

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "K",
MUMBAI**

**BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA No.121/M/2013 (Assessment Year- 2007-08)

M/s Nivea India Private Ltd. 3 rd Floor, Hyde Park, Saki Vihar Road, Andheri (East), Mumbai-400072. PAN: AACCN1990P	Vs.	DCIT Range-8(2), Aayakar Bhavan, M.K. Road, Mumbai-400020.
(Appellant)		(Respondent)

Assessee by : Shri Kanchan Kaushal
with Ms. Hirali Desai and
Shri Aliagger Ram
Purledla(AR)

Revenue by : Mrs. Malathi
Sridharan(CIT-DR)

Date of hearing : 24.05.2017

Date of Pronouncement : 21.08.2017

Order Under Section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee u/s 253 of Income Tax Act (the Act) is directed against the order of Id. Commissioner of Income-tax (Appeals)-15, Mumbai dated 16.10.2012 for Assessment Year 2007-08. The assessee has raised the following grounds of appeal:

Grounds

1. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in assessing the total loss of the Appellant at Rs 3,46,71,778 as against loss of Rs 10,65,20,488 computed by the Appellant in

its return of income,

Transfer pricing

On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in:

2. Rejecting the transfer pricing study conducted by the Appellant without giving any cogent reasons
3. Violating the provisions of Rule 10D of the Income-tax Rules, 1962 which provide that the transfer pricing documentation should be based on contemporaneous data i.e data available in the public domain at the time of undertaking the economic analysis for filing the Accountant's Report by the due date of filing the return of income
4. Stating that the conditions mentioned in clauses (a) to (d) of section 92C(3) of the Act were satisfied. before determining an ALP different from the ALP determined by the Appellant
5. Rejecting the adjusted Profit Level Indicator ('PLI') applied by the Appellant for benchmarking the international transactions of import of raw materials/ packing materials/ semi-finished goods from associated enterprises ('AEs')
6. Not computing the PLI of the Appellant after increasing the profit by Rs 25,50,000, representing royalty amount suo moto disallowed by the Appellant in its return of income

Without prejudice grounds

7. Not appreciating that the international transaction of import of raw materials, packing materials and semi-finished goods from AEs impacts only gross margins of the Appellant, which is at arms length.
8. Upholding the AO's action of calculating the adjustment with reference to the total purchases of the Appellant (ie including the third party transactions) instead of considering the purchases from AEs only.
 9. Not restricting the adjustment to the margin charged/earned by the AE's from supply of raw materials/packing materials/semi-finished goods to the Appellant.

Corporate tax adjustments

On the facts and in the circumstances of the case and in law, the I earned CIT(A) erred in:

10. Disallowing interest of Rs 491 on delayed payment of withholding tax.
 11. Granting credit for TDS only to the extent of Rs 430.462, thereby resulting in short grant of credit for TDS to the extent of Rs 188,566/-
2. In addition to the original ground of appeal, the assessee has raised the following additional grounds of appeal:

“On the facts and in the circumstances of the case, the overseas associated enterprises being the least complex of the entities involved in supply of raw materials, packing materials and semi finished goods to the Appellant, which entered into the transaction in the capacity of low-risk manufacturers had to be taken as tested parties for the purpose of benchmarking analysis; and the price at which such products were supplied by the overseas associated enterprises i.e. mark-up of 4% on full cost being less than arm's mark-up as per the fresh benchmarking analysis carried out by the Appellant, the transaction of the import of such product by the Appellant (aggregating to Rs. 7,51,51,003) may be held to be at arm's length.”

3. Brief facts of the case are that the assessee is an Indian subsidiary of Beiersdorf AG (BAG). BAG was founded in Hamburg in 1882 and is a Global group of branded consumer goods. The assessee is engaged in marketing and distribution of Nivea products in India, filed its return of income for relevant AY on 31.10.2007 declaring total income at Rs. Nil. Along with the return of income, the assessee furnished report under Form-3CEB. The assessee in report under Form 3CEB reported international transaction with its Associated Enterprises. Thus, the AO made reference u/s 92CA(1) of the Act to Transfer Pricing Officer (TPO) for computation of Arm's Length Price (ALP) in relation to international transaction. The following transaction was reported by the assessee:

Sr.No.	Nature of Transaction	Amount	Method
1	Purchase of finished goods	9,82,54,576	Resale Price Method
2	Purchase of Raw Material (Bulk)	3,29,56,891	TNMM
3	Purchase of Packing Material	2,11,08,585	TNMM
4	Purchase of semi-finished goods	2,10,85,527	TNMM
5	Purchase of Assets (Machinery)	1,77,69,248	Cost to cost
6	Purchase of Router	76,416	Cost to cost
7	Royalty expenditure	44,00,000	CUP
8	Reimbursement of expenses	1,10,78,970	Cost to cost

The assessee selected three comparable companies and submitted that the assessee's profit margin is better than the (comparables) others:

S.No.	Name of the company	Operating margin on operating Income (%)
1	Dr Sabharwal's Mfg Labs Ltd	7.53%
2	Singar Ltd.	8.92%
3	WF Ltd.	8.55%
4	Arithmetic mean	8.33%
5	Nivea India	8.91%

The assessee has applied (Transaction Net Margin Method (TNMM) as most appropriate method to determine the Arm's Length Transfer Price for controlling the transaction. During the proceedings before the TPO, the TPO asked the assessee to explain whether any part of brand expenses are borne by assessee as the assessee is also promoting its AE's global brand in India. In reply the assessee contended that the assessee is in the start of year of its business operation in India and did aggressive marketing for diverse product portfolio. A heavy advertising of portfolio was required to create required awareness among the consumers. It was further contended that to become one of the leading player in Indian cosmetics with difference growth and making its presence in consumer goods against established player, the assessee needs to invest a lot in the marketing intangibles against established player like HUL, L,Orel and P&G.

4. After considering the contention of assessee, the TPO observed that the product or brand of the assessee-company was not introduced for the first

time in India, the comparable companies are computing in the market without the leverage of global brand. Unlike the assessee-company, the comparable companies have to bear product risk, technical risk, foreign exchange risk etc. These adjustments were not considered in the hands of comparable companies. Hence, there is risk differentiate between the assessee and the comparables, the assessee has not given any economic justification for incurring such a huge expenditure in the promotion of brand which is not owned by assessee without getting any corresponding compensation (reimbursement). The TPO doubted, if any independent entity would expand the amount of 30% in the promotion of brand owned by it without any adequate compensation. The TPO concluded that assessee has not provided any adjustment in the hands of comparables on account of risk differentiation and in absence of compensation from the assessee for promotion of its brand; TPO felt that TNMM should be considered without any adjustment to the companies selected became uniformly comparable. The TPO found that assessee's operating profit/operating income without adjustment on account of sale and promotion of expenses in the manufacturing segment is found to be (-) 22.10%. The TPO further held that the profit margin of comparable without adjustment is as under:

Name of the company	Operating profit /operating income
Dr Sabharwal's Mfg Labs Ltd	1.94

Singar Ltd.	8.54
VVF Ltd.	1.60
Average Mean	4.02

On the basis of profit margin, the TPO worked out the adjustment of Rs.6,70,54,631/- in the following manner:

Particulars	Amount (Rs.)	Amount (Rs.)
Operating income		
Income	25,67,03,000	
Other Income	<u>54,000</u>	25,67,57,000
Operating expenses		
AE Cost	7,51,51,003	
Non-AE cost	<u>23,83,38,997</u>	31,34,90,000
Operating Profit		(5,67,33,000)
Operating Profit/ Operating Income		-22.10%
Arm's length margin		4.02%
Determination of arm's length price		
Operating income	A	25,67,57,000
Operating Profit @ 4.02%	B	1,03,21,631
Operating cost	C= A-B	24,64,35,369
Non-AE cost	D	23,83,38,997
Arm's length value of AE cost	E=C-D	80,96,372
Actual AE cost	F	7,51,51,003
Adjustment (excess of actual AE cost over arm's length value)	G=F-E	6,70,54,631

5. On receipt of order of TPO u/s 92CA(3) suggesting the adjustment of Rs. 6,70,54,631/-. The AO issued show-cause notice dated 16.11.2010 as to why the addition should not be made. The assessee further vide its application dated 23.02.2011 contended that assessee did not wishes to exercise the option for filing objection before the Dispute Resolution Panel (DRP) against the draft assessment and would like to prefer the option for filing appeal before the Id. CIT(A). Hence, the AO passed the order u/s 144C(3) r.w.s. 143(3) of the Act On 25.02.2011. Aggrieved by the order of various addition and adjustment on account of ALP with regard to international transaction, the assessee filed appeal before the Id.

CIT(A), but without any success. Further, aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before the Tribunal.

6. We have heard the Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue. The Ld. AR of the assessee argued that he has raised the additional ground of appeal. It was further argued that the additional ground of appeal may be taken up first. The learned AR for the assessee argued that the overseas AE's are least complex entity and should be allowed as a tested party. The FAR analysis for determining the complexity of each of the entity is already available on record before the lower authorities in the form of TP study report. In support of his submission the Id AR for assessee relied on the decision of Hon'ble Supreme Court in National Thermal Power Corporation Ltd (229ITR 383), Jute Corporation of India (187ITR 688), the decision of Delhi High Court in GE Money Financial Services Pvt Ltd Vs PCIT in ITA No. 662/2016 dated 31.08.2016, Mumbai Tribunal in Pfizer Limited Vs ACIT in ITA No. 3729 & 3424/M/2008 dated 06.11.2015 and JCIT Vs Grasim Industries MA No. 247/M2010 in ITA No.6253/M/1999, CIT v/s S. Nellippan [66 ITR 722(SC)], Ahmadabad Electricity Company and Godavari Sugar Mills Ltd. v/s CIT [199 ITR 351(Bom)] and Inaroo Ltd. v/s CIT [204 ITR 312(Bom)]. The Id AR argued the assessee is entitled to raise additional ground of appeal before the Tribunal, even though the claim has not been made either before

Income-tax Officer/Assessing Officer or the First Appellate Authority. It was further argued that the additional ground of appeal raised by assessee is purely legal in nature. All the facts related with the additional ground of appeal, are available on record. On the other hand, Id. DR for the Revenue strongly opposed the admission of additional ground of appeal at the second appellate stage. The Id. DR for the Revenue argued that in the application for admission of additional evidence, the assessee has relied upon the additional evidence filed by assessee before the Tribunal. In the application for raising additional grounds of appeal, the assessee has pleaded that the additional ground of appeal is based on evidence filed before this Tribunal. The Id. DR for the Revenue further argued that as per the mandate of section 92D, 92E, the person who have entered into International Transaction or Specified Domestic Transaction has to keep and maintain such information and document in respect thereof and to furnish the report of the Accountant in the Form 3CEB on or before the specified date. The specified date is defined under Clause-(iv) of section 92F, as per section 92F the meaning of specified date is the due date of filing of return of income as per sub-section (1) of section 139 of the Act. It was further argued that admittedly no such document or information was available or filed by the assessee either before AO/TPO. There is no reference about the AE's of assessee as a tested party in the report furnished under Form 3CEB. The Id. DR for the Revenue further argued

that by way of additional ground of appeal, the assessee is seeking substitution of tested party for the purpose of bench marking of Transfer Pricing Adjustment. The additional ground of appeal raised by assessee is purely factual in nature and cannot be allowed to raise at this stage. The Id. DR for the Revenue argued that though the ratio *descedendi* in case of NTPC, Jute Corporation of India Ltd. is not in dispute of the real dispute in raising the additional ground of appeal is that if the fact for determining the additional ground of appeal is emanated from the record available before the lower authority or not. The Id. DR for the Revenue argued that the question related to the additional ground of appeal is directly covered by the decision of Hon'ble Bombay High Court in case of Ultratech Cement v/s ACIT (2017) 81 Taxmann.com 72 (Bom) wherein all earlier decision on the issue related to raising of additional ground has been considered by the Hon'ble Court. It was further argued that Chapter X of the Act does not envisage taking the AE as a tested party. Even otherwise, if it is held that Chapter does not prohibit considering the tested party the same is permitted only when the AE is least complex entity and reliable data of comparable are available. The AE's with whom, the assessee has entered into international transaction are not least complex entity as they have their own trademark as well as technical knowhow. The assessee used both these intangible for its business activity and for which the assessee compensate them. Reliable

date relating to comparable is not available in this case. The additional ground of appeal raised by assessee is absolutely factual in nature and allowable under law. The decisions relied by Id AR for the assessee are distinguishable on facts of the present case.

7. We have considered the rival submission of the parties on the admission of additional ground of appeal. The assessee in the application for admission of additional ground of appeal has categorically contended that the additional ground of appeal is raised in view of the additional evidence submitted before the Tribunal. The assessee has referred various decisions of superior courts. In the additional ground, the assessee has categorically mentioned that AE's is least complex entity involved in supply of raw-material, packing material and semi-finished goods to the assessee, which entered into transaction in capacity of low risk manufacture had to be taken as a tested party for the purpose of benchmarking analysis.
8. As per our considered view, the Transfer Pricing Regulations practice in India is based on Arm's Length Principle. The concept revolves around that price or margin determined in control transaction involving two AE's should be compared to an uncontrolled transaction between two India enterprises operating under same circumstances. The Income-tax Act has not defined "tested party". However, the Organization for Economic Co-operative and Development (OECD) in Transfer Pricing

Guidelines for multinational enterprises of tax administration (OECD Guidelines) defines “tested party”, according to which, tested party “the one to which the transfer pricing matter should be applied in the most reliable manner and for which most reliable comparable can be found” i.e. it will most often be that has to be less than functional analysis. Thus, on the basis of the definition provided by OECD under OECD Guidelines, in our view the “tested party” must contain (a) least complex (b) availability of reliable and accurate data or comparable (c) the data available can be used with minimal adjustment.

9. To ascertain the fact, if the facts related to additional ground of appeal is available on record or not. We have gone through the report in Form No. 3CEB page 16 to 28 of the Paper Book. The Exhibit-1, attached with the report described the name of the AE’s, nature of relationship with AE, and the brief description of business carried by the AE. Exhibit 2 described the details of particulars of international transaction of assessee for purchases/ sale of raw materials, consumables or other supplies. Exhibits 3&5 described the details of international transaction in respect of purchased and sale of finished goods with its AE’s. An Exhibits 4 contains the details of sale and purchases of tangible moveable and immovable property or lease of such property. Exhibit 6 refers about the details of transaction of intangible property (not available in TP study). Further page no.29 to 92 contained details of comprehensive transfer

pricing study. Thus, in our view the only available details with regards to assessee's AE's on record of TP study is the name of the AE's, nature of relationship with AE, and the brief description of business carried by the AE.

10. The Hon'ble Jurisdictional High Court in Ultratech Cement Ltd. vs. ACIT (supra) while dealing with the additional ground of appeal related to the claim of deduction u/s 80IA which was not claimed by the assessee while filing the return of income. The Hon'ble Court held that it is *sine qua non* provided in sub-section (7) of section 80IA of the Act is the furnishing along with return of income, a report of audited account in Form No. 10CB as required under Rule 18BBB(3) of the Act. The Form 10CCB which is required to be filed along with return of income as various details to be filed including the initial AY from which the deduction is being claimed, the nature of activities carried out with regard to the infrastructure facility, namely, whether it is for developing or developing and operating or for developing, operating and maintaining the new infrastructure facility. It is only on the examination of these details as submitted by the Auditor in Form No. 10CCB that the claim of deduction can be considered. The Court further held that in case no Form No. 10CCB is filed by the appellant/assessee, therefore, there is no evidence on record for subject AY to allow the claim.

11. We have seen that, undisputedly the name of the AE's, nature of relationship with AE, and the brief description of business carried by the AE with assessee for functional analysis and benchmarking related with its AEs are on record in the report under Form 3CEB. Though the complete details are not ascertainable from the record relied by the assessee. Though, the details related with the foreign AE's are available in the additional evidence filed by the assessee, which have not been relied by Id AR for the assessee while making submission on additional ground of appeal. We have also considered the objections of the revenue that additional ground raised by the assessee should not be admitted at this stage. After considering, the submission of revenue, we are of the view that approach in such matters should be different, when the revenue seeks to fasten liability before the Tribunal. The reasons are that the Tribunal is the last fact-finding authority and the assessee has no other avenue to raise its grievances so far as facts are concerned. In case, on the facts and in the law, ultimately if it is discovered that assessee is not liable to tax, the revenue cannot have grievances. The Article 265 of the Constitution of India provides that no tax should be levied and collected except by authority of law. In case, if ultimately the assessee is found to be liable to tax, the assessee will compensate the revenue in term of interest on the tax liability. We are of the view that fundamental principle laid down by Hon'ble Apex Court in case of NTPC (supra) is that there

can be no tax liability without the authority of law and the principal will hold good all points of time. The Hon'ble Delhi High Court in case of GE Money Financial Services Private Ltd Vs PCIT(supra) while examining the correctness of the order related with the treating of Foreign Associated Enterprises (AE's) held as under:

“The question of law which the assessee/appellant argues in this appeal for AY 2009-10 is regarding the appropriateness and correctness of treating the Foreign Associated Enterprises (AE's) as a tested party. The assessee's transfer pricing analyses and determination of ALP led it to approach to ITAT which by impugned order has remitted the matter for consideration of the most appropriate method as well as question of appropriate comparable is applicable in the circumstances of the case. The assessee has approached this court against the observation and findings of the ITAT –in para 10 to 18 to the effect that the foreign AE cannot be considered as tested party. Reliance is placed upon section 92B to contend that there is nothing in the provision inhibiting such consideration.

This court notices that for re-consideration and determination of the appropriate method as well as appropriate comparable is and the tested party, it would be convenient and appropriate for the TPO to consider the question which the assessee as in the present case. The TPO is therefore directed to overlook and not feel bound by the observation of the Tribunal and render finding on merit of the issue.”

12. In view of the above factual and legal discussion, we are of the view that whole intent and purpose of the transfer pricing provision is first select the most appropriate comparable/ tested party and thereafter, by applying the most appropriate method to determine arm's length price(ALP). Considering, the fact that assessee has not raised the issue related with the selection of comparable as AE's either before the transfer pricing officer or before first appellate authority, and has raised the issue for the first time before the Tribunal by way of additional ground of appeal. Thus, considering the

material available on record and the factual and legal discussion as referred above, we admit the additional ground of appeal raised by assessee, and are inclined to restore this issue raised in the additional ground to the file of assessing officer/transfer pricing officer for examining issue afresh. The AO/TPO shall decide the issue after considering all the material available on record in accordance with the law. The assessing officer/transfer pricing officer shall decide the issue by calling the information and documents from the assessee as well as by making his own inquiry in the data base or otherwise. Needless to say that assessing officer/transfer pricing officer shall afford reasonable opportunity to the assessee before deciding the issue. The assessee is also directed to cooperate with the assessing officer/transfer pricing officer in providing all necessary information and documents and not to seek adjournment without any proper and valid reasons. With these observations the additional ground of appeal raised by assessee is allowed.

13. In the result the grounds of appeal No. 1 to 6 are allowed for statistical purpose. However, it is made clear that till the passing of order by assessing officer/ transfer pricing officer on this issue, the assessee would not be entitled to claim the refund of tax if already paid/ deposited.
14. Ground No. 7 to 9 is raised as alternative grounds. As we have restore the transfer pricing issues to the file of assessing officer/transfer pricing officer by allowing additional ground of appeal, thus these grounds of appeal needs no adjudication.

15. Ground No.10 relates to disallowing of interest of Rs. 491/-on account of delayed payment of tax and ground No. 11 relates to short grant of credit for TDS. Considering the fact that main grounds of appeal related to transfer pricing adjustment has been restored to the file of assessing officer. Hence, the assessing officer is directed to verify the facts and grant appropriate relief in accordance with law. In the result ground No. 10 & 11 are also allowed for statistical purpose.

16. In the result, appeal filed by assessee is allowed for statistical purpose.

Order pronounced in the open court on 21st day of August 2017.

Sd/-

Sd/-

(R.C. SHARMA)

(PAWAN SINGH)

ACCOUNTANT MEMBER

JUDICIAL MEMBER

Mumbai; Dated 21/08/2017

S.K.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
(Asstt.Registrar)
ITAT, Mumbai