

IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH 'B', BANGALORE

BEFORE SHRI. N. V. VASUDEVAN, JUDICIAL MEMBER

AND

SHRI. ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

I.T(TP).A No.436/Bang/2015  
(Assessment Year : 2010-11)

Deputy Commissioner of Income-tax,  
Circle -6(1)(1), Bangalore

..Appellant

v.

M/s. Sanyo India P. Ltd,  
No.45, 2<sup>nd</sup> floor, Jubilee Building,  
Museum Road, Bangalore 560 025  
PAN : AAJCS0730M

..Respondent

Assessee by : Shri. Chavali Narayan, CA  
Revenue by : Smt. Neera Malhotra, CIT

Heard on : 22.09.2015

Pronounced on : 30 .09.2015

**ORDER**

**PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :**

In this appeal filed by Revenue, grounds read as follows :

1. *The directions of the Dispute Resolution Panel are opposed to law and facts of the case.*
2. *On the facts and in the circumstances of the case the Dispute Resolution Panel erred in directing the AO to adopt RPM method and to reject TNMM method as the most appropriate method without ascertaining the nexus with the business activity of the taxpayer.*

3. *On the facts and in the circumstances of the case the Dispute Resolution Panel erred in directing the AO to exclude company which are functionally similar and thereby excluded Usha International Ltd., the said company without appreciating the fact that the said company was already selected by the TPO as the comparable to the taxpayer company after having discussed in the showcase notice.*
4. *For these and other grounds that may be urged at the time of hearing, it is prayed that the directions of the Dispute Resolution Panel in so far as it relates to the above grounds may be reversed.*
5. *The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.*

Grounds 1, 4 and 5 are general needing no adjudication.

02. Ld. Counsel for the assessee at the outset submitted that issue regarding most appropriate method for evaluating the pricing of international transactions of the assessee, which appears in ground 2 of the Revenue had come up before this Tribunal in assessee's own case for A. Y. 2008-09. Placing a copy of the order dt.17.10.2014 in ITA No.1022/Bang/2012, Ld. AR submitted that this Tribunal held Resale Price Method ('RPM' in short) as the best in the circumstances of the business of the assessee and had remitted the issue of analysing the international transactions back to the file of the AO / TPO.

03. Per contra, Ld. DR submitted that AO had pursuant to the DRP directions, instead of correctly following such directions, simply deleted the adjustments recommended by TPO in full.

04. We have perused the orders and heard the rival contentions. Assessee was distributing and marketing consumer durables in the name of 'Sanyo' and these were imported from its AE abroad, namely Sanyo Electric Co. Ltd, Japan. Assessee had used RPM in its TP study. As per the assessee, RPM was the most appropriate method since it was selling the goods which was received in finished manner from its AE abroad, in the local market without any value addition. However, the TPO when the matter was referred to him by the AO, rejected the RPM adopted and held that TNMM was the most appropriate method. He there after made analysis of the international transactions based on the TNMM. Assessee had assailed this before the DRP and the DRP held that RPM was the most appropriate method in the situation of the business of the assessee for analysing the value of the international transactions with regard to purchase of finished goods from its AE abroad and sale thereof in the local market. DRP had remitted the matter back to the AO for evaluating the value of international transactions of the assessee based on RPM. However, in the assessment order passed, AO had simply deleted the additions proposed by the TPO on a premise that the DRP had deleted the additions suggested by the TPO. Since the fact-situation is very similar to that in the assessment year 2008-09, in our opinion the directions given by this Tribunal for the said year would apply here also. Relevant paragraphs 11 to 21 of the order dt.17.10.2014, is reproduced hereunder :

11. Facts apropos are that the assessee is a wholly owned subsidiary of M/s Sanyo India Pvt.Ltd.,Japan, primarily engaged in the business

of distribution and sale of consumer durables in the nature of washing machines, microwave ovens, projectors, refrigerators, audio and digital products, air conditioners, spares etc., Such goods which were sold by the assessee were imported from its associated enterprise abroad namely M/s Sanyo Electric Company Ltd., Japan. Though, there were altogether five classes of international transactions for the assessee, the AO as well as the TPO had accepted assessee's prices to be in Arm's Length vis-à-vis all of them, except for the transactions relating to import of consumer durables for re-sale. Assessee had adopted RPM using gross profit margin on sales as profit level indicator (PLI). As per the assessee re-sale price method was most appropriate method for evaluating the value of imports. Assessee relied on Rule 10B(1)(b) of the IT Rules. As per the assessee RPM was applicable in a situation where property or services were purchased from an associated enterprise were re-sold as such to an unrelated enterprise. Assessee after a search of various comparable candidates zeroed in on five companies as proper comparables. The result of three years of these companies viz..for years ended, 30-03-2006,31-03-2007 and 31-08-2008 were considered and weighted average margin of such comparables were worked out at 11.49%. Since the assessee had margin on sale of 8.37%, as per the assessee it was well within plus or minus 5 % of the arm's length margin of 11.49%. Thus, as per the assessee there was no requirement of any adjustment for pricing of imported goods.

12. The TPO when the matter regarding fixation of ALP of international transactions were referred to him, proposed to reject the RPM adopted by the assessee. As per the TPO, the TNM method was most appropriate since it operated in a manner similar to cost plus as well as re-sale methods. Further, as per the TPO when the TNM method was applied the net margins were less affected by transactional differences, than the RPM method. As per the TPO when net margin of tax payers from controlled transactions could not be established with reference to the net margin of the same tax payer with reference to comparable uncontrolled transactions, re-sale of price and cost plus method could not be applied.

13. When a notice on above lines were given, reply of the assessee was that entire revenue of the assessee was not from re-sale of goods sourced from the associated enterprises. As per the assessee the aggregate value of purchases during the relevant previous year came to 97.75 Crores, whereas imports from associated enterprises only Rs.59.96 Crores. Assessee's insisted that RPM method was the

direct and most appropriate one in its case. Assessee also relied on OECD guidelines, in support of its contention that RPM method was best suited to it.

14. However, TPO was not impressed by the above. According to him, purchases from associated enterprises were more than 60% of the total purchases. Further, as per the TPO, assessee had taken multiple years data of comparables while doing the TP analysis. Assessee also could not establish functional similarity of the products sold by it and the products sold by comparables selected by it. Therefore, he rejected the re-sale price method adopted by the assessee and substituted with TNM method.

15. Assessee objected to the above treatment before the DRP. However, this was however, not successful. DRP was of the opinion that assessee could not have adopted multiple year data. It confirmed the view taken by the TPO. The AO thereafter, accepted the recommendation of the TPO and made an addition based on TNM method.

16. Now before us, learned AR strongly assailing the substitution of method submitted that no proper reasoning was given by the authorities below for rejecting the re-sale proper method. As per the learned AR, assessee was importing the goods from its associated enterprises and selling it in the local market without any value addition. Only work done by the assessee on such goods were to re-pack it according to the local requirements. As per the learned AR assessee had made a proper analysis as required under the TP regulations and gave reasons why it had adopted the RPM method. Assessee had pointed out that it was having purchases and sale from unrelated enterprises also, and was not solely doing the business of importing goods from associated enterprises and selling it in the local market. As per the learned AR, assessee was a trader simpliciter. It had analysed 612 companies which were importing consumer durables for re-sale and out of that selected 5 companies as proper comparables, while working out the ALP. The TPO had rejected the TP documentation for vague reasons. When assessee was buying and selling goods the best method as per the learned AR was RPM. Assessee was receiving finished goods from the associated enterprises and selling it, acting as a full fledged distributor of the associated enterprise. When the property or services purchased from the associated enterprises was re-sold to an unrelated party without any value addition, as per the learned AR, RPM was the best method. Reliance was placed on the decision of Mumbai Bench of this

Tribunal in the case of ITO Vs M/s L'oreal India Pvt.Ltd.,(ITA No.5423/Mum/2009 dated 25-04-2012), M/s Star Diamond Group Vs DDIT (ITA No.3923/Mum/2008 dated 28-01-2011 that of co-ordinate bench of this Tribunal in the case of M/s Textronix India Pvt. Ltd., Vs DCIT(ITA No.1334/B/2010) and M/s Mattel Toys(I) Pvt.Ltd., Vs DCIT(ITA No.2810/M/2008 dated 12-06-2013) and M/s Frigoglass India Pvt.Ltd., Vs DCIT (ITA No.463/Del/2013 dated 11-04-2013) and that of M/s Tupperware India Pvt. Ltd., Vs DCIT (ITA No.2140/Del/2011 dated 29-08-2014).

17. Per contra, learned DR submitted that selection of most appropriate method for evaluation of international transactions was responsibility of both the parties and not that of the TPO alone. According to him, assessee having used the multiple year data and having not followed the procedure prescribed under the Rules, could not say that the TPO had erred in adopting TNM method. AS per the learned DR, the TPO has specifically mentioned at para-5 of his order the reasons why he was rejecting the RPM method. Assessee could not establish the functional similarity of the product imported and sold by it with that of the comparables selected by it. Therefore, according to him, the lower authorities had taken a correct view on this issue.

18. We have perused the order, and heard the rival contentions. There is no dispute that the assessee had followed RPM method for analyzing its international transactions relating to goods imported by it from its associated enterprise abroad and sold here in the local market. There is also no dispute that the assessee was importing these goods in the finished stage and selling it without making any value additions thereon. The only work rendered by the assessee was re-packing the cartons received from its supplier abroad. In other words, assessee was acting purely as a trader. Rule 10C of the Rules requires adoption of the most appropriate method which best suits the facts and circumstances of each of particular international transaction and which provide most reliable measure of an ALP in relation to the international transactions. It is an accepted position that the entire trading of the assessee did not comprise of imports from associated enterprise and selling it in local market. There were substantial local purchases as well. That RPM method is the most appropriate method when assessee is selling goods purchased from the associated enterprises as such, has been held by the Mumbai Bench in the case of M/s L'Oreal India Pvt. Ltd., (supra), The Co-ordinate Bench at para-19 of its order had held as under;

*“ 19. During the course of hearing ld. DR also supported the method considered by TPO and referred to para 2.29 of OECD guidelines 2010 as stated herein above. On the other hand, ld.AR justified the RPM method adopted by it and also referred to order of TPO in the preceding assessment years as well as succeeding assessment years to the assessment year under consideration to substantiate that RPM is the most appropriate method to determine ALP. He submitted that the assessee made adjustment for making and selling expenses to the profits to make it comparable to the comparable companies profits. We agree with ld.CIT(A) that there is no order of priority of methods to determine ALP. RPM is one of the standard method and OECD guidelines also states that in case of distribution and marketing activities when the goods are purchased from AEs which are sold to unrelated parties, RPM is the most appropriate method. In the case before us, there is no dispute to the fact that the assessee buys products from its AEs and sells to unrelated parties without any further processing. Further, the assessee has also produced certificates from its AEs that margin earned by AEs on supplies to the assessee is 2% to 4% or even less. The department has not disputed the above certificates. Therefore, the TPOs contention that AEs have earned higher profit is not based on facts. On the other hand, we agree with ld.CIT(A) that the margin of profit earned by AEs themselves is also reasonable and therefore, it could not be said that there is shift of profits by the assessee to its AEs at overseas. Considering the facts of the case and also the order of TPO that RPM method has been accepted in the preceding as well as succeeding assessment years to the assessment year under consideration in respect of distribution segment activity of the assessee, we do not find any infirmity with the order of the ld.CIT(A) in deleting the addition of Rs.4,90,07,000/- made by the AO. Ground no.2 is accordingly rejected by upholding the order of the ld.CIT(A).*

Similarly in the case of M/s Star Diamond Group Vs DDIT (supra), it was held under at para-13 of its order as follows;

*“ 13. This finding in our humble opinion is wrong for the reason that the CIT(A) has adopted these very comparables, along with three other while arriving at the operating margins at para-7.16 of his order. As the assessee is a trader, without value addition to the goods, we find force in the submission of the assessee that resale price method is the most appropriate method for determining the ALV with respect to AE transaction. In fact, the revenue has accepted this method in earlier two years. The transfer pricing officer in his order dated 7-3-2005 for the assessment year 2002-03 and order dated 20-03-2006 for the assessment year 2003-04, has*

*agreed with the computation of arms length price made by the assessee under the resale price method. If the comparables are not found appropriate, fresh comparables can be searched, but the method adopted need not be rejected. In any event, as the comparables given by the assessee i.e Flawless Diamonds and Professional Diamonds are not in business of purchase and sale of rough diamonds, it would have to set aside of the issue to the file of the Assessing Officer for fresh adjudication, so as to enable both the assessee, as well as the AO to undertake a fresh exercise, by finding out appropriate comparables and adopting resale price method. Before doing so we observe as follows;*

The Co-ordinate Bench in the case of M/s Textronix India Pvt.Ltd., Vs DCIT(supra), at para-6 of its order held as under;

*“ 6. We have considered the rival submissions. The dispute is with regard to the ALP in respect of international transactions whereby the assessee imports equipments from its AE and re-sells them without any value addition to the India customers. In similar circumstances, Mumbai Bench of the Tribunal in the case of M/s L’Oreal India Pvt.Ltd.,(supra) has taken the view that the RPM would be the most appropriate method for determining the ALP. The Mumbai Bench of the Tribunal, in this regard, has referred to the OECD guidelines wherein a view has been expressed that RPM would be the best method when a re-sale takes place without any value addition to a product. In the present case, the assessee buys products from the AE and sells it without any value addition to the Indian customers. In such circumstances, we are of the view that the ratio laid down y the Mumbai Bench of this Tribunal in the se of M/s L’Oreal India Pvt.Ltd., (supra), would be squarely applicable to the facts of the assessee’s case”.*

19. The only discernable reason why the TPO has rejected the re-sale method adopted by the assessee to our eyes is that assessee had given multiple year data of comparables. The data given by the assessee for the five comparables selected by it were as under;



<i>Company name</i>	<i>2006 12 months</i>	<i>2007 12 months</i>	<i>2008 12 months</i>	<i>Weighted average</i>
Khaitan Electricals Ltd	18.59	10.48	15.98	13.07
<i>Khaitan (Ind.) Ltd.,</i>	<i>11.02</i>	<i>7.25</i>	<i>8.62</i>	<i>9.17</i>
Media Video Ltd.,	12.12	11.24	-	11.57
Peerless Developers Ltd.,	4.68	5.84	-	5.28
XPRO Global Ltd.,	7.96	15.01	21.84	18.35
Arithmetic mean (%)	10.87	9.96	15.48	11.49

Learned counsel for the assessee has stated at bar that years mentioned in the above table were financial years ending 31-03-2006, 31-03-2007 and 31-03-2008. If that be so, the TPO was having results of the comparables selected by the assessee for the relevant previous year as well. If the TPO found that the comparables were dealing in different type of goods, he could select by himself a set of comparables after giving proper reasons. There were many other companies dealing with goods similar to that of the assessee. Nothing stopped the TPO from working out the ALP based on the data which was available on record or from getting a fresh set of comparables, which was appropriate in his opinion. In other words, according to us, the reason for rejecting the re-sale price method adopted by the assessee was not correct. In our opinion, re-sale price method was most appropriate method in the facts and circumstances of this case.

20. As a necessary corollary to the above discussion, we are of the opinion, that the AO/TPO has to do a fresh analysis of international transaction involving trading of imported goods, considering RPM method as the most appropriate method. Other grounds raised by the assessee were with respect to the comparables, considered by the TPO in TNM method study, and this has become irrelevant in view of our finding that the RPM method was the best suited one.

21. Accordingly, we set aside the orders of the learned AO with regard to the ALP fixation of international transaction involving trading of imported goods of AEs and remit it back to the AO for consideration afresh based on RPM method and in accordance with law.

For the impugned assessment year also therefore we set aside the order of lower authorities and remit the issue of fixation of ALP of the international transactions entered by the assessee, back to the file of the AO / TPO. Same directions which were given by us for A. Y. 2008-09 will apply here also.

05. Coming to ground 3, we are of the opinion that when RPM method is adopted, the AO / TPO should be given all freedom to consider the functional similarities and dissimilarities for every company considered by the assessee in its TP study. We are of the opinion that ground 3, in such circumstances, become infructuous. Ground.3 is dismissed as infructuous.

06. In the result, appeal of the Revenue is treated as partly allowed for statistical purpose.

Order pronounced in the open court on 30th day of September, 2015.

Sd/-

(N. V. VASUDEVAN)  
JUDICIAL MEMBER

Sd/-

(ABRAHAM P GEORGE)  
ACCOUNTANT MEMBER

MCN

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar