

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH : "I" NEW DELHI]**

**BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER
AND**

SH. YOGESH KUMAR US, JUDICIAL MEMBER

I.T.A. No. 6944/DEL/2019 (A.Y 2013-14)

<p>M/s. Mitsui Prime Advanced Composites India Pvt. Limited, Unit No. 106B, First Floor, Solitaire Plaza, Near Guru Dronacharya Metro Station, M. G. Road, Gurgaon, [Haryana] – 122 002. PAN No. AAFCM1458C (APPELLANT)</p>	Vs.	<p>DCIT, Circle : 16 (2) New Delhi. (RESPONDENT)</p>
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Appellant by	Shri Deepender Kumar, CA Shri Hariom Jindal, C. A. & Ms. Ritika Aggarwal, AR
Respondent by	Shri Rajesh Kumar, [CIT] - D. R.;

Date of Hearing	16.03.2023
Date of Pronouncement	06.04.2023

ORDER

PER YOGESH KUMAR US, JM

The present appeal has been preferred by the assessee for assessment year 2013-14 aggrieved by the final assessment order passed u/s

143(3)/144C(3) read with Section 92CA(3) of the Income Tax Act ("Act" for short) dated 24/10/2017 by the DCIT, Circle 16(2), New Delhi.

2. The assessee has raised the following substantive grounds of appeal:-

A. GENERAL GROUNDS

1. *Order passed by Ld. (IT (A) dated 28.06.2019 is a vitiated order as Ld. (IT (A) erred both on facts and in law in confirming additions made by the Ld. AO/Ld. Transfer Pricing Officer ("TPO") to the Appellant's income by issuing an order without appreciation of facts and law.*
2. *That Ld. (IT (A) erred in confirming the income of the Appellant at Rs.15,24,58,920/- as against the returned income/loss declared by the Appellant at Rs. (1,85,56,288) by sustaining an addition of INR 17,10,15,208/-, being the transfer pricing adjustment, by holding that Mitsui Prime's international transactions does not satisfy the arm's length principle envisaged under the Act.*

B. TRANSFER PRICING GROUNDS:

3. *That Ld. (IT(A) has erred in confirming the addition made by Ld. TPO/AO to the income of the Appellant by INR 17,10,15,208/- stating that suo-mota price penetration adjustment carried out by the Appellant itself in the TP documentation has not been offered to tax and in doing so Ld. CIT(A) has erred on facts and in law by:*

- 3.1. *Not following the provisions of section 92C(4) of the Income Tax Act, 1961 ('the Act') while carrying out the transfer pricing assessment.*
- 3.2. *Not determining the arm's length price of the international transactions in accordance with the provisions of section 92C(1) and section 92C(2) of the Act and arbitrarily disregarding the economic adjustment envisaged under Rule 10B(e)(iii).*
- 3.3. *Disregarding the arm's length price as determined by the Appellant in the TP documentation in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules').*
- 3.4. *Disregarding the fact that the price penetration adjustment has been adopted in relation to sale to third parties in India and has no nexus with the purchase from related parties.*
- 3.5. *Holding that the tax ought to have been paid on the price penetration adjustment.*
- 3.6. *Disregarding that the comparable companies are at a different stage of their business cycle and therefore, for a correct comparability suitable price penetration adjustment has been made.*
4. *Without prejudice to above grounds, Ld. CIT (A) has grossly erred both on facts and in law for:*
 - 4.1. *Confusing the comparable adjustments made by Appellant while computing PLI with suo-moto adjustment to control transactions.*

4.2. *Disregarding the fact that where comparability adjustment is not allowed even then impact of comparability adjustment have to be on ALP not on income of the Appellant.*

4.3. *Disregarding the fact that where comparability adjustment is not allowed even then the ALP determined based on comparables is within the range of control transaction thus requiring no adjustment.*

4.4. *Disregarding the fact that it is the right of taxpayer to ask for the comparability adjustments when required and when the ALP is within limit then there is no need to ask comparability adjustments, thus putting endues emphasis on earlier years where there was no claim of comparability adjustments.*

4.5. *Ignoring the applicability of necessary economic adjustments (like working capital adjustment, capacity utilization adjustment and other economic adjustment but other than price penetration adjustment) in the computation of the arm's length price.*

4.6. *Disregarding the corroborative gross margin analysis presented by the Appellant.*

4.7. *Disregarding the corroborative CUP analysis for purchase of raw material from related parties.*

4.8. *Disregarding the fact that foreign exchange gain or loss should be taken as non-operating item while calculating the margin of the Appellant as well as the comparable companies.*

C OTHER GROUNDS:

5. *Ld. AO/TPO has erred both the fact and in law in initiating penalty proceedings under section 271(1)(c) of the Act.*

The above grounds of appeal are mutually exclusive and without prejudice to each other.”

3. Brief facts of the case are that, during the year under consideration the assessee had entered into following international transaction with it's A.E:-

S.No.	Description of the transactions	Amount (in INR)	Method	PLI
1	Import of raw materials and finished goods	249,487,767	Transactional Net Margin Method ('TNMM')	Operating Profit ("OP") Operating Revenue ("OR")
2	Availing of engineering support services	2,064,967		
3	Availing of technical assistance	1,071,943		
4	Payment of guarantee fee	769,421		
5	Interest payment	122,834		
6	Reimbursement of salary to A.Es	36,346,371	Other Method ('OM')	Not Applicable
7	Reimbursement of expenses to AEs	1,792,682		
8	Reimbursement of expenses by AEs	340,817		
9	Issue of share capital	36,000,000		

In respect of the above transactions, the principal activity of the assessee was manufacturing of polypropylene compound resins. The international transactions mentioned in S. No 1 to 4 listed above have been analysed by using a combined transaction approach and by comparing the net margin earned by the assessee from its manufacturing business with margins earned by other comparable companies in the same industry. Hence, it was concluded that the international transactions with the AE's is at arm's length.

4. The assessee company followed a price penetration policy wherein the produces were sold to unrelated parties at a reduced price. Accordingly, price penetration adjustment of Rs. 17,10,15,208/- was made to the margin of the assessee to make it a comfortable to the market price. The assessee filed its return declaring loss of Rs. 1,85,56,288/- and refund of Rs. 28,50,540/- arising on account of tax deducted at source. The case of the assessee was selected for scrutiny proceedings u/s 143(3) of the Act. The A.O. by making reference u/s 92CA(1) of the Act to Transfer Pricing Officer for determining the Arm's Length nature of the assessee's international transaction. The TPO made adjustment equivalent to the amount of price penetration adjustment amounting to Rs. 17,10,15,208/- by disregarding the contention of the assessee. In-view of the order passed by the Ld. TPO, the Ld. AO subsequently, vide draft assessment order dated 15th December, 2016, informed assessee that an addition of INR 17,10,15,208 was to be made to assessee's total income. However, since the assessee did not exercise its option of filing its objections before the DRP the AO proceeded to finalise assessment order upholding the adjustment made by the Ld. TPO. The final assessment order dated January 24, 2017 was passed under Section 143(3)/144C(3) r.w.s 92CA(3) of the Act at an assessed income of INR 15,24,58,920/- [addition on account of Transfer pricing adjustment).

5. Aggrieved by the final assessment order dated 24/01/2017 the assessee preferred an appeal before the CIT(A). The Ld.CIT(A) vide order dated

28/06/2019, confirmed the income of the assessee at Rs. 15,24,58,920/- by sustaining an addition of Rs. 17,10,15,208/- being transfer pricing adjustment, by holding that Mitsui Prime's International Transaction does not satisfy the Arms Length Principle envisaged.

6. Aggrieved by the order of the CIT(A), the assessee preferred the present appeal on the grounds mentioned above. The Ground No. 1 & 2 are general in nature which requires no adjudication. The Ground No. 3 is regarding the addition made by the TPO/A.O. to the income of the assessee of Rs. 17,10,15,208/- on the ground that 'Price Penetration Adjustment' carried out by the assessee itself in the TP accommodation has not been effected to tax and by doing so CIT(A) has erred in fact and law.

7. At the outset the Ld. Counsel for the assessee contended that there is no dispute regarding the method and the margin adopted for bench marking the international transaction the only dispute is of ad-hoc adjustment made by the TPO. Further submitted that, the TPO had accepted the method and margin. However, treated "price penetration adjustment" claimed by the assessee as income of the assessee. Further submitted that the margins of the assessee are at Arm's Length even without price penetration adjustment. On the other hand, the Ld. DR submitted that the A.O/TPO have applied their mind and passed reasoning order and by relying on the orders of the Lower Authorities. The Ld. Dr submitted that the Ground No. 3 is deserves to be dismissed.

8. We have heard the parties and perused the material available on record. In the present case there is no dispute regarding the methods and margin adopted for bench marking the international transactions, the only dispute is of ad-hoc adjustment made by the TPO. The TPO had accepted the methods and margin however, treated price penetration adjustment claimed by the assessee as income of the assessee. The assessee has provided a table to demonstrating the outcome of the bench marking with and without adjustment made by the assessee.

S N	Particulars		Mitsui Prime	Comparabl e	Comments
1.	Without Ad-hoc Adjustment i.e. Price Penetration Adjustment	Original Margin	.83%	3.27%	Falls within the (+/-) 3% tolerance band as prescribed under the second proviso to section 92C (2) of the Act [Also Refer Annexure A to the Synopsis at Page No 5-
		Updated Margin (submitted during TP proceedings before Ld. TPO)	.83%	(-) .64%	At Arm's Length
2.	With Ad-hoc Adjustment i.e. Price Penetration Adjustment	Original Margin	10.43%	3.27%	At Arm's Length
		Updated Margin (submitted during TP proceedings before Ld. TPO)	10.43%	(-) .64%	At Arm's Length

9. Further, the ad-hoc addition made by the TPO by treating price penetration adjustment claimed by the assessee as income of the assessee. In the following judicial pronouncements it has been held that any ad-hoc

determination of Arms Length Price by the TPO under Section 92 de-hors Section 92C(1) of the Act, hence, will be unsustainable in law.

- *“Pr. CIT v Sun Pharmaceuticals Industries Ltd. [2019] 109 taxmann.com 54 (Gujrat HC). In this case, SLP is also dismissed on the ground of delay as well as on merits. Pr. CIT v Sun Pharmaceuticals Industries Ltd. [2019] 109 taxmann.com 55 (SC)*
- *CIT v SI Group-India Ltd. [2019] 107 taxmann.com 314 (Bombay HC)*
- *CIT v Lever India Exports Limited [2017] 78 taxmann.com 88 : 246 Taxmann 133 (Bom. HC)*
- *CIT v Johnson & Johnson Ltd. [2017] 80 taxmann.com 337 (Bom. HC)*
- *Mccan Ericsson *India) (P) Ltd. v Addl. CIT [2012] 24taxmann.com 21 (Delhi HC)”*

10. The Ld. DR neither disputed the above table submitted by the assessee demonstrating outcome of the bench marking with or without adjustment made by the assessee nor brought any material against the assessee to the notice of the Bench. Thus, it is clear that that margin of the assessee are at “Arm’s Length” without the price penetration adjustment and ad-hoc adjustment made by the TPO on account of price penetration is without jurisdiction of the TPO as held in the above case laws. In view of the above discussion, we allow the Ground No. 3 and its sub Grounds and delete the addition made by the A.O. which has been upheld by the CIT(A).

11. In view of allowing the Ground No. 3, the other grounds of the assessee render in-fructuous. Accordingly, Ground No. 4 and its sub ground and Ground No. 5 are dismissed as in-fructuous.

12. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the Open Court on 06th April, 2023.

Sd/-
(Dr.B. R. R. KUMAR)
ACCOUNTANT MEMBER
Dated : 06/04/2023
MEHTA/R.N., Sr. PS

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI