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

BEFORE SHRI G. S. PANNU, PRESIDENT
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 486/DEL/2022 (A.Y. 2017-18)

Sumitomo Corporation India Pvt. Ltd., 302 &303, 3rd Floor, World Mark–2, Asset No. 8, Aerocity Hospitality District New Delhi – 110 037. **PAN No. AABCS1887M**	Vs.	Assessing Officer, DCIT, Circle : 21 (2), New Delhi.

AND
STAY No. 92/DEL/2022
[in I.T.A. No. 486/DEL/2022 (A.Y. 2017-18)

Sumitomo Corporation India Pvt. Ltd., 302 &303, 3rd Floor, World Mark–2, Asset No. 8, Aerocity Hospitality District New Delhi – 110 037. **PAN No. AABCS1887M** **(APPELLANTS)**	Vs.	Assessing Officer, DCIT, Circle : 21 (2), New Delhi. **(RESPONDENTS)**

Assesseeby :	**Shri Himanshu S. Sinha, Advocate;, Sh. Parash Bishwal, Advocate & Sh. Bhuwan Dhoopar, Adv**
Department by:	**Shri Vivek Verma, [CIT] – D.R. and Sh. Mahesh Shah, CIT (DR)**

Date of Hearing	**26.09.2023**
Date of Pronouncement	**18 .10.2023**

ORDER

PER YOGESH KUMAR U.S., JM

The present appeal has been preferred by the assessee and the Stay Application has been preferred by the Revenue–Departmentfor assessment year 2017-18.

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

1. *That the Ld. AO has grossly erred both on facts and in law, in determining the income of the Appellant at Rs. 39,49,71,366/- in assessment order dated 21 February 2022 framed under section 143(3) read with section 144B of the Act as against the income of Rs. 16,21,03,480/- per the return of income filed by the Appellant. In so doing, the Ld. AO has erred in making an addition of Rs. INR 23,28,67,886/- in the arm's length price of international transactions entered by the Appellant with its associated enterprises ("AEs").*

2. *That in making the aforesaid addition, the Ld. AO has erred in making a reference under section 92CA(1) of the Act to the Ld. Transfer Pricing Officer ("TPO") on the following amongst other grounds, rendering the order of the Ld. TPO as unsustainable both in law and on facts:*

2.1. *As the reference made by the Ld. AO to the Ld. TPO is not in accordance with the provisions of Section 92CA(1) of the Act; and*

2.2. *As no opportunity of being heard was granted at any stage of the proceedings for this purpose, whether at the proposal stage or even later at the time of grant of approval.*

3. *The Ld. TPO has erred in making the transfer pricing adjustment without establishing the existence of any one of the four pre-conditions provided in section 92C(3) of the Act, which is a mandatory requirement for making an adjustment under section 92CA(3) of the Act.*

4. *The Ld. TPO has disregarded the transfer pricing approach adopted by the Appellant to determine the arm's length price ("ALP") of its international transactions. The Appellant's use of Transactional Net Margin Method ("TNMM") with operating profit/operating expenses ("OP/OPEX") as the profit level indicator ("PLI") has been disregarded without any justification whatsoever.*

5. *The Ld. AO / TPO has disregarded the directions of the Ld. Dispute Resolution Panel ("DRP"), wherein it is directed to the Ld. AO / TPO to ascertain whether an appeal has been filed against the order of Hon'ble Income-tax Appellate Tribunal ("ITAT") in the Appellant's own case for AY 2012-13 & AY 2013-14 or AY 2014-15; and in case no appeal has been filed against the aforesaid orders, the benchmarking of the AE indent segment has to be in line with the aforementioned ITAT orders and that the adjustment made by the Ld. TPO in its original order on protective basis has to be dropped.*

While making the adjustment based on the directions of the Ld. DRP, the Ld. AO / TPO has assumed that an appeal has been filed against the order of ITAT for AY 2012-13 & AY 2013-14 or AY 2014-15 but have not provided any evidence to substantiate the same. Therefore, the order of the Ld. AO / TPO should be considered null and void-ab- initio due to non-compliance with section 1440(10) and section 144C(13).

Substantive addition

6. *The Ld. DRP / TPO erred in considering the average rate of commission earned in non- AEs segment by applying Comparable Uncontrolled Price ("CUP") method to determine arm's length commission rate for indenting transactions with the AEs (other than those which are covered by the Bilateral Advance Pricing Agreement with Japan). While doing so, the Ld. DRP / TPO disregarded:*

6.1. *the difference in the functions performed, risks assumed, number of transactions, value of transactions, nature of products, commission rates and geographical locations etc. in respect of transactions of Appellant with AEs (other than Sumitomo Corporation, Japan) and non-AEs;*

6.2. *the judgments of Hon'ble ITAT in Appellant's own cases for (i) AY 2007-08 to AY 2011-12 (based on the order of High Court), (ii) AY 2012-13 and AY 2013-14; (iii) AY 2014-15; and (iv) AY 2015-16 and AY 2016-17, wherein Hon'ble ITAT has held that the average rate of commission earned in non-AEs segment cannot be considered to determine arm length's commission rate; and held that TNMM with Berry ratio (modified form of OP/OPEX) as the PLI should be accepted as the most appropriate method;*

6.3. *the directions of the Hon'ble High Court of Delhi in Appellant's own case for AY 2007-08 to AY 2010-11 that in case the average rate of commission earned from third parties was to be considered as arm's length price for indenting transactions with the AEs, it had to be established that there is no significant variation in the rate of commission between different products and without conducting any such enquiry, such average rate of commission could not be adopted*

as arm's length; and

6.4. the transfer pricing approach agreed upon in the Bilateral Advance Pricing Agreement ("BAPA") signed between the Appellant and the Central Board of Direct Taxes ("CBDT"), where TNMM has been selected as the most appropriate method with OP/OPEX as the PLI for similar transactions with Sumitomo Corporation Japan.

7. *The Ld. DRP / TPO has erred in applying and computing ALP for indenting transactions by applying 3.29 per cent commission rate (by first applying 2.92 per cent and then adding 0.37 per cent based on OP/OPEX of comparable companies). While doing so, the Ld. DRP / TPO erred in:*

7.1. *alleging that the functions performed by the Appellant were far more for the AEs as compared to the non-AEs, without providing any justification / empirical evidence thereof;*

7.2. *applying a flawed methodology of adding a mark-up of 0.37 per cent to the commission earned from the non-AEs, which does not fall under any of the specified methods in Section 92C of the Act, read with Rule 10B of Income-tax Rules, 1962 ("the Rules");*

7.3. *using a set of companies for calculation the mark-up of 0.37 per cent (i.e., 12.72 per cent of 2.92 per cent), most of whom are not comparable to the Appellant on various grounds; and*

7.4. *not considering the companies as comparable, which were contained in the TP documentation prepared by the Appellant and also provided in form of a fresh search (during the course of transfer pricing assessment).*

Protective addition

8. *Without prejudice to the contention that TNMM with Berry ratio (modified form of OP/OPEX) as the PLI should be accepted as the most appropriate method for determining ALP of the international transactions entered into by the Appellant in a proper manner, as has been upheld by the Hon'ble ITAT in earlier years, rather than the CUP method, the Ld. TPO and AO have erred in respect of the following while computing the protective adjustment amounting to INR :*

8.1. *including the free-on-board ("FOB") value of goods transacted under indenting segment in the cost base, while calculating the ALP for transactions with AEs other than Sumitomo Corporation Japan. Further, the Ld. DRP / TPO has also erred in adding the FOB value of goods as part of the operating revenues of the Appellant.*

using a set of companies for computation of the arm's length margin, most of whom are not comparable to the Appellant on various grounds.

8.3. *not considering the companies as comparable, which were contained in the TP documentation prepared by the Appellant and also provided in form of a fresh search (during the course of transfer pricing assessment); and*

8.4. *computing the segmental profitability of the Appellant by allocating expenses to the non-AE segment, so as to fix the profit level (i.e. OP/OPEX) of such segment to be 12.72 per cent (being the median margin of the set of comparable companies). While doing so, the Ld. DRP / TPO failed to appreciate that the OP/OPEX should be*

determined using the actual figures reflected in the profit and loss account. Since the gross profit and operating expenses are undisputed, the operating expenses should be allocated in the ratio of gross profit of each segment and not by assuming an arbitrary OP/OPEX for non-AE segment.

9. *The addition of INR 1,59,18,332/- to the total income of the Appellant on protective basis is completely misconceived both in law and on facts. The Ld. DRP / TPO erred in making an adjustment on protective basis in respect of an issue on which substantive addition has also been made, which is not permissible in law as the concept of substantive and protective adjustment is relevant only when an income is to be added in the hands of more than one taxpayer. This is without prejudice to the contention that TNMM with Berry ratio (modified form of OP/OPEX) as the PLI should be accepted as the most appropriate method for determining ALP of the international transactions entered into by the Appellant in a proper manner, as has been upheld by the Hon'ble ITAT in earlier years, rather than the CUP method.*

10. *That on the facts and circumstances of the case and in law, the AO have erred in levying / charging interest under sections 234B and 234C of the Act.*

The above grounds of appeal are mutually exclusive and without prejudice to each other.The Appellant craves leave to add, alter, amend or vary any of the above grounds either before or at the time of hearing as we may be advised. The arguments taken hereinabove are without prejudice to each other."

3. The Ground No. 1 is general in nature which requires no adjudication, Ground No. 2 & 3 are not pressed by the assessee.

4. **The Ground No. 4, 6, &7** arerelated to substantive adjustment of Rs. 21.69 crores, made using the CUP Method pertaining AE's other than Sumitomo Corporation, Japan. The assessee is aggrieved by the action of the TPO/DRP in disregarding the transfer pricing approach adopted by the assessee to determine the arm's length price ("ALP") of its international transactions. The assessee use of Transactional Net Margin ("TNMM") with operating profit/operating expenses ("OP/OPEX") as the profit level indicator ("PLI") has been disregarded by the TPO/DRP.

5. The Ld. Counsel for the assessee submitted that, the above said issue being recurring one which has been decided by the Tribunal in favour of assessee for 10 previous years (AY 2007-08 to 2016-17), wherein the CUP Method has been rejected and TNMM was held to be most appropriate method. The Ld. AR has produced plethora of orders passed by the Co-ordinate Bench of this Tribunal for all previous 10 years and submitted that the Ground No. 4, 6, & 7 are may be allowed in terms of the decisions rendered in the previous years.

6. Per contra, the Ld. DR vehemently argued and justified the orders of authorities below, but could not produce any contrary views taken against the assessee and could not negate the fact that the said issue has been decided in favour of the assessee for all previous 10 years.

7. We have considered the rival contentions of the parties, perused the material on record. It is found that in Assessee's own case in the consolidated order dated 22/10/2018 for the AY 2007-08 to 2011-12 in ITA No. 5095/Del/2011 and other connected Appeals, (Sumitomo Corporation India

Ltd. Vs. ACIT (2018) 99 Taxman.com 319 Delhi Trib), the Coordinate Bench has held that owing to significant differences between the AE and non AE commission transactions in respect of the nature of the goods, volume of transaction and the geographical locations of the markets, average commission rate in the non-AE segment could not be adopted as the ALP for the commission rate of numerous products in the AE segment under CUP method, which warrants a very high degree of similarity between controlled and uncontrolled transactions. The relevant extract of the order of the Tribunal are reproduced hereunder:-

> *"15. We have heard the parties at length and also perused the material referred to before us as discussed herein above. The approach of determining the ALP on the basis of average per cent of commission reported by the assessee in respect of indenting transactions with the non-AEs as held by the Tribunal has not found judicial favour with the Hon'ble High Court and matter has been remanded back for further examination of similarity between the two transactions and to conduct further in depth inquiry to examine the high degree of comparability of relevant control and uncontrolled transactions. Further, if the average rate of commission on such transactions was to be applied to the FOB value of goods involved in the indenting transactions with the AEs, then this Tribunal has to satisfy itself that there is no significant variation in the rate of commission between different products. From the perusal of the indenting transactions undertaken by the assessee with AE and non AE under various product segments, it is discerned that, for instance in the product segment 'Automotive', the assessee has undertaken 249 transactions with AE and only 4 with non AE and in the Assessment Year 2007-08 the volume of transaction, FOB value*

wise is 'Nil' in the case of non AE; and the commission earned with the AE is Rs. 7,50,43,686/- and with the non AE it is only Rs.9,672/-. Similarly the products dealt with AE in automotive segment are entirely different and the geographies involved are Switzerland, Singapore, Thailand and Japan whereas non AE transactions are with Suzuki Motorcycle India Pvt. Ltd. and Bajaj Auto Ltd in India. Likewise under the product 'chemicals' the assessee has undertaken 1044 transaction with AE and only 112 transaction with non AE and the commission with AE is 1.28%, whereas non AE it is 2.26%. Similarly, the products dealt with AE and non-AE under this segment are quite different and geography involved with AE are Spain, Japan, Italy, Switzerland, Thailand, whereas with non-AE it is India. Likewise in 'electronics' segment the transaction undertaken with the AE are 253, whereas with the non AE it is 5 and again not only the products are different but also geographical location are different with that of non-AE which are mostly with Indian parties and all AE transactions are with various foreign countries. Similar differences are noted in all across 10 to 11 products dealt by the assessee with AEs and non AEs. The total number of transactions with the AE during the year was 3,145 and with non AE it was only 371. Thus, apparently there is a huge difference in volume on FOB basis and the geographies dealt are also entirely different. The amount of average commission earned with the AE, is 1.58% whereas in the case of non AE it is 2.26. All these differences are permeating in all the Assessment Years as highlighted by the assessee in the chart submitted before us and on perusal of the same, it is quite glaring that under both the transactions, i.e., controlled transaction with the AE and uncontrolled transaction with the non AEs, there are huge

dissimilarity between the products, difference in volume, difference in value, markets and geographical location.

16. It is quite settled proposition that while applying CUP method, a very high degree of similarity has to be seen between the control and uncontrolled transactions not only in terms of products, contractual terms, volume, value but also market and geography locations. The reason being under CUP, price charged or paid for the property transferred has to be identified and the differences between the international transaction and the comparable uncontrolled transactions has to be seen which could materially affect the price in the open market. The price of different products cannot be the same as it depends upon the negotiation based on volumes, value and other contractual terms. Further different market and geographical location also affects the pricing factors and therefore, if there are differences on account of these factors CUP cannot be held to be the most appropriate method for bench marking the arm's length price. Here in this case, under the indenting segment there are various dissimilarities in the transaction with the AE and non AE as discussed above and for this reason alone the average commission earned cannot be the benchmarking factor for determining the ALP, and therefore, we hold that neither the CUP method can be applied nor the transaction with the AE and non AE can be taken for the purpose of comparability analysis. Thus, we reject the CUP method by taking the average commission earned in the transaction with the AE and non-AE.

17. Now, in these circumstances, we have to see whether TNMM can be considered as most appropriate method. First of all, it has

been brought on record before us that right from the Assessment Years 2003-04 to 2006-07, TNMM has been accepted as the most appropriate method by the TPO. However, instead of 'berry ratio' as PLI, TPO has taken OP/TC as PLI. Further, it has been brought to our notice that from the Assessment Years 2011-12 to 2018-19 under the MAP agreement it has been agreed that TNMM should be the most appropriate method to determine the ALP of the international transaction of the indent keeping into the fact that assessee is a low risk service provider and there is no change in FAR right from Assessment Years 2003-04 to 2018-19. Once TNMM has been accepted under the similar FAR, we do not find any reason to deviate by adopting some other method. Otherwise also we have held that CUP method cannot be applied and other methods admittedly are incapable of capturing the true arm's length result and therefore, we hold that TNMM should be taken as a most appropriate method for benchmarking the said transaction."

8. The aforesaid order for the AY 2007-08 to 2011-12 dated 22-10-2018 has also been followed by the Tribunal for the subsequent Assessment Years by deciding the issue under consideration in favour of the Assessee.

9. In view of the above discussions and the binding precedent orders in Assessee's own case (Supra), we respectfully follow the same and hold that once TNMM has been accepted under the similar FAR, there is no reason to deviate by adopting CUP Method and other methods admittedly are incapable of capturing the true arm's length result and therefore, we hold that TNMM should be taken as a most appropriate method for benchmarking the said transaction. Accordingly, we are inclined to allow the Grounds of Appeal No. 4, 6 & 7 for statistical purpose and remand the issue to the file of Ld. TPO to

examine and bench mark the integration transaction by adopting as most appropriate method by taking 'Berry ratio' as PLI as has been approved by Hon'ble High Court. Needless to say, the assessee shall be granted with the proper opportunity of being heard. **Accordingly, Grounds of Appeal No. 4, 6 & 7 are allowed for statistical purpose.**

10. The Ground No. 5 is regarding the directions of the Ld. DRP to the Ld. Assessing Officer/TPO to ascertain whether an appeal has been filed against the order of the Tribunal in the assessee's own case for AY 2012-13, 13-14 or 2014-15 and in case no appeal has been filed against the aforesaid order, the benchmarking of the A.E indent segment has to be in line of the aforesaid orders of the Tribunal and that the adjustment made by the TPO in its original order on protective basis has to be dropped. The Ld. Counsel submitted that while making the adjustment based on the direction of the Ld. DRP, the Ld. A.O/TPO has assumed that an appeal has been filed against the order of the Tribunal for AY 2012-13, AY 2013-14 or AY 2014-15 but not provided any evidence to substantiate the same. Therefore, the order of the A.O/TPO should be considered as null and void-ab-initio. Due to non-compliance of Section 144C(10) and Section 144C (13).

11. The similar ground of appeal was also raised before the Tribunal in Assessment Years 2015-16 & 2016-17, however, since in those Assessment Yeas, the Tribunal has deleted the substantiate adjustment itself the above ground has not been adjudicated as the said ground has remind as academic in nature. Following the consistency since we have also deleted the substantive adjustment itself, **the Ground No. 5 has become academic in nature. Accordingly, the Ground No. 5 is dismissed.**

12. Ground No. 8 is regarding protective addition of Rs. 1.59 crore under TNMM applying PLI of OP/OPEX. The Ld. TPO while making the adjustment included the FOB value of the goods transacted under indenting segment in the cost base as well as part of opening revenues of the assessee. The similar protective addition has also made in Assessee's own case for AY 2015-16 wherein the said issue has been dealt and decided in favour of the Assessee in ITA No. 507 & 508/Del/2021 and it is held as under:-

> ……."*"25. The Id. Transfer Pricing Officer has added FOB value of goods of Rs. 1262,21,61,684/- to the operating expenses of the assessee as well as to the commission income of the assessee. For the sake of clarity, the steps of the computation are as under:- .....*
>
> *26.* ***Now in the above steps we find that while calculatins step 1, there is no justificationsiven by the learned transfer-pricins officer of makins an addition to the operatinsexpenses of the free on-board value of soods on which the commission is earned. Thereis no justification also while calculatins step 4 that why free on-board value of soodsare also added to the operatins income.*** *Neither the learned transfer-pricing officer nor the learned dispute resolution panel has given any justification for making the above adjustment. The learned departmental representative also could not show us any reason that why the free on-board value is required to be added to the operating expenses as well as to the operating income derive at the arm 's-length price of the indent commission on by the assessee from associated enterprises other than Japan.*
>
> *27. We find that the coordinate bench in eisht prior assessment years has held that thetransactional net marsin method with berry ratio as the profit level indicator should beadopted. Therefore, respectfully following the coordinate bench in assessee's own casefor earlier years we find that only the berry ratio needs to be adopted. Further thetribunal in earlier year has also held that/FO be value of goods is the cost and revenueof the buyer and the seller and not "the commission asent. Therefore, such anadjustment could not have been made."*

13. By respectfully following above said ratio laid down by the Tribunal in earlier years, we are of the opinion that FOB value of the goods is the cost and revenue of the buyer and the seller and not the commission agent. Therefore, such an adjustment could not have been made.

14. Ground No. 8.2 & 8.3 are regarding comparables selected by the TPO. The Ld. Counsel for the assessee submitted that the assessee in TP report selected 8 comparable companies, but the TPO has rejected all the 8 comparables and selected fresh comparable set off 8 new Companies. Without giving any cogent reason whatsoever. The Ld. Counsel for the assessee further submitted that the new set of comparables includes three companies which are fully dissimilar on product functions risks and business model. The Ld. DR has justified the action of the Lower Authorities. Since the Ld. DRP and the Ld. TPO has rejected all the 8 comparables and selected a fresh comparables set of 8 new companies. The observation made by the Ld. TPO while rejecting the comparables proposed by the assessee reproduced hereunder:-

S.No	Company Name	Analysis
1	Associated Road Carriers Ltd.	This company fails the FAR filter hence; this company is not being considered as a comparable.
2	Hindustan Cargo Ltd.	This company fails the FAR filter, hence; this company is not being considered as a comparable.
3	Gordon Woodroffe Logistics Ltd.	This company fails the FAR filter, hence; this company is not being considered as a comparable.
4	Patel Integrated Logistics Ltd.	This company fails the FAR *filter* hence; this company is not being considered as a comparable.
5	Global International Carriers Ltd	This company fails the FAR *filter* hence; this company is not being considered as a comparable.
6	North Eastern Carrying Corporation Ltd.	This company fails the FAR *filter* hence; this company is not being considered as a comparable.
7	Concor Air Ltd.	This company fails the FAR filter, hence; this company is not being considered as a comparable
8	Pearl International Tours & Travels Ltd.	This company fails the FAR filter, hence; this company is not being considered as a comparable.

15. The Ld. TPO except giving the stereotype reason/analysis i.e.*"This Company fails FAR filter hence this Company is not being considered as comparable"*, not discussed as to how the comparable of the assessee fails the FAR profile analysis. The DRP has confirmed the said approach of the TPO without assigning any reasons. The Ld.Counsel for the Assessee contended that out of 8 companies selected by the TPO, 3 companies namely, EDCIL (India) Ltd., PRAENDEX management resources Pvt. Ltd. and Interactive Manpower Soulution Pvt. Ltd. are not comparables as they are functionally dissimilar. In our opinion, the said approach of the TPO/DRP is erroneous. Since, the assessee has provided the details of the above said 8 Companies in the TP Study; the Ld. TPO/DRP ought to have analyzed the same in detail. Likewise, the TPO/DRP ought to have given clear finding as to how the above 3 companies selected by the TPO are comparable to the FAR of the Assessee. Therefore, we deem it fit to direct the DRP to consider the above 8 Companies selected by the assessee along with the three comparable companies selected by the TPO on the basis of FAR analysis of the assessee and decide afresh by giving cogent reasons. The DRP is further directed to pass a speaking order on those comparable after giving proper opportunity of being heard to the assessee. **Accordingly, the Ground No. 8.2 & 8.3 are allowed for statistical purpose.**

16. Ground No. 9 is in respect of addition of Rs. 1,59,18,332/- to the total income of the assessee on protective basis. In view of deletion of the protective adjustment itself, the Grounds No. 9 has become academic in nature which requires no adjudication. The Ground No. 10 being consequential in nature which requires no adjudication. **Accordingly, Ground No. 9 & 10 are dismissed.**

17. In the result Appeal filed by the Assessee is partly allowed for statistical purpose.

18. In view of deciding the main appeal, the Stay Application filed along with the Appeal has rendered infructuous.

Order pronounced in the open court on the 18th October, 2023.

Sd/-	**Sd/-**
(G. S. PANNU)	**(YOGESH KUMAR U.S.)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 18/10/2023

**R.N, Sr. PS*

Copy forwarded to:

1. Appellants
2. Respondents
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI