

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI**

**BEFORE SHRI G.S. PANNU, PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

**ITA No. 2281/Del/2022
Assessment Year: 2018-19**

ADM Agro Industries Kota &
Akola P. Ltd., 3rd Floor, Vatika
Professional Point, Golf Course
Extension road, Sector-66,
Gurgaon.

PAN: AABCS9646L

(Appellant)

Versus ACIT, Circle 1(1),
New Delhi

(Respondent)

Assessee by: Sh. Ajay Vohra, Sr. Advocate &
Ms. Ananya Kapoor, Advocate
Revenue by: Sh. Rajesh Kumar, CIT-DR

Date of hearing : 15.03.2023
Date of pronouncement : 13.06.2023

ORDER

PER SAKTIJIT DEY, J.M.:

Captioned appeal has been filed by the assessee challenging the final assessment order dated 21.07.2022 passed u/s. 143(3) read with section 144C(13) of the Income-tax Act, 1961 pertaining to assessment year 2018-19, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. At the outset, Shri Ajay Vohra, learned Sr. Counsel, appearing for the assessee, on instructions, submitted that the assessee does not want to press ground No.1. Accordingly, this ground is dismissed as not pressed.

3. In ground Nos. 2 to 8, the issue raised by the assessee relates to adjustment proposed by the Transfer Pricing Officer (TPO) to the Arm's Length Price (ALP) of the international transactions relating to merchanting trades.

4. Briefly, the facts are, the assessee is a resident corporate entity. As stated, the assessee is engaged in the following streams of activities :

(i). Trading Activity: In this segment, the assessee undertakes physical trading of agricultural commodities, such as, sorghum, barley, wheat, oilseeds, yellow peas etc.

(ii). Merchanting trades: In this segment, the assessee undertakes merchanting trade in agricultural commodities under Foreign Exchange Management Act and guidelines issued by Director General of Foreign Trade (DGFT).

5. In the year under consideration, the assessee undertook various international transactions with its Overseas Associated Enterprises (AEs) and in the audit report in Form 3CBE reported following transactions :

(i). Merchating activities(Sales)	906,74,08,330/-
(ii). Merchating activities (Purchase)	905,83,49,086/-
(iii). Purchase of traded goods(Yellow & Green peas)	59,61,31,527/-
(iv). Payment of interest	29,081/-

6. After verifying the 3CBE report as well as Transfer Pricing Study Report (TPSR) of the assessee, the TPO accepted the ALP of the trading segment. Whereas, in respect of merchating trades, the TPO observed that the assessee has benchmarked such activities by applying Transactional Net Margin Method (TNMM) using Operating Profit(OP)/Value Added Cost(VAC) as the Profit Level Indicator (PLI). Further, for comparative analysis, it selected 13 companies in the business auxiliary services segment as comparables. As against the margin shown by the assessee at 604.17%, the average margin of the comparables works out to 5.51% - 11.12%. Thus, the assessee claimed the transactions with AEs in the merchating trades to be at arm's length. The TPO, however, did not accept assessee's claim. He observed

that while the PLI of the comparables is Operating Profit(OP)/Operating cost(OC), the PLI of the assessee is OP/VAC. Thus, he observed that the assessee has not provided any justifiable reason why the PLI different from the PLI of the comparables was taken. He observed, the PLI of OP/VAC, otherwise known as Berry ratio, taken by the assessee as against OP/OC has rendered the benchmarking of the assessee flawed. He observed, in case OP/OC is taken as PLI of the assessee, the profit margin will work out to 0.09% as against OP/OC (Median) of the comparables of 9.51%. Accordingly, he issued a show cause notice to the assessee to explain why OP/OC should not be taken as PLI of the assessee to determine the net margin. Though, the assessee furnished a detailed reply opposing the adoption of OP/OC as PLI on the ground that since, the comparables are in business auxiliary services, they do not have any cost of goods, hence, the assessee has taken OP/VAC as the PLI after reducing cost of goods. TPO, however, was not convinced with the submissions of the assessee. Adopting OP/OC as the PLI of the assessee, he proceeded to determine the arm's length margin of the assessee qua the comparables and proposed an adjustment of Rs.82,12,60,000/- to the ALP disclosed by the assessee. While framing

the draft assessment order, the Assessing Officer added back the transfer pricing adjustment proposed by the TPO. Challenging the said adjustment, the assessee raised objections before learned DRP. However, learned DRP upheld the action of the TPO.

7. Before us, learned Sr. counsel appearing for the assessee submitted, in so far as merchanting trade segment is concerned, the buyer and seller, both non-resident entities, are pre-identified and the assessee merely acts as a facilitator/service provider/arranger. Explaining further, he submitted, assessee enters into purchase contract with ADM International Sarl, Switzerland(ADM Sarl) and a back to back sale contract with ADM, Asia Pacific Trade Pte. Ltd. (ADM Asia Pacific) to buy and sell agricultural commodities, such as sorghum, barley and wheat. He submitted, the sale and purchase contracts are entered into instantaneously and title to the goods involved in the merchanting activities is transferred immediately in high seas without entering the custom barrier of India. He submitted, the logistics of loading and unloading the commodities are managed by the original buyer and seller, ie., ADM Sarl and ADM Asia Pacific and the assessee is not engaged in either managing logistics or packaging and labelling of the

goods. He submitted, even, the assessee does not take possession of the goods involved in the merchanting activities, hence, has no responsibility of maintaining warehouses and storing the goods.

8. He submitted, the price for purchase and sale of goods under the merchanting activities are based on price information provided by leading global price brokers of international repute and leading commodity exchanges. He submitted, the limited economic value adding activities undertaken by the assessee consist primarily of coordination and processing of documentation. Therefore, the risk and functions involved in the merchanting trades are very less as compared to a regular trade transaction. He submitted, the assessee is not exposed to any risk of fulfilment of contract and risk on account of commodity price and inventory are transferred on back to back basis from the assessee to its AE. In this context, learned counsel drew our attention to the summary of purchase and sale transactions under merchanting trades along with their terms and price fixed, as placed in the paper book. He also drew our attention to copies of purchase and sale contracts, invoices and bill of lading for merchanting trades. He submitted, in the merchanting trades activities, the assessee earns fixed profit margin of 10 basis

points on purchase price, which covers the administrative cost with a little mark-up.

9. Learned counsel submitted, since the assessee did minimal value addition in respect of the goods purchased and sold under the merchanting trades, such value addition could be considered akin to that done by business auxiliary service providers for application of TNMM. He submitted, unlike a routine trading activity where traders buy goods from vendors for re-sale purpose and stock the same in their custody and perform several functions and bear multiple risk, the assessee had not gone through that process, as the merchanting trades were conducted in high seas beyond the custom barriers of India, wherein, the transfer and title of goods passes from ADM Sarl to ADM Asia Pacific instantaneously on back to back basis. He submitted, the substantive difference in the functional and risk profile between the merchanting and physical trade business has been recognized in various judicial precedents. In this context, he drew our attention to a decision of Tribunal in the case of Kargil India Pvt. Ltd. vs. Addl. CIT (ITA No. 4095/Del/2010 dated 28.11.2013). He submitted, while commenting that the assessee has kept inventory with reference to merchanting

activities as per the audited financial statement, the TPO has grossly misconceived the facts, as he has completely overlooked the fact that in addition to the merchanting activities, the assessee has a separate segment of physical trade and the inventory in the books of account are entirely on account of such physical trades.

10. He submitted, this can be further demonstrated from the fact that in merchanting trades, commodities traded are corn, sorghum, barley and wheat, whereas the inventory maintained by the assessee for physical trade pertain to yellow peas and oilseeds. He submitted, for merchanting trades, the assessee has neither kept any inventory nor has any fixed asset, as only few employees in India from accounting and finance department are involved primarily for preparing contracts, raising invoices and other accounting and administrative functions in relation to trades. Thus, he submitted, in such scenario, the assessee is merely undertaking auxiliary support function, which cannot be considered to have contributed in developing supply chain or creating human asset intangibles with reference to merchanting trades. He submitted, the buyer and seller in merchanting trades are related parties and predetermined and the assessee merely resells the goods to

a pre-identified AE after purchasing from another AE and retaining a fixed margin of 10 basis points. He submitted, the assessee does not pay any role in price determination and price negotiation. He submitted, the assessee is not involved at the stage of deciding/determining the timing of these transactions. Thus, essentially, the assessee is involved in rendering minimal support functions.

11. He submitted, since, the assessee did minimal value addition in respect of merchanting trades, that can be considered akin to the functions done by the business auxiliary activity providers, therefore, value added cost considered in the denominator of PLI is total OC of the assessee in merchanting trades less the cost of goods sold. He submitted, since the value addition of the assessee in respect of merchanting trades is akin to a business auxiliary service provider, the assessee computed its return on value added cost incurred for merchanting trades and benchmarked the same against the weighted average of operating margins of comparables in business auxiliary service provider segment. He submitted, the operating cost base of the comparables, being service providers, is similar to the value added cost base of the assessee with respect to merchanting activities primarily

comprising of employee cost and other related/allocable overheads, such as, rent, electricity, communication expense etc. Thus, he submitted, in the given circumstances, the PLI of the assessee has to be OP/VAC. In this context, he drew our attention to OECD guidelines on berry ratio. Further, in support, he relied upon the following decisions :

(i). Sony Ericsson Mobile Communications India (P) Ltd. v. CIT (2015) 55 taxmann.com 240(Delhi)

(ii). Sumitomo Corporation India(P) Ltd. v. CIT (TS-493-HC-2016(DEL)-TP)

(iii). Li & Fung India Pvt. Ltd. v. CIT (ITA No. 306/2012)

(iv). Mitsubishi Corporation India Ltd. vs. DCIT (ITA No. 5042/Del/2011 dated 21.10.2014).

(v). Marubeni Itochu Steel India Pvt. Ltd. v. DCIT (ITA No. 761/Del/2015 dated 24.07.2015)

(vi). Schefenacker Motherson Ltd v. ITO (123 TTJ 509) Delhi.

(vii). Cheil Communications India Pvt. Ltd. v. DCIT (ITA No. 712/Del/2019 dated 30.11.2010).

(viii). M/s. Qual Core Logic Ltd. v. CIT (ITA No. 893/Hyd/2011 dated 31.05.2012)

12. Therefore, he submitted, as per the ratio laid down in the aforesaid judicial precedents, OP/VAC as PLI is permissible under Rule 10(B)(1)(e). Thus, he submitted, the adjustment should be deleted.

13. Per contra, learned Departmental Representative submitted, the audited financials of the assessee do not make any distinction between the traded goods and merchanting goods. He submitted, as per the audited financials, the assessee has only one segment of trading activities. Drawing our attention to the Transfer Pricing Study Report, he submitted, as per the segmental reporting, the assessee is primarily engaged in the business of trading of agricultural products and there is no mention of merchanting activities in the segmental reporting. As regards assessee's contention that in the merchanting trade segment, it is more like a risk free entity as it is only indulging in flash transfer of title and receiving 10 basis points on the purchase invoice value, learned Departmental Representative, inviting reference to RBI Circular No. RBI/2019-20/152 dated 23.01.2020 submitted that the circular clearly provides that the merchanting trader should be genuine trader of goods and not merely financial intermediaries who operate on behalf

of somebody. Thus, he submitted, the basic premise of the assessee that it is not doing any major activity and mainly raising invoices with respect to merchanting trade is wrong and fallacious and deserves to be rejected. Drawing our attention to the TP study report of the assessee, learned Departmental Representative submitted, the TP study report makes it clear that the assessee enters into the purchase contracts with its AE and subsequent sale contract is also with another AE. He submitted, though, the assessee claims that sales and purchase contracts are entered simultaneously on the same day, but still the fact remains that the assessee first purchases the commodities from its AE and then sells it to another AE. In sum and substance, both the purchase and sale transactions were undertaken by the assessee. Therefore, it is absolutely wrong on the part of the assessee to claim that it has limited role in purchase and sale of commodities and no role in pricing mechanism.

14. Proceeding further, he submitted, as per material on record, the assessee enters into a trade transaction only when it can earn reasonable return covering its administrative cost. Meaning thereby, it is not the AEs but the assessee who determines when to enter into the

trade. Further, he submitted, in the TP study report, there is no mention of retaining of fixed price margin of 10 basis points. Learned Departmental Representative submitted, assessee's contention that it has not undertaken any risk or has undertaken limited risk, is unacceptable as the materials on record reveal that the assessee is involved in all the activities/functions which happens in any independent high seas purchase/sale transaction. He submitted, once the purchase contract is signed, the risk and the title of the goods immediately passes from seller to the assessee and the assessee company becomes the owner. Therefore, the assessee becomes responsible for all the risks associated with the goods. He submitted, even, the assessee is required to arrange insurance. He submitted, the insurance documents also make it clear that it has to be arranged and covered by the assessee. He submitted, as per the terms of the purchase contract, all the taxes, levies, duty etc. present or arising in future date on the cargo are on account of the assessee. Thus, he submitted, the aforesaid facts clearly reveal that the assessee is fully liable for all the risks and rewards of the transaction undertaken by it. He submitted, though, sales from merchanting trades contribute 98% of the total

revenue earned by the assessee, however, the expenses allocated to merchanting trades constitutes 0.19% of the total expenses, which has absolutely no basis. He submitted, the PLI of berry ratio adopted by the assessee is not at all applicable as the assessee is a full-fledged trader of goods and the value of goods definitely has a role in the profits earned.

Finally he summed up his submissions as under :

- 1) *The assessee company is clear cut high seas trader as it performs all the functions of high seas trader and also assumes all the risks associated with the high seas trade.*
- 2) *In the case of assessee company, there is no such things as merchanting activities and the artificial difference is sought to be created between merchanting trade and normal trade which appears to be done only for the sake of transfer pricing benchmarking study.*
- 3) *The assessee company assumes the title of the goods and after taking the ownership of the goods is exposed to all risk and rewards.*
- 4) *The assessee company cannot be treated as a stripped down distributor and the application of Berry Ratio i.e. OP/VAC as PLI in the case of assessee is wrong and totally unfit.*
- 5) *In the case of assessee company, the operating expenditure shown by the assessee with regard to merchanting activities does not capture major functions performed and also risks undertaken by the assessee. The Berry Ratio is not applicable because the assessee has substantial fixed assets and substantial depreciation cost, and also high inventory. Further the assessee uses human resources intangible for*

pricing of purchase/sale in high seas and has clearly developed supply chain.

6) The case of the assessee is unique in the sense that, for itself, it applies Berry Ratio i.e. OP/VOC as PLI whereas for comparable selected by the assessee company only, it employees OP/OC as PLI. This use of two different PLIs i.e. one for itself and other for comparables selected by the assessee only, is unheard and not backed by any evidences. Use of two different PLIs is akin to comparing two similar entities with different yardsticks. For instance, as mentioned during the course of hearing also, use to two different PLIs meaning comparing two elephants and taking height as yardstick for one elephant and weight as yardstick for another elephant. Use of two different PLIs in one case, that in comparability studies will always fetch unreliable results which can never be applied any TP study. Further the transfer pricing guidelines, even if it may be subjective but the subjectivity can never be taken to be point where it results in absurdity.

Thus it is humbly prayed that in view of the above discussion, the assessee's appeal may kindly be dismissed as all the issues raised by the assessee are not backed by any evidence and also they are in contradiction to the transfer pricing provisions of the Income Tax Act."

15. As regards judicial precedents cited by learned counsel for the assessee, learned Departmental Representative submitted, they are distinguishable on facts, hence, not applicable to assessee's case.

16. In rejoinder, learned sr. counsel submitted, the audited financial statements of the assessee have been prepared in accordance with the Indian generally accepted accounting standards. He submitted, as per

such standards, separate segmented results are not required to be prepared for merchanting trades and physical trades, as, both the activities fall under the broad spectrum of trading. He submitted, based on accounting treatment alone, it cannot be inferred that the functional and risk profile of the merchanting trades and other physical trades carried out by the assessee are same from transfer pricing standpoint. Further, he submitted, at this stage, learned Departmental Representative cannot make out a new case for the department, as the distinction of merchanting trades and physical trade has been acknowledged by the TPO and he has accepted assessee's determination of ALP for physical trades. Whereas, he made adjustment only on merchanting trades undertaken by the assessee. As regards the contention of the Revenue that as per RBI Circular, only genuine merchanting trade transactions are allowed and not financial intermediaries, learned counsel submitted that the assessee undertakes genuine buy-sell trades of physical commodities and is not a financial intermediary in the sense it does not act as a link between the parties like mutual funds, bank etc.

17. He submitted, learned Departmental Representative has failed to appreciate the nature of functions performed and risk assumed in the physical trade activities and merchanting trades. He submitted, there is no allegation by RBI of any violation of the merchanting trades regulations/guidelines. He submitted, the assessee has held no inventory on account of merchanting trades, but only requires office space for employees involved in merchanting trades. He submitted that the majority of the fixed assets reported in the fixed assets schedule and financial statement, are plants and machinery, leasehold land etc., which were towards manufacturing plant of the assessee and have been shut down and consequently impaired during the financial year 2017-18. Thus, he submitted, there is no basis for rejecting berry ratio as appropriate PLI of the assessee. He submitted, in any case of the matter, the TPO has accepted the segmental profitability submitted by the assessee as part of the TP study report and made adjustment using the same segmental results by only adding back cost of the goods to the denominator of PLI. He submitted, all other variables/parameters forming part of the PLI, such as, operating profit, value added cost have been accepted by the TPO. Therefore, the submission made by the

Departmental Representative regarding lack of segmental bifurcation etc. is outside the purview of appeal, as it is neither the case of the TPO nor DRP. Therefore, he submitted, at this stage, learned Departmental Representative cannot improve upon the reasoning of the departmental authorities so as to enlarge the scope of the appeal.

18. We have patiently and carefully heard the parties, given a thoughtful consideration to the detailed submissions made, both orally and in writing, perused the materials on record and also applied our mind to the judicial precedents cited before us.

19. The crux of the dispute lies within a narrow compass, as to, what should be the PLI of the assessee qua the PLI of the comparables. Before we proceed to address this issue, it needs to be observed that in Form 3CEB, the assessee has reported revenue from two separate segments, firstly, merchanting trades segment and secondly, trading segment. In so far as the trading segment is concerned, the assessee, though, purchases (agricultural products) from its AEs, however, they are sold to un-related parties. Undisputedly, the purchases made by the assessee in the trading segment have been accepted by the TPO to be at Arm's

Length. In so far as merchanting trades segment is concerned, the assessee had applied TNMM as the most appropriate method to benchmark the transactions. Not only the TPO has accepted applicability of TNNM, but has also accepted the comparables selected by the assessee, who are basically business auxiliary service providers. The assessee has computed its profit margin by applying OP/VAC as the PLI. While doing so, the assessee has excluded cost of goods from the denominator. It is the case of the TPO that since the PLI of the comparables is OP/OC, the assessee cannot have a different PLI, but it has to be OP/OC.

20. As discussed earlier, in merchanting trades, the assessee enters into a purchase contract with one of its overseas AE, viz, ADM Sarl. Whereas, it sells the purchased goods to another overseas AE, ADM Asia Pacific. Though, technically, the assessee had entered into purchase and sale contracts for buying and selling goods, however, in reality, the assessee merely acts as a facilitator of buying and selling of goods between the two AEs. As per the business model, the goods purchased from ADM Sarl are sold to ADM Asia Pacific in high seas without entering the custom barriers of India. Thus, essentially, the goods are

transferred in the high seas from original seller of goods to the ultimate buyer without entering into the territorial waters of India. Thus, factually, the goods never come to assessee's inventory and stored in any warehouse in India. In fact, the aforesaid purchase and sale transactions between the two overseas AEs through the assessee take place instantaneously on back to back basis. Even, the entire logistics of loading and unloading the commodities are managed by the overseas AEs, viz., ADM Sarl and ADM Asia Pacific. The assessee is neither engaged in arranging logistics nor in packaging or labelling of the commodities. These facts are clearly demonstrated from the purchase and sale invoices, where, the purchase and sale transactions are completed in a single day, instantaneously. It is also a fact on record that both the seller and buyer are pre-determined and prices of the commodities are pre-fixed. The assessee only provides certain administrative functions. Hence, the role of the assessee is limited. Thus, to recover the administrative cost with little mark-up, the assessee is remunerated at 10 basis points of the purchase invoice.

21. From the aforesaid facts, it is clear that the functions performed and risk undertaken by the assessee is that of a business auxiliary

service provider and not different from them. It is further established from the fact that the comparables selected by the assessee are business auxiliary service providers and the TPO has found them to be functionally similar to the assessee. That being the functionality of the assessee and the comparables, it needs to be examined whether PLI adopted by the assessee is acceptable. The TPO has rejected the PLI of OP/VAC on the ground that it is not in conformity with Rule 10(B)(1)(e). Of course, the DRP has endorsed the view of the TPO.

22. At this stage, it is necessary to look into the relevant statutory provisions relating to determination of ALP of international transactions with AEs. Section 92 of the Act provides for computation of income having regard to the ALP of international transactions with AE. Section 92C of the Act provides the methods for computation of ALP. TNMM is one of the approved methods for computing ALP. Rule 10B(1)(e) lays down the mechanism for computation of ALP under TNMM. On a holistic reading of Rule 10B(1)(e), it becomes clear, the computational mechanism is in several steps. In the first step, the net profit margin of the enterprise (in the present case, the assessee) realised from the international transaction with AE has to be computed

in relation to cost incurred or sales effected or assets employed or to be employed by the enterprise or **having regard to any other relevant base**. In the second step, the net profit margin realised by an enterprise (in the present case, comparables) from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base. In the third step, necessary adjustments, if any, is made to the profit margin of comparables to take care of the differences that may be arising in the margin of the controlled transactions, which could materially affect the amount of net profit margin in the open market. In the fourth and fifth steps, the net profit margins of the controlled and uncontrolled transactions are compared and the ALP is determined. Thus, as could be seen from the computational mechanism provided in rule 10B(1)(e), it is not rigid but flexible. The net profit margin of the assessee can be computed not only in relation to cost incurred or sales effected or assets employed, but, having regard to any other relevant base also. The expression “any other relevant base” is wide enough to align the computation of margin of the assessee and the comparables.

23. Thus, if we go by the provision of rule 10B(1)(e), the return on value added cost, otherwise known as berry ratio, is not completely excluded from its purview. It can be a relevant base for computing the margin. The berry ratio in simple terms means a ratio of gross profit to operating expenses. Therefore, where operating expense is considered as a relevant base, there would be no difficulty in using berry ratio as PLI in terms of Rule 10(B)(1)(e). In case of Sumitomo Corporation India Pvt. Ltd. (supra), Hon'ble jurisdictional High Court, while considering applicability of berry ratio, has observed that it can be used effectively only in cases where the value of goods have no role to play in the profit earned by a assessee and the profits earned are directly linked with the operating expenditure incurred by the assessee. The operating expenditure incurred by the assessee effectively captures the functions performed and risk undertaken by the assessee. Thus, in a case where assessee uses an intangible as a part of its business, berry ratio may not be an appropriate PLI, as the value of such intangible would not be captured in the operating cost. Similarly, berry ratio is not appropriate PLI for determining the ALP in cases where the assessee may be having substantial fixed assets since, the value added by such assets would not

be captured in berry ratio. However, it can be applied where the operating expense adequately represent all functions performed and risks undertaken. Thus, the Hon'ble High Court held that berry ratio is effectively applied only in case of stripped down distributors who have no financial exposure and risk in respect of the goods distributed by them. Various other decisions cited by learned Sr. counsel lay down the ratio that Rule 10(B)(1)(e) does not completely rule out applicability of berry ratio.

24. Keeping in perspective the legal position enunciated in the judicial precedent cited before us, if we examine the facts of the present appeal, undisputedly, the only variation made by the TPO to the PLI of the assessee is to add the cost of goods to the denominator. However, it is a fact on record that the operating cost of the comparables are not inclusive of cost of goods, as they are business auxiliary service providers, hence, they do not have any cost of goods. Since, the assessee is found to be functionally comparable to the business auxiliary service providers, it is established that the assessee has undertaken limited functions and risk in the merchanting trades segment and earns a fixed profit margin. Therefore, in our view, the cost of goods cannot be

included in the denominator of the PLI. Thus, for the assessee, return on value added cost will be the relevant base for computing the net profit margin to bring the profit margin of the comparables in alignment with that of the assessee.

25. Having held so, for the sake of completeness, we are of the view that various contentions of learned Departmental Representative need to be addressed. In course of hearing, learned Departmental Representative submitted that the accounts of the assessee as well as the TP study report disclose only one segment, i.e., trading segment. The merchanting trades segment is nowhere found either in TP study report or anywhere else. Thus, he has submitted that assessee's contention that it has two segments, viz., trading segment and merchanting trades segment is not acceptable. Further, referring to RBI Circular, he has submitted that only genuine traders of goods are recognised as merchanting traders and not mere financial intermediaries. He has made various other allegations regarding disproportionate expenses relating to merchanting trade segment and physical trade segment etc.

26. On examination of facts on record, we find that the aforesaid submissions of learned Departmental Representative are extraneous to the issue at hand. Admittedly, in the TP study report, the assessee had furnished segmental information regarding both the merchanting trades segment and physical trade segment. The TPO has also accepted the segmental analysis of the assessee. In fact, he has accepted the transactions in trading segment to be at ALP. As discussed earlier, the only variation, he has made in merchanting trades segment, is in relation to PLI of the assessee. Thus, neither the TPO nor DRP have made any adverse comment regarding the merchanting trades segment. Further, when there is no allegation either by RBI or any other regulatory authority regarding merchanting trades segment of the assessee, in our view, learned Departmental Representative cannot give a new dimension to the entire issue by making allegations which are not borne out on record. At this stage, learned Departmental Representative cannot improve upon the case of the TPO or learned DRP by enlarging the scope of the appeal. Thus, considering the fact that in the PLI of the comparables, cost of goods is not included in the denominator, in our view, the same would also apply to the assessee. Hence, cost of goods

cannot form part of the denominator of PLI. Accordingly, we direct the Assessing Officer to compute the ALP by applying PLI of operating profit to value added cost, excluding the cost of goods. Grounds are allowed.

27. In the result, appeal is partly allowed.

Order pronounced in the open court on 13/06/2023.

Sd/-

(G.S. PANNU)
PRESIDENT

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

*aks/-