

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " "**

**BEFORE SHRI VIJAYPAL RAO, JUDICIAL MEMBER AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER**

I.T.(T.P) A. No.1039/Bang/2012 (Assessment Year : 2008-09)		
M/s. FMC India Pvt. Ltd., Embassy Star, 8 Palace Road, High Grounds, Bangalore-560 052. PAN AAACF 4579 N	Vs.	Dy. Commissioner of Income Tax, Circle 11(3), Bangalore.
Appellant		Respondent.

Appellant By : Shri Padamchand Khincha, C.A.
Respondent By : Shri Ganapathi Bhat, CIT (D.R)

Date of Hearing : 7.9.2015.
Date of Pronouncement : 24.09.2015.

O R D E R

Per Shri Jason P. Boaz, A.M. :

This appeal by the assessee is directed against the order of assessment passed under Section 143(3) rws 144C of the Income Tax Act, 1961 (in short 'the Act') dt.15.4.2012 in pursuance of the directions of the Dispute Resolution Panel ('DRP') issued under Section 144C(5) rws 144C(8) of the Act dt.18.4.2012. The relevant Assessment Year is 2008-09.

2. The facts of the case, briefly, are as under :-

2.1 The assessee company, a subsidiary of FMC Agricultural Product International AG Switzerland, is engaged in the business of manufacture and processing of pesticides by

importing the same from its Associated Enterprises ('AE'). In addition, the assessee is also engaged in trading and providing research and development services to its AEs. For Assessment Year 2008-09, the assessee filed its return of income on 30.09.2008 declaring income of Rs.5,83,62,730. The return was processed under Section 143(1) of the Act and the case was taken up for scrutiny.

2.2 The Assessing Officer observed that the assessee had entered into international transactions in excess of Rs.15 Crores and therefore with the approval of the CIT-I, Bangalore made a reference to the Transfer Pricing Officer ('TPO') to determine the arms length price ('ALP') thereof, as per the provisions of section 92CA of the Act. In the year under consideration, the international transactions entered into by the assessee were categorized as -

- (i) Processing Function,
- (ii) Research and Development Service;
- (iii) Import & Processing of Lithium Metals and
- (iv) Support Services.

The TPO on examination thereof found that, other than the Research and Development Services of the assessee, all the other reported international transactions were at arm's length. The total operating revenues from R&D Services provided to its AE was Rs.2,41,30,256 with operating costs at Rs.1,96,59,322. The operating profit was Rs.36,16,844 and the operating profit as a percentage of operating revenue was 19%. In its T.P. Study, the assessee adopted TNMM as the Most Appropriate Method ('MAM') and selected 7 companies as comparables. The arithmetic mean of these comparable

companies was computed at 12.84%. Since the assessee's profit margin (OR/OC) of 19%, from the provisions of R&D Services, was higher than that of the comparables computed at 12.84 %, the assessee assumed the value of international transactions relating to R&D Services Segment to be at arm's length. The TPO adopted TNMM in the MAM. However, out of the 8 comparable companies selected by the assessee, the TPO rejected 5 of these companies, retaining only two of them. In addition thereto, the TPO selected 5 more companies as comparables. The TPO's final list of comparable companies are as under :-

S.No.	Name of Company	OP/TC (%)
1.	Honda R&D (India) Pvt. Ltd.	3.00
2.	Research & Support International Pvt. Ltd.	6.91
3.	Celestial Biolabs Ltd.	73.92
4.	Clinigene International Ltd.	17.54
5.	Jindal Drilling & Industries Ltd.	7.81
6.	IDC (India) Ltd.	15.55
7.	Oil Field Instrumentation (India) Ltd.	45.60
	Average Mean Margin	24.33

The TPO vide order under Section 92CA of the Act dt.31.10.2011 has proposed a T.P. Adjustment of Rs.13,74,069 to the ALP of international transactions entered into by the assessee in the period relevant to Assessment Year 2008-09. The Assessing Officer determined the income of the assessee at Rs.5,97,36,798 which included the T.P. Adjustment of Rs.13,74,069 under Section 92CA of the Act vide draft assessment order passed under Section 143(3) of the Act dt.7.12.2011.

11. *not making proper adjustment for enterprise level and transactional level differences in determining the ALP.*
12. *not appreciating that the law does not compel adopting many (or any minimum) companies as comparables and that the appellant could justify the price paid/charged on the basis of any one comparable only.*
13. *not allowing the benefit of the +/-5% range mentioned in the proviso to section 92C (2). The appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.*

The appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

4. At the outset, the learned Authorised Representative for the assessee submitted that the assessee is only pressing for exclusion of the following two companies from the TPO's list of comparables.

(i) Oilfield Instrumentation India Ltd. and

(ii) Celestial Labs Ltd.

It was submitted that except for pressing ground of appeal at No.9 for exclusion of the above two companies from the list of comparables all other grounds i.e. at S.Nos.1 to 8 and 10 to 13 are not being pressed in this appeal before us. In this view of the matter, the grounds of appeal at S.Nos.1 to 8 and 10 to 13 not being pressed are rendered infructuous and are accordingly dismissed.

5. Oil Field Instrumentation India Ltd. ('Oil Field')

5.1 This company was chosen as a comparable by the TPO and its inclusion was upheld by the DRP inspite of the objections raised by the assessee to its inclusion/retention in the list of comparable companies. Before us, the learned Authorised Representative submitted that as per the material in the public domain i.e. in its web site, this company i.e.

'Oil Field' is engaged in the supply of equipment for mud logging units/mud logging services mainly for Geological Operations for oil, gas and mineral exploration. The learned Authorised Representative contends that its products and services while include 90% of mud logging services, rig instrumentation, gas detection, MWD/ directional / drilling, LOG/MAT digitizing, horizontal drilling/river crossing etc. cannot be treated as comparable to the Research and Development activity carried out by the assessee in the Agro Chemical Industry. The learned Authorised Representative for the assessee submitted that even for the immediately preceding year i.e. Assessment Year 2007-08 in the assessee's own case, the CIT (Appeals) following the decision of the ITAT, Mumbai Bench in the case of Tevapharma (P) Ltd. in ITA No.6623/Mum/2011 for Assessment Year 2007-08, had directed and upheld the exclusion of this company i.e. 'Oil Field' from the list of comparables to the assessee in the case on hand who is an R&S Service Provider in the Agro Chemical Industry. It was further submitted that the co-ordinate bench of the Tribunal in its order in IT(TP)A N 431/Bang/2012 dt.10.4.2015 for Assessment Year 2007-08 had upheld the order of the learned CIT (Appeals) in excluding this company i.e. 'Oil Field' from the list of comparables to the assessee and dismissed Revenue's appeal. The learned Authorised Representative prays that in view of the factual matrix brought out above, this company ought to be excluded from the list of comparables to the assessee.

5.2 Per contra, the learned Departmental Representative supported the orders of the authorities below in including / retaining this company in the list of comparables to the assessee in the case on hand.

5.3.1 We have heard both parties and perused and carefully considered the material on record; including the judicial pronouncements cited and placed reliance upon by the assessee. From the factual matrix laid out above it is evidently clear that this company, namely, 'Oil Field' is engaged in activities like mud logging, gas detection, horizontal, MWD and directional drilling, rig instrumentation, etc. which clearly demonstrate its functional dis-similarity and difference from the assessee's operation which is of a R&D service provider in the Agro Chemical Industry. We find that the ITAT, Mumbai Bench in the case of Tévapharma India Pvt. Ltd. in ITA No.6623/Mum/2011 and co-ordinate benches of this Tribunal in the case of Apotex Research Pvt. Ltd. in ITA No.918/Bang/2011 and Millipore India Pt. Ltd., in IT(TP)A No.689/Bang/2011 after considering the functional profile of this company i.e. Oil Field Instrumentation India Ltd. held that this company cannot be a comparable to companies who are R&D service providers. The co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08, in its order in IT(TP)A No.431/Bang/2012 after considering the above referred decisions of the ITAT, Mumbai Bench in Tévapharma Pvt. Ltd. (supra) and of the co-ordinate benches of this Tribunal in the case of Apotex Research Pvt. Ltd. and Millipore India Pvt. Ltd. (supra) has held as under at para 5.2.4 to 5.2.6 of order while excluding this company i.e. 'Oil Field' :-

" 5.2.4 The learned CIT(A) has rejected the aforesaid three companies from the list of comparables based on functional differences vis-a-vis the assessee also relying on the decision of the ITAT, Mumbai Bench in the case of Tevapharm India Pvt. Ltd. in ITA No.6623/Mum/2011 for Assessment Year 2007-08 wherein these three companies were rejected as comparables in respect of an R&D Service Provider. Before us, no material evidence has been brought on record by revenue to justify the inclusion of these three companies in the list of comparables.

5.2.5 We also find that co-ordinate benches of this Tribunal in the cases of Apotex Research Pvt. Ltd. V DCIT in ITA No.918/Bang/2011 dt.23.11.2012 for Assessment Year 2007-08 and in Millipore India Pvt. Ltd. in IT(TP)A No.689/Bang/2012 dt.4.7.2014 for Assessment Year 2007-08, after considering the functional profile of M/s. Oil Field Instrumentation India Ltd. and M/s. Celestial Bio Labs Ltd. held that these two companies cannot be treated as comparables for an R&D Service Provider.

5.2.6 In this view of the matter, following the findings in the decision of the Tribunal Benches in the cases of Tevapharm India Pvt. Ltd. (supra), Apotex Research Pvt. Ltd. (supra) and Millipore India Pvt. Ltd. (supra), we hold that these three companies viz. Oil Field Instrumentation India Ltd., Celestial Bio Labs, Ltd., and Agile Electric Technologies Pvt. Ltd. are functionally different from the assessee in the case on hand and therefore cannot be treated as comparables. We are, therefore, in agreement with the finding of the CIT (Appeals) in respect of the exclusion of these three companies from the list of comparables and consequently direct the Assessing Officer / TPO to exclude these three companies from the list of comparables."

5.3.2 Following the decision of the Mumbai Bench of the ITAT in the case of Tevapharma Pvt. Ltd. (supra) and of the co-ordinate benches of this Tribunal in the case of Millipore India Pvt. Ltd. (supra), Apotex Research Pvt. Ltd. (supra) and the assessee's own case for Assessment Year 2007-08 (supra), we direct the Assessing Officer / TPO to exclude this company i.e. Oil Field Instrumentation India Ltd., from the list of comparables to the assessee in the case on hand.

6. **Additional Grounds of Appeal.**

Celestial Biolabs Ltd.

6.1 In the course of proceedings before us, the assessee filed the following additional grounds of appeal seeking the exclusion of Celestial Biolabs Ltd. (old name Celestial Labs Ltd.) along with a prayer for admission and adjudication of the same :-

" 1. The learned TPO has erred in selecting Celestial Biolabs Ltd. as a comparable despite it being functionally different from the appellant's business."

6.2 We have considered the averments and prayer for admission and adjudication of the additional ground raised by the assessee, seeking the exclusion of Celestial Biolabs Ltd. from the list of comparables, In the interest of justice and equity and also since all the necessary facts for adjudicating this ground are already a part of the record, we are of the view that this additional ground raised by the assessee is to be admitted for adjudication.

6.3 According to the assessee from the details in the public domain, Celestial Labs Ltd. is a diversified company apart from software development services operating in diverse field such as rendering IT Services, ITES encompassing application, development and maintenance, production support, data warehousing, SAP implementation, bio-informatics, research in pharmaceutical products and is also into manufacturing and trading of products such as Cel Sanjeevani Products, SAP Services. It is contended by the learned Authorised Representative that in view of the above facts which establish that Celestial Labs Ltd. is functionally dis-similar and different from the assessee in the case on hand it

ought to be rejected as a comparable to the assessee company which is only an R&D service provider in the Agro Chemical Industry. The learned Authorised Representative submitted that even in the assessee's own case for Assessment Year 2007-08, a co-ordinate bench of this Tribunal in its order in IT(TP)A No.431/Bang/2012 dt.10.4.2015, following the decision of the Mumbai ITAT in the case of Tevapharma Ltd. (supra), had directed and upheld exclusion of this company i.e. Celestial Biolabs Ltd. from the list of comparables to the assessee in the case on hand. The learned Authorised Representative prays that in view of the factual matrix brought out above, this company ought to be excluded from the list of comparables to the assessee.

6.4 Per contra, the learned Departmental Representative supported the order of the TPO in selecting this company as a comparable to the assessee in the case on hand.

6.5.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial decisions cited by the assessee. From the factual matrix laid out above, it is abundantly clear that Celestial Biolabs Ltd. is engaged in diverse activities like development and sale of software products, data warehousing, bio-informatics, apart from software development services rendering it functionally different and dis-similar to the assessee in the case on hand who is merely a R&D provider in the Agro Chemical Industry. We find that the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 in IT(TP)A 431/Bang/2012 dt.10.4.2015 following the decision of the ITAT, Mumbai Bench in the case of Tevapharma Ltd. (supra) and of the co-ordinate benches in the case of Apotex Research Pvt. Ltd.

(supra) and Millipore India Pvt. Ltd. (supra) has held that this company i.e. Celestial Biolabs Ltd., cannot be treated as comparable to companies which are mere R&D Service Providers. In this regard, the co-ordinate bench in its order for Assessment Year 2007-08 (supra) has held as under at paras 5.2.4 to 5.2.6 of its order as under :-

" 5.2.4 The learned CIT(A) has rejected the aforesaid three companies from the list of comparables based on functional differences vis-a-vis the assessee also relying on the decision of the ITAT, Mumbai Bench in the case of Tevapharm India Pvt. Ltd. in ITA No.6623/Mum/2011 for Assessment Year 2007-08 wherein these three companies were rejected as comparables in respect of an R&D Service Provider. Before us, no material evidence has been brought on record by revenue to justify the inclusion of these three companies in the list of comparables.

5.2.5 We also find that co-ordinate benches of this Tribunal in the cases of Apotex Research Pvt. Ltd. V DCIT in ITA No.918/Bang/2011 dt.23.11.2012 for Assessment Year 2007-08 and in Millipore India Pvt. Ltd. in IT(TP)A No.689/Bang/2012 dt.4.7.2014 for Assessment Year 2007-08, after considering the functional profile of M/s. Oil Field Instrumentation India Ltd. and M/s. Celestial Bio Labs Ltd. held that these two companies cannot be treated as comparables for an R&D Service Provider.

5.2.6 In this view of the matter, following the findings in the decision of the Tribunal Benches in the cases of Tevapharm India Pvt. Ltd. (supra), Apotex Research Pvt. Ltd. (supra) and Millipore India Pvt. Ltd. (supra), we hold that these three companies viz. Oil Field Instrumentation India Ltd., Celestial Bio Labs, Ltd., and Agile Electric Technologies Pvt. Ltd. are functionally different from the assessee in the case on hand and therefore cannot be treated as comparables. We are, therefore, in agreement with the finding of the CIT (Appeals) in respect of the exclusion of these three companies from the list of comparables and consequently direct the Assessing Officer / TPO to exclude these three companies from the list of comparables."

6.5.2 Following the decision of the co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08 (supra), the decision of the ITAT, Mumbai Bench in the case of Tevapharma Ltd. (supra) and of the co-ordinate benches of this Tribunal in the cases of Apotex Research Pvt. Ltd. (supra), we direct the Assessing Officer / TPO to

exclude this company i.e. Celestial Biolabs Ltd. from the list of comparables to the assessee in the case on hand.

7. In the result, the assessee's appeal for Assessment Year 2008-09 is partly allowed.

Order pronounced in the open court on 24th Sept., 2015.

Sd/-
(VIJAYPAL RAO)
Judicial Member

Sd/-
(JASON P BOAZ)
Accountant Member

*Reddy gp

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By Order

Asst. Registrar, ITAT, Bangalore