

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'I' : NEW DELHI**

Before Sh. R. S. Syal, AM And Sh. A. T. Varkey, JM

ITA No. 521/Del/2013 : Asstt. Year : 2008-09

ITW India Limited, Level 1, Lotus Plaza, 732/1, Mehrauli Gurgaon Road, Gurgaon-122001, Haryana	Vs	Assistant Commissioner of Income Tax, Circle 1(1), Gurgaon
(APPELLANT)		(RESPONDENT)
PAN No. AAACI4550Q		

Assessee by : Sh. Deepak Chopra, Adv, Sh. Anil Kumar Gupta, CA,
Mrs M. Bajpai & Ms. Neha Singh, Adv.

Revenue by : Sh. Peeyush Jain, CIT DR

Dt. of Hearing : 28.01.2015	Dt. of Pronouncement: 30.01.2015
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ORDER

Per R. S. Syal, AM:

This appeal by the assessee is directed against the order passed by the Assessing Officer on 30.11.2012 u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2008-09.

2. The first issue raised in this appeal is against the addition on account of Transfer Pricing Adjustment from

international transaction of 'Sale of finished goods' valued at ₹ 11,80,09,913/-

3. Briefly stated the facts of the case are that the assessee is an Indian subsidiary company of Illinois Tool Works Inc. The holding company has worldwide presence in the field of manufacturing of highly engineered products and specialty items. The assessee is engaged in manufacturing and sale of steel strapping/industrial packaging machines and consumables, quality assurance products, mechanical systems and components and specialty chemicals, aluminum insulation jacketing etc. The assessee applied the Transactional Net Margin Method (TNMM) on entity level for demonstrating that all of its international transactions, being six in total, including the instant transaction of 'Sale of finished goods', were at Arm's Length Price (ALP). Profit Level Indicator of Operating Profit/Operating cost was used. The

Transfer Pricing Officer (TPO) did not accept the application of TNMM on entity level. In so far as the international transaction of 'Sale of finished goods' is concerned, the TPO, after seeking objections from the assessee, used Comparable Uncontrolled Price (CUP) method for determining the Arm's Length Price of this set of international transactions. In this regard, the TPO sought information from the assessee about the comparable uncontrolled transactions undertaken by it. The assessee supplied such internally comparable uncontrolled transactions data. The TPO accepted all other transactions at ALP except ten individuals transactions tabled on page 3 of his order. In the Table drawn by the TPO, he recorded the Item code, Name, Price and Number of units sold to AEs and non-AEs and the difference. Such difference totalling Rs. 41.63 lacs was proposed as a Transfer Pricing Adjustment. It is a

matter of record that the Dispute Resolution Panel (DRP) allowed relief of roughly Rs. 11 lacs in respect of the second transaction of the Table. That is how, the Assessing Officer made an addition amounting to Rs. 29,88,080/- in his final assessment order, against which the assessee is aggrieved in the present appeal.

4. We have heard the rival submissions and perused the relevant material on record. In so far as the application of the most appropriate method for determining the ALP is concerned, we find that the assessee's adoption of combined TNMM on an entity level in respect of six separate sets of distinct international transactions - Purchase of raw material, Purchase of plant & machinery, Commission expenses, Sale of finished goods, Commission income and Reimbursement of expenses - is not capable of acceptance. Section 92(1) provides that : 'Any income arising from an international

transaction shall be computed having regard to the arm's length price.' The mandate of this section is to determine the ALP of 'an' international transaction. The term 'transaction' has been defined under rule 10A(d) to mean '*a number of closely linked transactions*'. It follows that the ALP of more than one transaction can be determined as one unit, only if they are closely linked transactions. In such a case, the plural of international transactions shall be considered as a singular for the purposes of benchmarking as a single transaction. Reverting to the facts of the instant case, we find that all the six sets of international transactions undertaken by the assessee can, by no standard, be considered as 'closely linked'. We, therefore, refuse to accept the adoption of TNMM on entity level.

5. As the assessee has no mechanism to determine the ALP of this international transaction under the TNMM in a

separate manner and the further fact that the comparable uncontrolled data under the CUP method is available, we feel no difficulty in holding that the CUP is the most appropriate method for this transaction. Under the given facts and *qua* the international transaction of sale of finished goods instantly under consideration, we hold that the TPO was justified in applying the CUP method.

6. Adverting to the Table drawn by the TPO on page 3 of his order, we find that he has proposed the adjustment by considering price of particular products sold to its AE in a particular quarter by comparing it with the price at which the same products were sold by the assessee to non-AEs in the same quarter. In principle, we approve the manner in which the TPO has proceeded to determine the ALP of this international transaction.

7. The objection of the Id. AR is restricted only to the adoption of price charged by the assessee from non-AEs for comparison with the international transactions given at serial nos. 6, 7 and 9 of the Table. To explain the assessee's objection, we are taking up the transaction at serial no. 6. The product sold by the assessee to its AE is STX 00016 @ ₹ 8264/- per unit. On the other side of the Table, the TPO has taken comparable uncontrolled transaction with non-AE, namely, Cmt Spinning Mills Ltd., Mauritius with the price at ₹ 9668/- per unit. That is how difference of ₹ 1404/- (₹ 9668/- minus ₹ 8264/-) per unit has been proposed as transfer pricing adjustment. Here, it is relevant to note that the TPO has compared the price charged by the assessee from its AE with that charged from non-AEs within the same quarter of the year. In so far as the transaction at serial no. 6 is concerned, we find that the assessee sold 126 units to its AE at a uniform

price of ₹ 8264/- per unit. As against that, it sold 10 units of the same product in the same quarter to Aljazeera Industrial Services, Bahrain and 48 units to Cmt Spinning Mills Ltd., Mauritius @ ₹ 8264/- and ₹ 9668/- per unit respectively. The TPO has considered the highest price charged by the assessee from non-AEs in the same quarter for making the transfer pricing adjustment. The Id. AR contended that price charged by the assessee from Aljazeera Industrial Services, Bahrain at ₹ 8264/- per unit should have been considered. In our considered opinion this approach of extremes as adopted by the TPO and pleaded by the Id. AR, cannot be accepted. No side can be allowed cherry-picking. The best course in our considered opinion is to average the prices charged by the assessee from its non-AEs in the same quarter and then make its comparison with the price charged from the AE.

8. Section 92C deals with the computation of arm's length price. Sub-section (1) provides that the arm's length price in relation to an international transaction shall be determined by any of the five specific and one general methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons etc. The first proviso to sub-section (2) of section 92C provides 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'. Rule 10B(1)(a) deals with the determination of Arm's Length Price under the CUP method. Sub clause (i) of Rule 10B(1)(a) provides that; 'the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or number of such transaction, is identified'.

When we consider the mandate of section 92C in conjunction with that of rule 10B, it transpires that if there is a single comparable uncontrolled transaction, then the price in such transaction is to be considered but if there are number of such comparable uncontrolled transactions, then the arithmetic mean of such prices charged or paid should be identified. Neither the Revenue can pick a single highest price from a number of comparable uncontrolled transactions, nor the assessee can argue for taking the lowest of such comparable uncontrolled transactions. It, therefore, follows that the average of the prices charged by the assessee from its non-AEs in the same quarter should be considered for identifying the benchmark price of the same product sold to AE in the same quarter.

9. Reverting to the facts of the instant case, we find that the average of the prices charged in two comparable

uncontrolled transactions comes to ₹8966/- per unit (₹8264/- + ₹/-9668 = ₹17932/- ÷ 2). It is this price of ₹8966/- per unit which should be considered for the purpose of making comparison with the price charged by the assessee at ₹8264/- per unit for working out the transfer pricing adjustment.

10. Similar course of action needs to be adopted in respect of transactions at serial no. 7 and 9 of the Table. Here also, the Id. AR stated that the TPO has taken highest price and not the lowest or average. Following our view taken above, we hold that the average price of the same quarter should be considered. We, therefore, set aside the impugned order on this issue and send the matter back to the file of AO/TPO for re-determination of Arm's Length Price of the international transaction of 'sale of finished goods' in accordance with our above directions concerning the items at serial nos. 6, 7 and 9

of the Table given in the TPO's order. No other aspect of the determination of the ALP of this international transaction was challenged before us. Thus, on all other issues, the TPO's order should be taken as final.

Commission Expenses

11. The second international transaction which is disputed in the present appeal is commission payment by the assessee amounting to ₹77,00,402/- to its AEs. The assessee benchmarked this transaction again on entity level under the TNMM. The TPO refused to accept the application of the TNMM in this manner and proceeded to determine the ALP of this transaction under the CUP method. This transaction was considered in the nature of intra-group service. After seeking and considering the details from the assessee, the TPO came to the conclusion that the ALP of this transaction was Nil because the assessee failed to provide any evidence of

an independent transaction between unrelated parties and further the assessee could not explain with any documentary evidence about the functions performed by the AE necessitating the payment of such commission. That is how, he computed the Arm's Length Price of this international transaction price at Nil. The assessee remained unsuccessful before the DRP and the Assessing Officer, accordingly, made this addition amounting to ₹77.00 lacs, being the entire commission paid by the assessee to its AEs.

12. After considering the rival submissions, we find it as an undisputed position that the TPO computed Arm's Length Price of this transaction at Nil and the Assessing Officer made the addition without independently considering the deductibility or otherwise of such expenditure in terms of section 37(1). The Hon'ble Delhi High Court in the case *CIT vs. Cushman and Wakefield*

India Pvt. Ltd. (2014) 367 ITR 730 (Del), has held that the authority of the TPO is limited to conducting transfer pricing analysis for determining the ALP of an international transaction and not to decide if such services exist or benefits did accrue to the assessee. Such later aspects have been held to be falling in the exclusive domain of the AO. In that case, it was observed that the E-mails considered by tribunal from Mr. Braganza and Mr. Choudhary dealt with specific interaction and related to benefits obtained by assessee, providing a sufficient basis to hold that benefit accrued to assessee. Since the details of specific activities for which cost was incurred by both AEs (for activities of Mr. Braganza and Mr. Choudhary), and attendant benefits to assessee were not considered, the Hon'ble High Court remanded the matter to file of concerned AO for an ALP assessment by TPO, followed by AO's assessment order in accordance

with law considering the deductibility or otherwise as per section 37(1) of the Act.

13. When we advert to the facts of the instant case, it is found that the TPO proposed the transfer pricing adjustment with the Nil ALP of the Commission transaction on the ground that no evidence was furnished about any services rendered by the foreign AE. The AO in his final assessment order dated 30.11.2012 has taken the ALP at Nil without anything further. Applying the *ratio decidendi* of *Cushman and Wakefield India Pvt. Ltd. (supra)* to the facts of the instant case, we find that the TPO was required to simply determine the ALP of this transaction unconcerned with the fact, if any benefit accrued to the assessee and thereafter, it was for the AO to decide the deductibility of this amount u/s 37(1) of the Act.

14. Since the authorities below have acted in contradiction to the *ratio* laid down by the Hon'ble Jurisdictional High Court in the case of *Cushman (supra)*, we set aside the impugned order on this score and remit the matter to the file of AO/TPO for deciding it in conformity with the law laid down by the Hon'ble jurisdictional High Court in the case of *Cushman (supra)*.

15. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the open Court on 30/01/2015.

Sd/-
(A.T. Varkey)
JUDICIAL MEMBER
Dated: 30/01/2015

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(R. S. Syal)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR