IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD

Before Shri Rama Kanta Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member

ITA-TP No. 486/Hyd/2022		
Assessment Year: 2018-19		
Auronext Pharma Private Limited, Hyderabad PAN : AAHCA7988H	Vs.	The Deputy Commissioner of Income Tax, Circle-1(2), Hyderabad
(Appellant)		(Respondent)
Assessee by:	Shri B.G.Reddy,	
Revenue by:	Shri Rajendra Kumar, CIT-DR	
Date of hearing:	29.05.2023	
Date of pronouncement:	30.05.2023	

O R D E R

Per Shri Laliet Kumar, JM.

This appeal filed by the assessee is directed against the order dated 31.07.2022 of the Assessing Officer, which in turn had followed the directions issued by the Dispute Resolution Panel (DRP), dt. 29.06.2022 for the assessment year 2018-19 on the following grounds:

2. *"Transfer Pricing (TP) Grounds:*

Purchase and Sale Transactions:

1) The Honourable DRP erred in law and on facts and circumstances of the case in endorsing the rejection of the CUP method by the Learned TPO and adopting the TNMM method resulting in an adjustment of Rs. 19,84,20,000/-

2) i) The Honourable DRP erred in law in upholding the Learned TPO's action of rejecting external comparable

transactions under the CUP method merely because of the similarity in names of the parties involved in the transactions and holding them as transactions between related parties and hence not comparable.

ii) Without prejudice to the above the Honourable DRP/ the Learned TPO ought to have appreciated that the information as regards the comparable transactions was obtained from an external database - "Seaair" over which the assessee has no control is not a privy to the information in the external database and hence there is no way for the assessee to know whether the parties involved are related parties.

3) Without prejudice to the Ground No 2 above, the Honourable DRP erred in law and on facts and circumstances of the case by not considering the other comparable transactions under the CUP Method where the names of the parties involved in the external transactions are not similar.

4) Without prejudice to the above, under the TNMM Method, the Learned DRP/TPO ought to have considered the capacity utilization adjustment considering that the assessee was still in the initial stages of its operations and without appreciating the business dynamics of the industry in which the assessee operates.

Interest on Receivables from Associated Enterprises:

5) The Learned DRP/AO/TPO erred in law and on facts and circumstances of the case in treating Interest on Receivables as a separate International Transactions in terms of Sec 92B of the Income Tax Act, 1961.

6) The Learned TPO/AO, in pursuance of the directions of the DRP, erred in making an addition of Rs. 21,58,372/- in respect of notional interest on delayed receipt of trade receivables from Associated Enterprises.

7) The Learned DRP/AO/TPO ought to have appreciated that trade receivables arise in the normal course of business and are not to be treated as unsecured loans for the levy of interest.

8) The Learned DRP/AO/TPO ought to have appreciated that the Assessee has not received any amount in the form of interest on delayed receipt of receivables from either Associated enterprises or third parties including

indigenous parties and that not charging any interest from AEs on the trade receivables is consistent with the Arm's length principle.

9) The Learned DRP/AO/TPO erred in not appreciating the fact that all the trade receivables are received within the time permissible as per the RBI norms or, in a few rare cases, within the extended time as permitted by RBI."

3. The ld.AR at the outset had submitted that the assessee is not pressing Ground No. 5 to 9 which are pertaining to interest on receivables from the AE. In respect thereof, the ld.AR had made the endorsement on the appeal, "as not pressed". In the light of the submissions of the ld.AR, the Grounds No. 5 to 9 of the assessee's appeal are dismissed as not pressed, to which ld.DR had no objection.

4. The Ground No. 10 of the assessee's appeal provides as under:

"*10) Without prejudice to the above grounds, the Learned AO erred on facts of the case in giving effect to the brought-forward losses only to the extent of Rs. 2,68,03,509/- whereas the brought-forward losses as per the Returns of income filed by the assessee are Rs. 91,88,80,212/-."*

4.1. In this regard, the ld.AR had submitted that the brought forward losses claimed by the assessee in the return of income were Rs. 91,88,80,212/- whereas the Assessing Officer while passing the final assessment order, had merely allowed the set-off of brought forward losses to the extent of Rs. 2,68,03,509/-. In this regard, the ld.AR submitted that the assessee had filed the rectification application before the Assessing Officer and the result is awaited. He had submitted

that the appropriate direction be issued for earlier disposal of the rectification application.

4.2. Per contra, the ld.DR has no objection for issuing the appropriate direction in this regard.

4.3. We have heard the rival contentions of the parties and perused the material available on record. Admittedly the assessee has filed the rectification application before the assessing officer so that the brought forward losses be setoff, as claimed in the return of income. As the issue is pending for adjudication before the Assessing Officer, it will be appropriate for the Assessing Officer to pass the order at the earliest. In the light of the above the issue is allowed for statistical purposes with the direction to the assessing officer to examine the record and pass appropriate order of the rectification application filed by the assessee.

5. The major grounds raised by the assessee are Grounds No. 1 to 4, reproduced herein above. In this regard, the ld.AR submitted that during the assessment year under consideration, the assessee had entered into the international transaction with its AE as mentioned at page 2 of the order passed u/s. 92CA(3) of the Act. As per the audited statement of accounts, the financials of the assessee were found to be OP/OR (2.84%) and OP/OC (2.91%). During the period under consideration, the assessee has sold the finished goods amounting to Rs. 107,76,44,055/- to its AE and applied

external Comparable Un-Controlled Price (CUP) method to determine the ALP of the transactions.

6. The learned TPO had examined the TP study of the assessee, however, the said TP study of the assessee was rejected by the TPO. The findings of the TPO are given in the paragraph No. 6 to the following effect:

> *"6.0. The TPO's observation on the economic analysis done by the assessee:*
>
> *From the information furnished, it is seen that the taxpayer has not sold the products to any other 3rd party in those respective countries. Therefore, the taxpayer has ruled out the internal CUP mechanism and relied on external CUP method. For this, the taxpayer has furnished data wherein it has compared the value of the same product exported by a 3rd party to its AEs or otherwise and held that the transaction entered into by the taxpayer with its AE is within arms' length. On examination, it is noticed that the information furnished by the taxpayer pertains mostly to the transactions between other taxpayers with their AEs. Since the comparable transactions were with related parties those transactions cannot be considered under CUP method for the purpose of benchmarking the taxpayers transactions. As per Rule 10(8) the price charged in a comparable uncontrolled transactions after adjusting to account for differences if any between the international transaction and the comparable uncontrolled transaction are between the enterprises entering into such transactions can only be considered as Arm's Length price. In the instant case the taxpayer adopted the price charged in the transaction entered into between related parties as external CUP which has no sanctity as per Rule 10(8). Also considering the volatile nature of market, unless comparisons are done on any particular date, there is a likely chance that the price may vary in the international market. For adopting CUP as MAM, strict comparability is necessary with regard to the product - which includes date as well. Also, CUP method is appropriate when the price of any product under controlled environment is compared with the price of the same product under uncontrolled environment keeping all other things constant. In the present case, the taxpayer has not done so. Therefore, application and methodology adopted by the taxpayer in*

adopting external CUP for benchmarking its transactions with its AEs is incorrect and therefore liable for *rejection.*

In view of the above and also as per section 92C(3)(c), it is relevant to hold that the data used in computation of the arm's length price is not reliable or correct. Based on the above grounds, the TP document is proposed to be rejected and the TPO proceeds to determine arm's length price. Since strict comparison under external CUP method is proven to be a failure as discussed in the preceding paragraphs, the TPO proceed to determine the ALP in relation to this transaction on the basis of material or information or documents available with this office by invoking S. 92C(3) of the Income Tax Act, 1961. Hence, the TPO proposes TNMM as MAM and conducted an independent search for com parables considering the functions of the assessee, the assets employed and the risks taken and the results of the search is given in the following paras:"

7. After analysing the TP study, the learned TPO had applied the TNMM method as most appropriate method to determine the ALP. After considering the objections of the assessee, the TPO had recommended for adjustment u/s. 92CA for Rs. 23,93,47,000/- as TP adjustment and has added to the income of the assessee.

8. The assessee was aggrieved by the order passed by the TPO and draft assessment order and accordingly approached the DRP. The learned DRP, had rejected the Ground No. 2 of the assessee's appeal and held that the approach of the TPO/AO for using the TNMM as most appropriate method cannot be faulted with. After considering the submission of the assessee, the DRP had issued the direction to the Assessing Officer in respect of the TP adjustment as well as for the outstanding trade receivables.

9. The assessee, had challenged the order of the DRP on the grounds stated herein above.

10. It is the submission of the assessee before us that the CUP method applied by the assessee for benchmarking the transactions was the Most Appropriate Method (MAM). It was submitted by the assessee that the reasoning given by the TPO in the order, is unsustainable in the eyes of law, further, it was submitted that the DRP in the finding recorded in paragraph 2.2.1 is contrary to record. It was submitted that the assessee has provided the data for unrelated third party transaction, who were into the similar kind of sales of formulations/drugs. However, the DRP had wrongly mentioned that the assessee had not furnished such information to it. The paragraph 2.2.1 of the DRP's order mentioned as under:

> *"2.2.1 Having considered the submissions, the taxpayer has used external CUP method in order to determine the arm's length price of its international transaction involving sale of finished goods to the AE's. The assessee has used the comparable sale price of third-party exports for the respective month in respect of the same product which the assessee exported to its AE. TPO on examination found that the data used by the assessee mostly pertain to related party transactions. Since for comparability analysis, data of controlled transactions are required as per rule 10B, the method used by the assessee is found to be incorrect. Since the methodology adopted by the taxpayer is unreliable, the TPO has rightly rejected the TP study furnished by the assessee. We have also perused the TP study of the assessee and we find that the CUP analysis is replete with related party transactions. Majority of the CUP data pertain to related party transaction of Sun Pharma, Ranbaxy, Hospira Healthcare Ltd., Venus Remedies etc. The assessee has stated in its objections that "unrelated third party transactions data is readily available". <u>However, the assessee has not furnished such a study before DRP after removing all the related party transactions</u>. (Emphasis supplied by us)*

2.2.2 Objection of the assessee is therefore rejected."

11. On the last date of hearing, we have directed the ld.DR to file the comments on the above said issue. The ld.DR, had filed the submissions, which are to the following effect:

> *"Sub: Comments of Transfer Pricing Officer, on the submissions made on behalf of the assessee in case of M/s Auronext Pharma Private Limited (PAN- AAHCA7988H) for the AY 2018-19*
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> *Ref: Mail from the office of CIT(DR-1), ITAT A Bench Hyderabad, dated 20-04-23*
>
> *****
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> *Kind reference is invited to the above subject.*
>
> *2.0 Vide the letter dated 16-03-2023 from the Office of the CIT (DR), ITAT the comments of TPO were asked on the submissions made before Hon'ble bench in case of MIs Auronext Pharma Pvt. Ltd. For the AY 2018-19. The directed report was submitted on 03-04-23 and subsequently another communication was received from the office of the CIT (DR), in which the TPO was again asked to provide his comments on the submissions made on behalf of the assessee. Accordingly the comments of TPO on the issues raised in the submissions are as discussed in subsequent paragraphs.*
>
> *3.0 It has been argued on behalf of the assessee that the TPO arrived at the conclusion that the comparable transaction are with Associated Enterprises only by making a comparison of the names of the comparable companies without carrying out a detailed inquiry. It was further submitted that the TPO has failed to appreciate the fact that the assessee is not privy to the information of the relationship that the claimed comparable might have with their customers. It was argued that the assessee has obtained information from an external database source and the relevant information was not available on the same. The assessee also argued that without prejudice to the above stand of the assessee, even if the comparable parties are Associated Enterprises, the relationship between the parties does not by itself necessarily make the transaction incomparable and that such entities are two separate and*

independent legal entities which operate on commercial terms and conditions between them.

4.0 In this respect it is being pointed out that the essence of Transfer Pricing proceedings is determination of the Arm's Length Price (which may be determined by any of the methods prescribed under Section 92 of the Income Tax Act including Comparable Uncontrolled Price method and more than one ALPs may result from the bench-markinq process in which case either mean or range concept is applied). In this respect it is important to point out that by its very definition the Arm's Length Price is a price charged or paid between unrelated parties or uncontrolled transaction and relevant extract from clause (ii) of the Section 92F of the Income Tax Act is reproduced below-

> *"(il) "arm's length price" means a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions;"*

5.0 It is clear from the above excerpt that the prices charged in transactions between parties which are Associated Enterprises can not be taken as Arm's Length Price. Further, specifically in respect of the Comparable Uncontrolled Transaction method, it is being pointed out that the use of the word 'uncontrolled' in the very name of the method indicates that the purported transaction must be uncontrolled or between independent parties. Further, relevant extract in para 2.14 of the OECD Transfer Pricing Guidelines, July 2017 is reproduced below-

> *"The CUP method compares the prices charged for property or services transferred in a controlled transaction to the prices charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances."*

6.0 Further para 2.16 of the same part mentions that it may be difficult to find a transaction between independent enterprises that is similar enough to a controlled transaction such that no differences have a material effect on the price and that even minor differences could materially affect the price, thereby pointing towards the practical difficulties in adoption of CUP. The important point to note is that the guidelines clearly say that the uncontrolled transaction has to be between independent entities. Further para 3.24 of the guidelines.

clearly lays down that the comparable uncontrolled transaction is a transaction between two independent parties that is comparable to the controlled transaction under examination. Thus the comparable transaction has to be uncontrolled i.e. between two independent parties.

7.0 In this respect, attention is being drawn to the judgment of In this respect the attention is further being drawn to the order of Hon'ble Hyderabad bench of ITAT in case of Corteva Agriscience Services India Private Limited vs ACIT, in ITA No. 2185 of 2017. Hon'ble bench in para 4 of the order noted as below-

> *"Faced with this situation, we quote Tecnimont Icb Pvt Ltd., Mumbai Vs. ACIT (2012) 138 ITO 23 (Mumbai) and Sabic Innovative Plastic India Pvt Ltd Vs. DCIT (2013) 59 SOT 138 (Ahmedabad) holding that an associate enterprise itself would not to be taken as a comparable since lacking the independent nature of an uncontrolled transaction in forming hallmark of Chapter X of the Act. We thus delete the impugned arms length price adjustment on receivables for this precise reason alone."*

8.0 Hence Hon'ble jurisdictional bench has held that an Associated Enterprise can not be taken as a comparable. In this respect reliance is further being placed on the judgment of Hon'ble Mumbai Bench of ITAT in case of Technimont ICB (P.) Ltd vs, Addl. CIT in ITA No. 4608 & 5085 .of 2010 of 2010 with CO No 78 of 2011 (reported in [2012] taxmann.com 28 (Mumbai)), and the relevant part, from para 10 of the order is reproduced below-

> *"As Rule 10 A clearly states,' the expression 'uncontrolled transaction', for the purpose of Rule 10 B to 10 E, means "a transaction between enterprises other than associated enterprises, whether resident or non-resident", it is thus free from doubt that so far as transactions between the associated enterprises are concerned, the same are outside the ambit of 'uncontrolled transactions'. The transactions between ICBC and JTSC are clearly such transactions, and these transactions constitute as much as 59% of total revenues. Rule 10B(1){e), which sets out the mechanism to compute the arm's length price under the TNMM, provides that the profits earned by the enterprise taken as comparable, from comparable uncontrolled transactions, is to be taken into account. In other' words, profits from controlled transactions, which in turn refers to intra*

associated enterprise transactions, cannot be taken into account in computing arm's length price under the TNMM. However, when we take Icac as a comparable in the present case, this is precisely what we end up doing -taking into account the profits earned by the Icac from its associated enterprise i.e. ITS Contracting Co. In our humble understanding, this is not permissible under the scheme of the Indian transfer pricing legislation. When the profits derived by an enterprises arise out 0" significantly or predominantly, intra AE transactions, the same cannot be taken into account for computation of arm's length price under the transactional net margin methods."

9.0 While the above observation of Hon'ble bench has been made in a case where TNMM was used, the definition of the 'uncontrolled transaction' as provided under Rule 10A is applicable on all methods provided in Rule 10B (including Comparable Uncontrolled Price) and the same has been pointed out by Hon'ble bench also.

10.0 Attentions is further being invited to the judgment of Hon'ble Ahmadabad bench of ITAT in case of Gemstone Glass Pvt ltd vs JCIT in ITA No. 2858 of 2012. The relevant part of the order from para 6 is reproduced below-

"We have noted that so far as assessment year 2007-08 is concerned, the TPO has applied internal CUP method to ascertain the arm's length price. It is only elementary that comparable uncontrolled price at which the entity has sold the same product to an independent enterprises is a sine qua non for application of internal CUP. It is so for the reason that Rule 10 8(1){a) provides that under comparable uncontrolled price method, as a first step, the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified. Rule 10A(a), on the other hand, defines 'uncontrolled transaction' "e transaction between enterprises other than associated enterprises, whether resident or non-resident". Therefore, the first essential input for application of CUP method is the price charged or paid for similar product in a transaction between two enterprises, whether resident or non-resident, which are not associated enterprises. In the present case, the comparable price adopted for determining the arm's length price is the price at which the assessee has sold the same product to other group entities, which are thus 'associated enterprises', residents in India. It has been defended by the DRP on the ground that

there cannot be any tax avoidance motive in selling the products at an artificial price. In our considered view, however, this aspect of the matter is irrelevant inasmuch as the very definition of 'uncontrolled transaction' under rule 10A excludes the transactions with associated enterprises "whether resident or non-resident". Once it is not in dispute that "uncontrolled transaction" is a statutorily defined term, there is no room for discarding or questioning this definition on the basis of superior logic in an alternative definition. Such heroics are not called for in the process of judicial interpretation. Learned DRP ought to have followed the law as it exists rather than pondering over what the law ought to be, as is inherent in their justification for inclusion of uncontrolled transactions with associated enterprises resident in India. We disapprove the fine of reasoning adopted by the authorities below. In our considered view, whether the transactions are with associated enterprises resident in India or with associated enterprises resident outside India, the prices at which such transactions are entered into with such enterprises cannot be taken as "comparable uncontrolled price" for the purpose of determining the arm's length price."

11.0 Thus it is obvious that the price claimed to be the Arm's Length Price must be the one that has been charged in a comparable transaction between independent or unrelated entities. Hence, it has to be ascertained that the price proposed to be applied as Arm's Length Price is a price charged in respect of a transaction between independent entities and in a given case if this fact can not be ascertained, then the comparability can not be ascertained. Accordingly, it is humbly being prayed before Hon'ble bench that the argument that even if the parties to a transaction are Associated Enterprises, such a transaction may still be considered for comparability; may be rejected.

12.0 It has also been argued on behalf of the assessee that the TPO has failed to appreciate the fact that the relevant information to decide the relation between the claimed comparable and their customers is not available with the assessee and in light of the same the assessee can not decide whether the involved parties are Associated Enterprises or not. In this respect it is being pointed out that the Comparability Analysis and establishment of adequately acceptable comparability between the tested transaction and transaction claimed to be comparable are positive acts of having to prove existence of something. In these cases the comparability can not be assumed if the 'non-comparability' can not be proven. In

other words it has to be established that the claimed uncontrolled transaction is adequately comparable under all the parameters mandated under the Act. In this respect it is also being submitted that since proceedings under the Income Tax Act are akin to the proceedings of a civil court, in civil proceedings the onus to prove the existence of a disputed fact is on the party making the claim of its existence. Hon'ble Apex Court in case of Union of India and Ibrahim Uddin & Anr in Civil Appeal Number 1374 of 2008, observed that court can not lose sight of the fact that burden of proof is on the party which makes a factual averment. Accordingly, if the assessee is making the claim of comparability, then assessee has to prove with relevant evidences (i.e. the Annual Reports) that the involved parties satisfy all the criteria of comparability 'ac down under the Income Tax Act. The admission on behalf of the assessee that it is not in possession of the relevant information shows that the comparability can not be established in these case and accordingly the concerned prices can not be accepted as Arm's Length Prices.

13. It has also been argued on behalf of the assessee that the TPO rejected comparable simply on the basis of the similarity of names is incorrect and in this respect it is being pointed out that as has been admitted on behalf of the assessee also that the information to ascertain comparability in cases of the comparable selected on behalf of the assessee is not available in public domain (in fact in many cases even the names of the comparable are not clear as incomplete names or short forms have been used). Accordingly the facts essential for ascertaining comparability are not available, however in respect of certain comparable e.g. Hospira Healthcare India Private Limited, the SEC filings of its customer for the transaction under examination (named Hospira Inc.) were available on USA SEC website. On perusal of the Form 10-K, which is equivalent of an Annual Report, it was noted that the entity Aspira Healthcare India Private Limited has been declared to be a wholly owned subsidiary. Since Aspira India Healthcare Private Limited is one of the comparable suggested om behalf of the assessee and it sold its products to Hospira Inc. i.e. its Holding Company, the argument that TPO rejected comparables on the basis of similarity of names is not correct and it is prayed that the same may be rejected.

14.0 It has also been argued on behalf of the assessee that in cases of some of the comparables selected on behalf of the assessee, the names are not similar and these comparables may be adopted for comparison. In this respect it is being

submitted that TPO has pointed out in his order that the CUP method involves a very strict comparability and the same has not been established by the assessee. In this respect the attention is being drawn to Para 2.16 of the OECD Transfer Pricing Guidelines, June 2017, wherein it has been mentioned that under CUP even the minor differences between the properties transferred in the controlled and uncontrolled transactions could materially affect the prices. Further para 2.20 of the same part mentions that under CUP the economically relevant characteristics of the controlled and uncontrolled transaction must be comparable and these characteristics include the contractual terms of transaction, such as volume traded, period of arrangements, the timing and terms of delivery, transportation, insurance and foreign currency terms. The guidelines further point out that for some commodities certain economically relevant characteristics (e.g. prompt delivery) might lead to a premium or a discount. In para 2.22 it has further been pointed out that a particularly relevant factor is the pricing date, since prices of goods may be different in different time periods. Thus it is obvious that the requirements of comparability in CUP are very strict and it was pointed out by TPO that the same have not been established by the assessee.

15.0 In this respect reliance is being placed on the judgment of Hon'ble Hyderabad bench of ITAT in case of M/s Bharathi Cement Corporation Private Limited vs DCIT in ITA No. 159 of 2022. In para 20 of the order Hon'ble bench noted that the application of CUP requires high degree of comparability not only in the products sold and services. provided but also in the economic circumstances in which the transaction takes place. Accordingly the application of CUP was rejected when the conditions surrounding the transaction were not comparable.

Attention is further being drawn to the judgment of Hon'ble Mumbai bench of ITAT in case of G S Caltex India Pvt Ltd vs DCIT in ITA No. 228 of 2016. The relevant part from para 7 of the order is reproduced below-

> *"The AO adopted Transactional Net Margin method (TNMM) as in the opinion of the AO internal CUP method adopted by the assessee is not reliable keeping in view geographical differences prevailing in different countries wherein the subsidiaries/associated companies were situated to whom supplies were also made by its AE, different qualities of lubricating oil supplied by its AE in different geographies/countries as also the difference in quantity dealt in these different geographical markets rendering CUP method as unreliable. We are of the view that the authorities*

below have rightly adopted TNMM method due to these differences noted by the authorities below as CUP method requires high degree of comparison in the product/services, geographies and other attributes such as scale of operations, type of market etc .. The comparative chart submitted by the assessee reflecting supplies made by its AE in other geographies(countries) clearly reveals that there are product quality differential and other differences such as scale of operations as the assessee is admittedly buying in larger quantities from its AE etc, than quantities sold by its AE in other graphical(Countries) areas making CUP unreliable. "

16.0 Hence it is obvious that under CUP not only should there be a strict comparability in respect of the properties of the goods being transferred but even the surrounding economically relevant circumstances must be matched. In the present case the information in respect of these economically relevant circumstances is not even available as per assessee's own admission hence a comparability for the same is not possible. Accordingly the CUP must be rejected in the case and the same has been brought out by TPO in his order by pointing towards strict comparability under CUP.

17.0 In this respect while there is no information available in respect of the surrounding economically relevant circumstances (thereby making the comparability analysis impossible), even the specific formulations of the compounds being sold and their quantities are different in some cases, as are the currencies and geographies in which such compounds are being sold. Thus, even the characteristics of the products being sold are different, making them incomparable under CUP.

18.0 Thus it is humbly being urged that the observations of TPO that some of the transactions claimed as comparable on behalf of the assessee were between related parties and that the conditions of comparability under CUP are very strict are correct only. In case of the assessee, it has been admitted on behalf of the assessee only that the information on economically relevant circumstances of the transaction are not available and accordingly the comparability can not be established. In fact in assessee's case in respect of the properties of the product being transferred also adequate matching is not there in the sense that different formulations and quantities of the product are being compared. Accordingly it is being urged before Hon'ble bench that adoption of Comparable Uncontrolled Price as Most Appropriate Method, as urged on behalf of the assessee, may be rejected for non-availability of data or adequate information.

The report in case of M/s Auronext Pharma Private Limited, for the A Y 2018-19, on the submissions made on behalf of the assessee is being submitted to JCIT (Transfer Pricing), Hyderabad for his kind perusal and forwarding to CIT (DR)-1, A Bench, ITAT, Hyderabad."

12. The ld.AR had filed rejoinder to the above said submissions and it was submitted as under:

Rejoinder of the Appellant on the comments of the TPO-1, Hyderabad

1. During the appeal hearing of the captioned case, Hon'ble ITAT directed the Departmental Representative, Ld. CIT(DR) to obtain the comments of the Transfer Pricing Officer/AO on the submissions of the Appellant in Para 6.0 of the written submissions filed before the Hon'ble bench on 16/03/2023 in relation to external CUP method applied by the appellant for its TP analysis of sale transactions with its AEs during the year. The relevant submissions of the appellant, which were filed on 16/03/2023, are extracted below for ready reference:

"Adjustment in relation to sales of finished goods to AEs: (Rs.19,84,20,000)

6.0 Submissions before the Hon'ble Bench

i) Assessee had applied external CUP method for benchmarking the transactions relating to sale of finished goods to AEs during the year as the data pertaining to unrelated third-party transactions is readily available in public domain. The TPO has rejected the TP Study of the assessee and CUP method on the specious ground that the external comparable transactions are between Associated Enterprises and the data used in computation of the ALP is not reliable and correct.

ii) The TPO arrived at the conclusion that the comparable transactions are between Associated Enterprises only by referring to the names of the comparable companies without carrying out a detailed inquiry as to whether the comparable transactions are in fact between Associated Enterprises.

iii) The TPO ought to have noted the fact that the assessee is not privy to the information of the relationship of the external comparable enterprises and that the assessee has obtained the information from an external database source- *Seaair*-. It publishes the CUP data which is available in public domain and hence the same can be regarded as a valid CUP for benchmarking the transactions of the Assessee Company with its AEs.

iv) Without prejudice to the above, the TPO rejected the entire study of the assessee without considering other transactions which are between enterprises where the names are not similar. Apart from the comparable transactions where the names of the parties are similar, there are other comparable transactions, the relevant extracts of which are included in the Paper Book compilation of the Appellant (APB-1, Pages 20 to 32) and the details of which are as follows:

Annexure No in TP Study Report	Name of the product	Price of the transaction between Auronext (Appellant) and its AE	Comparable Transaction between	Price charged in Comparable Transaction
1	Meropenem USP 500 Mg	USD 3	Sakar Healthcare Limited and M/s Chirosyn Discovery Technologies.	USD 1.58006
2	Meropenem 1g vial	USD 6	Quik Pharmaceuticals and Pharma LLC	USD 5.27
3	Meropenem 500 mg powder or solution or injection or infusion	GBP 1.54	Hospira Healthcare India Private Limited and Fiona Clarke	GBP 1.5
5	Merogram 1000 (Thailand)	USD 2.28	BDR Pharmaceuticals International Pvt. Ltd and PIPHLT	USD 2.1
6	Imipenem+Cilastatin	USD 3.19	Sun Pharmaceutical Industries Limited and M/s Saigon Pharmaceutical Company & Sun Pharmaceutical Industries Limited and M/s Hapharco J.S.C Branch	USD 2.29
8	Elmero 1gm	USD 3	G M Global and Doctor Hospital Health System	USD 2.2
9	Imipenem Cilastatin	Between USD 2.09 to USD 2.43	Sun Pharmaceutical Industries Limited and Ranbaxy Pharmaceuticals Canada Inc.	USD 1.94673
12	Meropenem 1g	USD 1.47 to USD 1.75	S.R.S. Pharmaceuticals Pvt. Ltd. and Setaa Pharma S.A.S.	USD 1.075
13	Meropenem 1000	USD 2.17 to USD 2.54	S.R.S. Pharmaceuticals Pvt. Ltd. and Setaa Pharma S.A.S.	USD 2.05 to USD 2.15
14	Ertapenem 1g	USD 21	United Biotech Pvt. Ltd and Libra Chile S.A.	USD 21

The above data obtained from independent external source clearly demonstrate that the transactions between the Appellant and its AEs are at arms' length and CUP is the MAM in the present case for benchmarking the transaction of sale of goods to AE.

v) We also submit that CUP, being more direct method, the same should be preferred over other methods and for this proposition, Appellant rely on the following authorities:

i. Serdia Pharmaceuticals India (P.) ltd. vs. ACIT 9 taxmann.com 13/44, ITAT (Mum)

Traditional Transaction Method such as CUP, CPM and RPM should be used, if data is available, over Transactional Profit Methods such as PSM and TNMM.

ii. ACIT v. Sonata Software ltd. ITA No. 3514/Mum/2010 dated 29.08.2012 (Mum. -Trib.)

TNMM and Profit Split Method (PSM) are treated as methods of last resort which are pressed into service only when the other methods i.e., CUP, Resale Price Method (RPM) and Cost-Plus Method (CPM) cannot be reasonably applied.

iii. ACIT vs MSS India (P.) Ltd. {2009} 32 SOT 132 (Pune)

.....while there is no particular order or priority of methods which the assessee must follow, and no method can invariably be considered to be more reliable than others, on a conceptual note, transactional profit methods (i.e., Transactional Net Margin Method and Profit Split Method) are treated as methods of last resort which are pressed into service only when the standard methods, which are also termed as 'traditional methods' (i.e., Comparable Uncontrolled Price Method, Resale Price Method and Cost Plus Method) cannot be reasonably applied.

iv) Fulford (India) Ltd Vs ACIT (ITA No. 6154/MUM/2011 dated 25.11.2019 (Mumbai - Trib.)

6.1 Accordingly, the CUP method for determining the arm's length price was the most appropriate method for determining arm's length price, on the facts of instant case, and the selling price of related products in foreign market by the domestic unrelated parties constituted good comparable for applying the said method.

6.2 Further, OECD-TP guidelines also endorse the position that CUP method is most preferable over all methods, in case comparable uncontrolled transactions are available with the tax payer. It is also provided in the OECD guidelines that application of CUP method is justifiable even with some differences between international transactions and Comparable Uncontrolled Transactions, subject to proper adjustments for removing the differences.

6.3 Based on the above facts, we submit that external CUP is the MAM for benchmarking sales of finished goods made by the company to its AEs during the year and the price charged by the appellant for sale of goods to its AEs is more than the price charged by the unrelated parties from their customers and sale of goods by the appellant to its AEs is at arm's length. We therefore urge the Hon'ble Bench to delete the upward adjustment made on this ground in the assessment order."

2. Comments of the TPO in his report dated 03.04.2023 & 01.05.2023: Pursuant to the directions of Hon'ble Bench, TPO forwarded his reply dated 03.4.2023 and 01.05.2023 and a copy of which was made available to us on 02.05.2023. The gist of the comments of the TPO is as follows:

i) In Comparable Uncontrolled Price (CUP) method, the very name of the method suggests that the comparable transaction must be uncontrolled or between independent and unrelated enterprises and an associated Enterprise cannot be taken as comparable. TPO referred to certain case laws for this observation including the decision of ITAT, Hyderabad in Corteva Agriscience India Private Ltd. vs. ACIT in ITA No. 2185 of 2017.

ii) If the assessee is making the claim of comparability, it has to prove with relevant evidences that the involved parties satisfy all the criteria of comparability laid down under the Act.

iii) The argument of the appellant that TPO rejected comparable on the basis of similarity of names is not correct as in one case of Hospira healthcare India Private Limited, it was found from Form 10-K available on USA SEC website that the products were sold to Hospira Inc. i.e., its holding company.

iv) Under CUP method, the surrounding economically relevant characteristics of the controlled and uncontrolled transaction must be comparable and these characteristics include geographical differences prevailing in different countries, properties of the goods being transferred, the contractual terms of transactions such as volume traded, period of arrangements, the timing and terms of delivery, transportation, insurance, and foreign currency terms. In the present case, the information in respect of these characteristics is not available with the assessee or inadequate and hence comparability for CUP cannot be established. TPO relied on certain judicial precedents for these comments in his report.

iv) Thus, according to the TPO, the requirements of comparability in CUP are very strict and the same have not been established by the appellant.

3. Submissions of the Appellant on the comments of the TPO:

i) Reliability and accuracy of data relating to external CUP:

3.1 The first observation of the TPO in this regard is that the data used by the appellant in computation of ALP under CUP method is not reliable and correct. This observation is not well founded. Appellant had made international sales of finished products of the value of Rs. 107.76 crores to its AEs during the subject year. Out of this, international sales made by the appellant to one AE, Auromedics Pharma LLC is to the extent of 52.85 crores, which comprises 49 % of total international sales made to all related parties. As internal CUP is not available, Appellant applied external CUP method to justify the arm's length pricing of the international transactions. The CUP method was selected as the most appropriate method as the data pertaining to unrelated third-party transactions in respect of similar pharma products is readily available in public domain. TPO

ought to have appreciated the fact that the appellant has obtained the comparable uncontrolled data relating to prices of similar products from an external database source- **Seaair**, which contains data of commercial transactions between multiple parties. Seaair is a global Export-Import information provider with years of experience in providing product wise, location wise export and import data along with the prices of the products based on the executed transactions. In a way, it publishes the CUP data for multiple years and is available in public domain and hence the same can be regarded as reliable and accurate source of data for TP analysis of the sales transactions undertaken by the Appellant Company with its AEs. We respectfully submit that the data obtained by the appellant from an independent external source about similar transactions with unrelated third parties, which is available in public domain, satisfy all the criteria of reliability and accuracy and hence the observations made by the TPO/DRP on the reliability and correctness of such data are inappropriate on the facts of the case. Appellant had reliable data available on similar transactions and, thus, claimed CUP as MAM

ii) Strict comparability in respect of the products sold and the surrounding economic circumstances:

3.2 The next observation of TPO in the report is that under CUP method not only there should be strict comparability in respect of properties of the goods being transferred but also the surrounding economic circumstances must be matched. In the case of the appellant, both the criteria are satisfied to benchmark the international transactions with AEs under CUP method.

3.2.1 Product & economic comparability: As mentioned earlier, out of total international sales of 107.77 crores made during the year, sales made to one related party namely Auromedics Pharma LLC in USA are to the extent of Rs. 52.85 crores in respect of two products, the details of which are as follows:

Product	Qty.	Sales Amount (USD)	Sales Amount (Rs.)
Meropenem 500 mg	5,77,080	17,31,240	11,02,78,320
Meropenem 1g/vial	10,95,010	65,70,060	41,82,19,353
Total	16,72,090	83,01,300	52,84,97,673

As internal CUP is not available, Appellant has considered external comparable uncontrolled price by collecting data of exports made by other unrelated parties in India to companies in USA during the year for the same product i.e., Meropenem 500 mg & Meropenem 1g/vial and compared the sale price for the respective months. Where there were no specific exports made by other parties to USA in case of these products in the same month, Appellant has considered the prices of the products

sold in immediately preceding months in which export data was available in public domain. For instance, export data relating to above two products sold by appellant to its AE, Auromedics and in comparison, export data of two unrelated parties and the price at which the same products were sold by the unrelated entity in India to other parties in USA are captured hereunder for ready reference (included in APB-3, Pages 30 & 32):

Auronext (Appellant) Data										Industry data							
Invoice Number	Invoice date	currency	Qty in Nos	Total Amount (INR)	Total Sales value INR	Item rate	External comparable rate	Inc/dec	Inc/Dec percentage	Date	Qty.	Item rate	currency	Total Amount INR	country	Indian Company	Foreign company
210/17-18/257	23-Mar-2018	USD	40,900	1,22,400	78,51,960	3.00	1.58	1.42	47%	19-Mar-2018	6932	1.58006	USD	10,953	USA	Sakar Healthcare Limited	Cherosyn Discovery technologies
210/17-18/182	23-Jan 2018	USD	9,470	56,820	35,85,342	6.00	5.27	0.73	12%	25-Jan-2018	1500	5.27	USD	1,680	USA	Quik pharmaceuticals	Pharma LLC

3.2.2 After comparing the rates at which the Appellant sold to Auromedics with the external CUP i.e., sales by other parties in India to USA based companies, it has been found that

- The rate sold by the Appellant to Auromedics is higher by 47% than external CUP in case of Meropenem 500 mg and
- The rate sold by Appellant to Auromedics is higher by 12% than external CUP in case of Meropenem 1g/vial

It could also be noticed from the above chart, the products sold are identical and there is no much timing difference except a few days in sale of products, sales are to parties based in one country USA and sale proceeds were received in same currency i.e., US dollars. Same is the factual position in case of sale of other products to AEs during the year. Thus, there is strict and high degree of comparability in respect of properties of products sold in case of appellant and unrelated parties, in respect of other economically relevant circumstances such as geographical location/country, timing of the transaction, foreign currency in dollars, type of market etc. and therefore the requirement of strict comparability is also satisfied in case of comparable data collected by the appellant from external and independent database. Therefore, the observation of the TPO in the report that the appellant has not established product comparability and comparability of other economic parameters of the transaction is misplaced and contrary to the data placed on record. Once, the appellant discharges this burden, the burden shifts to the tax authorities to establish that the arm's length price has not been determined in accordance with the provisions of the law or that the information or data used in the computation is not reliable or correct. But, Ld. TPO has not spelt out any specific infirmities or incongruities in applying the CUP method and in determining the ALP of the international transactions in question except making sweeping generalised assertions that

specific formulations of the compounds sold are different and no information is available in respect of the surrounding economic factors. But as could be seen from TP study report, there are no such product differences or geographic or economic variables in uncontrolled comparable transactions and the minor variations, if any, did not have material impact on the price of products sold. Further, the fact that 'as volume increases, the price decreases' is a well-established commercial principle and in the case of appellant the price charged is higher even where the volume of supplies (weight) is more than volumes of comparables as is evident from the above chart. The TPO's observation by cherry picking one instance in Para-13 of the report to reject the application of CUP is not tenable when there are other uncontrolled comparables in the same study report submitted before the TPO and which prove that the transactions in question are at arm's length.

3.2.3 In this context, we refer to the following authorities, which support the case of the appellant that on the facts of the case CUP method is the MAM for TP analysis (copy enclosed):

i) **DCIT, Circle-4(2), Mumbai vs. UBS Securities India (P.) Ltd. [2021] 125 taxmann.com 254 (Mumbai - Trib.)**

"7.1 ..... The TNMM applied by the assessee has been rightly rejected by the TPO/AO for the reasons that (i) in the given case the assessee clearly has not applied the most appropriate method as there is a clear market rate prevailing for broking services which is expressed in terms of a percentage of the trade undertaken, (ii) in the presence of a reliable comparable uncontrolled price, the CUP method should have been chosen by the assessee as the most appropriate method, as it is most direct method and hence is preferable to all other methods which determine the ALP in an indirect manner....."

ii) **S I Group-India Ltd. vs. DCIT-LTU, Mumbai [2016] 68 taxmann.com 158 (Mumbai - Trib.)**

"14. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We find that PTOP, which stands for Para Tertiary Octyl Phenol, is essentially a generic product. As a look at the import statistics would show that PTOP prices, except in the specialised categories such as organic chemical or specific printing ink usage, move in a narrow range. In these circumstances, ***emphasis on exact product comparison is wholly unwarranted****. We have noted that the prices which have been taken for comparison are FOB prices in Korea and as such impact of geographical differences is minimised. The quantities and sale instances in the case of the tested party are fewer but that does not lead to the inference that a comparison cannot be made at all. It is only when comparable instances are of relative smaller quantity and based on fewer sale instances that the bona fides of comparable are in the dock. When the quantity and the instances of comparables is much higher vis-a-vis the transaction with AE, issues cannot be raised about the bona fides. So far as CUP comparability is concerned,* ***differences in the size, geographical location etc. cannot be reason enough to discard the comparables, unless it is shown that such factors influence conditions in the market in which respective parties to the transactions operate****. There is, in the orders of the authorities below, not even a whisper about the impact, if any, of these factors on the market conditions. It is also important to bear in mind the fact that the imports are of very small quantities which does not even account for one per cent of total transactions. In the light of all these factors, and particularly bearing in mind smallness of the amount involved, in our considered view, it was not a fit case for rejection of CUP method, as employed by the assessee. We, therefore, deem it fit and proper to uphold the grievance of the assessee and direct the Assessing Officer to delete the impugned ALP adjustment of Rs.8,28,196/-"(Emphasis by appellant)*

iii) **Bharti Airtel Ltd. vs. Addl. CIT, Range -2, New Delhi [2014] 43 taxmann.com 50 (Delhi - Trib.)**

"Merely because markets of uncontrolled transactions and controlled transactions are at different locations, and irrespective of the geographical distance between the markets, the transactions in such markets do not cease to be good comparables for determining the arm's length price under the CUP method. [Para 48]

The assessee has used as many as thirty internal comparables for the purpose of determining arm's length price under the CUP method. These comparables are in respect of transactions with operators from various parts of the world. The TPO has rejected all but one of these comparables on the ground that the remaining comparables are with respect to geographically different markets but, as seen above, a difference in geographical location of the market, unless resulting in different market conditions, is not a reason good enough to reject a comparable under the CUP method.

There is no mention whatsoever of any commercial differences, i.e., differences in market conditions, in the market of the uncontrolled transaction and the intra AE transaction. Since the TPO has rejected these comparables, ***the onus is on him*** *to demonstrate that the market conditions are so different that the uncontrolled transactions cease to be comparable with the intra AE transactions. Not only that this onus is not discharged, there is not even a suggestion that the market conditions of the uncontrolled transactions are materially different. In view of these discussions, as also bearing in mind entirety of this case, the very basis of exclusion of other comparables is devoid of legally sustainable reasons. [Para 49]*

.....

Therefore, there cannot be any difference in the market conditions in such a case merely because the international calls originate from different countries. It is a business-to-business service, without direct involvement of the end customer in call originating location, and, therefore, even if there is a difference in retail telecom market in countries of origin of call, such a difference cannot have any impact so far as determination of price for Indian segment of such a call is concerned. [Para 51]

In view of the above, it is considered appropriate to delete the impugned ALP adjustment in respect of sale of 'carriage and termination of voice traffic'. [Para 53]"

iv) **DCIT vs. GlobalWool Alliance (P.) Ltd. [2022] 145 taxmann.com 466 (Kolkata - Trib.)**

Where assessee-company entered into international transactions with its AE for import of raw material (greasy wool) and benchmarked transactions by applying internal CUP method, since raw material purchased by assessee from external parties were of same product and average micron was 21.36 in comparison to 21.76 found in purchase from non AEs and weighted average purchase price from AE in comparison to weighted average purchase price from non-AE fell within tolerance range of +/- 5 per cent, TPO erred in rejecting CUP method and making adjustments by applying TNM method.

3.2.4 Further, OECD-TP guidelines also endorse the position that CUP method is most preferable over all methods, in case comparable uncontrolled transactions are available with the tax payer. It is also provided in the OECD guidelines that application of CUP method is justifiable even with some differences between international transactions and Comparable Uncontrolled Transactions, subject to proper adjustments for removing the differences. In this regard, the relevant portion of the text of Para-2.17 of OECD-TP guidelines 2022 is reproduced hereunder:

"Where differences exist between the controlled and uncontrolled transactions or between the enterprises undertaking those transactions, it may be difficult to determine reasonably accurate adjustments to eliminate the effect on price. The difficulties that arise in attempting to make

reasonably accurate adjustments should not routinely preclude the possible application of the CUP method."

3.2.5 We therefore respectfully submit that on the facts of instant case, the CUP method is the most appropriate method for determining arm's length price of export sales carried out with AEs during the year and the selling price of related products in foreign market by the domestic unrelated parties constituted good comparable for applying the CUP method.

3.3 **Distinguishing features of Case laws relied upon by TPO:**

i) In the case of Corteva Agriscience Services India Private Limited vs. ACIT in ITA No. 2185 of 2017 dated 26.11.2021, relied upon by TPO, Hon'ble ITAT, Hyd. Bench observed that an associate enterprise itself would not to be taken as a comparable since lacking the independent nature of an uncontrolled transaction. These observations were made in the context of TPO relying on assessee's inter-company agreements executed with its associated enterprise for determining the corresponding credit period in the business transactions. Whereas in the case of present appellant, none of the external CUP comparables mentioned in the TP study report is the associated enterprise of the appellant and in such a situation, the said decision has no application to the facts of the present case.

ii) In the case of Technimont ICB Pvt. Ltd vs. Addl. CIT in ITA Nos 4608 & 5085 of 2010 and in the case of Gemstone Glass Pvt Ltd. vs. JCIT in ITA No. 2858 of 2012, also relied upon by TPO, it was held that prices at which transactions are entered with associated enterprises cannot be taken as comparable uncontrolled price for the purpose of determining ALP. In the present case, as already submitted, there are also transactions between independent parties in respect of sales of similar products as collected from external database in public domain and it is evident from this data that the price charged for sale of goods from AEs is more than the price charged by the unrelated parties from their customers and this clearly proves that sale of goods by the appellant to its AEs was at arm's length price.

4. Viewed from any perspective and having regard to the price charged by unrelated parties from their customers for similar products, the price charged by the appellant for export sales from its AEs is at arm's length. We therefore urge Hon'ble bench to appreciate the facts of the case and delete the entire upward TP adjustment made by the Assessing officer/TPO on this ground

13. We have heard the rival contentions of the parties and perused the material available on record. Admittedly in the present case, the TPO has rejected the TP study of the assessee on the pretext that the transactions sought to be compared by the assessee pertains to the other taxpayers with their AEs, and, therefore, the same cannot be compared being transaction

between the related parties. It was submitted by the TPO that, for benchmarking the ALP for CUP method, it is essential to examine the price charged or paid for the property transferred in a comparable uncontrolled transaction. The sole basis of rejecting the method adopted by the assessee was the transactions were between the related parties and were not un-controlled transactions. A similar view was also expressed by the DRP while passing the impugned order in paragraph 2.2.1. and also in the report filed by the TPO before us dt. 01.05.2023 (supra).

14. Undoubtedly, the assessee in the rejoinder has rebutted the contention of the TPO/DRP and had submitted that the documents/data were furnished before the DRP, of unrelated parties transactions with respect to sale of goods/products. The record shows that the assessee had filed the documents before the DRP and on account of that reason only it was contended by the assessee that the data is readily available. In view of the above, we are of the opinion that the DRP/TPO is duty bound to examine the data available in respect of un-related parties and apply the CUP method to benchmark the international transactions. The assessee, in the original submissions as well as in rejoinder has given the details of unrelated parties, which are mentioned in the preceding paragraphs. In the light of the above, we deem it appropriate to remand back the matter to the file of the TPO/AO to examine afresh the data available with respect to un-related parties and find out whether the transaction of the assessee are at arm's length or not by applying the CUP method. Needless to say,

while doing so, the TPO, may not restrict to the comparables suggested by the assessee, who are unrelated parties and the TPO may be at liberty to find out any other suitable comparables having similar profile, functions and fulfil the other criteria laid down under rule 10B for CUP method.

15. As we are remanding back the ground of applying appropriate filter to the file of TPO/AO, therefore, the other issues raised by the assessee have become academic and are not being adjudicated. It may be apposite to mention that we have not expressed any opinion on merits of the case of the assessee, more particularly about the TNMM method and capacity utilization etc. Those issues are left open to be decided in appropriate proceedings.

16. In the result, appeal of assessee is treated as partly allowed for statistical purposes.

Order pronounced in the Open Court on 30th May, 2023

Sd/-	Sd/-
(RAMA KANTA PANDA)	**(LALIET KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad,
dated 30th May, 2023

TNMM

Copy forwarded to:

1. *M/s. Auronext Pharma Private Limited, Galaxy Towers, 22nd Floor, Plot No. 1. Survey No. 83/1, Hyderabad Knowledge City, Raidurg Panmaktha, RR District, Hyderabad.*
2. *The Deputy Commissioner of Income Tax, Circle-1(2), Hyderabad.*
3. *The Dispute Resolution Panel (DRP), Bengaluru.*
4. *The Director of Income Tax (IT & TP), Hyderabad.*
5. *The Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.*
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