IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H' DELHI
BEFORE SHRI A.D. JAIN AND SHRI K.G. BANSAL

ITA No. 4405(Del)/2009
Assessment year: 2003-04

Assistant Commissioner of Income-tax, Circle 18(1), New Delhi.	Vs.	UE Trade Corporation (India) (P) Ltd., 1-C, Vandhna Building, 11, Tolstoy Marg, New Delhi.

ITA No. 4460(Del)/2009
Assessment year: 2003-04

UE Trade Corporation (India) (P) Ltd., New Delhi.	Vs.	Assistant Commissioner of Income tax, Circle 18(1), New Delhi.
(Appellant)		(Respondent)

Department by : Shri Narender Kumar Chand, Sr. DR
Assessee by : Shri Rajan Bhatia, Advocate

ORDER

PER K.G. BANSAL: AM

These cross appeals emanate from the order of CIT(Appeals)-XX, New Delhi, passed on 23.09.2009 in appeal no. 35/2007-08 pertaining to assessment year 2003-04. The assessee has taken following two substantive grounds in its appeal:-

(i) "That the ld. CIT(A) has erred in sustaining the adjustment of Rs. 6,40,581/- out of Rs. 9,76,369/- made by the AO on account of determination of Arm Length Price, disregarding the facts on record.

(ii) That the ld. CIT(A) has erred in holding that adjustment as made by the ld. AO, even after having made a reference to Transfer Pricing Officer, was permissible in terms of provisions of Income Tax Act, 1961."

1.1 On the other hand, the revenue has taken following two grounds in its appeal:-

(i) "On the facts and in the circumstances of the case, ld. CIT(A) has erred in deleting the addition of Rs. 3,35,787/- out of the total addition of Rs. 9,76,369/- made by the AO on the basis of ALP worked out by TPO, on the ground that after allowing the benefit of +/- 5%, there is no difference in ALP in respect of four invoices.

(ii) On the facts and in the circumstances of the case, ld. CIT(A) has erred in deleting the addition of Rs. 7,79,812/- made by the AO on account of difference in closing stock."

1.2 As the appeals were argued in a consolidated manner, we think it fit to pass a consolidated order.

2. The facts of the case are that the assessee filed its return on 2.12.2003 showing loss of ` 1,19,21,769/-. The return was processed on 21.3.2004. Thereafter, the return was selected for scrutiny by issuing notice u/s 143(2) on 15.10.2004. In the course of hearing, it was found that the assessee undertook international transactions with associated

enterprises regarding export of pulses, payment of interest and reimbursement of expenses. The assessee relied on "Agriwatch" data base for justifying the contention that import of pulses was undertaken at arm's length price. However, the AO noted that in six instances, the price paid by the assessee was in excess of the quotation in the "Agriwatch". The details of the difference were tabulated, which show that the assessee paid an amount of ` 9,76,369/- in excess of arm's length price. Therefore, this amount was deducted from the loss declared by the assessee. The details of the transactions are shown in a tabular form below:-

S. No.	Invoice No.	Invoice date	Rate per unit(US$)	Arms Length Price per unit (US$)	Total difference in (Rs.)
1	EX02/1822	27.08.2002	305.01	295	55793.73
2	EX02/2044	19.01.2003	260	250	121731.46
3	EX02/2045	19.01.2003	260	250	121731.46
4	EX02/2047	30.01.2003	233	230	36530.87
5	EX02/2049	03.02.2003	260	230	110371.70
6	EX02/2050	03.02.2003	270	210	530210.13
	Total		1588.01	1465	976369.35

2.1 The assessee had shown the value of closing stock at ` 15,87,84,036/-. This included the closing stock of coffee valued at `

18,75,961/-. In the course of hearing, the assessee was required to file the details regarding closing stock of coffee and its valuation. The details were filed showing the value at ` 26,55,773/-. The difference of ` 7,79,812/- was also deducted in computing the loss for this year. The details furnished in the course of assessment are reproduced below:-

S. No.	Type	Qty.	Rs. Per kg.	Amount (Rs.)
1.	RC/B/AB	10189	37.58	382903
2.	RC-PB	26897	36.05	969520
3.	RC-C	13716	33.58	460583
4.	RC-BBB	27651	30.48	842766
	Total:	78453		2655773

2.2 After making certain other disallowances, which do not concern us, the loss was computed at ` 99,10,220/-.

2.3 Both the aforesaid deductions from the loss were challenged before the ld. CIT(Appeals). It was submitted that the assessee used comparable uncontrolled price (CUP) method to justify the price paid to associated concerns for import of pulses. The uncontrolled price was taken from "Agriwatch" data base. In so far as first four transactions mentioned in the table furnished by the AO, in respect of which adjustment was made, the variation was less than 5%. Therefore, no adjustment can be made in

respect thereof. This argument was accepted. Therefore, the addition in respect of only two items was upheld.

2.4 In respect of the valuation of closing stock of the coffee, it was submitted that the assessee valued the same on the basis of weighted average method. This method has been followed consistently in all the subsequent years. Therefore, no addition should have been made in valuation of the closing stock. This contention was also accepted.

2.5 The assessee is in appeal in regard to transfer pricing adjustment sustained by the ld. CIT(A) and the revenue is in appeal against deletion in respect of transfer pricing adjustment as aforesaid and valuation of closing stock. We proceed with the appeal of the assessee at the first instance.

3. Before us, the ld. counsel referred to the fifth item in the table furnished by the AO, which shows the purchase price per unit at US$ 260 and the arm's length price as per "Agriwatch" data base at US$ 230. Our attention has been drawn to page no. 69 of the paper book, being the reproduction from the data base, which shows the single quotation on

3.2.2003 at US$ 250. It is contended that the lower authorities erred in taking arm's length price at US$ 230. If the value is correctly taken at US$ 250 per unit, the difference between arm's length and the cost price falls within the permissible range of 5%. Therefore, it is argued that no addition can be made in respect of this item. Thereafter, he drew our attention to page no. 35 of the paper book, which shows the quoted price in respect of item no. 6 of the AO's table at US$ 210 per unit on 24.1.2003. No quotation is available on 3.2.2003. The subsequent quotation on 10.2.2003 is US$ 280 per unit. He further drew our attention to page nos. 28 to 31 of the paper book, which show that quotation for a few days remained the same, thereafter increased and remained the same for a few days and this pattern is repeated. In view thereof, it is argued that the arm's length price remained same for quite some time and when it moved, it became more or less the same as the purchase price of the assessee. Therefore, it is argued that no adjustment should be made in respect of this transaction also.

3.1 The assessee also took certain other pleas, which are summarized as overleaf:-

(i) Second proviso to section 92C(2) permits a variation of 5% in all cases and for all years;

(ii) reference was made to the TPO for determining arm's length price, which was not done. Thereafter, the AO proceeded to determine arm's length price on his own. Thus, he intruded into the jurisdiction of the TPO. Since the TPO did not make any order, it may either be deemed that assessee's valuation has been accepted or that the order has become barred by limitation;

(iii) all the transactions of import of goods should be seen in totality for the purpose of making adjustment u/s 92C and not item-wise. If that is done, the overall price paid for all the imports fall within the permissible limit; and

(iv) transfer price regulations are meant for the purpose of curbing tax avoidance and if such intention is absent, no adjustment should be made.

3.2 In reply, the ld. DR submitted that the AO made adjustment in respect of import of cereals and for this purpose six transactions have been picked up. The assessee has been undertaking import from associated concerns. It has relied on the "Agriwatch" data base and used CUP method to agitate that the purchases have been made at arm's length price. There is no evidence on record that the purchase price was fixed periodically or at the beginning of the year. Therefore, each transaction of import is a separate and distinct transaction. Accordingly, it is argued that the lower authorities were justified in making adjustment on transaction to transaction basis.

3.3 It is further submitted that the quotations of the commodity under reference and quotations for other items also, in respect of which no adjustment has been made, remain stagnant for some time and then move. This is quite natural as the prices are not expected to move from day-to-day. Therefore, what is to be seen is the arm's length price on the date on which the assessee imported the goods.

3.4 It is also submitted that transactions are under question. For each transaction there is only one arm's length price found on the basis of

quotation in the data base. It is not a case where a number of comparable transactions are available, whose mean is determined. Therefore, there is no question of granting concession of 5% as per the provision existing for this year.

3.5 Coming to general observations, it is submitted that the report of the TPO is advisory in nature and the AO is not bound by the same. In case a reference is made for valuation and the report of the TPO is not received, the AO is within his right to determine arm's length price on his own. In case a report is received, the AO may adopt the value arrived at in the report or may take his own decision depending upon the facts of the case and the contents of the report. Accordingly, it is agitated that the assessment is not barred by limitation. Alternatively, if non-making of report means that the TPO accepted the value of the assessee, the AO can make suitable adjustment on his own as mentioned earlier.

3.6 The chapters XXA and X regarding "Acquisition of immovable properties in certain cases of transfer to counteract evasion of tax" and "Special provision relating to avoidance of tax" respectively stand on totally different footings. In the case of the latter, there is no need to

prove evasion or avoidance of tax. The only issue is to determine arm's length price so that the profit could be determined as if the enterprise acted in a free manner without control or superintendence which undermines its capacity to undertake business transactions. As all the transactions are independent transactions, which have been sought to be justified independently on the basis of "Agriwatch" data base, the assessee cannot take a plea that the transactions chosen by the AO for adjustment represent only a miniscule part of all the transactions of import. There is no equity in this matter.

3.7 In the rejoinder, the ld. counsel accepted that the report of the TPO is not binding on the AO. However, a reference is made to the TPO and non-making the report is an irregularity. If it is so held, he will have no objection in remanding the matter to the AO with a view to obtain TPO's report. However, if the same is done, the TPO may be excluded from valuing four transactions which have been accepted by the ld. CIT(Appeals) to be at arm's length.

4. We have considered the facts of the case and submissions made before us. The submissions put forward by both the parties require determination of some preliminary issues. We proceed to do that at the outset.

4.1 The first issue is that the AO did not grant opportunity of being heard to the assessee and made the addition on the basis of Agriwatch data base, which has been relied upon by the AO, for making the additions. Therefore, it is agitated that the matter may be restored to the file of the AO to determine arm's length price in respect of only those transactions which have been disputed by the assessee. Thus, the request is conditional that where relief has been granted by the CIT(Appeals), the Tribunal may decide the appeal of the revenue, but where no relief has been given by the CIT(Appeals), the matter may be restored to the file of the AO. The correct position is that the assessment order has merged with the order of the ld. CIT(Appeals) and, therefore, it ceases to have any force to the extent it is contrary to the order of the ld. CIT(Appeals). There is no submission that the ld. CIT(Appeals) has not granted proper opportunity to the assessee. In this situation, the irregularity, if any, committed by the

AO stands cured. Therefore, we do not think it necessary to remand the matter to the AO in respect of any transaction.

4.2 The second ground is that the position should be seen as a whole with respect to all the transactions and not only with respect to the disputed transactions. In other words, if transfer pricing study is made for all the transactions, the variation made by the AO would be of insignificant amount warranting no addition. On the other hand, the case of the ld. DR is that purchases by way of import do not constitute a series of connected transactions, but each transaction is a separate transaction. Therefore, the AO was right in examining each transaction separately for this purpose. It is seen that the assessee has not been able to bring anything on record that various purchases were a part of pre-arranged scheme or agreement so as to constitute a part of the indivisible transactions of purchase. Accordingly, it is held that the AO was within his right to evaluate each transaction separately.

4.3 The third ground is that since the TPO did not carry out the transfer pricing study with a view to determine arm's length price in spite of a reference having been made to him, the order of assessment has

become time barred. There are two limbs of the argument in this behalf, namely, that –(i) it is deemed that he accepted the transactions at recorded value; and (ii) the assessment order has become barred as it has been passed without the existence of TPO's order. The learned DR has countered both the arguments. In the case of Sony India Pvt. Ltd. Vs. Central Board of Direct Taxes & Another (2007) 288 ITR 52, the Hon'ble High Court of Delhi mentioned that on receipt of a reference, the TPO has to determine arm's length price u/s 92CA of the Act in relation to the transactions referred to him u/s 92C. The price has to be determined on any one of the methods mentioned in section 92C(1) and by applying most appropriate method referred to in section 92C(2). He shall take into account all the facts and data available with him and pass a speaking order after obtaining the approval of the director. On receipt of the order, it is imperative that an opportunity is to be given to the tax-payer before making adjustment to the total income. Such an opportunity has to be granted by the AO. Therefore, the final determination of the income has to be made by the AO after hearing the assessee even on the report of the TPO. This case leads to a clear conclusion that the report of the TPO is not binding on the AO. If that is so, the first limb of the argument does not hold any force because if the TPO agreed with the

assessee, the AO can still make a variation in the arm's length price determined by the TPO. Although the TPO is expected to make a report on arm's length price on receipt of a reference, his failure to do so does not bar the jurisdiction of the AO to determine the arm's length price as in any case the final determination has to be made by the AO only. Thus, failure to act on the part of the TPO cannot lead to the presumption that the order has become time barred. Therefore, this argument is also rejected.

4.4 The fourth point is that transfer pricing provisions are in the nature of ante-tax evasion provisions. Therefore, the provision should be construed strictly and benefit of doubt, if any, should go to the assessee. In this connection, reliance is placed on the decision of Hon'ble Supreme Court in the case of C.B.Gautam Vs. Union of India & Others (1993) 199 ITR 530. In this case, it has been held that the historical setting, in which the provisions of chapter XXC were enacted, indicates that the provisions were to be resorted to only in cases where there is an attempt to evade payment of tax by significantly under-valuing the immovable property agreed to be sold. This intention of the legislature also becomes clear from Board instruction no. IA 88. Since there is no attempt to evade

the tax or to significantly reduce the value of the transactions, it is argued that transfer pricing provisions were not rightly invoked in this case. In reply, the ld. DR relied on the decision of the Special Bench of Bangalore Tribunal in the case of Aztec Software & Technology Services Ltd. Vs. ACIT (2007) 294 ITR (AT) 32. In this case, it has been inter-alia held that where the language of the statute is clear and unambiguous, it should be interpreted on the plain and natural meaning of the words. In such a case, courts are not required to look into the object or intention of the legislature by resorting to the aid of rules of interpretation. It has been further held that in such a case there is also no need to take the help from speech of the Finance Minister, notes on clauses, marginal notes or headings. It has been also held that the pre-conditions for determining arm's length price are mentioned in section 92C. Once these conditions are satisfied, the AO can proceed to determine such price. There is no other condition required to be satisfied for invoking these provisions. Further, reliance has been placed on the decision of Hon'ble Punjab & Haryana High Court in the case of Coca Cola India Inc. Vs. ACIT & Others (2009) 309 ITR 194. In this case, it has been held that international transactions with an associated enterprise constitute a distinct class of transactions, which are different from other transactions. There

is always a possibility that such a transaction may be under-valued. Therefore, provisions have been enacted to substitute arm's length price in place of the price shown for the transaction by the contracting parties. These provisions are not governed by Foreign Exchange Regulation Act, 1973. Therefore, the provisions are intra-vires Article 14 of the Constitution of India. Reliance has also been placed on the decision of Hon'ble Delhi High Court in the case of Sony India (P)Ltd. (supra). In this case, it has been mentioned that multi-national corporations operate through a number of companies which may include setting up a base by incorporating a local subsidiary in a country where they seek to operate. It is often seen that these corporations transfer goods and services to the local subsidiary at a price not reflecting the market price with the result that the subsidiary is able to avoid payment of local taxes either partly or wholly. The AO may refer the valuation of international transaction to the TPO for determining its arm's length price. The overall scheme of the Act is that such price has to be determined by him as per the statutory provisions after hearing the assessee. On receipt of the report, the AO has to hear the assessee again in respect of the price determined by the TPO. The effect of this is that the assessee gets two opportunities to demonstrate that the price declared by him is arm's length price and,

therefore, it should be accepted. Having considered the ratio of the aforesaid cases, we are of the view that the provisions contained in chapter XXC and chapter X stand on totally different footings. Therefore, the case law decided under chapter XXC cannot be relied upon while deciding a case under chapter X. The cases decided under this chapter and discussed above show that the AO can refer the matter to the TPO for determining arm's length price of an international transaction or he may determine it on his own. Therefore, it is held that the AO was within his jurisdiction when he determined the price of six items of imports made by the assessee.

5. The substantive argument to justify the price of international transactions undertaken by the assessee is that the variation is within the permissible tolerance level of 5%. We may at this juncture look at the provision contained in section 92C(2), interpretation of which is under dispute. The provision as it stands now reads as under:-

> "(2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed:

> Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:
>
> Provided further that if the variation between the arm's length price so determined and price at which the international transaction has actually been undertaken does not exceed five per cent of the latter, the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price."

5.1 However, for the year under consideration, this provision had only one proviso, which reads as under:-

> "Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices, or, at the option of the assessee, a price which may vary from the arithmetical mean by an amount not exceeding five per cent of such arithmetical mean."

5.2 The case of the ld. counsel is that the provisos as they stand now should be made applicable in the case of the assessee because these are explanatory in nature and, therefore, operate retroactively. In this connection, reliance has been placed on the decision of Delhi Bench of the Tribunal in the case of Sony India Pvt. Ltd. Vs. DCIT (2008) 114 ITD 448. In this case, it has been held that as far as first limb of the proviso is concerned, it is of general application. The controversy relates to the

second limb of the proviso where an option is given to the tax-payer to take arm's length price which may vary from arithmetical mean by an amount not exceeding five per cent of such arithmetical mean. There is no controversy that the tax-payer can take arm's length price which is not exceeding five per cent of the arithmetical mean. The "option" as is clear from the language, is to take arm's length price which is not in excess of five per cent of the said mean. If one goes by the language, one cannot see anything in it to restrict the application of the provision only to marginal cases where price disclosed by the tax payer does not exceed five per cent of the arithmetical mean. The price determined on application of most appropriate method is only an approximation and it is not a scientific evaluation. Therefore, the legislature thought it fit to allow marginal benefit to those tax-payers who opt for such benefit. It may be seen from this decision that the benefit is available only when the arm's length is determined to be the mean of a number of prices of comparable transactions. However, the case of the assessee is that since the whole exercise leads to only approximate result, such benefit is also available to the assessee where there is only one comparable case. Further, reliance is placed on the decision of Mumbai Bench of the Tribunal in the case of DCIT Vs. BASF India Ltd. 2010-TII-40-ITAT-

Mum-TP dated 16.07.2010 in ITA No. 195/Mum/2006 for assessment year 2002-03, a copy of which has been placed before us. In this case, transfer pricing adjustment was made inter-alia in respect of items Amdea-05 and Butyl Acrylate. The case of the assessee was that in both cases the difference in price is about four per cent, which is less than five per cent and, thus, no adjustment could be made in view of the provision contained in the second proviso to section 92C(2). This contention was upheld by mentioning that if the difference is less than five percent, then the actual price paid should be considered as arm's length price under the aforesaid proviso. It was also mentioned that similar view has been taken in the case of Sony India Pvt. Ltd. (supra).

5.3 On the other hand, the ld. DR has relied on the decision of "F" Bench of Delhi Tribunal in the case of Perot System TSI (India) Ltd. vs. DCIT 2010-TIOL-51-ITAT-DEL for assessment years 2002-03 to 2004-05 in ITA Nos. 2320 to 2322(Del)/2008 dated 30.10.2009, a copy of which has been placed before us. The Tribunal came to the conclusion that since only one rate was used as a comparable transaction, it cannot be equated with more than once price. Therefore, the tolerance limit of five per cent was not available in the relevant proviso applicable to the

proceedings of these years. For the sake of ready reference, paragraph nos. 15.2 to 15.5. of the order are reproduced below:-

> "15.2 We can gainfully refer here the relevant provisions of section 92C(2) of the IT Act.
>
> *"Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices, or, at the option of the assessee, a price which may vary from the arithmetical mean by an amount not exceeding five per cent of such arithmetical mean."*
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> 15.3 The TPO in this case has applied the monthly LIBOR (London International Bank Official Rate) downloaded from the British Bankers Association website. During the financial yer 2001-02 LIBOR for US dollar loan was 2.39%. On that LIBOR the Assessing Officer added average basis point charged by other companies and for this purpose he took rate for 5 companies. The arithmetic mean which came to 1.64%. Accordingly, Assessing Officer computed the arm's length rate to be LIBOR + 1.64% using CUP method.
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> 15.4 The assessee agitated before the ld. CIT(A) that the Assessing Officer had not allowed the variation of +/- 5% from the arm's length interest computed and for this the assessee's argument was that proviso to section 92C(2) of the Act gives a right on the assessee to demand such an adjustment. The ld. CIT(AZ) found that first and foremost reason for not allowing deduction of 5% from the arm's length interest is the fact that there are not more than once price in respect of each of the transaction, as specific one year LIBOR rate has been held to be arm's length price for the transactions. Therefore, he held that 5% allowance itself is infructuous.

> 15.5 We have carefully considered this aspect. We find ourselves in agreement that no more than once price has been used for each transaction. Only the LIBOR rate has been applied which has been adjusted for some basis points as required. This cannot be equated with more than once price in respect of each transaction. Hence, we uphold the ld. CIT(A)'s order on this issue."

5.4 We have considered the facts of the case and submissions made before us. The proviso, which is applicable to the proceedings of this year, contemplates an option to the assessee to choose a price which may vary from the arithmetical mean by an amount not exceeding five per cent of such arithmetical mean. This proviso is applicable where more than one price is determined and thereafter the mean of such prices is taken to be arm's length price. However, there is only one comparable instance in this case. The decision in the case of Perot Systems TSI (India) Ltd. (supra) supports the case of the revenue. The argument of the ld. counsel is that this proviso has been substituted by two provisos by Finance (No. 2) Act, 2009 with effect from 01.10.2009. The newly inserted provisos are clarificatory in nature and, therefore, they act retroactively. Accordingly, these will apply to assessment year 2003-04 also. We have considered this matter also. In the first instance, the provisos deal with the determination of arm's length price of an

international transaction. Therefore, these provisions are in the nature of substantive provisions and not procedural provisions. A substantive provision can be amended retrospectively by the legislature. However, such amendment is taken retrospectively only if it has been so specifically provided by the legislature itself. The proviso was substituted with effect from 01.10.2009 and not retrospectively. Therefore, it comes into operation from assessment year 2009-10 and applies to subsequent years. In the second place, we have already seen that arm's length price has to be determined as per statutory provisions. Therefore, the concession of 5% cannot be read in the statute by interpretation. Accordingly, it is held that newly inserted provisos do not apply to assessment year 2003-04.

5.5 Without prejudice to the aforesaid argument, we may now examine the newly inserted provisos. The first proviso speaks of more than one price which is determined by most appropriate method and in such cases the arm's length shall be arithmetical mean of such prices. The second proviso is in continuation of the first proviso when it mentions that if the variation between arm's length price so determined and price

at which international transaction has actually been undertaken does not exceed five per cent of the latter, the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price. The words "so determined" clearly lead to a conclusion that more than one price is determined and thereafter its mean is taken. Therefore, the exception provided in both the provisos of section 92C(2) are applicable only when more than one price is determined. Thus, even under the amended provision, it can very well be argued that the benefit is not available to the assessee as one price has been determined by applying CUP method. In the case of Sony India Pvt. Ltd. (supra), the TPO did not allow the benefit of the provision in respect of arithmetical mean of more than one price determined by the most appropriate method. Thus, in that case more than once price was determined. Such is not the case here. In the case of DASF India Ltd., the decision of Sony India Pvt. Ltd.(supra) was followed. This case does not deal with the controversy at all. Even the ld. DR did not bring this controversy to the fore. Therefore, the decision in the case of Sony India Pvt. Ltd. was mechanically followed. However, in the case of Perot Systems TSI (India) Ltd., it has been specifically held that the tolerance level of five per cent is countenanced only when there is more than one price and not

when there is only one comparable price, LIBOR in that case. Therefore, we find that the decision of the aforesaid Perot Systems is preferable to the decision in the case of DASF India Ltd. It is mentioned that in circumstances such as obtaining in various decisions on the issue, the plea of two views being possible on the same issue is also not sustainable. The language of the proviso as it existed for the relevant year is quite clear. None of the decisions relied upon by the ld. counsel holds in any manner that the substituted provisos are clarificatory in nature. Therefore, it is held that in a case where there is only one price determined, the option of five per cent is not available to the assessee.

5.6 Coming to the merits of two adjustments under question, it is a matter of fact on record that the comparable price in respect of item no. 5 of the Assessing Officer's table is 250 and not 230. Therefore, the AO is directed to take arm's length price at US$ 250 per unit.

5.7 In respect of item no. 6, the case of the ld. counsel, to put in simple terms, is that "Agriwatch" data base is not reliable in respect of "black urd", which has been mentioned as "black mapte" in the data base. A

statement is made at the bar by the ld. counsel that both the items are same. On the other hand, the case of the ld. DR is that absence of quotation on some dates is because of lack of transaction. Further, his argument is that it is quite natural that the price may stay stable for an item over a number of days and thereafter move. It is not necessary that the price vary from day-to-day. Variation or absence thereof depends upon a particular item and market conditions prevailing in respect of that item. We agree with this line of argument, more so because no other data has been furnished by the assessee to dispute the contents of this data base. In fact, it will not lie in the mouth of the learned counsel to argue that the data base ought to be accepted for all other transactions but for the instant transaction. If his argument is to be accepted, it may cast doubt about the whole data base. This is not the contention of either party. Therefore, we hold that the ld. CIT(Appeals) was justified in adopting the comparable price of US$ 210 per unit in place of purchase price of US$ 270 entered by the assessee in the books of account.

6. Coming to the appeal of the revenue, ground no. 1 is in regard to the allowance of five per cent on the arm's length price worked out by the AO. On grant of such deduction, no difference has been found between the recorded price and the reduced arm's length price as aforesaid. This issue stands covered by our order in the appeal of the revenue, in which it has been held that if there is only one price, then such a deduction is not admissible. However, since the ld. counsel took some further arguments in the matter based upon board circular no. 12/2001 dated 23.8.2001, we may delve upon this issue further.

6.1 It is mentioned in the circular that the AO shall not make any adjustment to the arm's length price determined by the tax-payer, if such price is up to 5% less or up to 5% more than the price determined by the AO. In such cases, the price declared by the tax-payer may be accepted. The case of the ld. DR is that the relevant provision is clear and, therefore, there is no need to take recourse to the circular. In this very connection the meaning of the expression "arm's length price determined by the tax-payer" also came for discussion during the course of hearing and the case of the ld. counsel is that if the price entered in the

books for the transaction is within the tolerance limit of 5%, the AO may not disturb the price on account of transfer pricing adjustment. Further, it is submitted that the circular is in the nature of a beneficial circular, which should be given effect to, as held in the case of Navnit Lal C. Javeri Vs. K.K. Sen, Appellate Commissioner (1965) 56 ITR 198. In this case, the Hon'ble Minister for revenue had given an assurance that outstanding loans and advances which are otherwise liable to be taxed as dividends will not be subjected to tax if it is shown that they had been genuinely refunded to the respective companies before 30.06.1955. In order to carry out this assurance, circular no. 20(XXI-6)/55 was issued by Central Board of Revenue on 10.5.1955. At page 203 of the report, it is mentioned that it is clear that a circular of the kind, which was issued by the Board, would be binding on all officers and persons employed in the execution of the Act. As a consequence of the circular, past transactions which would normally have attracted the stringent provisions were substantially granted exemption from the operation of the said provision by making it clear to all the companies and their shareholders that if past loans were genuinely refunded to the companies, they would not be taken into account. Further, reliance has been placed on the decision of Hon'ble Supreme Court in the case of Ellerman Lines Ltd. Vs. CIT (1971) 82

ITR 913. It is mentioned that the Central Board of Revenue had issued the notification dated February 10, 1942, under which instructions were issued to the assessing authorities laying down the principles to be applied for assessing the foreign shipping companies. They were directed in respect of British shipping companies to permit them to elect to be assessed on the basis of a ratio certificate granted by the U.K. authorities regarding the income or loss and the wear and tear allowance. The Hon'ble Court mentioned at page 920 of the report that as the Tribunal had determined the tax due from the assessee on the basis of ratio certificate given by the U.K. authorities, it cannot be said that the decision reached by the Tribunal was an unreasonable one. The ld. counsel also distinguished between a beneficial circular and a circular which interprets the law. It is his case that a benevolent circular is binding while the courts may not agree with the circulars which interpret the law as the same has to be done on the basis of statutory provisions.

6.2 We have considered the facts of the case and submissions made before us. The Board circular states that where arm's length price determined by the tax-payer is five per cent less or five per cent more

than the price determined by the AO, the price declared by the tax-payer may be accepted. In the first limb of this paragraph, the board has used the words "arm's length price determined by the tax payer", which means that on the basis of pricing study, the assessee has determined a price. In this case, the price has not been determined by the assessee. He has merely relied upon the "Agriwatch" data base. This very data base has been used by the AO. Thus, the price determined by the assessee and the AO is the same. In the second limb, the words used are "price declared by the tax payer". To our mind, the words in the first and second limbs will have to be read to have the same meaning, i.e., the assessee has determined the arm's length price and thereafter declared such price for the purpose of transfer pricing adjustment. Neither such a price is determined nor declared as the transaction has been shown in the books and the return at the purchase price. Therefore, we are of the view that the aforesaid circular is not applicable on the facts and in the circumstances of the case. It was also the case of the ld. counsel that if statutory provisions, on plain reading, leads to an absurd result, they should be interpreted suitably by taking into account the equitable consideration, as held in the case of CIT Vs. J.H. Gotle (1985) 156 ITR 223. We have seen that there is no absurdity when the provisions,

applicable to this case, are interpreted literally. Therefore, relying on our order in the assessee's appeal (supra), this ground is allowed.

7. Ground no. 2 is regarding adjustment of ` 7,79,812/- made on account of difference in the value of closing stock. We have already summarized the facts relating to this addition. It may be recapitulated that the assessee had shown the value of closing stock at ` 18,75,961/-. In the course of hearing, the inventory was filed along with valuation, which showed the value at ` 26,55,773/-. Therefore, an addition of ` 7,79,812/- was made to the total income. Before the ld. CIT(Appeals), it was submitted that the assessee has regularly followed the weighted average method for valuation of closing stock. It was further submitted that the valuation of stock is a tax neutral issue as the closing stock of this year becomes the opening stock of immediately succeeding year. The ld. CIT(A) mentioned that this is the first year of operation of the assessee. The assessee has followed weighted average method in this and subsequent years. Therefore, the addition was deleted.

7.1 Before us, the ld. DR submitted that being the first year, there could be no question of consistently following the method up to this year.

Therefore, the principle of consistency is not applicable. In this connection, reliance is placed on the decision of Hon'ble Supreme Court in the case of CIT Vs. British Paints India Ltd. (1991) 188 ITR 44. The facts in that case are that the assessee valued the stock at 84.49% representing the actual cost of the raw-materials. The over-head charges representing 15.51% were excluded from the valuation. Thus, while the correctness of accounts was not in question; nor the system adopted by the assessee; the question was only regarding valuation of stock without taking into account the production expenses. The Hon'ble Court mentioned that any system of accounting which excludes all costs other than cost of raw-material for goods-in-process and finished products, is likely to result in a distorted picture of the true state of the business for the purpose of computing the chargeable income. The Tribunal had upheld the order of the AO and, therefore, the Hon'ble Court mentioned that these orders were based on findings of fact made on cogent evidence and in accordance with correct principles.

7.2 In reply, the ld. counsel submitted that the stock was valued on the basis of Accounting Standards-2, issued by Institute of Chartered Accountants of India, thus, valuing the stock of coffee on weighted average value basis. This Accounting Standard is binding in nature, as

held in the case of J.K. Industries Ltd. & Another Vs. Union of India & Others (2008) 297 ITR 176. This method has been accepted in the immediately succeeding year. Therefore, in view of the decision of Hon'ble Supreme Court in the case of CIT Vs., Bilahari Investment (P) Ltd. (2008) 299 ITR 1, the book results should have been accepted. He also distinguished the facts of the case of British Paints India Ltd. (supra), as in that case production cost was not taken into account. In this case, all costs have been aggregated in respect of raw, processed and finished coffee and thereafter the average price is found out. Therefore, it was agitated that the method adopted by the assessee ought to have been accepted by the AO.

7.3 In the rejoinder, it is submitted that the finding of the ld. CIT(Appeals) is based upon altogether different consideration. No details has been filed regarding the method used for working out average weighted price.

8. We have considered the facts of the case and submissions made before us. It is seen that the AO valued the stock on the basis of

inventory and valuation furnished by the assessee in the course of hearing. However, the assessee took up a plea before the ld. CIT(Appeals) that the assessee has been using weighted average value method. This method has been used in this year, being the first year, and in all subsequent years. It was submitted that during the course of assessment proceedings, the MIS report was wrongly furnished to the AO, who made addition on this basis without giving an opportunity of being heard to the assessee. The gist of the arguments of the ld. counsel before us is that the MIS report contained the realizable value of the stock, while the assessee is entitled to value it on the basis of cost or market price, whichever is lower. Since the assessee had closing stock consisting of raw, processed and finished coffee, the weighted average value method was used. We find that the ld. counsel has not referred to any valuation report made by the assessee on the aforesaid method and has also not filed AS-2, mandating weighted average method in such a case. In any case, the ld. CIT(Appeals) has not allowed the AO to state his case on the submissions made before the ld. CIT(Appeals), which were not made in the course of assessment. Further, the ld. CIT(Appeals) has not examined whether the assessee has followed weighted average value method and whether such method is an accepted

method of valuation mandated by AS-2. Therefore, we are of the view that the whole issue requires fresh consideration by the AO. It is ordered accordingly. The assessee will be at liberty to lead all evidences before him, which may be examined by him with a view to decide the matter afresh as per law and after hearing the assessee. Thus, this ground is treated as allowed for statistical purposes.

9. In the result, the appeal of the assessee is partly allowed and the appeal of the revenue is treated as partly allowed for statistical purposes.

This order was pronounced in the open court on 24th December, 2010.

Sd/- sd/-

(A.D. Jain) (K.G.Bansal)
Judicial Member Accountant Member
Date of order: 24th December, 2010

SP Satia

Copy of the order forwarded to:-

UE Trade Corporation (India) P. Ltd., New Delhi.

ACIT, Circle 18(1), New Delhi.

CIT(A)

CIT

The DR, ITAT, New Delhi. Assistant Registrar.