

in respect of the trading segment is within the +/- range without appreciating the fact that since the quantum of international transactions for the year under consideration is Rs.5,10,88,530/- (on the cost side), the corresponding (+)/(-)5% range would be Rs.5,36,42,957/- to Rs.4,85,34,103/- and thus the arm's length purchase price of Rs.4,42,31,397/- as worked out by the TPO in his order, fails beyond the (+.-) 5% range and consequently, falls outside the scope of the Second Proviso to section 92C(2) of the Act?

2. Whether on the facts and circumstances of the case and in law, the ITAT is correct in directing the Assessing Officer to allow benefit of +/- 5% to the assessee without considering Explanation (2A) to Section 92C(2) inserted by Finance Act 2012 w.e.f. 1.4.2002, whereby deduction of 5% earlier being allowed by appellate authorities has been explicitly prohibited w.e.f. 1.4.2002 and therefore, the ITAT ought not to have issued such directions to the A.O. as are in contravention of the provisions of the statute ?

3. Without prejudice to the above, whether on the facts and circumstances of the case and in law, the ITAT was justified in arriving at their findings without adjudicating on the department's specific

ground of appeal before the Tribunal that the CIT(A) was not justified in ignoring other two comparable cases adopted by the TPO?”

3. Mr.Pinto, learned Counsel submits that Section 92C(2) has not been properly considered by the Commissioner of Income Tax (Appeals) and the Tribunal. By mere mathematical calculation, it would be seen that the arm's length purchase price as worked out by the TPO in his order falls beyond (+)/(-) 5% range and consequently falls outside the scope of second proviso to Section 92C(2) of the Income Tax Act. Learned Counsel submits that it was an error on the part of the Commissioner of Income Tax (Appeals) to discard the comparison of two companies made by the TPO, no reasons were put forth while discarding the said two comparable instances to be considered as Benchmark. According to the learned Counsel, the Tribunal also persisted with the same error. The transaction is beyond the arm's length. As such the order deserves to be set aside.

4. Learned Counsel for the respondent supports the order and submits that even if the case as put forth before the

Commissioner of Income Tax(Appeals) and the Tribunal is considered as it is, still the same is within the permissible arm's length. The case put forth by the Revenue in the present appeal was not at all put forth before the authorities below. As such the appellant cannot be permitted to raise a new ground in the present appeal which can only to be considered on the substantial questions of law.

5. We have considered the submissions canvassed by the learned Counsel for the respective parties.

6. Respondent/assessee is a company engaged in the business of marketing, manufacturing, sales and services of weighing equipments. During the year under consideration, it has carried out international transaction with its associate enterprises for purchase of goods, import of finished goods and other services. The assessee had selected one company namely Avery India Ltd. as a comparable company to benchmark its international transaction by applying TNMM as most appropriate method. Respondent has computed the profit margin of the comparable by using profit level index at 5.45%.

The Assessing officer had considered the operating margin at 9.60% and addition of Rs.58,57,133/- were made to the purchase made by the assessee. The assessee had calculated its operating margin at 6.18 %. Even the operating margin calculated by the TPO is considered as 9.60%, the same comes within the ambit and purview of arm's length.

7. The Commissioner of Income Tax (Appeals) and the Tribunal has considered the said aspect in a plausible manner.

8. Naturally this appeal has to be considered on the substantial questions of law. The grounds which were never agitated before the Commissioner of Income Tax (Appeals) and the Tribunal and those grounds based on the facts, cannot be agitated in the present appeal.

9. In the light of the above, the appeal being sans substantial question of law. The appeal is dismissed. No costs.

(G.S.KULKARNI, J.)

(S.V. GANGAPURWALA, J.)