



आयकर अपीलिय अधिकरण "के" न्यायपीठ मुंबई में।
**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI**

श्री आर सी शर्मा, लेखा सदस्य एवं
श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।

**BEFORE SHRI R. C. SHARMA, ACCOUNTANT MEMBER
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER**

IT(TP)A No.: 1373/Mum/2014

(Assessment year 2009-10)

सिंगेनता इंडिया प्राइवेट लिमिटेड Syngenta India Ltd., S No. 110/11/3, Amar Paradigm Baner Road, Pune -411 045 स्थयी लेखा सं. PAN: AAECS 9424 P	Vs	Dy. CIT- 1(3), Room No.564, Aayakar Bhavan, M K Road, Mumbai – 400 020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)

ITA No.: 1926/Mum/2014

(Assessment year 2009-10)

Dy. CIT- 1(3), Room No.564, Aayakar Bhavan, M K Road, Mumbai – 400 020	Vs	सिंगेनता इंडिया प्राइवेट लिमिटेड Syngenta India Ltd., S No. 110/11/3, Amar Paradigm Baner Road, Pune -411 045 स्थयी लेखा सं. PAN: AAECS 9424 P
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)

ITA No.: 560/Mum/2015

(Assessment year 2010-11)

सिंगेनता इंडिया प्राइवेट लिमिटेड Syngenta India Ltd., Pune -411 045	Vs	Dy. CIT- 1(3), M K Road, Mumbai – 400 020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)

ITA No.: 147/Mum/2016

(Assessment year 2011-12)

सिंगेनता इंडिया प्राइवेट लिमिटेड Syngenta India Ltd., Pune -411 045	Vs	Dy. CIT- 1(3), M K Road, Mumbai – 400 020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Assessee by	:	श्री मुकेश भूतानी Shri Mukesh Bhutani, श्री अजित कुमार जैन, श्री विशाल कालरा Shri Vishal Kalra
Revenue by	:	Shri N K Chand

सुनवाई की तारीख /Date of Hearing : 21-10-2016
घोषणा की तारीख /Date of Pronouncement : 30-11-2016

आदेश
ORDER

श्री अमित शुक्ला, न्या सः
PER AMIT SHUKLA, JM:

For the assessment year 2009-10, the cross appeals have been filed by the assessee as well as by the revenue against Final Assessment Order dated 23rd January, 2014 passed by the Assessing Officer under section 143(3) r.w.s 144C(13) in pursuance of order of Dispute Resolution Panel – II Mumbai (DRP) under section 144C(5) vide order dated 22.11.2013; For the assessment year 2010-11, the assessee has filed appeal against Final assessment order dated 29th December, 2014 passed under section 143(3) r.w.s. 144C(13) in pursuance of order passed by the DRP vide order dated 31.10.2014; and for the assessment year 2011-12 appeal has been preferred by the assessee against final assessment order dated 24th December, 2015, passed under section 143(3) r.w.s 144C(13) in pursuance of directions given by the DRP dated 27.11.2015. Since common issues are involved in all the appeals arising out of identical set of facts, therefore, the same were heard together and are being disposed off by way of this consolidated order. The various transfer pricing issues involved in all the appeals at a glance are highlighted as under:-

Sl. No.	Issue under Appeal	AY 2009-10	AY 2010-11	AY 2011-12
1	Adjustment in contract Manufacturing segment Departmental Appeal (Computation of 5% Range working as per Proviso to section 92C(2) of the Income tax Act, 1961 ('Act')	Rs.26,08,53,000	NA	NA
2	Disallowance of royalty Payment -(Assessee's Appeal)	Rs.4,79,44,806 (Ground Nos. 3 & 3.1)	Rs.6,13,25,824 Ground Nos. 3 & 3.1	Rs.5,53,93,209 Ground Nos.3 &3.1
3	Adjustment on account of location savings- (Assessee's appeal)	Rs54,69,43,636	Rs60,45,21,233 Ground No.4 and 4.1	Rs.65,26,11,480 Ground No.4 & 4.1
4	Adjustment on account of green (environment) cost- (Assessee's appeal)	Rs.1,47,27,846 Ground No.5	Rs.1,79,80,345 Ground No.5	NA

2. To understand the facts and implications thereof on the issue raised, we will first take-up the assessee's appeal for the assessment year 2009-10, vide which following grounds have been raised:-

Appeal under section 253(1) of the Income Tax Act, 1961 ("Act") against the order dated January 23, 2014 (received on January 27, 2014) passed under section 143(3) r.w.s, 1440(1) of the Act, passed by the learned Additional Commissioner of Income Tax, Range 1(3), Mumbai ("AO") for the aforesaid assessment year.

GROUND OF APPEAL

1. *That on the facts and circumstances of the case and in law, the learned AO has erred in assessing the income of the appellant for the relevant assessment year at Rs 279,69,55,760, as against returned income of Rs 191,78,79,648/-*

Transfer pricing grounds:

2. *Based on the facts and circumstances of the case and in law the learned AO/ TPO pursuant to the directions of the DRP, erred in making an adjustment of Rs.60,96,16,288 in respect of the international transactions, alleging that the same to be not at arm's length in terms of the provisions of Sections 92C(1) and 92C(2) of the Act, read with Rule 10D of the Income-tax Rules, 1962 ("the Rules").*

3. Based on the facts and circumstances of the case and in law, the learned AO/ TPO pursuant to the directions of the DRP, arbitrarily erred in disallowing the royalty payment amounting to Rs.4,79,44,806, paid in relation to corn and sunflower seeds.

3.1 Without prejudice and notwithstanding, based on the facts and circumstances of the case, the disallowance in relation to the royalty payments for the instant assessment year should be restricted by the amount of payments recovered from its AEs and offered to tax in the subsequent year(s) or directions may kindly be issued to reduce the said amount from income in the year offered to tax.

4. Based on the facts and circumstances of the case and in law, the learned AO/ TPO pursuant to the directions of the DRP, erred in making arbitrary adjustment of Rs.54,69,43,636 on account of location savings attributed to Appellant's licensed manufacturing and contract manufacturing activities based on conjectures and surmises and further erred in not appreciating that the same was not an international transaction amenable to transfer pricing ("TP") provisions.

4.1 Without prejudice and notwithstanding to the above, the learned AO/ TPO erred in wrongly computing and not restricting the adjustment on account of location saving to Appellants contract manufacturing activities i.e. Rs.45,88,53,296, in accordance with the directions of DRP.

5. Based on the facts and circumstances of the case and in law, the learned AO/ TPO pursuant to the directions of the DRP, erred in making arbitrary adjustment of Rs.1,47,27.846 based on conjectures and surmises in relation to environment/ green cost savings and further erred in not appreciating that the same was not an international transaction amenable to TP provisions.

6. That the learned AO/ TPO erred on the facts and circumstances of the case and in law in not granting the benefit of economic and risk adjustments

Corporate-tax grounds:

7. Based on the facts and circumstances of the case and in law, the learned AO, pursuant to the directions of the DRP, erred in setting off the brought forward losses of Rs.8,10,29,424 pertaining to Profenofos unit against the profits of the current year while computing deduction under Section 80-IB of the Act.

8(a) *Based on the facts and the circumstances of the case and in law, the learned AO, pursuant to the directions of the DRP, erred in adding an amount of Rs.27,75,55,199 to the value of closing stock for Assessment Year 2009-10 on account of unutilized CENVAT credit.*

(b) *Without prejudice to the above, the learned AO ought to have made similar adjustments to opening stock, purchases and sales as laid down in Section 145A of the Act.*

(c) *Without prejudice to the above, the learned AO ought to have held that the value of the opening stock of the Assessment Year 2009-10 should be increased by Rs.18,53,74,019 on account of the addition made to the closing stock for the Assessment Year 2008-09;*

(d) *Without prejudice to the above, the learned AO ought to have held that the value of the opening stock of the subsequent Assessment Year i.e. Assessment Year 2010-11 should be increased by Rs.27,75,55,199 on account of the addition made to the closing stock for Assessment Year 2009-10.*

9. *Based on the facts and circumstances of the case and in law, the learned AD erred in not granting depreciation on repairs and maintenance to building treated as capital in nature in the final assessment order for AY 2008-09.*

10 *Based on the facts and circumstances of the case and in law, the learned AD erred in not granting credit for tax deducted at source amounting to Rs.117,79,418.*

11. *Based on the facts and circumstances of the case and in law, the learned AD erred in levying interest under section 234B amounting to Rs.19,52,57,581 as against the correct amount of Rs. 18,27,15,110.*

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the Appellant”.

3. The background of the case in brief are that, the assessee is a public limited company engaged in the business of manufacturing and trading of agro-chemical products/crop protection chemicals and multiplication and trading of seeds.

The crop protection segment is further divided into following two segments:-

- (i) Licensed manufacturing - Under this segment, the Assessee manufactures and formulates crop protection chemicals which are manufactured majority through job workers and the sold primarily in the domestic market;
- (ii) Contract manufacturing - Under this segment, the assessee is engaged in the contract manufacturing of active ingredient Thiamethoxam (“TMX”) and products containing TMX. This involves imports of raw materials from Syngenta Asia Pacific Pte Ltd (“SAPL”) and sale of finished goods to SAPL. The assessee has a manufacturing unit at Goa where it manufactures such active ingredients (i.e. TMX and its derivate products).

The assessee has reported its segmental accounts in the following manner:-

	Segment Crop Protection			Segment Seeds	Total
	Sub-segment I	Sub-Segment-II	Crop Protection-Total		
Particulars	Crop Protection Licensed Manufacturing	Crop Protection Contract Manufacturing			
Gross sales	79,96,232	38,93,619	1,18,89,851	25,60,669	1,44,50,520
Less: Excise Duty	(6,48,164)	-	(6,48,164)		(6,48,164)
Net Sales	73,48,068	38,93,619	1,12,41,687	25,60,669	1,38,02,356
Less: Cost of goods sold	(52,34,359)	(34,61,675)	(86,96,034)	(12,81,355)	(99,77,389)
Less: Operating Expenses	(9,79,139)	-	(9,79,139)	(6,71,743)	(16,50,882)
Operating Profit	11,34,570	4,31,944	15,66,514	6,07,571	21,74,085
Add: Other Income			1,03,071	4,097	1,07,168

Less: Other Expenses			(45,785)	(3,554)	(49,339)
Profit for the year			16,23,800	6,08,114	22,31,914
(OP/Sales)	14.19%	--		23.73%	
OP/TC		12.48%			

4. We will first dwell upon the issue of adjustment on account of 'Royalty' Payments in relation to Corn and Sunflower seeds, the facts in brief are that, the assessee in the Financial Year 2002-03 had entered into a 'Technical Collaboration Agreement with Syngenta Seeds AG, Switzerland' ("SSAG") for the use of proprietary rights, proprietary information, valuable technical know-how and trademarks owned by its AE, SSAG; to produce, promote and commercialize corn and sunflower seeds in the domestic market. In terms of the said agreement, the assessee paid SSAG, royalty @ 5% on local sales and 8% on export sales. The copy of the agreements of corn and Sunflower seeds have been placed in the paper book before us at pages 359 to 375 and 385 to 401 respectively.

5. The Ld. TPO, to whom matter was referred to by the AO to examine the ALP of the international transactions, first of all noted the past history of 'royalty' transaction and observed that in assessment years 2007-08 and 2008-09 the TPO had concluded that, *firstly*, there is no transfer of technology from AE to the assessee or to the contract manufacturer; and *secondly*, the corn and sunflower seeds were not patented products. Accordingly, it was held that there is no justification for payment of 'royalty' and disallowed payment for 'technology royalty' albeit the 'brand royalty' was allowed. In this year also following the same reasoning the TPO made the adjustment on following grounds / reasons:-

- a) There is no justification for payment of royalty, since no transfer of technology from AE to Assessee was evidenced;
- b) Corn and Sunflower seeds are not patented products and therefore, there is no legal requirement for the assessee to pay the royalty; and
- c) Arm's Length Price ("ALP") for payment of royalty has to be @ 1% for domestic sales and 2% for export sales which would be at par with 'other seeds'.

In view of the above observation, the TPO treated the ALP for payment of 'royalty' @ 1% for the domestic sales and 2% for exports sales which was at par with other seeds. The assessee's submissions before the TPO in this regard were as under:

- There is huge requirement of continuous research and development and innovation in development of the higher yield seeds, in order to meet the increasing requirements of consumer for food;
- To meet the requirement, the Group's researchers focus their efforts on creating new varieties with greater productivity, better tolerance to pests, diseases and environmental stresses, and improved quality characteristics such as nutritional composition, safety, consumer appeal and shelf life. In the years 2006, 2007 and 2008, Syngenta set aside USD \$232 million, \$283 million and \$343 million, respectively in total research and development spending for the seeds business, representing approximately 14% of its annual seeds turnover in each year;

- The assessee also explained that in the seeds business, the parent seeds provide the key property/characteristic of the seeds and play a vital role in the yield/ productivity of the crop. These parent seeds are further developed into hybrid seeds (i.e. plant material). These parent and hybrid seeds are owned by Syngenta Crop Protection AG ('SCPAG') and the hybrid seeds (i.e. plant material) are provided to SIL;
- Subsequent to this, SIL carries out the modification to the plant material imported which are resistant to diseases, viruses and climatic conditions, according to specific guidelines/ protocols on the process and procedures as prescribed by the Headquarters in Switzerland to enable the seeds to grow in Indian conditions. The hybrid seeds (i.e. plant material) received by SIL is vital for carrying out the business of sale of corn and sunflower seeds; and
- The direction/ guidance for modification carried out by SIL on the basic seeds of corn and sunflower received from the AE so that the seeds can be commercialized for sale.

Thereafter the assessee made further submission justifying the payment of Royalty along with various documents which has been noted by the TPO from pages 6 to 7 of the order. However, the TPO rejected the assessee's submission and computed the royalty in the following manner:-

	CORN SEEDS		SUNFLOWER SEEDS	
	Domestic Sales	Export Sales	Domestic Sales	Export Sales
Royalty (5% on domestic & 8% on export)	3,37,63,263	74,25,821	1,73,73,237	19,55,009
Total Royalty	4,11,89,083		1,93,28,226	
Allowed 1% and 2%	67,52,653	18,56,455	34,74,643	4,88,752
Disallowed	2,70,10,610	55,69,365	1,38,98,574	14,66,257
1,25,72,503	Brand Name License Fees on corn and sunflower			
4,79,44,806	Disallowed item – royalty paid on corn and sunflower			
6,05,17,309	Total royalty			

6. The DRP upheld the disallowance of the royalty payment and also rejected the assessee's contention regarding Internal CUP which was available in the case of the assessee with similar agreement with independent third parties. The sum and substance of the reasons given by the DRP for rejecting the assessee's contention can be summarized in the following manner:-

- a) The agreements furnished by the assessee were in other geographical locations and the economic conditions prevailing therein were not comparable to conditions in India;
- b) The assessee could not controvert TPO's assertion that variety of corn in the agreements was different from the variety supplied to India;
- c) The comparable agreements submitted by the assessee pertain to corn seeds and not to sunflower seeds; and

- d) The agreement between Hoechst Schering Agrevo Limited ('HSAL') and Sandoz India Limited ('Sandoz') sought to be used by the Assessee as a comparable, pertain to the year 1995 and was not continuing when the present agreement was entered into".

7. Before us, the Ld. Counsel, Mr. Mukesh Bhutani after explaining the entire facts and background of the case submitted that, this precise issue had come up for consideration before the Tribunal in the assessee's own case for the assessment years 2007-08 and 2008-09 wherein, the matter has been set aside to the file of the TPO to examine the Internal CUP. He also brought to our notice that, in the assessment year 2003-04, the similar matter was restored back to the file of the TPO by the Tribunal, in pursuance thereof; TPO had examined the Internal Cup and accepted the payment of 'Royalty' on the same rate. On merits, Mr. Bhutani submitted that assessee has substantiated the determination of ALP of the entire transaction along with royalty payments in its Transfer Pricing Study Report by using TNMM as MAM which has been accepted in the earlier years also. The assessee had carried out detailed search analysis after selecting the comparables and in the TP Study Report it has been reported that, the operating margin of the assessee in the Seed Segment is far better than operating profit margins of comparables. The comparative profit margin of the assessee in various assessment years vis-a-vis the comparables were highlighted in the following manner:-

Assessment Year	Operating profit Margin of assessee (seed segment)	Operating profit margin of Comparables (Updated)
2009-10	23.73%	17.90%
2010-11	26.10%	16.83%
2011-12	22.39%	17.11%

He submitted that once the operating profit margin is far higher than the comparable companies, then no separate adjustment on account of Royalty should be made as it gets subsumed under the TNMM. Further justifying the royalty payments on merits, Mr. Bhutani submitted as under:-

- a) SSAG has been supplying plant material / basic seed to the assessee, which then carries out its own processes and modifications to suit Indian climatic conditions. The final product is a “commercial hybrid sunflower seed” obtained from “basic seed”. It is this basic seed/plant material and trademark of SSAG, in respect of which royalty is paid by the assessee;
- b) The benefits received by the assessee under the agreements with SSAG, inter alia, are as follows:
 - “Syngenta” technology has enabled the Assessee in breeding and multiplication of seeds and to exploit it in the domestic and export markets;
 - Access to technology, helps in increasing the productivity, yield and/or provides disease resistant product to the farmers and thereby increase in sales and market share of the Assessee in the seeds segment;
 - The Assessee continues to use the technology even after the period for payment of royalty expires; and

- The sales of corn and sunflower seeds have grown significantly over a period of time. Had SIL not received this technology, it would not have achieved these sales in the domestic market and this would have affected its growth and market share.
- c) Payment of royalty is further justified by the fact that headquarters of the group in Switzerland provided various guidelines and directions to Syngenta group entities in the following manner:-
- The dedicated team responsible for developing new variety of parental seeds for the group provides crucial information to the Assessee to enable it to grow the seeds in Indian climate and to effectively meet the yield/productivity specifications;
 - The information includes protocols, guidelines on procedures to combat diseases;
 - Safeguard against viruses and make crops resistant in the Indian geographical region;
 - Syngenta also uses a data application management application ('SPIRIT) for its group entities to actualise research co-operation on a global scale. The main aim of the application is to provide history, data, information and best seed-breeding solutions to user groups;
 - In addition, training programs imparting knowledge about breeding methods, techniques, and novel technologies are also arranged for the breeders.

- d) Receipt of technology in form of basic seeds by the Assessee from its AE is demonstrated by the grant of 'Permit for Import of Germplasm/ Transgenic/ Genetically Modified Organism for Research Purpose' by the National Bureau of Plant Genetic Resources ("NPGBR") to the assessee.

8. As regards the TPO's action for benchmarking the royalty rate of hybrid corn and sunflowers seeds @ 1% and 2% for the domestic and exports sales respectively as against 5% and 8% paid by the assessee by treating the same at par with "brand name license fee" (BNLF) and other seeds, Mr. Bhutani highlighted the following distinguishing features between the contracts of the two categories of the agreement:-

Sr.No.	Particulars	Royalty agreement (Corn & Sunflower seeds)	BNFL agreement (other Seeds)
1	Rates as per agreement	5% and 8% for domestic and export sales respectively	1% and 2% for Domestic and export sales respectively
2	Purpose of payment	Royalty for technology. No separate BNLF paid	Brand name only
3	Rights granted As per Agreement	"2.1... License to use or utilize any of the PROPRIETARY RIGHTS, PROPRIETARY INFORMATION and TRADEMARKS in order to produce, promote and commercialize seed within the territory".	"Section 2.1 ... License to use the Syngenta Brand"

He submitted that, the TPO without brining on record any specific reason has erred in benchmarking the 'royalty' rate for payment of 'royalty' under the 'Technology Agreement for Hybrid and Secondary seeds' with BNLF rate paid on other seeds by the assessee without appreciating that both the royalties paid were for different purpose. So far as reliance on internal CUP, it was submitted that this issue has been

accepted by the Tribunal in the earlier years and specifically in the assessment years 2007-08 and 2008-09. Before us, he pointed out that there were various other “royalty agreements” for licensing technology entered into by the AEs and third parties in the Asia Specific Region which can be used for the purpose of benchmarking the ALP by applying the CUP method. The summary of comparable agreements and the royalty rate paid were given in the following manner:-

Dt. of effect of agreement	Licensor	Licensee	Products	Type of Intangible	Royalty Base	Territory
January 1, 1998	Novartis Seeds AG	Corson Grain Ltd.	Corn	Intellectual Property & Trademarks	12% (7%-8% 12%)	New Zealand
December 1, 2004 (for a period of 20 years)	SCPAG	Chengde Great Wall Seeds Co. Ltd.	Corn	Intellectual Property & Trademarks	10%	China
January, 17, 2003	Corn States Inte	Syngenta Seeds AG	Corn	Intellectual Property & Trademarks	14% or 15%	European Union and Turkey
January 1, 2003	Syngenta Seeds AG	Novartis Seeds Ltd.	Corn	Intellectual Property & Trademarks	12%	United Kingdom And Ireland
October, 2007	SCPAG	Cantenbury Seeds	Pea	Intellectual Property	12%	Production in New Zealand, promotion and commercialization in India and Pakistan
Average					12%	

Referring to these agreements, the copies of which have been placed in the paper book, Mr. Bhutani submitted that they constitute internal CUP because, the terms and conditions, technology transfer and the products were same, therefore, he submitted that the royalty paid by the assessee @ 5% and 8% is quite lower than the royalty paid by the AEs to the third parties which was around 12%. Thus, the royalty payment by

the assessee is at Arm's length. He further pointed out that, even if the agreements relates to different geographical regions, however, the geographical circumstances will not make a difference because the terms of technology transfer being the same. Even if one goes by 'Royalty Stat Database', then also the comparables drawn are mostly from different geographical regions.

9. On the other hand, Ld. DR submitted that, the royalty has to be benchmarked separately as it may not be covered under the PLI worked under the TNMM. In support he strongly relied upon the decision of Hon'ble P&H High Court in the case of CIT vs. Knorr Bremise India Pvt. Ltd., Income-tax Appeal No.182 of 2013 judgment dated 06.11.2015. Objecting to the Internal CUP based on different agreement by the AE at different geographical locations, he submitted that, it is one of the major factor which makes a difference while carrying out the comparability analysis and that is why it has been kept as part of Rule 10B(2). He submitted that, if at all CUP method is to be applied, then external CUP should be looked into and for that purpose 'Royalty Stat Data' can be used as it is now available in India also wherein Indian comparables are also there.

10. In rejoinder, Mr. Mukesh Bhutani submitted that, in so far as the decision of Hon'ble P&H High Court in the case of Knorr Brmise India Pvt Ltd. (*supra*) the same may not be applicable as there the issue involved where entirely different and on the facts of that case the Court upheld that if there

are several independent transactions then they can be separately benchmarked. In fact in para 43, the Court has observed that, if it is established that sale of various goods or provision of services form one composite and indivisible transaction, TNMM method cannot be applied separately to some of the components and the CUP or any other method for the remaining component. If the ratio of the said decision is to be strictly applied, then the entire transaction has to be taken as one and royalty payment is to be reckoned as part of the transaction. Here in this case, the entire transaction with the AE is composite and royalty payment is part of it, therefore, it cannot be held that for other transactions TNMM should be adopted and for 'royalty', CUP method. In any case, the assessee has placed strong reliance on the decision of the Hon'ble Delhi High Court in the case of Sony Ericsson Mobile Communications vs. CIT, reported in [2015] 374 ITR 118 and going by the ratio of the said judgment then the royalty payment will get subsumed in the profit margin arrived under TNMM. Further in assessee's own case in the earlier years, the Tribunal has held that Internal CUP should be applied, therefore following the same precedence in this year also directions should be given for following the Internal Cup. Regarding Ld. DR's argument that Internal Cup based on AEs and third party are of different geographical region, he submitted that, in assessee's own case the TPO himself has taken CUP from different jurisdiction not only in one year but in three assessment years viz., AYs 2002-03, 2003-04 and 2004-05, wherein he has specifically dealt and analyzed the facts of each and every transaction of the other AEs with the

third parties, therefore, there cannot not be any variation in this year.

11. We have heard the rival submissions, perused the relevant finding given in the impugned orders as well as material referred to and placed on records. It is an undisputed fact that the assessee's AE, Syngenta Seeds AG, Switzerland has been supplying plant material / basic seed to the assessee in terms of 'Technical Collaboration Agreement'. The assessee based on such proprietary rights, proprietary information, valuable technical knowhow and trademarks owned by AE carries out to produce, promote, and commercialize corn and sunflower seeds in the domestic market through its own process and modification to suit to Indian climatic condition. It bears the trademark of the AE in respect of which the royalty is being paid. The benefits derived by the assessee under the agreement and also the use of technology in the form of basic seeds have already been discussed above. The issue of royalty payment has chequered history, that is, similar payment in terms of same technical collaboration agreement has been made to the AE in the earlier years also. In the assessment year 2007-08 this issue has been dealt by the Tribunal after discussing the entire facts in the following manner:-

29. We have heard the rival submissions and perused the relevant finding given in the impugned orders as well as material placed before us. It is an undisputed fact that assessee had entered into technical collaboration agreement with Syngenta AG Switzerland

for the use of proprietary rights; proprietary information; valuable technical know-how; trademarks owned by its AE to produce, promote and commercialize corn and sunflower seeds in the domestic market. All these rights, information and trademarks were given as non-exclusive, non-transferable and royalty bearing license. As per agreement, the said license includes the rights to multiply the lines and varieties and produce the basic seed as per the assessee's requirement. In the TP Study report, the assessee has highlighted the benefits from such a technical know-how agreement and how it has helped the assessee to develop the capability of seeds that cater to the tropical climate of the region. The significant R&D required for this purpose has not been undertaken by the assessee. If all these technical know-how given by AE have been used including trademark and information for the business carried out by assessee in India, then the payment made for usage and utilization of such rights, information and trademarks has to be reckoned as "royalty" only. Here it is not the case that payment has been made in this year for the first time albeit is a recurring payment from the earlier years and also in the subsequent years and no such adjustment or disallowance has been made in the seeds segment. It has been categorically stated before the authorities below and before us, which has not been rebutted by the revenue that, the payment of royalty in the seed segment had passed the test of functional and economic justification and has been allowed in the earlier years. The assessee is importing basically the breeder seeds and with the aid of technical know-how of its AE and assists in further

developing seeds at the facilities located in various parts of the country. Thus, to say that there is no benefit to the assessee from such proprietary information, trademarks, technical know-how would not be correct. Even in third party situation, proprietary rights, information and license to use trademarks and know-how is provided or made available then it would not be free of cost. In such transactions there is always a price which needs to be computed under the principles of "Arm's Length Price". Thus, we hold that, the contention of the TPO as well as direction of the DRP that royalty payment has to be treated as "Nil" cannot be justified in the wake of not only the "technical collaboration agreement" but also the actual conduct of the parties and the assessee who has earned huge returns during carrying out its activity by exploiting these intangibles.

30. *Once we hold that the royalty payment cannot be computed at "Nil", the next issue which comes before us is how to compute the Arm's Length Price of such a transaction. The Ld. Counsel before us has contended that, there is an Internal-CUP which is based on agreement dated 13th August, 1995 with the third parties namely, HSAL & Sandoz India Ltd. The third party data have been rejected on the ground that, the agreement relates to the year 1995, whereas the payment has been made in 2006 by the assessee to its AE. However, we fail to understand if the terms of the agreement are still in force and has not been terminated then how the year of agreement will make a difference. If a similar payment has been made to the third party in this year, then, if other attributes of CUP are fulfilled*

then same has to be considered for the comparability analysis to benchmark the ALP of the payment. What is required to be seen is, whether the terms and conditions of the agreement with the third party and the terms and conditions of the agreement with the AE are similar or not. If they are similar, then definitely there is a situation of internal CUP, unless some material differences is shown between the two agreements or there is change in the facts from year 1995 to this year or any other criteria of significance. We find that the Tribunal in respect of 'license manufacturing segment' has restored back the matter to the file of the TPO for benchmarking the same by using CUP method. On the same principle, we are also in agreement that CUP method should be applied for benchmarking this transaction. Accordingly, we restore this issue to the file of the TPO/AO to examine the terms and conditions of the agreements with the third party and whether such terms are still relevant for the year under consideration and also the terms and conditions entered into by the assessee with its AE".

Thus, the Tribunal has set aside this issue to the file of the TPO/Assessing Officer to examine the terms and conditions of the agreements with the third parties and to see the availability of Internal CUP. In this year, before us the Ld. Counsel has additionally pointed out that, there are similar "royalty agreements" for licensing technology entered into by the AEs with the third parties in the Asia Specific Region. The payment made on the basis of such similar agreements can be taken as an Internal CUP for benchmarking and

determination of the ALP. The summary of comparable agreements has already been reproduced above. The issue, whether such comparable agreements which are based on different geographical region can be taken for the comparability analysis or not would be a very difficult proposition to accept at the first instance, because under Rule 10B (2) the factors governing the comparability of international transaction with an uncontrolled transaction is judged by the factors of similarity of; quality of products; contractual terms; economic conditions prevailing in different geographical locations and other market conditions, etc. The geographical location becomes very vital factor in certain cases because one has to take into account the market condition, the laws in force, cost of labour, capital, overall economic level of competition, etc. However, in the present case, it has been brought to our notice that, the Assessing Officer/TPO in earlier years consecutively in three assessment years has specifically dealt and analyse the similar agreements of the assessee's AEs with third parties in the different geographical regions. Therefore, no exception should be carved out in this year and accordingly, these agreements can be examined or analyzed by the TPO if the geographical location does not have any material effect on the determination of the prices. Thus, we direct the TPO/AO that while carrying out the comparability analysis under CUP method, should also examine these agreements as referred to above by different AE's with third parties to benchmark the ALP of 'royalty payment'. In case, the Internal CUP are not available or the comparability analysis is not possible then

External CUP can be explored by looking into the 'Royalty Stat Data' available for the Indian comparables working under the similar kind of technical agreements and conditions for which royalty is being paid. Thus, with this direction, the issue of royalty is being sent back to the file of the AO/TPO for re-adjudication in line of the direction given herein above.

12. The next issue for our consideration is Transfer Pricing Adjustment on account of 'location savings' which has been made by the TPO on the reasoning that assessee has not received any compensation from the AE on account of the advantage of location, that is, operating in India has led to a lower cost saving on account of cheap labour, etc. Before coming to this conclusion, the Ld. TPO proceeded on the premise that location savings arises due to unique location which a Company is able to generate costs savings on one or many factors of production like land, capital, labour, manager and entrepreneur. Due to high cost of production in the developed countries, the multinational companies are setting up new plants in the developing countries which give rise to the location savings. Accordingly, he issued show cause notice to the assessee and required the assessee to explain why the locational cost saving should not be attributed to the assessee as it has derived location saving advantage in India by having a manufacturing facility in India. His specific focus on location saving was in respect of labour cost. The assessee's submissions in response to the show cause notice in brief can be summarized as under:-

- (i) Relying on OECD guidelines on the concept of location savings, assessee submitted that location saving can be derived only when there is either re-allocation of activities or business restructuring which in the case of the assessee cannot be applied nor any business restructuring;
- (ii) The assessee is not entitled to be compensated over and above reward earned by it through Transfer pricing Comparability Analysis;
- (iii) The AEs have operation all across the globe and could procure the finished goods either from the assessee or any other group or third party and therefore, due to various alternatives being available to the AEs the assessee does not have any bargaining power with the AE. In its export operations, assessee acts as a contract manufacturer and in this capacity it does not own or control any non-routine intangible assets. The assessee is also not entitled to any location specific advantages that are not available to other companies in the Indian market;
- (iv) The assessee placed strong reliance on the decision of ITAT Delhi Bench in the case of Gap International Sourcing India Pvt Ltd in ITA 5147/Del/2011 and 228/Del/2012.

13. However, the Ld. TPO rejected the assessee's contention on the ground that, *firstly*, locational saving is not tagged with reallocation of an existing business. It can arise

wherever factors of production are employed keeping in view the locational advantage of a particular location to give rise to the saving with respect to one or many of the factors of production, like cheap finance, cheap labour, cheap raw materials etc. He also referred to India's position on United Nations Transfer Pricing Draft in this regard; *secondly*, in case of India, cheap manpower is clear and distinguishing factor and, therefore, in terms of Draft United Nations Model, India has a clear location advantage vis-à-vis the labour supply; *lastly*, as regards the decision of ITAT Delhi Bench, he submitted that the said decision is being further challenged by the Department and in fact there is another decision of Co-ordinate Bench of ITAT Delhi Bench in the case of Li-Fang, which upholds the principle of locational saving. He proposed to calculate the location saving on export business of the assessee as per the following formula:-

Location Savings	
Cost of per employee Globally	(A)
Less: Cost of per employee in India	(B)
Difference	C= (A) – (B)
Value of Adjustment = (C)* no. of employees in India.	

Accordingly, he calculated the adjustment in the various segments in the following manner:-

Corp Protection –Contract Manufacturing			
Particulars	Total Cost	No of Employees	Cost per Employee (INR)
Cost of employees	USD 2,179 mn	25,925	
Cost of employees	INR 9.93 crores	242	410,331
Difference (A)			3,792,176
Value of Savings (A)*242			917,706,592
Corp Protection – Licensed Manufacturing			
Particulars	Total Cost	No of Employees	Cost per Employee (INR)
Cost of employees	USD 2,179 million	25,925	4,202,507
Cost of employees	INR 37.71 crores	52	814,417

Difference (A)			3,388,090
Value of Savings (A)*52			176,180,680
Seeds			
Particulars	Total Cost	No of Employees	Cost per Employee (INR)
Cost of employees	USD 2,179 million	25,925	4,202,507
Cost of employees	INR 16.42 crores	12	636,434
Difference (A)			3,566,073
Value of Savings (A)*12			42,792,876

Thereafter, he took 50% on such saving to be adjusted for making the addition in ALP, which was done on the following reasons:-

“The said transactions are between assessee and its AE. As information in respect of benefit being passed on to end customer has not been given by assessee, the savings are being bifurcated in 50:50 ratio. This view is also supported by India’s position before different international fora that arm’s length compensation for cost savings and location rents should be such that both parties would benefit from participating in the transaction. In other words, it should be not less than zero and not greater than the value of cost savings and locations rents; it should also reflect an appropriate split of the cost savings and location rents between the parties. Accordingly, the adjustment is being made at 50% of the savings which is Rs.56,83,40,074/- summarized in the table below:

<i>Location Savings</i>	Rs.
<i>- Licensed Manufacturing Segment</i>	8,80,90,340
<i>- Contract Manufacturing Segment</i>	45,88,53,296
<i>- Seeds Segment</i>	2,13,96,438
Total	56,83,40,074

14. The Ld. DRP upheld the contention of the TPO, however, gave part relief by restricting the adjustment of locational saving only to the Goa Pant of the assessee and

accordingly the adjustment has been marginally reduced to Rs.54,69,636/- out of Rs.56,83,40,074/-.

15. Before us, Mr. Bhutani retreating the same submissions which were made before the authorities below, relied heavily upon the coordinate Bench decision in the case of *Watson Pharma Private Ltd vs DCIT*, reported in [2015] 168 TTJ 281 (Mum). The sum and substance of the Tribunal's conclusion can be summarized as under:-

- The assessee as well as AE operates in a perfectly competitive market and the assessee has to exclusive access to factors that may lead to super normal profits from location specific advantages. Revenue authorities were not able to substantiate the adjustment made;
- The ALP principle requires benchmarking with comparables, and any advantage accruing from location savings would be reflected in profitability earned by comparables;
- OECD and G20 in Action 8: Guidance on Transfer Pricing Aspects of Intangibles concluded that where local market comparables are available specific adjustment for location savings is not required;
- TPO's reliance on UN TP Manual about was considered incorrect reliance, because UN Manual, is basically a view of Indian tax administration and is not binding on Appellate authorities; and
- Further, the TPO had based the adjustment on a method, which was not ascribed by the provisions of the Act.

Mr. Bhutani, also relied upon Delhi High Court decision in the case of Li Fung India (P) Ltd. vs. CIT reported in [2014] 361 ITR 85, wherein Hon'ble court has held that AO/TPO cannot resort to adjustments on vague generalities. He further submitted that, here in this case one has to see from this angle also, whether Assessing Officer has recorded his 'satisfaction' before making reference to the TPO for computing the ALP of an international transaction specifically with regard to the location cost saving. Nowhere the Assessing Officer has given any mandate to the TPO to treat the location saving as international transaction which needs to be benchmarked. Such unilateral action by the TPO renders the TP order unsustainable in law. The Ld. Counsel further submitted that, the locational saving cannot be reckoned as international transaction within the meaning of section 92B. The sum and substance of his argument in this regard can be summarized in the following manner:-

- a) Section 92 of the Act, provides that any income arising from an international transaction shall be computed having regard to the ALP. Section 92 of the Act, which triggers the applicability of TP provisions, contemplates the existence of an income arising from an international transaction. Thus, the scheme of transfer pricing essentially requires three conditions, all of which have to be cumulatively satisfied:
 - i) Existence of an international transaction between two AEs;
 - ii) Existence of income arising from such international transaction; and

- iii) Such income to be computed having regard to the ALP of the transaction.
- b) From the perusal of the provisions it can be inferred that TP regulations would be applicable to any transaction being an arrangement, understanding or action in concert in relation to purchase, sale or lease/ use of tangible / intangible property or any other transaction having bearing on profits, income, losses or assets of such enterprises. In other words, to be an international transaction it should be pursuant to an arrangement, understanding or action in concert;
- c) Thus, the pre-requisite for invoking TP provisions is that there must be an international transaction within the meaning of the Act between two AEs and there must exist an income arising from an international transaction;
- d) It is to be appreciated that a transaction per se involves a bilateral contract between the parties. Unilateral action without any binding obligation cannot be termed as transaction. Reference was invited to the 'Objective and Scope of Transfer Pricing Provisions' as given in Circular No.14 of 2001;
- e) Reliance was also placed on the following decisions, wherein, existence of an agreement, understanding or arrangement to substantiate the existence of an international transaction under section 92B of the Act has been held to be an essential requirement:

- Vodafone India Services Private Limited vs UOI and Ors 368 ITR 1 (Bom);
- Maruti Suzuki India Limited vs CIT [2016] 381 ITR 117 (Del);
- CIT vs Whirlpool of India Limited [2016] 281 ITR 154 (Del);
- Bausch & Lomb Eyecare (India) Private Limited vs Addl CIT [2016] 381 ITR 227 (Del); and
- Patni Computers Systems Limited vs DCIT 60 DTR 113 (Pune).

He submitted that the above judgments make it amply clear that existence of income/ potential income is the very basis to assume jurisdiction for invoking TP provisions to benchmark or examine the transaction having regard to the express language of section 92(1) of the Act. He further submitted that even the expanded definition of 'international transaction' by the Finance Act, 2012 does not cover location savings in its purview. Thus, based on the above, he submitted that location savings is not an international transaction within the meaning of section 92B of the Act. Explaining the scope of section 92CA, he submitted that, it provides for making a reference to the TPO of "the computation of the arm's length price" of an international transaction. No other issue can be referred to the TPO. The scheme of section 92CA before insertion of sub-sections 2A, 2B and 2C, was that the AO shall with prior approval of the Commissioner make a reference to the TPO for computation of ALP of the international transaction. Sub-section (2A) was inserted by

Finance Act, 2011, w.e.f. June 01, 2011 whereby the TPO was empowered to compute the ALP on any other international transaction that comes to his notice during the course of proceedings before him. Subsequently, sub-sections (2B) and (2C) were inserted in section 92CA by Finance Act, 2012 with retrospective effect from June 01, 2002. He brought to our notice that recently, the CBDT has issued Instruction No. 3 / 2016 dated March 10, 2016, whereby it has been clarified that it is the AO who has to record 'satisfaction' and make a reference for computing the ALP of an international transaction. In absence of the same, the TPO cannot *suo-moto* pick-up a transaction for characterizing the same as an international transaction and compute its ALP. He referred to para-3 of the said instructions, which lays down the detail procedure in this regard. In the instant case, no such reference qua location saving was made by the AO to the TPO. The alleged location savings was held to be an international transaction and benchmarked as a unilateral action by the TPO. In view of the above, such a unilateral action by the TPO makes the TP order on this account bad in law. *Lastly*, he submitted that, locational saving is, in fact, embedded in the operating margins of the comparables. He pointed out that, assessee operates in a perfectly competitive market and in such a market, a manufacturer will have to pass on any location specific advantages (if any), to the customers to remain competitive. Accordingly, it would not be able to earn more than what the third party comparable companies, in same geographical location, performing similar functions and assuming similar risk, would earn. Thus, it can be stated that

return on location specific advantages, if any, are already embedded in the operating margins of comparable companies.

16. On the other hand, Ld. DR strongly objecting to the Ld. Counsel's contention on the power of the TPO for making such adjustment *sans* any specific reference made by the Assessing Officer to the TPO, he submitted that the guidelines issued by the CBDT in 2016 is administrative in nature and deals with the procedural aspect for AO and TPO which cannot be reckoned as retrospective. The power of the TPO is not carved by the new Instructions but from the Statute itself. After referring to the said CBDT Instruction No.3 of 2016 dated 10th March, 2016, he submitted that Board has specifically mentioned "henceforth" which *inter alia* means that, from the date of the Instruction and not prior to this date. In support, he referred to para 4.1 of the said instruction. Referring to the decision of Sony Ericson, 374 ITR 118 he submitted that TPO has *suo-motto* power to examine the international transactions. The TPO in course of the proceedings is well within his power to examine any other international transaction. Accordingly, he submitted that this plea of the Ld. Counsel cannot be sustained. On merits of the issue, he strongly relied upon the order of the TPO as well as DRP that the advantage of location saving cannot be ruled out in assessee's case. The concept of location saving is quite *germane* to Transfer Pricing concept while determining the ALP of the transaction between the MNE group.

17. We have heard the rival submissions and perused the relevant finding given in the impugned orders *qua* the issue of Transfer Pricing adjustment on account of locational savings. The TPO noted that, one unit of the assessee is captive manufacturer which is producing agro chemicals for sale to the world market by a Singapore based entity. Due to unique location of operating in India, the assessee company is able to generate cost savings on one or many of the factors of production for which assessee should have been compensated with a better price. He has also referred to Draft UN Model and India's stand about the location advantage vis-a-vis the labour cost and other factors of production and, therefore, assessee should have received compensation for it from the AE. From the reading of the order of the TPO as well as the order of the DRP, we are at the outset, unable to apprehend as to under which existing Transfer Pricing provisions enunciated in our Income-tax Act or the Income-tax Rules, such a transaction has been reckoned as separate international transaction which warrants separate benchmarking especially when the overall profit margin of the entire transaction with the AE under the TNMM vis-à-vis the comparables has been accepted. No provision or precedence has been referred by the Revenue authorities, whether our existing Transfer Pricing provisions suggest any such kind of an adjustment or is there any settled judicial principle that location costs requires to be adjusted while measuring the allocation of the profits of the Group entities/associated enterprises operating in different tax jurisdiction and such a location cost advantages needs to be factored in while

determining the Arm's Length Price. The locational savings alludes to a concept of a location specific advantage with reference to specific market features and/or factors of production that enables MNE to achieve improved financial outcome from the provision of the same product or services relative to alternative locations, that is, the places where costs are lower than the location where the activities were initially performed or carried out. The features and factors include labourers/skilled labourers, incentives, market advantage, infrastructure and other factors of costs savings. The location saving arise from the cost saving due to differences in the costs of operations between high cost and low cost tax jurisdictions. Earlier this concept was recognized under OECD Transfer Pricing Guidelines, wherein in Chapter 9 dealing with "Business Restructuring", this concept has been discussed in the following manner:-

"9.148 Location savings can be derived by an MNE group that relocates some of its activities to a place where costs (such as labour costs, real estate costs, etc.) are lower than in the location where the activities were initially performed, account being taken of the possible costs involved in the relocation (such as termination costs for the existing operation, possibly higher infrastructure costs in the new location, possibly higher transportation costs if the new operation is more distant from the market, training costs of local employees, etc.). Where a business strategy aimed at deriving location savings is put forward as a business reason for restructuring, the discussion at paragraphs 1.59-1.63 is relevant;

9.149 *Where significant location savings are derived further to a business restructuring, the question arises of whether and if so how the location savings should be shared among the parties. The response should obviously depend on what independent parties would have agreed in similar circumstances. The conditions that would be agreed between independent parties would normally depend on the functions, assets and risks of each party and on their respective bargaining powers;*

9.150 *Take the example of an enterprise that designs, manufactures and sells brand name clothes. Assume that the manufacturing process is basic and that the brand name is famous and represents a highly valuable intangible. Assume that the enterprise is established in Country A where the labour costs are high and that it decides to close down its manufacturing activities in Country A and to relocate them in an affiliate company in Country B where labour costs are significantly lower. The enterprise in Country A retains the rights on the brand name and continues designing the clothes. Further to this restructuring, the clothes will be manufactured by the affiliate in Country B under a contract manufacturing arrangement. The arrangement does not involve the use of any significant intangible owned by or licensed to the affiliate or the assumption of any significant risks by the affiliate in Country B. Once manufactured by the affiliate in Country B, the clothes will be sold to the enterprise in Country A which will on-sell them to third party customers. Assume that this restructuring makes it possible for the group formed by the enterprise in Country A and its affiliate in Country B to derive significant location savings.*

The question arises whether the location savings should be attributed to the enterprise in Country A, or its affiliate in Country B, or both (and if so in what proportions);

9.151 *In such an example, given that the relocated activity is a highly competitive one, it is likely that the enterprise in Country A has the option realistically available to it to use either the affiliate in Country B or a third party manufacturer. As a consequence, it should be possible to find comparables data to determine the conditions in which a third party would be willing at arm's length to manufacture the clothes for the enterprise. In such a situation, a contract manufacturer at arm's length would generally be attributed very little, if any, part of the location savings. Doing otherwise would put the associated manufacturer in a situation different from the situation of an independent manufacturer, and would be contrary to the arm's length principle;*

9.152 *As another example assume now that an enterprise in Country X provides highly specialized engineering services to independent clients. The enterprise is very well known for its high quality standard. It charges a fee to its independent clients based on a fixed hourly rate that compares with the hourly rate charged by competitors for similar services in the same market. Suppose that the wages for qualified engineers in Country X are high. The enterprise subsequently opens a subsidiary in Country Y where it hires equally qualified engineers for substantially lower wages, and subcontracts a large part of its engineering work to its subsidiary in Country Y, thus deriving significant location savings for the group formed by the enterprise and its subsidiary. Clients continue to deal directly with the enterprise in Country X and are not necessarily aware*

of the sub-contracting arrangement. For some period of time, the well known enterprise in Country X can continue to charge its services at the original hourly rate despite the significantly reduced engineer costs. After a certain period of time, however, it is forced due to competitive pressures to decrease its hourly rate and pass on part of the location savings to its clients. In this case also, the question arises of which party/ies within the MNE group should be attributed the location savings at arm's length: the subsidiary in Country Y, the enterprise in Country X, or both (and if so in what proportions); and

9.153 In this example, it might be that there is a high demand for the type of engineering services in question and the subsidiary in Country Y is the only one able to provide them with the required quality standard, so that the enterprise in Country X does not have many other options available to it than to use this service provider. It might be that the subsidiary in Country Y has developed a valuable intangible corresponding to its technical know-how. Such an intangible would need to be taken into account in the determination of the arm's length remuneration for the sub-contracted services. In appropriate circumstances (e.g. if there are significant unique contributions such as intangibles used by both the enterprise in Country X and its subsidiary in Country Y), the use of a transactional profit split method may be considered”.

Thus, under OECD, the locational saving costs has been recognized only when there is either reallocation of activities or business restructuring whereby MNE Group, Multinational Enterprises reallocates some activities or business to a place where costs are lower than the location where such activities

or business was initially performed. Whether under various circumstances, locational savings may arise or not and whether under the TP analysis such an adjustment can be made has been elaborately dealt in the examples explained in para 9.150 to 9.153.

18. The key factor which is required to be looked into while considering the location cost advantage to an entity working in low cost jurisdiction is that, whether there are suitable local comparable data to determine the conditions in which third party would be carrying out such an activity which would be the measure of Arm's Length and if on such comparability analysis the price received or charged is comparable then no attribution on account of locational savings can be made. If comparable data are available where transaction is being tested or where the tested party is located, then the benefits of location savings can be said to have been captured in the ALP which has been determined. Now, in the OECD / G-20 "Based Erosion & Profit Shifting Project" (BEPS), New Guidelines on the concept of locational savings have been illustrated under "Action 8". These guidelines recommend that, while determining how the locational savings are to be shared between two or more Associated Enterprises then at the threshold it is necessary to consider, *firstly*, whether location savings exists; *secondly*, the amount of any net location savings; *thirdly*, the extent to which locational savings are either retained by a Member or Members of the MNE Group or are passed on to independent customers or suppliers; and *lastly*, where locational savings

are not fully passed on to independent customers or suppliers, the manner in which independent enterprises operating under the similar circumstances would allocate any retained net location savings. Guidelines further states that, suitable comparability adjustment is to be made to account for location savings advantage giving rise to location savings, when function analysis shows that location savings are not passed on to customers or suppliers and there is no local market comparables then, adjustment can be made based on analysis of all the relevant facts and circumstances including functions performed, risk assumed and assets used of the relevant associated enterprises. However, before that, if reliable local market comparables are available which can be used to identify Arm's Length Prices, then specific comparability adjustment or location savings may not be required at all. The guidelines, however, does not prescribe any formula or basis for adjustment. The India Chapter on latest 2016 Draft on OECD/G-20 BEPS, which highlights the view of the Indian Tax Administration accept that, where comparable uncontrolled transactions are available, then the comparability analysis and benchmarking by using the results/profit margin of such local comparable companies will determine the ALP of a transaction with a related party in a low cost jurisdiction. If good local comparables are available then the benefits of locational savings can be said to have been captured in the ALP so determined. However, if good local parties are not available, or whether the overseas AE is chosen as a tested party, then the problem of capturing the benefit of location savings would remain an issue for

determination the ALP. The Indian Chapter has also aligns with the position advocated by BEPS 'Action 8' Report. However under the BEPS also such an adjustment is not required to be made separately if reliable local market comparables are available. In case, reliable local market comparables are not present, then various aspects have been highlighted for making the adjustment. But, whether such an Action Plan as enunciated in the BEPS Guidelines has been captured in our present TP provision? Till now, at least nothing has been brought on record before us, that the Action Plan as enunciated in the BEPS has been captured in our current TP laws /provisions. Therefore, the manner in which the TPO or DRP have made the adjustment is not at all justified *sans* any specific provision or guidelines.

19. Here in this case, the entire transaction between assessee and the AE have been analyzed under TNMM and the assessee's profit margin vis-a-vis the comparables have not only be accepted at Arm's Length Price, *albeit* its margin has been found to be higher than the average profit margin of the comparables. In that situation, any kind of return or advantage on account of location savings, already stands embedded/ captured in the operating margin of the Arm's Length Price determined vis-a-vis the comparability of the operating margins of the comparable companies. The TPO or the DRP have not carried out any comparability analysis with an uncontrolled transaction to show that such a factor materially affects the price/profit margin of the transaction. Such a comparability analysis with the uncontrolled

transaction is *sine-qua-non* for the determination of Arm's Length Price by choosing any of the prescribed method. If such an exercise has not been carried out, then such kind of TP adjustment should not be permitted to be made. If the revenue's case is that, though not canvassed before us, such an adjustment is being made under Rule 10B(3) to eliminate the material effect of a difference between the transactions which is being compared, then the onus is heavily upon the revenue to bring on record that, due to location savings, the comparability with the local comparables has failed to yield the Arm's Length results. The TPO has made the adjustment by comparing the cost per employee globally with cost of per employee in India. The method by which TPO has made the adjustment lacks merits because comparison of the employees of the AE working in the economic conditions at the location of the AE are completely different and cannot be benchmark factor at the outset. Here the tested party is SIL, i.e. assessee, which operates in a perfectly competitive market and in such a market; a manufacturer will have to pass on any location specific advantages to the customers to remain competitive. Otherwise it would not be able to earn more than what the third party comparable companies, in same geographical location, performing similar functions and assuming similar risk, would earn. In a nutshell, comparison of the transactions with an uncontrolled transaction is the key factor and primary requirement under our Transfer Pricing Laws before resorting to any kind of adjustment of the ALP. It is also not clear whether the TPO has treated the location saving as an independent international transaction

or it is just an adjustment on the determination of profit of the assessee. If it is an independent international transaction, then it needs to be benchmarked with uncontrolled transaction by carrying out comparability analysis under prescribed methods. On the other hand, if it is an adjustment on the profit of the assessee, then the TPO has to demonstrate that *firstly*, the profit margin of the assessee, under TNMM is incapable of determining the Arm's Length Prices and in the case of the assessee there are no independent local comparables in India to carry out the comparability analysis for determining of the ALP. Such an arbitrary adhocism for making such huge adjustment in the profit *sans* any Transfer Pricing analysis under the prescribed provisions cannot be sustained. Hon'ble Delhi High Court in *Li and Fung India Pvt. Ltd (supra)* too has observed that. “ *Tax authorities should base their conclusions on specific facts and not on vague generalities, such as “significant risks”, “functional risks”, “enterprise risk” etc. without any material on record to establish such findings. If such findings are warranted, they should be supported by demonstrable reason, based on objective facts and the relative evaluation of their weight and significance*”. Thus, the Transfer Pricing adjustment cannot be on vague generalities. Accordingly, the adjustment made on account of ‘location saving’ for sums amounting to Rs.54,69,43,636/- is directed to be deleted.

20. In view of our finding, the other pleas and arguments raised by the parties before us regarding powers of the TPO at the time of reference and recording of satisfaction by AO before reference, etc. (as discussed by us in foregoing

paragraphs) are not being dealt upon and as they have become pure academic in view our finding given above.

21. Now, we come to the issue of Transfer Pricing adjustment on account of green environmental cost savings. The TPO noted that, assessee is engaged in the business of manufacturing and selling of agro chemicals and multiplication and selling of high yield variety seeds. The process of manufacturing has serious and hazardous environmental impact upon land, water and air of India. Manufacturing and seed division of assessee use India for manufacturing and exporting about 20% of their products to the world markets and since export is being carried out from India using the softer environmental norms as compared to the Western countries, therefore, in this manner the assessee had saved cost on account of environmental compliance which would have otherwise incurred had the facility upon situated outside India. Further, the assessee is neither creating any provision for any kind of environmental degradation in India nor it is paid or compensated for additional profits earned by its AE for the environmental impacts. Thus, it is saving on the compliance cost relating to the environment. He proposed to make the adjustment on following formula:-

Environmental Cost	
Global Environment Compliance Cost	(A)
Less: Indian Environment Compliance Cost	(B)
Difference	(C) = (A) - (B)
Adjustment	(D) = 50% * (C)
Value of adjustment = D% of SIL's total revenue	

In response to the show cause notice, the assessee submitted it fully complies with the local environmental laws and regulations applicable in the country. The assessee's contention before the TPO was that;

- The assessee company has a valid consent to operate from Goa State Pollution Board, a statutory board constituted to plan a comprehensive programme for the prevention, control or abatement of pollution. The assessee has submitted the consent to operate the manufacturing facilities for:- (i) Water, (ii) Air and (iii) to handle hazardous waste. Thus, it can be concluded that SIL has complied with the local environmental laws; and
- SIL has never been fined/ penalized by any competent court in India in relation to claims for environmental damages.

Apart from that, it was submitted that, the return for assuming the environmental risk is already embedded in the margins earned by comparable companies which also carries this risk and since the operating margins earned by the assessee for its business activities are more than profit margin earned by the comparable companies, therefore, there is no question of assessee being separately compensated for environmental degradation. It was further pointed out that, the assessee has incurred huge amount towards environmental compliance cost during the year, which shows that in India also it is imperative for assessee to incur these costs if it has to carry on its business operations in India and comply with the environmental laws in India.

22. The TPO rejected the assessee's contention on the following reasons:-

- "i) As per information available in the public domain, Syngenta AG has to incur 3.72% of its sales revenue in making provisions for fighting environment degradation including regulatory compliance related with this whereas no such matching expenses is to be incurred or provision made by the assessee in India. If the assessee were to undertake this manufacturing in the USA, or it would have followed the same stringent environmental norms here in India, it would have incurred / provided for 3.72% of its sales i.e., Rs. 53.69cr. Obviously, the assessee is saving this cost by manufacturing and exporting from Indian soils owing to soft environmental regime in India;*
- ii) Permission from GOA Pollution control Board is under Indian Environmental Regulations and norms which as discussed above are soft compare to the first World countries. Permission from the above board only signifies that Indian norms shall be adhered to. It does not signify that the assessee is adhering to the same norms as prevalent in first World countries;*
- iii) Whether the assessee has been penalized by Indian authorities is not the real issue here. The issue is whether the assessee is making savings on account of having its manufacturing location in India or not. Further, without prejudice to the above it is to be noted that intense peoples' agitation has taken place in GOA in Corlim village panchayat jurisdictions against expansion of its existing facilities at Santa Monica works adversely affecting the*

tribal villages of Dulapi and Mangado. This information is available in public domain.

XXXXX XXXXX XXXXX XXXXX XXXXX

Summing up, it may be reiterated that the issue is of assessee saving immensely on the compliance costs relating to environment. The issue is not whether assessee complies with Indian environment laws or not but whether this compliance cost is similar or less when compared to the costs in the parent's and AEs' in developed countries. That there is tremendous difference in compliance costs among different parts of the world is recognized. In assessee's case this saving needs to be recognized in financial terms;

In so far as assessee providing details of its AE costs etc. as queried by TPO are concerned, under the Indian Income Tax provisions esp. those for Transfer Pricing, the primary onus lies on the assessee to establish that its pricing is at ALP in all aspects. The assessee cannot escape the TPO's demand for information merely because assessee does not consider this information relevant for determination of ALP (assessee's submissions supra). Thus the primary onus is not discharged. In the circumstances, TPO's calculation is based on information collected from public domain;

Additionally, as discussed by TPO, there is one unit of production devoted entirely to export of goods to AEs of assessee. This being the case, it is evident that benefits in respect of those exports are clearly transferred to the AE's. The pollutant unit was established in India for exporting assessee's production to AE's abroad including those in developed countries;

The environment being impacted due to the entire production and sales, assessee's entire sales are being considered for the adjustment. Accordingly, the adjustment has been calculated as under:-

Particulars		Source	USD million
Total environmental Provision	A	Syngenta AG –Form 20F For 2008 –Note 19 Page F-46	432
Total Sales	B	Syngenta AG –Form 20F for 2008 Note 5 Page F-30	11,624
% of environmental Provision to total sales	C= A/B%		3.716%
Particulars		Source	USD million
Total Sales of SIL	D	As per financial statement	14,450,520
Savings on Environmental Compliance cost		INR	53,69,81,323

The above calculated entire savings is to be considered. The savings allocable to assessee is treated at 75% as degradation of water and soil is long term, degradation of environment has severe impact on life and fauna and reversal process is cumbersome and costly. This would also be in consonance with the Indian position in various international discussion fora that arm's length compensation for cost savings and location rents should be such that both parties would benefit from participating in the transaction. In other words, it should be not less than zero and not greater than the value of cost savings and locations rents; it should also reflect an appropriate split of the cost savings and location rents between the parties. Accordingly, the adjustment has been made at 75% of the savings which is Rs.40,27,35,992/-”

23. Before the DRP, detailed submissions were made by the assessee, which can be summarized as under:-

a) The compliance with the environment norms is not a

subject matter of Indian Transfer Pricing Regulations;

- b) It is not an international transaction within the meaning of the Act and no prescribed transfer pricing method has been applied for determining the arm's length price of the alleged transaction by the TPO;
- c) The TPO neither provided any evidence nor demonstrated that the assessee has degraded the environment due to its activities. The TPO assumed that the environmental norms in India are softer while the environmental norms in western countries are stringent. No document for making such assumptions was ever put on record;
- d) The assessee has complied with the Indian Environmental norms and thus, there is no environmental degradation;
- e) Syngenta has globally adopted its own Health, Safety and Environment ("HSE");
- f) The assessee has been complying with the highest level of quality standards while carrying out its business activities and also has sufficient data to support that the assessee has complied with all the environmental norms in terms of:
- Submission of returns regarding disposal of hazardous waste in Form 4 submitted to State Pollution Control Board or Committee,

- Monitoring Reports by independent agencies; and
 - Renewal letter of consent to operate from Goa State Pollution Board
- g) The TPO failed to provide a rationale for taking provision for environmental compliance of Syngenta AG (refer Form 20F) as a base for determining the adjustment on account of green cost savings;
- h) The assessee incurs costs of Rs. 27,93,79,758/- on account of environmental and HSE compliance which is 2% of the sales;
- i) The assessee had stopped production of Monocrotophos in 2001 and accordingly, has not produced during AY 2009-10. To support the above fact, the extract of product register was submitted;
- j) The environmental norms in India are at par with the international standards. The comparison of both the norms has been submitted;
- k) The comparables selected by the assessee are local Indian comparables operating in similar economic circumstances as the assessee, and thus all comparable companies in the similar industry carry similar risk. Hence, such savings if any are embedded in the margin of the comparables;
- l) The assessee sells goods to its AE as well as third parties

in India. If no additional compensation is received by the assessee from third parties then why any additional compensation should apply to its transaction with AEs;

- m) The assessee submitted that the formula shared by the Ld. TPO on 18 January 2013 whereby 50% of location specific regulatory advantages were proposed to be attributed to the assessee is without any basis. However, in the TP Order, the TPO has allocated 75% towards the assessee. Thus, the same is against the principles of natural justice;
- n) Without prejudice to the above, the Ld. TPO erred in considering accumulated environmental provision instead of the current year provision;
- o) During AY 2009-10, the assessee has incurred environmental costs of 28,12,31,626/- which accounts for 3.24% of the total third party sales and 1.95% of total sales of the assessee. Since, the actual environmental cost incurred by the assessee is more than 0.51%, there are no savings made by the assessee on account of environmental cost”.

24. The DRP however confirmed the action of the TPO and held that the environmental norms in India stand at par with the most developed countries, however, the environmental saving to the entities in India result on account of lack of enforcement and not because of lack of norms. However, the DRP gave part relief by applying the percentage of saving to

export sales alone and not on total sales as applied by the TPO and accordingly, adjustment was restricted to Rs.1,47,27,846/-.

25. Before us, the Ld. Counsel Mr. Bhutani reiterating the same submissions pointed out that assessee has complied with the prescribed Indian Environmental norms and thus, there is no environmental degradation caused by the assessee. The compliances followed by the assessee in India were briefly stated to be as follows:

- a) The manufacturing activity is carried out in accordance with Syngenta's global manufacturing procedures and standards (GMPS);
- b) The crop protection products are subject to rigorous registration procedures aimed at ensuring safe product usage in the field. Further, Syngenta has globally adopted its own Health, Safety and Environment management system;
- c) Assessee has regularly complied with all the standards / norms laid down by the Ministry of Environment and Forests, Government of India who is entrusted with notifying the environment standards in India;
- d) Submission of returns regarding disposal of hazardous wastes in Form 4 submitted to State Pollution Control Board, performance reports of effluent treatment plant, air quality and meteorological data, etc.

Further, the comparables selected by assessee are local Indian comparables operating in similar economic

circumstance as the assessee itself, and thus all comparable companies in the similar industry carry similar risk. Hence, such savings if any, are embedded in the margin of the comparables and there cannot be any additional attribution. The environmental norms relating to permitted quantum of emissions in India are at par with or even stricter than international standards. In this regard, the assessee had submitted a comparative study of both these standards. This fact has also been accepted by the DRP in its order.

26. Without prejudice, the Ld. Counsel submitted that the TPO failed to provide a rationale for taking provision for environmental compliance of Syngenta AG as a base for determining the adjustment on account of green cost savings, without appreciating that the assessee complied with all the Indian environmental norms and high standards mentioned in internal HSE policy. The assessee incurred a huge cost on maintaining a team of about 36 personnel for monitoring compliances of HSE, taking approvals from regulatory authorities, monitoring and adhering to quality standards, preparation and filing of compliance reports, etc. The actual costs incurred by the assessee amounted to Rs.28,12,31,627 and Rs.27,93,79,758 in AY 2009-10 & 2010-11 respectively. He further pointed out that cost incurred by the assessee is significantly higher than the cost environmental cost saving attributed to the assessee by the TPO in respect of the same is given in the following manner:-

Particulars	Amount (for AY 2009-10)	Amount (for AY 2010-11)
Environmental provision for the year (in USD million) (as per Form 20F) (A)	59	48
Total Sales (in USD million) (as per Form 20F) (B)(B)	11,624	10,992
Percentage of environmental provision to total sales (A/B)	0.51%	0.44%
Export sales of SIL (in Rs.)	5,77,56,25,724	817,28,83,912
0.51% of above exports sales (in Rs.) (C)	2,94,55,691	3,59,60,689
Actual environmental costs incurred by the Assessee (in Rs.) (D)	28,12,31,625	27,93,79,758
Savings attributed to the Assessee (in Rs.) (C - D)	Nil (Since, actual Costs mentioned At (C) incurred by Assessee is Significantly Higher than Figure Mentioned at (D),there are no savings)	Nil (Since, actual Costs mentioned At (C) incurred by Assessee is Significantly Higher than figure Mentioned at (D), there are no savings)

Apart from that, the legal submissions which were made in respect of location cost saving were reiterated.

27. On the other hand, Ld. CIT DR relied upon the order of the TPO as well as DRP and submitted that environment saving costs needs to be factored in determination of ALP.

28. We have heard the rival submissions and perused the relevant finding given in the impugned order. With regard to green cost adjustment, the TPO has proceeded with the hypothesis that manufacturing activity of the assessee is leading to serious environmental impact upon land, water and air in India. Since, the norms in India are softer as compared to the western countries where laws and compliances are stringent, therefore, the assessee has saved compliance cost relating to environment, for which it needs to

be compensated. On this score also we are unable to apprehend as to when under the TNMM once a comparability analysis has been carried out vis-a-vis the margins of the comparable companies and the assessee's profit margin has been found to be not only at Arm's Length Price but at a higher profit margin and no adjustment in the profit has been made, then how a separate adjustment been made in the ALP by the TPO. If it is treated as separate international transaction, then certainly benchmarking has to be done by carrying out the comparability analysis with uncontrolled transaction under the prescribed methods; and if it is an adjustment made on account of profit margin after comparability analysis exercise is done, then TPO has to bring on record and justify how the 'green cost' is material effect to eliminate the difference under the comparable situation with the uncontrolled transactions. Both the TPO as well as the DRP has assumed that there is laxity of enforcement of Environmental Laws in India which is causing saving to the assessee. How far this assertion is true has not been substantiated. Before us, as well as before the authorities below, it has been submitted that assessee has fully complied with all the standard/norms laid down by Ministry of Environment and Forest and also has filed returns regarding disposal of hazardous waste in Form 4 submitted to State Pollution Control Board, performance reports of 'Effluent Treatment Plant', air quality and meteorological data. Further, it has been stated that assessee has incurred cost of Rs.27.94 crores approximately on account of environmental and HSE compliance in AY 2010-11 and in

assessment year 2009-10, the assessee has incurred environmental cost of Rs.28.12 crores. Here it has not been rebutted that these costs has not been incurred or under a comparable analysis with the comparables cost incurred by the assessee has not been found to be commensurate with the industry norm. The assessee had actually incurred environmental cost of more than 0.5% of total sales; therefore, there is no separate saving which can be attributed on the saving of the environmental cost. As incorporated in the foregoing paras, the assessee in its submissions duly supported by documentary evidences has pointed out to number of environmental compliances carried out by it to prove that in India also there is no laxity of compliance of laws and it had incurred huge costs on environmental protection measures and compliances. The working of the environmental cost attributed by the assessee has already been incorporated above, which has not been rebutted by any of the authorities. The TPO and the DRP without referring to any comparable data or carrying any kind of comparability analysis with local Indian comparables operating in similar economic circumstance as the assessee itself, where all the comparable companies in the similar industry carry similar risk has proceeded to make the adjustment on account of environment saving or “green costs” in the ALP which again is against the Transfer Pricing principles as enshrined in our Income-tax provisions. Any such savings if at all is embedded in the margin of the comparables and there cannot be any additional attribution. Such an ad-hoc adjustment in an arbitrary manner *sans* any sanction or authority under the

Income-tax provisions and that to be without there any comparable transactions with the local comparables cannot be sustained. The TPO has not demonstrated as to how and under what comparability analysis he has found that assessee has got the benefit of environmental/green costs savings and it is materially affecting the price under arms length conditions. Our finding and observations given with regard to location saving adjustment in the foregoing paragraphs will also apply here. Accordingly, we do not find any reason and justification for such adjustment and same is directed to be deleted.

29. Now we come to the domestic corporate grounds. In ground No.7, the assessee has challenged the direction of the DRP setting off the brought forward loss of Rs.8,10,24,124/- pertaining to Profenofos unit against the profits of the current year while computing deduction under Section 80-IB of the Act.

30. Before us, it has been submitted that this issue had come up for consideration before the Tribunal in assessment years 2007-08 and 2008-09 wherein this has been decided in favour of the assessee.

31. We find that the Assessing Officer has followed the earlier year finding and calculated the deduction under section 80IB holding that brought forward losses of earlier years have to be taken into account for determining the

deduction under section 80IB(10). The Tribunal has decided this issue after considering the facts in the following manner:-

“36. In ground No. 2.1 to 2.5, the assessee has mainly challenged the set off of losses of 80IB units against the profits of non 80IB units for working out the eligible profits under section 80IB.

37. Brief facts are that, the assessee company in its Audit report in Form No.10 had made a claim for deduction under section 80IB with regard to its 4 unit namely: i) Multipurpose Formulation Unit; ii) Thiamethoxam Unit; iii) Topik Unit; and iv) Profenofos Unit.

The AO required the assessee as to why deduction under section 80IB should not be calculated after adjusting consolidated loss of the two units against the profits of two other units. In response to the show cause notice, assessee relied upon certain case laws viz., CIT vs Canara Workshops, 161 ITR 320(SC) and various other Tribunal decisions. The Ld. AO however, rejected the assessee’s contention that deduction has been claimed only in respect of two units without setting off of losses of other 2 units. The relevant observation of the AO in this regard is as under:-

“The contention of the ARs is perused. The assessee draws a consolidated trading and P&L a/c including sales purchases and expenses of all the units. So profit and loss shown by the assessee company includes the profits and losses of all the units. Since the above losses are included in the profit or loss of the assessee company, its taxable income is already reduced to that extent. Even the AR admits to that in above submission. In such a situation on one hand the taxable profit of the company is reduced by these losses and on the 80IB. Thus, the deduction u/s 80IB is inflated to that extent. The assessee is claiming double benefit. This was certainly not the intention of the legislature. When the total income of the assessee is reduced by the loss of an eligible unit, profits of

other eligible unit before calculation of deduction u/s 80IB”.

3.4.3 The decisions relied on by the AR cannot be applied to the case of the facts are different. These decisions are based on the facts and documents of the relevant cases and the accounting treatment given by the assessee in those circumstances. It also depends on whether the loss in question is of eligible units or not. For example, in the above illustration, if the assessee keeps the loss of an eligible unit separate and does not consider it in arriving at the total deduction available will be Rs.50 and taxable income will be Rs.100. In such a case the loss of one eligible unit is not set off against the profit of another eligible unit and is carried forward for that unit itself. However, in the case of the total income, including the profits of the ineligible unit. Hence for the purpose of calculation of deduction u/s 80IB, the losses of eligible units are to be first set off from profits of other eligible units and on resultant positive figure the deduction is to be calculated.

3.4.4 In similar and circumstances and accounting treatments, it has been held that losses in two units and profit in one unit should be set off before computing deduction – CIT vs. Sundravel Match Industries Pvt Ltd. (MAD) 245 ITR 605 and CIT vs Macmilan Co. of India Ltd. (MAD) 243 ITR 403. Further, it has been held in CIT vs RPG Telecom Ltd. (Kar) 292 ITR 355 that “set off loss in other u nits against the income from eligible units and compute deduction only on the net income”.

and accordingly, computed the deduction under section 80IB in the following manner:

Name of Unit	Profit	Loss	Net Amount
1) Multipurpose Formulation Unit	20,00,51,614		20,00,51,614
2) Thiamethoxam Unit	2,19,69,406		2,19,59,406
3) Topik Units	--	2,31,03,440	2,31,03,440
4) Profenofos Unit	--	49,83,380	49,83,380
Total	22,20,21,020	2,80,86,820	19,39,34,200

The DRP also confirmed the said disallowance of deduction.

38. Before us, the Ld. Counsel submitted that, for the purpose of computing the deduction under section 80IB, each

unit has to be considered as a separate and independent unit.

In support, he relied upon the following decisions:-

- a) *Canara Workshops -161 ITR 320 (SC);*
- b) *Hindustan Construction Co. Ltd. -368 ITR 733 (Bom);*
- c) *Tridoss laboratories Ltd. -328 ITR 448 (Bom);*
- d) *Eskay Knit India Ltd. -ITA No.184 of 2007 (Bom);*
- e) *Sona Koyo Steering Systems Ltd -321 ITR 463 (Del);*
- f) *Modi Xerox Ltd [2012] -344 ITR 0411;*
- g) *Meera Cotton & Synthetic Mills P Ltd-29 SOT 177(All);*
- h) *Jindal Alluminium Ltd [2012] 19 ITR(T) 255 (Bang Trib);*
- i) *Nishikant S Shirodkar -ITA No.7626/M/2013 (Mum Trib).*

39. *On the other hand, Ld. DR strongly relied upon the order of the AO.*

40. *After considering the relevant finding given in the impugned orders as well as various decisions relied upon by the Ld. Counsel, we find that so far as the issue of claim of deduction under section 80IB, the profit and loss for 4 units for the year as well as profits eligible for deduction as per the assessee and as per the revenue is as under:*

Particular	Multipurpose	Thiamethoxam Unit	Topik Unit	Profenofos Unit	Total
Profit/loss for the year	20,00,51,614	2,19,69,406	(2,31,03,440)	(49,83,380)	
As per Assessee :					
Profits Eligible for deduction	20,00,51,614	2,19,69,406	--	--	22,20,21,020
As per Revenue :					
Profits eligible for deduction (As per Assessment Order)	20,00,51,614	2,19,69,406	(2,31,03,440)	(49,83,380)	19,39,34,200
Less: Exclusion of other income					(20,51,695)
Balance Profit					19,18,82,505
Deduction under 80IB					5,75,64,752

So far as the issue, whether each unit is to be treated as independent unit for the purpose of computing the profit or

whether loss of one unit can be adjusted with profit of other unit or not, we find from the perusal of Hon'ble Delhi High Court decision in the case of Sona Koyo Steering Systems Ltd., reported in [2010] 328 ITR 463, that while computing the deduction under section 80I, loss of one eligible unit can be set off or adjusted against profit of another eligible unit. Relevant observation of the Hon'ble Delhi High Court after relying upon the decision of Supreme Court in the case of Synco Industries Ltd, 299 ITR 44 reads as under:-

“8. It is further clear from a plain reading of the aforesaid provisions that the deduction under S. 80-I is to be made in case the gross total income includes any profits and gains derived from an industrial undertaking, etc., in case such profits and gains are included in the gross total income of the assessee. The deduction in the case of a company, in view of the proviso to s. 80-1(1), is to be given to the extent of 25 per cent of such profits and gains of such an industrial undertaking. It is also clear that in view of s. 80-1(6), which begins with a non obstante clause, the quantum of deduction is to be computed as if the industrial undertaking were the only source of income of the assessee during the relevant years. In other words, each industrial undertaking or unit is to be treated separately and independently. It is only those industrial undertakings, which have a profit or gain, which would be considered for computing the deduction. The loss making industrial undertaking would not come into the picture at all. The plain reading of the provision suggests that the loss of one such industrial undertaking cannot be set off against the profit of another such industrial undertaking to arrive at a computation of the quantum of deduction that is to be allowed to the assessee under s. 80-1(1) of the said Act.

9. In this regard, we may refer to the decision of this Court in the case of Dewan Kraft System (P) Ltd. (supra), which considered the pari-materia provisions of s. 80-IA(7) of the said Act. In that case, the question arose with respect to computation of the deduction in relation to three units - the Kalamb unit, the Delhi unit and the Noida unit. This Court held that while computing the deduction under s. 80-IA of the said Act, the profits and gains of the Kalamb unit for the purposes of determining the quantum of deduction under s. 80-IA(5) was to be computed as if such eligible business of the said unit was the only source of income of the assessee. This Court observed that the AO had erroneously mixed the profits of the Delhi and Noida units and had thereby restricted the deduction to the extent of business income and

that such an exercise was in total disregard of the provisions of sub-s. (7) of s. 80-IA of the said Act. It was held that the Kalamb unit, being the only unit of the assessee eligible for deduction under s. 80-IA of the said Act, was to be treated as an independent unit and the same was to be treated as the only source of income of the assessee for the purposes of computing deduction under s. 80-IA.

10. We now came to the decision of the Supreme Court in the case of Synco Industries Ltd. (supra) which was strongly relied upon by the learned counsel for the appellant. On going through the entire decision, we find that the Supreme Court was primarily concerned with the question as to whether any deduction could be allowed under Chapter VI-A if the gross total income was 'nil'. It is in that context that the Supreme Court considered the concept of gross total income and came to the conclusion, following its earlier decision in CIT vs. Kotagiri Industrial Co-operative Tea Factory Ltd. (1997) 139 CTR (SC) 359 : (1997) 224 ITR 604 (SC), that the gross total income has to be computed in accordance with the Act after adjusting the losses, etc. and that, if the gross total income so determined is positive, then the question of allowing deductions under Chapter VI-A would arise, but not otherwise. While doing so, the Supreme Court further made it clear that the gross total income must be determined by setting off business losses of earlier years before allowing deduction under Chapter VI-A and that if the resultant income is 'nil', then the assessee cannot claim any deduction under Chapter VI-A. While coming to the aforesaid conclusion, the Supreme Court was also confronted with an argument which had been raised on the basis of the provisions of s. 80-1(6) that the profits of one industrial undertaking cannot be set off against the losses suffered by the other industrial undertaking. The Supreme Court was of the view that the provisions of s. 80-1(6) were only for the purposes of computing the quantum of deduction, whereas the gross total income was to be computed in terms of the Act as provided in s. 80B(5). It is apparent that the Supreme Court distinguished the provisions of s. 80-1(6) which was for the purposes of computing the quantum of deduction from the provisions of s. 80-I (1) and s. 80-13(5) which deal with the manner in which the gross total income is to be considered. The Supreme Court observed as under:-

"13. While computing the quantum of deduction under s. 80-1(6), the AO, no doubt, has to treat the profits derived from an industrial undertaking as the only source of income in order to arrive at the deduction under Chapter VI-A. However, this Court finds that the non obstante clause appearing in s. 80-1(6) of the Act, is applicable only to the quantum of deduction, whereas, the gross total income under s. 80B(5) which is also referred to in s. 80I(1) is required to be computed in the

manner provided under the Act which presupposes that the gross total income shall be arrived at after adjusting the losses of the other division against the profits derived from an industrial undertaking. If the interpretation as suggested by the appellant is accepted it would almost render the provisions of s. 80A(2) of the Act nugatory and, therefore, the interpretation canvassed on behalf of the appellant cannot be accepted. It is true that under s. 80-1(6) for the purpose of calculating the deduction, the loss sustained in one of the units, cannot be taken into account because sub-s. (6) contemplates that only the profits shall be taken into account as if it were the only source of income. However, s. 80A(2) and s. 80B(5) are declaratory in nature. They apply to all the sections falling in Chapter VI-A. They impose a ceiling on the total amount of deduction and, therefore, the non obstante clause in s. 80-1(6) cannot restrict the operation of ss. 80A(2) and 80B(5) which operate in different spheres. As observed earlier, s. 80-1(6) deals with actual computation of deduction whereas s. 80-1(1) deals with the treatment to be given to such deductions in order to arrive at the total income of the assessee and, therefore, while interpreting s. 80-1(1), which also refers to gross total income one has to read the expression 'gross total income as defined in s. 806(5). Therefore, this Court is of the opinion that the High Court was justified in holding that the loss from the oil division was required to be adjusted before determining the gross total income and as the gross total income was 'nil' the assessee was not entitled to claim deduction under Chapter VI-A which includes s. 80-1 also.

14. The proposition of law, emerging from the above discussion is that the gross total income of the assessee has first got to be determined after adjusting losses, etc., and if the gross total income of the assessee is "nil" the assessee would not be entitled to deductions under Chapter VI-A of the Act."

11. From the above extract, it is apparent that the Supreme Court did not at all hold that while computing the deduction under s. 80-1(6), the loss of one eligible industrial undertaking is to be set off against the profit of another eligible industrial undertaking. All that the Supreme Court said was that in computing the gross total income of the assessee, the same has to be determined after adjusting the losses and that, if the gross total income of the assessee so determined turns out to be 'nil', then the assessee would not be entitled to deduction under Chapter VI-A of the said Act.

12. *We agree with the submissions made by the learned counsel for the assessee that there is nothing in the decision in the case of Synco Industries Ltd. (supra) which would enable us to detract from the position indicated by this Court in Dewan Kraft System (P) Ltd. (supra) and, as indicated by us above. In fact, the Supreme Court clearly held that while computing the quantum of deduction under s. 80-1(6), the AO, no doubt, has to treat the profits derived from an industrial undertaking as the only source of income of the assessee in order to arrive at a deduction under Chapter VI-A. The Supreme Court also held that under s. 80-1(6), for the purposes of calculating the deduction, the loss sustained in one of the units is not to be taken into account because sub-s. (6) contemplates that only the profits shall be taken into account as if it were the only source of income.*

13. *The above discussion makes it absolutely clear that the Supreme Court decision sought to be relied upon by the learned counsel for the appellant/Revenue, rather than deciding the issue in favour of the Revenue, clinches the matter in favour of the assessee. In view of the foregoing discussion, the substantial question of law, referred to above, is decided in favour of the assessee and against the Revenue.*

The appeals are dismissed.

41. *In the light of the aforesaid decision, we hold that each undertaking or unit is to be treated as independent and separate unit and it is those industrial undertaking which have a profit or gain are to be considered for computing the deduction. The loss making industrial undertaking would not come into picture at all. Thus respectfully following the aforesaid decision, we allow the claim of the assessee”.*

Thus, respectfully following the earlier years order, we decide the impugned issue in favour of the assessee and accordingly, ground No.7 is treated as allowed.

32. As regards the issue raised in Ground No.8 on account of addition of closing stock on account of un-utilized CENVAT

credit, it has been pleaded before us that, addition of Rs.27,75,55,199/- to the closing stock, if it at all is to be made, then corresponding adjustment should be made to the opening stock, purchases and sales also. It has been submitted that this issue has been decided in favour of the assessee by accepting this plea in the ITAT order for the assessment year 2005-06 wherein this issue has been decided in the following manner:-

2.3 The third dispute is regarding addition of Rs. 80334273/- to the value of closing stock on account of unutilized CENVAT credit. The AO noted that the assessee had not added the unutilized CENVAT credit in respect of materials other than capital goods amounting to Rs.80334173/- which was required to be added in view of the provisions of section 145A. He, therefore made addition of Rs. 80334273/-. The claim of the assessee to make similar adjustments to opening stock and purchases was not accepted. In appeal CIT(A) agreed with AC that this being the first year of change, the method of accounting u/s 145A was bound to have impact on the profit. He, therefore, confirmed the addition made by AG, aggrieved by which the assessee is in appeal before Tribunal.

2.3.1 Before us the learned AR for the assessee submitted that the assessee was following the exclusive method of accounting in which duty was not routed through the profit loss account. It was also submitted that adjustment u/s 145A, will have to be made at all stages including opening stock and purchases and if this was done this would not result in any addition to the total income. Reliance was placed on the judgment of Hon'ble High

Court of Bombay in case of Mahalaxmi Glass Works Pvt. Ltd (318 ITR 116) and on the judgment of Hon'ble Supreme Court in case of CIT Vs. Dynavision Ltd. (348 ITR 380). The learned DR on the other hand supported the orders of authorities below and placed reliance on the finding given in the respective orders.

2.3.2 We have perused the records and considered the matter carefully. The dispute is regarding addition on account of duty to the closing stock value. Under the provisions of section 145A, the valuation of purchase and sale and inventories for the purpose of determining the income is required to be made in accordance with the method of accounting regularly employed by the assessee and further adjustment is required to be made to include the amount of any tax duty, cess or fee by whatever name called actually paid or incurred by the assessee to bring the goods at place of its location and conditions as on the date of valuation. Therefore, the addition u/s 145A on account of duty is required to be made both in the valuation of purchase and sales as well as inventories. Hon'ble High Court of Delhi in case of Mahabir Aluminium (297 ITR 77) have held that adjustment on account of duty etc u/s 145A is required to be made to the opening stock. Therefore, adjustment on account of duty u/s 145A is required to be made at all stages including opening stock purchase and sales. We, therefore, set aside the order of CIT(A) and restore the matter to the file of AO for passing a fresh order after necessary examination in the light of observations made in this order and after allowing opportunity of hearing to the assessee.

Thus, respectfully following the same, we also accordingly restore the matter to the file of the Assessing Officer for deciding this issue in line with the directions given above that adjustment on account of duty u/s 145A is required to be made at all stages including opening stock purchase and sales which is in the line of the decision of Hon'ble Bombay High Court in the case of Mahalaxmi Glass Works Pvt. Ltd (318 ITR 116).

33. As regards not granting of depreciation on repairs and maintenance of the building treated as capital in nature in the final assessment order of the assessment year 2008-09 as raised vide ground No.9, before us it has been submitted that, similar depreciation has been granted by Assessing Officer for the assessment year 2010-11, however, the same has not been given in this year. Accordingly, we direct the Assessing Officer to grant the depreciation as repair and maintenance to the building has been treated as capital expenditure and also in line with the assessment year 2010-11.

34. As regards the non-granting of TDS credit, we direct the Assessing Officer to look into the matter and grant the credit accordingly.

35. As regard to ground No.11, relating to chargeability of interest under section 234B, it has been submitted that, the same should be calculated after giving appropriate credit of the TDS. We accordingly direct the Assessing Officer to

compute the interest under section 234B after giving due credit of the TDS amount.

36. Accordingly, the appeal of the assessee is treated as partly allowed for statistical purposes.

37. Now, we come to the revenue's appeal in ITA No.1926/Mum/2014 for AY 2009-10 vide which following grounds have been raised:-

"1. Whether in the facts and in the circumstances of the case and in Law, the DRP has correctly applied second proviso to Section 92C(2) of the Act on sale price or sale proceeds when the bench-marking using the TNMM has been done on the operating profits to total cost and consequently the said second proviso should have been applied on the operating profit to total cost?"

2. Whether in the facts and in the circumstances of the case and in Law, in invoking TNMM method in cost plus scenario, where in agreement with Associated Enterprises, the profit margin on cost is determined, the second proviso to Section 92C(2) of the Act has necessarily to be invoked on profit margin to the exclusion of sale price / sale proceeds, the latter being irrelevant secondary calculation for determining the tolerance limit envisaged in the second proviso".

38. As regards the Departmental appeal, it has been submitted that by the Id. Counsel that the TPO has made adjustment to Arm's Length Price to the transaction pertaining to sale of finished goods made to AEs in the crop protection-contract manufacturing segment to the tune of

Rs.26,08,53,000. This was done by re-characterizing the activities of the assessee to that of a toll manufacturer to a contract manufacturer. Subsequently, a search process was carried out with the functional profile of the assessee characterized as a contract manufacturer where a set of 6 comparables were finalized. The assessee agitated the inclusion of only one comparable company, that is, M/s Elder Projects on the ground that it was having significant related party transactions. The DRP merely remanded the issue to the TPO for verification of RPT. The TPO accepted the same in the remand report that it was having significant related party transactions. . The said comparable was thereafter directed to be excluded. This resulted in the recomputed mean margin of the comparable companies at 18.01% and after working capital adjustment it worked out at 16.35%, which fell within the tolerance range of (+/-) 5% range as provided in *proviso* to section 92C(2) of the Act and, thus, the addition was deleted.

39. After hearing both the parties, we find that, ground taken by the revenue is improper because the operating profit to the total cost is just representative of profit level indicator while determining the Arm's Length Price. In fact, PLI taken by the assessee is operating profit to the total cost only and not sale price or sale proceeds, therefore the ground taken by the revenue is contrary to facts and material on record which deserves to be rejected. Accordingly, the ground No. 1 raised by the revenue is treated as dismissed.

40. As regards the issue raised in ground No.2 also, it has been admitted by both the parties that the same is not arising out of the orders of the authorities below and is completely divorced from the findings given in the impugned orders. Accordingly, the same is dismissed as infructuous.

41. In the result, appeal of the revenue stands dismissed.

42. So far as grounds raised in the assessee's appeal for the AY 2010-11 and 2011-2012, it has been admitted by both the parties that the issues raised in these appeals by the assessee, including transfer pricing grounds viz.,

Sl. No.	Issue under Appeal	AY 2010-11	AY 2011-12
1	Disallowance of royalty Payment.	Rs.6,13,25,824 Ground Nos. 3 & 3.1	Rs.5,53,93,209 Ground Nos.3 &3.1
2	Adjustment on account of location savings-	Rs60,45,21,233 Ground No.4 and 4.1	Rs.65,26,11,480 Ground No.4 & 4.1
3	Adjustment on account of green (environment) cost-	Rs.1,79,80,345 Ground No.5	NA

Since, these adjustments on account of payment of Royalty; Location saving; and Environmental/Green costs savings are exactly the same, arising out of identical set of facts with identical finding of the TPO/AO, therefore, our finding given herein above will apply *mutatis mutandis* in these years also. Accordingly, grounds raised by the assessee in both the appeals stand allowed.

43. In the result, the assessee's appeal for the AY 2009-10 is partly allowed for statistical purposes and the appeals for AY 2010-11 & 2012-13 are allowed and that of the revenue stands dismissed.

Order pronounced in the open court on 30th November, 2016

Sd/-
 (आर सी शर्मा)
 लेखा सदस्य
(R. C. SHARMA)
ACCOUNTANT MEMBER

Sd/-
 (अमित शुक्ला)
 न्याईक सदस्य
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai, Date: 30th November, 2016

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
 - 2) प्रत्यर्थी /The Respondent.
 - 3) The CIT(A) –Concerned/DRP-II, Mumbai.
 - 4) The CIT– Concerned__, Mumbai.
 - 5) विभागीय प्रतिनिधि “के”, आयकर अपीलीय अधिकरण, मुंबई/
The D.R. “K” Bench, Mumbai.
 - 6) गार्ड फाईल \
- Copy to Guard File.

आदेशानुसार/By Order

उप/सहायक पंजीकार
 आयकर अपीलीय अधिकरण, मुंबई
 Dy./Asstt. Registrar
 I.T.A.T., Mumbai

*चव्हान व.नि.स
 *Chavan, Sr.PS/
 Lakshmikant Deka Sr.PS

सिंगएनता इंडिया प्राइवेट लिमिटेड

Syngenta India Ltd
 IT(TP)A 1373/Mum/2014
 ITA 1926/Mum/2014
 ITA 560/Mum/2015
 ITA 147/Mum/2016

अनु क्र. Sr.N	आदेश का घटनक्रम Episode of an order	दिनांक Date	स्वाशिरि Initials	यथोचित Concerned
1	Draft on handwritten Manuscript	17.11.2016		व.नि.स Sr.PS
2	Draft placed before author	24.11.2016		व.नि.स Sr.PS
3	Draft proposed & placed before the second Member			न्यास/JM
4	Draft discussed/approved by Second Member			लेस/AM
5	Approved Draft comes to the Sr.PS/PS			व.नि.स Sr.PS
6	Kept for pronouncement on			व.नि.स Sr.PS
7	File sent to the Bench Clerk	14.12.16		व.नि.स Sr.PS
8	Date on which file goes to the Head Clerk			
9	Date of dispatch of Order			