold in the market at a price best negotiated by the assessee. In the table below, the assessee has provided the details of the quantitative differences in respect of Sales made to the AE and the Non-AE.

Sr.No. in TPO order	Material Description	Quantity in KG sold to Non AE's	Quantity in KG sold to AE's	Addition Value (INR)	AE sales times of Non AE sales
59	Neobutenone Alpha	25	32,343	490,680,563	1,294
56	Damascenone Total	25	19,734	490,873,437	789
45	Great Heart	28,080	303,840	95,340,394	11
55	Aldehyde Supra	245	38,528	96,920,377	157
57	Damascone Alpha	2,175	33,610	84,185,258	15
60	Norlimbanol	250	10,825	73,314,292	43
				1,331,314,321	

Thus, we find from the facts of the case that the quantities sold to Non-AEs is significantly lower as compared with sales made to AEs. In fact the difference in quantities is to the extent

*of 1,294 times to 11 times. It is noteworthy that the CUP analysis of common products sold to AE and Non-AE, one of the example taken from the facts of the case is that w.r.t. product “Damascenone Total”, the assessee had sold 25 kg to a Non-AE at the rate of INR 38,000 per kg and sold 1,260 kg and 16,299 kg at the rate of INR 9,800 and INR 9,664 respectively to its AE namely, Firmenich Aromatics (China) Company Limited and Firmenich SA. Similarly, the assessee has sold 50 kg of the same product at the rate of INR 36,408 to other AE. Thus, TPO erred in comparing small; quantities with large quantities, thereby ignoring the volume difference. We also noted that when the quantity sold to a Non-AE is higher than that sold to an AE, then the price charged from the AE is more than non-AE. The assessee also explained that this would show that the comparison done by the TPO is wholly erroneous.”*

Thereafter, the Tribunal while deciding assessee’s appeal for Assessment Year 2014-15 and 2015-16 deleted the adjustment by following the decision rendered in Assessment Year 2013-14 (supra). No contrary material has been placed before us to distinguish the findings of the Co-ordinate Bench in assessee’s own case on the identical issue in the preceding Assessment Years. Respectfully following the decision of the Co-ordinate Bench ground No.1 of the appeal is allowed.

9. In ground No.2 of appeal, the assessee has assailed TP adjustment in relation to payment of royalty for availing technical know-how. The assessee has paid royalty of Rs.30,35,02,137/- for the use of technical know-how to its AE Firmenich SA Switzerland @ 5% on local sale and 8% on export sale. Royalty has been paid by the assessee for the use of technical know-how of AE’s secret formula, process, manufacturing procedure, etc. The TPO following the order for Assessment Year 2016-17 applied CUP and determined the rate of royalty at 4%. The TPO for applying CUP adopted comparable royalty rate based on the royalty agreement of Edward H. Hall and Uplift Nutrition Inc. The objection of assessee against use of said comparable by the TPO are :

- (i) Both the parties to agreement are located outside India and hence, are not governed by India Rules and Regulations;
- (ii) The Licensor is an individual;
- (iii) The Intellectual Property (IP) covered in comparable agreement differs from the IP covered in assessee's Technical Licence Agreement. The comparable agreement is only for 'patent', whereas the agreement in the case of assessee is for granting licence to IP such as secret formulae, trade secrets, etc. along with patents and copy rights;
- (iv) The comparables are functionally different.

10. We find that in Assessment Year 2015-16 the assessee adopted similar method for benchmarking the payment of royalty for use of technical know-how. The TPO in Assessment Year 2014-15 and 2015-16 held that CUP is the most appropriate method for benchmarking the transaction. The Tribunal in Assessment Year 2014-15 and 2015-16 rejected TPO's approach of benchmarking the transaction. In the impugned assessment year the TPO has again applied CUP to make the upward adjustment in respect of the transaction of payment of royalty. Once the Tribunal has held that CUP is not the most appropriate method for benchmarking the transaction, we see no reason to deviate from such a view where there has been no distinguishing feature in the international transaction of payment of royalty for use of know-how in the impugned assessment year. It is not in dispute that the royalty is paid to AE in accordance with the same Technical Assistance and Know-how Agreement as was in the preceding assessment years. Thus, in the light of the

decision of Co-ordinate Bench in assessee's own case for Assessment Year 2015-16 (supra), the ground No.2 of appeal is allowed.

11. In ground No.3 of appeal, the assessee has assailed TP adjustment in relation to payment of interest on ECB. The assessee has availed ECB loan from its AE, Firmenich Trading Corporation. The first loan agreement was entered on 10/06/2012 for USD 4.5 million and the second loan agreement was entered on 24/06/2016 for INR 1150 million. During financial year 2016-17, USD loan of Rs.4.5 million was converted into INR loan after taking approval from RBI. The assessee paid total interest of Rs.10,03,02,586/- during the period relevant to the assessment year under appeal. The assessee applied CUP to benchmark the transaction and used WALR of 10.16%. The TPO followed the order of preceding Assessment Years determining the arm's length of interest by applying LIBOR + 143.62 basis point. The TPO held that the assessee has paid excess interest and thus, made adjustment of Rs.11,41,870/-.

12. We find that in Assessment Year 2015-16 similar adjustment was made by the TPO in respect of payment of interest on ECB Loan. The Tribunal deleted the adjustment by observing as under:

*"9. TP Adjustment against payment of interest on ECB Loan The assessee obtained loan in the nature of External Commercial borrowings (ECB) from its AEs for the purpose of setting up new premises for corporate office and purchasing of the capital assets. The ECB Loan was taken on 10th June 2012 vide RBI approval at interest rate of 6 months USD LIBOR rate + 350 basis points. The assessee benchmarked the same relying upon RBI circular No. 12/2012-13 which allow ECB loan on automatic route at those rates. However, Ld. TPO computed benchmarking rate of LIBOR+143.62 basis points as per the Bloomberg database. Therefore, the differential of 206.38 basis points (350 bps – 143.62 bps) was considered as excess payment and TP adjustment of Rs.58.05 Lacs was proposed. This adjustment, upon confirmation by Ld. DRP, is in further challenge before us.*

*Our findings and Adjudication*

*10. We find that this issue is covered by Tribunal's order for AY 2013- 14 (para-24) wherein it has been held that ALP of such transaction could be more accurately determined by following rate of interest fixed by RBI in respect of ECB loan. This decision has subsequently been followed in AY 2014-15. The assessee has followed the same RBI rate to benchmark the transactions in this year. Therefore, respectfully following earlier stand of Tribunal, we delete the impugned adjustment. The grounds thus raised stand allowed."*

13. The Revenue has not brought on record any material to distinguish the findings of Co-ordinate Bench. We see no reason to take a different view, therefore, the adjustment made by the TPO / Assessing Officer in respect of payment interest on ECB loan is deleted and ground No.3 of the appeal is allowed.

14. In ground No.4 of appeal, the assessee has assailed penalty proceedings initiated u/s. 270A of the Act. Challenge to penalty proceedings at this stage is premature, hence, ground No.4 of the appeal is dismissed.

15. In ground No.5 of appeal, the assessee has challenged levy of interest u/s.234A,234 B,234C and 234D of the Act. Charging of interest under the aforesaid sections is mandatory and consequential, hence, we see no merit in ground No.5 of the appeal, hence, dismissed.

16. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on Friday the 10<sup>th</sup> day of March , 2023.

Sd/-

(GAGAN GOYAL)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 10/03/2023

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

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2. प्रतिवादी/ The Respondent.
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4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
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BY ORDER,

(Dy./Asstt. Registrar), ITAT, Mumbai