आयकर अपीलीय अधिकरण
मुंबई पीठ "एच ",मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
सुश्री पद्मावती. एस, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H ", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
MS. PADMAVATHY.S, ACCOUNTANT MEMBER

आअसं. 6567/मुं/2011 (नि. व. 2005-06)
ITA NO.6567/MUM/2011 (A.Y.2005-06)

Servier India Private Limited
[formerly known as Serdia
Pharmaceuticals (India) Pvt.Ltd.]
1703, 17th Floor, B Wing, Parinee Crescenzo,
Plot Nos C-38/39, "G" Block, Behind MCA,
BKC, Bandra (E), Mumbai 400 051
PAN: AAACS-6696-R ..... अपीलार्थी/Appellant

बनाम Vs.

Additional Commissioner of Income Tax,
Range-7(2), Mumbai,
Aaykar Bhavan, M.K.Road,
Mumbai – 400 020 .....प्रतिवादी/Respondent

अपीलार्थी द्वारा/Appellant by : Shri Mukesh Bhutani, Advocate with S/Shri Paras Savla & Pratik Poddar Advocates

प्रतिवादीद्वारा/Respondent by : S/Shri Manoj Kumar, CIT-DR and Manoj Kumar Sinha, Sr. A.R ,

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

घोषणा की तिथि/ Date of pronouncement : 11/03/2024

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)- 15, Mumbai [in short 'the CIT(A)'] dated 25/07/2011 ,for Assessment Year 2005-06.

2. The assessee has filed revised and concise grounds of appeal vide application dated 30/06/2021. The ld.Counsel for the assessee stated that the revised and concise grounds of appeal be considered for the purpose of adjudication of the present appeal. The revised/concise grounds of appeal are taken on record.

3. The primary issue raised by the assessee in appeal is with respect to arm's length pricing of Active Pharmaceutical Ingredients ('APIs'). The facts germane to the issue raised in appeal are as under: The assessee is a subsidiary of Servier International BV, Netherlands. The assessee is principally engaged in marketing of Finished Dosage Forms ('FDFs') based on APIs i.e. bulk drugs imported from Les Laboratories Servier Egypt Industries. During the Financial Year relevant to Assessment Year under appeal, the assessee entered into following international transactions:

s.No.	Nature of transaction	Value of transaction (Rs. In crores)	MAM selected by assessee
1.	Import of APIs from AEs.	18.45	TNMM
2.	Consultancy fees paid in respect of Financial Services.	0.01	TNMM

During Financial Year 2004-05 the assessee had purchased 10 items from its overseas Associated Enterprises(AEs). In respect of three items namely (i) Trimetazidine; (ii) Indapamide and (iii) Gliclazide, the Transfer Pricing Officer (TPO) obtained comparable rates by issuance of notice u/s. 133(6) of the Income Tax Act, 1961 [in short 'the Act']. In respect of above three items the TPO did not accept the Arm's Length Price(ALP) determined by the assessee and made adjustment. The TPO applied CUP as the most appropriate method to determine the ALP and made adjustment of Rs.6,38,16,911/-. In so far as the other seven items since, the TPO could not obtain comparable rates, the

TPO accepted TNMM as most appropriate method and made no adjustment. The First Appellate Authority rejected the submissions of assessee and upheld the adjustment. Hence, the present appeal by the assessee.

4. The assessee vide application dated 29/06/2021 u/r. 29 of the Income Tax (Appellate Tribunal) Rules, 1963 furnished additional evidence, which include, (i) License Agreement between Les Laboratories Servier dated 01/05/1986; and (ii) Certificate of Analysis in respect of Trimetazidine.

5. Shri Mukesh Bhutani appearing on behalf of the assessee submitted that the additional evidence filed by the assessee i.e. License Agreement dated 01/05/1986 is necessary to be placed on record for proper adjudication of the Transfer Pricing issue in appeal. The assessee is a licensed manufacturer of FDFs. The assessee imports APIs from it AEs, the assessee manufacture FDFs using APIs under license. The aforesaid License Agreement was not examined by the authorities below as the assessee had not placed it on record. He contended that the Tribunal while adjudicating similar issue in Assessment Year 2002-03 in ITA No.2469/Mum/2006 decided the similar issue placing reliance on the decision of Federal Court of Canada in the case of GlaxoSmithKline Inc. vs. Her Majesty the Queen (2010 FCA 201) The Tribunal observed that the Federal Court of Canada has overturned the decision of Tax Court of Canada . The assessee has claimed superiority of the product but the License Agreement on the basis of which the assessee is claiming obligation to purchase the API at higher price is not available before the Tribunal. He submitted that the assessee had benchmarked transaction by applying TNMM and according to the understanding of assessee License Agreement was not necessary for determination of ALP hence was not placed on record earlier. It

was in the light of specific observations made by the Tribunal, License Agreement gains importance for adjudication of T.P issue. This agreement is very crucial to determine over all nature of transaction which supports the assessee's argument that CUP cannot be taken as the most appropriate method. The ld.Counsel for the assessee thus, prayed for admission of additional evidence i.e. License Agreement between Les Laboratories Servier and the assessee.

6. The ld.Counsel for the assessee further submits that the assessee has also placed on record Certificate of Analysis as additional evidence which substantiates superiority of its APIs over generic APIs. He pointed that in the earlier Assessment Year the Tribunal had made certain remarks that adjustment can be given in case the assessee is able to substantiate superiority of its APIs in question viz-a-viz the comparable selected by the TPO. The ld.Counsel for the assessee in support of his arguments of admission of additional evidence placed reliance on the following decisions:

(i) Tek Ram (dead) through L.Rs vs. CIT, 357 ITR 133(SC);

(ii) Test Hundred India Pvt. Ltd., 197 Taxman 128 (Del)

(iii) K.Venkataramaih vs. A. Seetharama Reddy & Other, AIR 1963 (SC) 1526.

7. Per contra, Shri Manoj Kumar, representing the Department vehemently objected to the application for filing of additional evidence at this belated stage.

8. On merits of the adjustment the ld.Counsel for the assessee submitted that the assessee in order to benchmark the transaction had applied TNMM as the most appropriate method. The Assessing Officer accepted TNMM as the

most appropriate method in respect of import of seven APIs out of ten and objected to the application of TNMM in respect of only three APIs. Thus, the TPO accepted TNMM as the most appropriate method in substantial transactions and only in respect of miniscule part of the international transaction. The assessee objected to application of CUP as the most appropriate method, for the following reasons:

(i) The TPO compared assessee's purchase of APIs from AEs with generic APIs. The transactions and conditions of the import and the quality of generic APIs is unknown. (ii) The ld.Counsel for the assessee submits that Rule 10B(1)(a) specifies the requirement for application of CUP. The requirements specified in the aforesaid Rule are not met, hence, CUP cannot be applied. He further referred to Rule 10B(2)(b) and (c) to contend that uncontrolled transactions shall be judged with reference to clause (b) and (c), which provides for reference to the agreement. He submitted that CUP can be adopted as the most appropriate method if none of differences between transactions being compared are likely to materially effect the price or cost charged or paid or profit arising from such transaction in the open market or reasonably accurate adjustment can be made to eliminate the material effect on such differences. Since, in the instant case data with respect to generic APIs is not available and there is material difference in the quality of the APIs procured by the assessee and the generic APIs, CUP cannot be applied. He further referred to Rule 10(2)(c) to contend that the factors mentioned in clause (c) and (f) are litmus test for applying CUP to benchmark the transactions. In the instant case, the comparables selected by the TPO fails to qualify the test hence cannot be accepted. To support his submissions the ld.Counsel for the assessee placed reliance on the following decisions:

(i) Star India Pvt. Ltd. vs. ACIT, 151 taxamann.com 77 (Mum-SB);

(ii) USB India Pvt. Ltd. vs.ACIT, 121 ITD 131 (Mum);

(iii) USB India Pvt. Ltd. vs. ACIT, ITA No.6454/Mum/2013 for A.Y. 2004-05 decided on 18/05/2016;

(iv) DCIT vs. USB India Pvt. Ltd. , 70 taxmann.com 164 (Mum);

(v) Gulbrandson Chemicals P. Ltd. vs. DCIT, 104 taxmann.com 253 (Ahd)

The ld.Counsel for the assessee finally submitted that if the matter is restored to the Assessing Officer to consider additional evidence then no opportunity should be given to Assessing Officer to reframe the assessment in entirety.

9. On the other hand, Shri Manoj Kumar representing the Department vehemently defended the impugned order. The ld. Departmental Representative submits that it is a case of shifting of profits. Referring to clause 4.14 of the License Agreement he submitted that assessee is making out a new case. The expression used in clause 4.14.2 in the agreement is "Specialties" and not the product APIs. APIs are same as chemicals. He further referred to the License Agreement clause 4.3(Packaging) and clause 4.4 (Distribution) to contend that there is no reference of packaging and distribution in assessee's Transfer Pricing study report. He submitted that if the additional evidence filed by the assessee are admitted the TPO may be allowed to examine the transaction in light of License Agreement.

9.1 Referring to the decision rendered by the Special Bench in the case of Star India Pvt. Ltd. (supra) he submitted that the same is distinguishable on facts, hence, no reliance can be placed on the said decision. He further contended that in so far as case of GlaxoSmithKline Inc. (supra) is concerned, though the Supreme Court of Canada has set aside the case, thereafter, the

case was settled outside the Court. In any case, the decision rendered by Canadian Court does not have binding effect.

9.2 The ld. Departmental Representative further submits that the Department had shared the information collected u/s. 133(6) of the Act with the assessee. The assessee failed to furnish any evidence to show that the APIs purchased by the assessee are in any manner superior to the comparables. The assessee without any basis has leveled the allegation of cherry picking by the TPO. The TPO had issued notice U/s.133(6) in respect of all the APIs. Wherever, the TPO could get comparables, he applied CUP and where the TPO did not receive any reply to the notice and no comparables were available, he accepted TNMM applied by the assessee. The ld. Departmental Representative thus, prayed for upholding the order of CIT(A).

10. To rebut the submissions made on behalf of the Department the ld.Counsel for the assessee submits that the alleged information on APIs shared by the TPO vide letter dated 07/10/2008 is at page 80 of the Paper Book. A perusal of same would show that information is sketchy, the terms and conditions of the agreement between the parties were not made available to the assessee. Thus, it is incorrect statement that the TPO shared complete information collected during the proceedings u/s. 133(6) of the Act. He further rebutted the submissions made by ld. Departmental Representative that the decision in the case of GlaxoSmithKline Inc. (supra) was settled outside the Court. He submitted that the decision in the aforesaid case was given by the Court. He finally placed reliance on the decision in the case of PCIT vs. Amphenol Interconnect India (P) Ltd. 91 taxmann.com 441 (Bom) to contend that where TNMM is accepted as most appropriate method for substantial transactions

the TPO cannot change the method to CUP to benchmark miniscule part of the transaction. The ld.Counsel for the assessee made a statement at Bar that he would not reiterate and press arguments made before the Co-ordinate Bench in the case of Serdia Pharmaceuticals (India) Private Limited in the preceding Assessment Years.

11. We have heard the submissions made by rival sides and have examined the orders of authorities below. The assessee has filed an application for admission of additional evidence. The assessee has given detailed reasons for admitting additional evidence viz. (i)License Agreement between Les Laboratories Servier and assessee, dated 01/05/1986; (ii) Certificate of Analysis of comparable API (Trimeazidine) manufactured by Alcon Pharmaceutical Pvt. Ltd. The Department opposed admission of additional evidence at the second appellate stage.

12. The assessee has purchase APIs from its overseas AEs and to benchmark arm's length pricing of the international transaction applied TNMM. The TPO issued notice u/s. 133(6) of the Act to various parties to make his independent enquiries. Out of total ten APIs the TPO could gather information from the comparables only in respect of three. In so far as the APIs where no additional information were available to the TPO, he accepted assessee's TNMM as the most appropriate method. With regard to APIs where TPO could gather information, the TPO based on the information received applied CUP as the most appropriate method to benchmark the transaction. In assessee's own case in ITA No.2469/Mum/2006 for Assessment Year 2002-03, the assessee had applied TNMM to benchmark the transaction with its overseas AE, the TPO applied CUP, the Tribunal upheld CUP method as most

appropriate method for determining ALP. However, the Tribunal while coming to the said conclusion remarked that no License Agreement was placed on record by the assessee. The primary arguments of the assessee not to apply CUP in Assessment Year 2002-03 was that the APIs manufactured by the AEs are of superior quality as compared to APIs manufactured by comparable companies. Since, there is substantial difference in quality, therefore, CUP cannot be applied. The Co-ordinate Bench while addressing the arguments raised by assessee observed as under:

> *"89. In the case before us,* ***the plea of the assessee is of superiority of APIs manufactured by its associated enterprises that the APIs purchased by the assessee command a higher price, and not that it was on account of the compulsions of license agreement that the assessee had to buy it at a higher price. In any event, the assessee has not even filed copies of any agreements, including the license agreement, before us. As we make these observations, we make it clear our observations should not be construed an expression of opinion on things not before us. That is a plea whichwill have to be dealt with, on merits, when it is made. That apart, there are many other peripheral aspects which will have to be examined when such a claim is made by the assessee, such as, when assessee of claims that the higher price, independent of consideration paid in terms of the licence agreement, had to paid to the AE because of the licence agreement requirement, one will have to consider whether this excessive payment is de facto in the nature of a royalty payment, in the garb of payment for API, and whether, and to what extent, necessary corollaries to such a re characterization will follow.*** *Of course, this approach presupposes that a higher payment, on the ground of compulsions of agreement, can be re characterized, even in the absence of a specific legal provision enabling such recharacterization-a proposition yet to come up for judicial scrutiny. Be that as it may, since there is no material on record to suggest that the higher prices of API were warranted, on account of commercial compulsions arising out of licence agreement, we need not deal with this aspect in any more details. Suffice to say that this aspect of the matter is not relevant in the present case, as it has not been specifically pleaded before us. Therefore, observations of the Court of Appeal in Canada do not, in any manner, dilute the decision of the Tax Court of Canada, to the extent it is relevant in appeals before us."*
>
> *[Emphasized by us]*

Thus, the need and relevance of the License Agreement to adjudicate the issue for the first time emanated from the aforesaid observations made by the Tribunal in assessee's own case for the preceding assessment years i.e. A.Ys. 2002-03, 2003-04 and 2004-05.

The aforesaid decision was rendered by the Tribunal on 31/12/2010. By that time the assessment order for assessment year 2005-06 was already passed on 24/12/2008 and the first appeal of the assessee was pending for adjudication before the CIT(A). The order in assessee's appeal was pronounced by the CIT(A) on 25/07/2011. Though the assessee could have furnished additional evidence before the CIT(A) but filed application for admission of additional evidence only at second appellate stage before the Tribunal. Nevertheless, consideration of additional evidence filed by the assessee viz. License Agreement gathers importance in view of the observations made by Co-Ordinate Bench in assessee's own case for the preceding assessment years. Taking into consideration entire gamut of the case we deem it appropriate to admit the additional evidence filed by the assessee for proper adjudication of the issue in hand.

13. The assessee is aggrieved against the application of CUP as most appropriate method to benchmark the transaction in respect of three APIs purchased by the assessee from its overseas AEs. The TPO has accepted TNMM as the most appropriate method to benchmark the transaction in respect of 7 APIs. The License Agreement has been furnished by the assessee as additional evidence before the Tribunal and the same was not available to the TPO/Assessing Officer. Thus, without traversing into merits of the issue at this stage, we deem it appropriate to restore the issue back to the file of Assessing Officer /TPO to re-examine the transaction qua 3 APIs (wherein the TPO had applied CUP) in light of the License Agreement now placed on record as additional evidence. The Assessing Officer shall grant reasonable opportunity of hearing/making submissions to the assessee before re-

examining the aforesaid transactions, in accordance with law. Thus, ground No.2 to 5 of appeal are allowed for statistical purpose in the terms aforesaid.

14. In ground No.6 of appeal/additional ground, the assessee has assailed the assessment order in not allowing deduction u/s. 37(1) of the Act in respect of "Education Cess" and "Secondary and Higher Education Cess". The ld.Counsel for the assessee made a statement at the Bar that he is not pressing aforesaid ground/ additional ground of appeal. In view of the said statement, ground No.6/Additional Ground No.1 is dismissed as not pressed.

15. In the result, appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on Monday the 11th day of March, 2024.

Sd/-	Sd/-
(PADMAVATHY. S)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Dated: 11/03/2024
Vm, Sr. PS(O/S)

<u>प्रतिलिपि अग्रेषित</u>Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्तCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5.. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar)
ITAT, Mumbai